

SEVENTY-SECOND SESSION

***In re* NGOMA**

Judgment 1134

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Z'Ahidi Ngoma against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 24 May 1990 and corrected on 20 July, UNESCO's reply of 24 September, the complainant's rejoinder of 2 December 1990, the Organization's surrejoinder of 15 February 1991, the complainant's further observations of 12 April and UNESCO's final brief of 7 May 1991;

Considering the applications to intervene filed by:

N. Abitayeh

S. Awoyemi

E. Ayele

J. Batista

R. Benaissa

M. Burcez

S. Das

J. Escudier

P. Gaye

F. Ghachem

S. Janakiram

S. Jobe

J. Joumba

N. Leta

K. Lezeau

M. Lopes

C. Nicholls

K. Poku

A. Taleb

T. Tesfaye

J. Venev

and the Organization's comments of 8 November 1991 on those applications;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, UNESCO Staff Regulations 8.1, 8.2, 12.1 and 12.2, UNESCO Staff Rules 108.1 and 111.2(b), UNESCO Manual item 2805 and paragraphs 6 and 7 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. UNESCO Staff Regulation 8.1 reads:

"Machinery shall be provided by the Director-General to ensure continuous contact between the staff and himself through duly elected officials of the association or associations representative of the staff."

and 8.2:

"The Director-General shall establish joint administrative machinery with staff participation to advise him regarding general personnel questions and staff welfare and to make to him such proposals as it may desire for amendment of the Staff Regulations and Rules."

Rule 108.1(a) provides:

"In determining the representativeness of a staff association, the Director-General shall take into consideration the fact that it includes a sufficiently large number or a sufficiently distinct group of staff members."

There are two staff associations at UNESCO, the Staff Association (STA), which was founded in 1947, and the International Staff Association of UNESCO (ISAU), which was recognised in 1981. The facilities to be granted to staff associations are prescribed in Manual item 2805 and they include the grant of a yearly subsidy from the Organization.

In the autumn of 1987 the General Conference of the Organization elected a new Director-General. As part of a reform programme he promised closer co-operation with the staff and said he wanted to see that enough funds were allotted for social services and staff associations. In April 1988 he asked the Inspector-General to look into the matter. In a report of 5 August 1988 the Inspector-General said:

"As the situation stands today, a very great disparity exists as to the membership of the two recognized staff associations (2,128 for STA and 72 for ISAU). All rights, entitlements and contributions are today available to and shared by the two associations without distinction on account of their membership. The question, therefore, is whether some sort of proportionality needs to be introduced in the apportionment of contributions or other facilities."

On 12 October 1988 the Director-General wrote to the two presidents asking how many members each association had. The STA answered that it had 1,233 members among serving officials and 990 associate members who were former officials. In a letter of 27 October the President of the ISAU said that it had not yet determined the figure of its membership for 1988.

On 6 April 1989 the Director-General wrote to the two presidents to say that one quarter of the yearly subsidy was to be equally split between their associations and the rest allotted pro rata according to their membership figures as at 31 December 1988: how many members had they had at that date? In a letter of 11 April the President of the ISAU objected to the decision and in his reply of 31 May the Director-General agreed to await the recasting of Manual item 2805; he appended the draft of a new text and asked for comments by 9 June. Also on 31 May he made a similar invitation to the President of the STA. In letters of 2 and 7 June the President of the ISAU suggested amendments to the draft. The STA replied in a letter of 14 June.

On 2 August 1989 the Director-General sent the two presidents the new text of item 2805 that was to come into force in 1990. An administrative circular, No. 1688 of 6 November 1989, announced new arrangements for the grant of facilities to the associations, including the pro rata sharing of part of the subsidy. In a letter dated 14

November the President of the ISAU informed the Director-General of his objections to the arrangements, which nevertheless came into force on 1 January 1990.

The complainant, a citizen of Zaire, is an official of UNESCO and a member of the ISAU. He served as its president from 1985 to 1987. On 6 December 1989 he addressed a written protest against circular 1688 to the Director-General under paragraph 7(a) of the Statutes of the Appeals Board. On 5 February 1990, inferring rejection, he applied under Staff Rule 111.2(b) and paragraph 6 of the Statutes for permission to appeal directly to the Tribunal. By a minute of 8 February, which he got on 23 February, the Director of the Bureau of Personnel told him of the rejection of his protest, and that is the decision he is challenging. By a minute of 5 March 1990 the Director of the Bureau of Personnel informed him that the Director-General granted permission for direct appeal to the Tribunal.

By minutes of 1 and 26 March 1990 the Director asked the President of the ISAU to give the figure of its membership. Having got no answer, he sent another minute on 14 June to say that, in keeping with circular 1688, the ISAU would be paid 4,956 United States dollars - or a 12.25 per cent share - out of the subsidy for 1990 and the cost of employing a secretary half-time; having failed to comply with the arrangements for determining its representative character, it would not be consulted on the membership of joint bodies and its President would not be released half-time from official duties.

B. The complainant explains that the ISAU's purpose from the outset has been to represent - as the STA failed to do - all the regions and countries of the world the staff belongs to. It was at once recognised as representative of the staff and enjoyed in full the facilities it was entitled to. But it aroused great hostility, and the Administration so much preferred dealing with the STA that membership of the STA became essential to career advancement and courage was needed to stay with the ISAU. Under the influence of the widespread animosity the new Director-General, too, began to think of proportional representativeness as a means of curbing the ISAU.

(1) As the procedure followed shows, there was no prior consultation with the ISAU about the circular. The mere transmittal to it for comment, on 31 May 1989, of a new draft of item 2805 was not genuine consultation.

(2) There was abuse of due process. Though the circular purports just to make new arrangements for the grant of facilities it is at variance with Regulations 8.1 and 8.2 and Rule 108.1. Its definition of the representativeness of staff associations brings in alien notions such as "relative" representativeness and a system of weighting that those provisions do not allow. The Director-General improperly withdrew matters of staff representation from review by the General Conference of UNESCO, which according to Regulation 12.1 amends the Regulations and according to 12.2 has to be informed of any changes he makes in the Rules.

(3) The arrangements impair freedom of association in that paragraph L of the circular empowers the Director-General to check the membership figures supplied. The Administration should not have inquisitorial authority of that kind. However few members it may have, the ISAU has always striven for the welfare of the staff at large and its meetings are open to everyone, not just to its own members.

(4) The circular denies the ISAU the facilities it needs to survive and is in breach of the rule against retroactivity and of the ISAU's acquired rights as defined in the case law. By applying an unlawful weighting factor it withholds facilities which the association is entitled to by virtue of the Director-General's earlier recognition of it as "representative of the staff" under Regulation 8.1.

(5) The circular offends against the rule *patere legem quam ipse fecisti*. Having encouraged the ISAU to believe that it may expect certain vital facilities UNESCO may not, short of amending the rules, cripple its work by withholding or curtailing them.

(6) The Director-General misused his authority by strengthening the STA to the detriment of the ISAU and of the interests of the Organization as a whole, which require that staff be free to join an association with a wider geographic and cultural base. The sole aim in giving the STA the lion's share of the subsidy was to remove its financial deficit, whereas the subsidy is supposed to serve social and cultural purposes. The STA should have corrected its deficit, not by getting help from the Organization, but by increasing membership dues.

The complainant asks the Tribunal to declare circular 1688 null and void and to make an award of damages for material and moral injury. He seeks an order suspending the application of the circular pending the hearing of his

case.

C. In its reply UNESCO gives its own account of the facts.

(1) It submits that the complainant is mistaken in denying proper consultation with the ISAU: its account of the various stages of the procedure shows that the Director-General did consult the two staff associations and let them state their views about circular 1688. He discharged his duty of consultation by his letters of 31 May 1989 seeking the association's comments on the new draft of Manual item 2805, and the President of the ISAU replied on 2 and 7 June 1989. The final text took account of those replies.

(2) There was no abuse of due process. The circular was in line with the Staff Regulations and Staff Rules. The changes in Manual item 2805 required no amendment to Regulations 8.1, 12.1 or 12.2 or Rule 108.1. The circular duly applies the criteria in Rule 108.1(a) to determine the representativeness of a staff association for the purpose of the grant of facilities, namely that the association covers a "sufficiently large number" or else a "sufficiently distinct group" of staff.

(3) There was no breach of freedom of association. It is up to the associations to give their membership figures, and the Organization will check them only in exceptional circumstances, where there is reasonable doubt about their accuracy.

(4) There was no breach of acquired rights as defined in the Tribunal's case law: the ISAU may have an acquired right to the grant of facilities but not to the method of reckoning its share of the subsidy. What is at stake is not its right to facilities but just the method of allotting facilities between the associations. Nor is there any breach of the rule against retroactivity: the circular was not retroactive since it applied only as from 1990.

(5) Though the burden of proof is on the complainant, he offers not a shred of evidence to suggest that the Director-

General was prejudiced against the ISAU. The circular was intended neither to favour nor to hamper any of the associations, but to lay down rules on future dealings with all associations, the aim being to strengthen their role and bring the staff into the programme of reform. In particular there was no intention of helping the STA to meet its deficit.

(6) The circular being lawful, there are no grounds for awarding damages for material injury nor, for that matter, for moral injury.

The application for an order suspending the circular is unwarranted: the filing of a complaint is not a valid reason for suspending the effect of the impugned decision.

D. In his rejoinder the complainant points out what he sees as gross misrepresentation by UNESCO of material facts. He submits that a desire for reform was no excuse for an onslaught on freedom of association and for misinterpretation of the rules. UNESCO can offer no basis in law for the circular.

The complainant enlarges on his pleas and seeks to rebut UNESCO's about the flaws in the procedure followed, in particular the lack of prior consultation of the ISAU. Though he concedes the Director-General's power to determine the representativeness of an association he objects to the notion of relative representativeness, which is not in the rules. Rule 108(1)(a) sets objective criteria for determining representativeness, and all that Manual item 2805 may do is declare the effects of recognising an association as representative: it may not set different criteria.

The complainant presses his contention that there was breach of acquired rights: what he is objecting to is not just the manner of reckoning the ISAU's share of the subsidy but the application of a new and unlawful criterion of relative representativeness. He explains how by misuse of authority the Director-General has paralysed the ISAU's work.

He presses his claims and his application for suspension.

E. In its surrejoinder the Organization discusses in detail several issues of fact raised in the complainant's rejoinder, seeks further to refute his pleas, develops the reasoning in its reply and rejects his claims to damages and to an order of suspension.

It further contends that his claim to the quashing of the circular is irreceivable. The circular lays down general rules about the arrangements for the grant of facilities to associations and is therefore not in itself directly challengeable. UNESCO dwells at some length on the case law that it believes bears out that view. It points out that the complainant ought to be challenging an individual decision taken in furtherance of the general rule he is objecting to. Though he does cite several administrative measures that give effect to the circular he does so only in the context of his argument; besides, any formal challenge to those measures would be irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

F. In further observations invited by the Tribunal the complainant answers the Organization's objections to receivability and presses his claims. In a final brief the Organization develops its objections.

CONSIDERATIONS:

1. On 6 November 1989 the Assistant Director-General of UNESCO in charge of General Administration signed a circular, No. 1688, which the Director-General had approved after consulting the UNESCO staff associations. The circular had two purposes: to "consolidate the exercise of the right of association" recognised in the Staff Regulations and to "clarify the effects inherent in the representiveness of the associations".

Several staff members objected to the text of the circular, and the President of the International Staff Association (ISAU), one of the staff associations, responded to general opinion by writing an open letter of protest on 14 November 1989 to the Director-General.

The present complainant, who is a member of the ISAU, preferred legal action and addressed to the Director-General on 6 December 1989 a written protest applying for review of the circular on the grounds that it set a single criterion, size of membership, for determining representativeness. The effect, he said, was to reduce the scope for action by the ISAU and that offended against the whole notion of representativeness embodied in Regulation 8.1.

2. As drafted his protest amounted to a challenge aimed at having the circular withdrawn, and that indeed is how the Director of the Bureau of Personnel read it. In his reply of 8 February 1990 the Director said that the Director-General rejected the view that the circular impaired the complainant's right of association and he was therefore confirming it.

3. The complainant submits that the circular is unlawful and asks the Tribunal to quash it and by interlocutory order to suspend the application of it pending the final ruling on the case.

In its reply UNESCO answers his main claims on the merits but submits that his claim to suspension is irreceivable. Only in its surrejoinder does it plead for the first time that direct appeal will not lie against the issue of the circular and that the claim to quashing is therefore irreceivable as well.

4. A defendant organisation may at any point object to receivability, although it is unfortunate that UNESCO's stand has delayed a ruling by several months.

As is said in 1 above, one purpose of the circular is to confirm the staff's right of association. It sets the conditions of representativeness for recognition of a staff association by the Director-General, lays down the arrangements for recognition and declares the effects of recognition on an association's functions and the facilities granted to it and the consequences thereof. There is also a general section which says that the circular is to be put into effect by individual decisions that apply its provisions to each association.

No such decisions are at issue in this case.

That the circular is a general decision is not enough in itself to make the complaint irreceivable. Article VII(2) of the Tribunal's Statute, which sets the time limit for filing a complaint, says that appeal will lie against "a decision affecting a class of officials", and that wording is broad enough to suggest that a general decision may be directly challenged. But the provision is to be read together with Article VII(1), which provides that "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". In keeping with precedent and with VII(1) a complaint will be irreceivable if it challenges a general decision that must ordinarily be put into effect by individual decisions against which internal appeal will lie.

The Tribunal may not rule on the lawfulness of the circular because it cannot tell how that general decision is to be put into effect and, more particularly, how the representativeness of staff associations is to be determined and what the eventual financial consequences will be. The principal claims are therefore irreceivable.

5. The claim to an order suspending the application of the circular is irreceivable for the same reason: a court may not stay execution where it may not set the administrative decision aside altogether.

6. Since the complaint fails, so too do the 21 applications to intervene.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
William Douglas
A.B. Gardner