

## SIXTY-THIRD SESSION

### *In re* PILOWSKY

#### Judgment 848

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jorin Pilowsky against the World Intellectual Property Organization (WIPO) on 6 January 1987 and corrected on 22 January, WIPO's reply of 30 March, corrected on 31 July, the complainant's rejoinder of 28 August and the Organization's letter of 9 October 1987 stating that it did not wish to file a surrejoinder;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Regulations 4.5, 4.6, 4.11, 4.15(d) and 10 and Rules 10.1.1 and 11.1.1(b)(2) of the Staff Regulations and Staff Rules of the International Bureau of WIPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in Chile in 1929. He practised law in that country and was also in charge of industrial relations in a mining company and a professor of political science at the University of Chile in Santiago. In September 1973 there was a change of government in Chile and in December of that year he was allowed to leave the country. He was granted refugee status in Switzerland in 1974 and surrendered his Chilean passport to the Swiss authorities in Berne. He held Swiss travel papers which were renewed every two years. Until 1985 he worked as a translator into Spanish under short-

term contracts with WIPO and other international organisations in Geneva and elsewhere.

On 10 October 1984 he filled up a form applying for employment at the International Bureau of WIPO in Geneva. Against "present nationality" he put "Chilean"; he gave his "present address" as Geneva and said he had lived there since January 1974. He was granted an appointment for one year from 1 January 1986 as a translator at grade P.3.

On 24 February 1986 the Head of the Personnel Section wrote him a memorandum saying that WIPO had just learned he did not hold a Chilean passport and had therefore given wrong information on the application form; he was asked to declare in writing that he was a stateless person resident in Switzerland. The same day he replied asserting his Chilean citizenship and submitting papers in support. On 4 March he wrote again supplying a certificate of nationality issued by the Chilean Consul-General in Switzerland and refusing to declare himself stateless. The Head of Personnel answered on 10 March that the certificate was insufficient proof, that he would be treated as stateless and that he would get neither home leave nor other benefits for expatriates. Also on 10 March the Director General sent him a "written warning": his assertion of Chilean nationality in the application form amounted to "serious misconduct" and "Any further such act or omission may entail any of the sanctions under Rule 10.1.1 ...". On 18 April he objected to the warning, observing that he had surrendered refugee status and would be providing a Chilean passport. He later supplied one issued by the Consul-General on 28 April. In a minute of 12 May the Head of Personnel said that as from 1 May he was regarded as a Chilean citizen and entitled to the allowances and benefits set out in Regulation 4.5.

His performance report dated 21 May referred to the written warning of 10 March. On 26 June he wrote to the Director General asking him to delete that reference. Having got no answer, he appealed to the Appeal Board under Rule 11.1.1(b)(2) on 11 July seeking withdrawal of the written warning and of the reference to it in the performance report and asking that he be treated as a Chilean citizen as from the date on which he had taken up duty. In its report of 1 October 1986 the Board held that his appeal was unfounded and by a memorandum of 10 October 1986, the decision impugned, the Legal Adviser told him the Director General had rejected his appeal.

B. The complainant submits that, as the Appeal Board held, he has never lost Chilean citizenship and he cites the Constitution of Chile in support of that contention. He maintains that he filled up the form correctly and honestly

and that WIPO had ample time anyway to find out his status before it took him on. One of his referees was a Chilean Deputy Director General, Mr. Porzio, who knew his background. His failure to speak of his refugee status cannot amount to serious misconduct: the form does not ask what papers the applicant has, he never tried to hide his status, and the rule about geographic distribution does not apply to translators anyway. As soon as he knew that WIPO wanted proof of his citizenship he acted to produce his passport. An international organisation should respect a refugee's rights, not punish him, and WIPO acted in breach of basic principles and of Regulation 4.6, which requires it to recognise the staff member's nationality. The sanction is disproportionate to the alleged offence: WIPO had no interests at stake and was careless of his dignity. He asks the Tribunal to set aside the decision of 10 October 1986 and the sanction and to award him moral damages and costs.

C. WIPO gives its own account of the dispute. It contends that any applicant for employment must give full information - as Regulation 4.11 stipulates - on his nationality, residence and other status because it is an essential factor of an offer of appointment and serves in determining his entitlements. The information must be kept up to date and stated clearly and with no intent to mislead. The complainant failed to offer evidence to show that when he filled up the form he was a citizen of Chile. In particular the certificate he supplied on 4 March 1986 proved citizenship neither then nor at a later date, and his passport was not issued until 28 April 1986. He failed to give on the form information about his status: he did not at the time hold a Chilean passport and he had refugee status in Switzerland. What he said about his home address was misleading. He was in breach of good faith because he knew that what he had said was incomplete. In claiming membership of professional bodies in Chile he wrongly implied he was a member in good standing though there was at the time a ban on his return to Chile. His filling up the form amounted to serious misconduct within the meaning of Regulation 10.1 and warranted the written warning.

D. In his rejoinder the complainant objects to several points in the Organization's account of the facts. In particular he observes that from 1974 to 1986 he had quite enough dealings with it for it to know what his status was; indeed the date of his departure from Chile made it obvious. When he took up duty he filled up another form saying he had travel papers from Berne. He produces a text dated 7 May 1987 and signed by the head of the Chilean Bar certifying his continued membership since 1955.

Turning to the issues of law, he reaffirms that he never sought to mislead: he was never asked in the application form to prove his nationality but to state it, and he did. He later produced, on request, ample evidence of it, and WIPO was not entitled to require him to prove his nationality at all times. It may determine what his home country is but may not ignore nationality, let alone declare him stateless when he is not. Neither its own interests, nor those of Switzerland, nor the principle of geographic distribution were at stake. Its insinuations about his professional standing are irrelevant and unfounded, its accusations of bad faith mistaken and insulting. Since he had not been at fault the sanction it imposed was wrongful. It has, besides, harassed him unscrupulously.

#### CONSIDERATIONS:

1. The questions which fall to be determined are whether the Organization was justified in treating the complainant, for the purposes of the WIPO Staff Regulations and Staff Rules, as a stateless person with his home in Switzerland and whether he misled the Organization by claiming Chilean nationality.

The complainant, who over a period of several years had been granted many short-term contracts by the Organization, applied on 10 October 1984 for a fixed-term appointment. He stated in his application that he was born in Santiago, that his nationality at birth was Chilean and that his nationality on 10 October 1984 was Chilean.

The Organization concedes that the complainant is entitled to be regarded as a national of Chile with effect from 1 May 1986 in view of his production on 28 April 1986 of a photocopy of his current Chilean passport. But the Organization contends that the complainant was unable to prove that he held such nationality at the time of submitting his application. It argues that its practice is to require as proof of nationality the production of a passport or identity card, "together with its date and place of issue, thus also enabling verification of its current force". It states that in keeping with this practice the Head of the Personnel Section informed the complainant by memorandum dated 24 February 1986 that for the purposes of the Staff Regulations and Staff Rules he was to be regarded as stateless and that his home was Switzerland.

The Organization puts its case no higher than saying that passports are, in the practice of States, accepted as prima facie evidence of nationality. It does not seek to challenge the fact that the complainant acquired Chilean

nationality at birth, nor does it suggest that he has ever been deprived of that nationality by any act of the Chilean authorities. What it says is that by implication the granting by the Swiss authorities of refugee status to the complainant and the issuing to him of a travel authorisation in some way terminated his Chilean nationality.

Regulation 4.6 of the Staff Regulations and Staff Rules of the International Bureau of WIPO states that the Bureau will recognise only one nationality for each staff member, and where the staff member has more than one nationality he will be regarded as a nationality of the country to which he is bound by the closest ties. The regulation affords no guidance for resolving the issues raised here.

The undisputed evidence is that the complainant was endowed at birth with Chilean nationality in accordance with the laws of his country. His residence in Chile from 1929 to 1973 and his membership of the Bar of Chile strongly suggest that his right to Chilean nationality was fully recognised. Among the documents exhibited in the dossier are copies of the complainant's birth certificate, his Chilean identity card, a safe-conduct issued to him when he left his country in 1973, a certificate of nationality issued by the Consulate-General of Chile in Zurich and, finally, a Chilean passport issued to him on 28 April 1986. All this is overwhelming evidence of the complainant's right to Chilean nationality.

The Organization is bound to recognise that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality", as stated in the Universal Declaration of Human Rights approved on 10 December 1948. It should also be guided by the definition of stateless persons set out in Article I of the Convention relating to the Status of Stateless Persons of 28 September 1954 as "a person who is not considered as a national by any State under the operation of its law". It follows that the Organization was under an obligation to examine the available evidence with great care before concluding that the complainant had not proved the nationality he claimed. The Organization attached great weight to the fact that the complainant was the holder of a Swiss travel authorisation and that he had been prohibited at one stage from re-entering Chile. But these facts cannot support the inference that the complainant's nationality was thereby annulled or suspended, the only logical conclusion to be drawn from these elements being that drawn by the Swiss authorities, namely that the complainant was a person without a national passport who had been given permission to reside in Switzerland. In the circumstances the Director General's decision that the complainant had not proved his Chilean nationality was based on an error of law and a failure to take essential facts into consideration. Therefore it cannot stand.

2. On 10 March 1986 the Director General wrote to the complainant stating:

"The fact that you have stated in your application that you were Chilean but are unable to prove such nationality existing at the time of your application and that you disclosed the fact that you had no Chilean passport but only a Swiss titre de voyage only after your employment are acts or omissions that constitute a case of serious misconduct giving rise to the present written warning that such conduct is unacceptable. Any further such act or omission may entail any of the sanctions under Rule 10.1.1 of the WIPO Staff Regulations and Staff Rules."

The short answer to the Director General's warning is that it is misconceived. The possession of a passport does not by itself determine nationality, but neither does the failure to produce a passport denote a loss of nationality heretofore held. There is no entry in the complainant's application for employment which has been shown to be inaccurate, nor has any answer which he gave to the Personnel Section been shown to be false or misleading. By stating his date and place of birth, his nationality, his place of residence and the period during which he lived there, his marital status and the names of his dependants, the complainant satisfied the requirements of Regulation 4.11, which placed on him the duty of providing information necessary for the purpose of determining his status and entitlements. Thus the Director General's warning of 10 March 1986 that the complainant was guilty of serious misconduct was based on a clearly mistaken conclusion drawn from the available facts. In the result the warning will be set aside and the complainant compensated for the moral injury suffered by him as a result of the unwarranted action of the Organization.

DECISION:

For the above reasons,

The complaint is allowed.

1. The Director General's decision of 10 October 1986 is quashed and the warning dated 10 March 1986 set aside

and any record of it shall be removed from the complainant's file.

2. The Organization shall pay the complainant as damages for moral injury the sum of 10,000 Swiss francs with interest thereon at 8 per cent a year from 18 April 1986 until the date of payment.

3. The Organization shall pay the complainant the sum of 6,000 Swiss francs towards his legal costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
William Douglas  
A.B. Gardner