

## FOURTH ORDINARY SESSION

### ***In re* LEFF**

#### **Judgment No. 15**

THE ADMINISTRATIVE TRIBUNAL,

Having had referred to it a complaint submitted against the United Nations Educational, Scientific and Cultural Organisation on 24 March 1954 by Mr. David Leff, an official of that organisation, asking that "the Tribunal be pleased to judge that the order given by the Director-General of UNESCO to Mr. David Leff on 3 and 11 December 1953 and on 22 March 1954 cannot be validly given under the regulations and rules in force, that it enjoins an international official to perform an act foreign to the service and to his obligations, and that in consequence it must be rescinded;"

Considering the memorandum of reply to the said complaint submitted by the defendant Organisation on 23 April 1954;

Considering the additional memorandum deposited by the complainant on 10 May 1954;

Considering the memorandum of rejoinder of the defendant Organisation dated 2 June 1954;

Having had referred to it a statement submitted in his own name on 10 August 1954 by Mr. Harry Dawes, Chairman of the Staff Association of UNESCO;

Considering the pleadings exchanged by the representatives of the parties during the hearing;

Considering that the complaint is receivable in form:

Considering that the facts of the case are the following:

(1) On 17 August 1951, the passports of the complainant, his wife and his two children, all citizens of the United States of America, were withdrawn from him by the Consulate of the United States in Paris;

(2) On 15 May 1953, a summons to appear (subpoena) before the Federal Grand Jury in New York was notified to the complainant, ordering him to appear on 21 May 1953 "to testify and give evidence" concerning a possible violation of Section 371, title 18, US Code: "Conspiracy to commit offence or to defraud the United States":

(3) The complainant summoned as a witness not having replied to that summons on the date fixed, the Acting Director-General of the defendant Organisation was informed that the competent authorities had refused to consider as legitimate the grounds invoked by the complainant for not appearing; in consequence, the Acting Director-General, by a letter dated 22 May 1953 informed the complainant of his decision to proceed to an investigation into the circumstances of the summons addressed to the complainant and the validity of the grounds invoked by him for refraining from complying therewith; by the same letter the Acting Director-General, relying on Article 92, paragraph (e) of the Staff Rules, suspended the complainant, with pay, on the grounds that his refusal to reply to the summons constituted prima facie evidence of conduct incompatible with his obligations as a staff member of UNESCO as they are laid down in Staff Regulation 1.4;

(4) By a letter of 27 May 1953 the complainant introduced an appeal before the Appeals Board of UNESCO seeking the rescission of the suspension decision and the abandonment of the investigation ordered by the Acting Director-General;

(5) On 27 July 1953 the Appeals Board gave the opinion:

(a) that the suspension pronounced against the complainant be rescinded; (b) that the complainant be reinstated; (c)

that for the rest, the complainant was not justified in asking that an end be put to the investigation;

(6) By a letter dated 29 July 1953 the Director-General consequently instructed the complainant to report for duty on 30 July;

(7) On 30 July 1953 the Director-General verbally proposed to the complainant, in the event of his going to New York and being unable to return to Paris, to transfer him, "with his post", to New York, this transfer to include the payment of the travel expenses of his family and the transport of his possessions;

(8) By a letter dated 3 August 1953 the complainant informed the Director-General that before replying to the proposal thus made, he wished to exercise his right as a citizen of the United States to ask to be questioned in Paris and requested time for this purpose;

(9) By a letter dated 24 September 1953, the Director-General was informed by the Embassy of the United States in Paris that "With reference to Mr. David N. Leff's request that his testimony ... be taken in Paris ... the Grand Jury considers that the subpoena served Mr. Leff requiring that he appear in New York ... is still in effect" and that "The Grand Jury does not intend, therefore, to respond to Mr. Leff's inquiry."; this letter was communicated to the complainant on 25 September 1953;

(10) By a letter dated 22 October 1953 the complainant informed the Director-General of the negative result of his negotiations and asked UNESCO to undertake official negotiations to secure that his testimony be accepted in Paris;

(11) By a letter dated 18 November 1953 the Director-General informed the complainant of his refusal to undertake officially negotiations of this nature, considering that it was for the competent judicial authority to decide on the procedure to be followed;

(12) By a letter dated 3 December 1953 the Director-General informed the complainant that, having received no reply to his offer of transfer, he instructed him to proceed to New York to respond to the subpoena of the Grand Jury. This letter stated inter alia:

"For the reasons I gave you in my letter of 18 November 1953, I cannot accept your suggestion that I should make a request to the Grand Jury to apply the provisions which exist for taking testimony abroad. Such an intervention has not been made in the past. I must repeat what I have said before, that you have not satisfied me that any of your rights would be jeopardized by your response to the subpoena, or by your acceptance of the offer I have made to transfer you, and your post, to the New York office.

You indicated in your letter that you are still not in a position to accept my offer which you will remember, I first made on 30 July 1953. In the circumstances, I feel obliged to instruct you to proceed to New York for the purpose of responding to the Grand Jury's subpoena.";

(13) This instruction was repeated in a letter dated 11 December 1953 by which the Director-General instructed the complainant to make the necessary arrangements for this purpose before 17 December 1953; this letter read as follows:

"11 December 1953.

Dear Mr. Leff,

In reply to your letter of 7 December 1953, I am obliged to remind you that I and the Acting Director-General before me have always considered that your refusal to respond to the subpoena addressed to you by the judicial authorities of your country is a serious matter which can gravely damage the prestige and reputation of the Organisation.

On 3 December 1953, I instructed you to go to New York to respond to the subpoena in order that prejudice may not be caused to this Organisation which you have undertaken to serve with its interests alone in view. However, I have only done this after giving you guarantees, which I consider satisfactory, as to your fears regarding the continuation of your employment by UNESCO and separation from your family. These guarantees are contained in the promise made in my letter of 3 December that I will, at your request, transfer you to work in the New York

Office and arrange for the transportation of your family to the United States if you are not in a position to return to your work in Paris.

It follows that my letter is in no sense an instruction that you and your post shall be transferred to New York. I am completely safeguarding the possibility for you to return to your work in Paris.

In the circumstances, I can only repeat the instructions given in my letter of 3 December, and I request that before 17 December you make the necessary arrangements with the Head of the Bureau of Personnel and Management to leave for New York in the near future.

I consider that it would serve no useful purpose to take up certain misstatements contained in your letter of 7 December regarding matters on which you have already received full explanation.

Yours sincerely,

(signed)

Luther H. Evans

Director-General"

(14) By a letter dated 14 December 1953 the complainant informed the Director-General of his intention to lay the matter before the Appeals Board;

(15) By a letter dated 17 December 1953 the Director-General informed the complainant that in view of the exceptional circumstances of the affair, he had decided to rescind that part of his letter of 11 December 1953 which required the complainant to make arrangements by 17 December 1953 for his departure; he added that he would inform the complainant at a later time of the date by which he required him to make these arrangements; this letter read as follows:

"17 December 1953

Dear Mr. Leff,

I have your letter of 14 December 1953, in which you express the hope that I will consent to await the result of your appeal against my order before taking further action.

I have discussed this suggestion with my advisers and also with the Executive Committee of the Staff Association. I have decided, in view of the exceptional circumstances of the affair, to rescind that part of my letter of 11 December 1953 which required you to make arrangements by 17 December for your departure to New York at an early date. I will, at a later time, inform you of the date by which I require you to make these arrangements.

Yours sincerely,

(signed)

Luther H. Evans

Director-General"

(16) By a complaint dated 28 December 1953 the complainant requested the Appeals Board to express the opinion that the order given to him to go to New York for the purpose of giving testimony before the Grand Jury "could not be validly given under the regulations and rules in force, that it enjoins an international official to perform an act foreign to the service and that in consequence it must be withdrawn";

(17) On 8 March 1954 the Appeals Board expressed the opinion "that the decision dated 3 and 11 December 1953 should be rescinded in so far as it orders Mr. Leff to go to New York to comply with the summons to appear before the Grand Jury"; it added that the same might not have applied if it had been a question of a writ of summons and not a subpoena;

(18) By a letter dated 16 March 1954 the Director-General indicated to the complainant that, by a letter dated 13 March 1954, he had been informed by the Permanent Delegate of the United States to UNESCO that the United States District Court for the Southern District of New York had issued, on 11 March 1954, an order enjoining the complainant to show cause, on 25 March 1954, why he should not be adjudged for criminal contempt of court for having refused to appear before the Grand Jury pursuant to a subpoena;

(19) On 16 March 1954 the complainant received by registered letter a copy of the order to show cause and asked the head of the Bureau of Personnel and Management of UNESCO whether such an order could be properly served on the international territory of UNESCO;

(20) By a letter dated 16 March 1954 the head of the Bureau of Personnel and Management stated, on behalf of the Director-General, that the premises of UNESCO being inviolable, no service of legal process might take place thereon except with the consent of, and under conditions approved by, the Director-General, which consent had been neither requested nor given;

(21) By a letter dated 22 March 1954 the Director-General informed the complainant that he had been officially informed of the issue of the order to show cause by the United States District Court for the Southern District of New York and instructed the complainant to satisfy the requirements of the judicial authorities of the United States; this letter read as follows:

"Paris, 22 March 1954

Dear Mr. Leff,

I have given all due consideration to the opinion dated 9 March 1954, rendered by the Appeals Board and concerning my instruction for you to proceed to New York in answer to the subpoena issued to you by the United States Grand Jury and served on you on 15 May 1953.

I have also been officially informed that the United States District Court for the Southern District of New York has issued an order for you to show cause, on 25 March of this year, why you should not be cited for contempt for failure to respond to the above mentioned subpoena.

In the light of these developments, I hereby instruct you to satisfy the requirements of the judicial authorities of the United States, and I request you to let me know what steps you are taking to this effect.

I want you to know that I shall attach the greatest importance to the judgment which will be rendered by the United States District Court for the Southern District of New York.

Yours sincerely,

(signed)

Luther H. Evans

Director-General"

(22) By a letter dated 27 March 1954 the Director-General was informed by the Permanent Delegate of the United States to UNESCO that the said Court has found the complainant in contempt of court and had issued a bench warrant against him;

(23) On 6 April 1954 a notice of cross-motion filed with the United States District Court for the Southern District of New York made known that the complainant moved that the subpoena, bench warrant and order to show cause be quashed upon the ground that a Grand Jury subpoena could not be served outside the United States, that the respondent was never served with process and that the Court was without jurisdiction over his person;

(24) By a letter dated 15 April 1954 to the Chairman of the Appeals Board, the Director-General informed him that the judicial authorities of the United States had issued the order to show cause to which the Appeals Board had formally referred in its opinion of 8 March 1954 and in the absence of which the Appeals Board had considered that it was not for the Director-General to order the complainant to go to New York; the Director-General added

that in the presence of this new fact, "he reserved the right to take, in the light of the judgment to be adopted by the United States District Court any decision concerning the complainant which he might deem necessary";

Considering that the first question which arises is to know whether the order given by the Director-General to the complainant on 22 March 1954 - by which the Director-General instructed him to satisfy the requirements of the judicial authorities of the United States as formulated at that date in consequence of the issue of the order to show cause - forms an indivisible whole with that of 3 December 1953 (repeated on 11 December 1953) concerning the summons before the Grand Jury of which the first is but the consequence;

Considering that the order of 3 December 1953 (repeated on 11 December 1953) was partly rescinded on 17 December only in so far as it fixed the maximum time limit for its execution, the order itself being unquestionably maintained in principle;

Considering that it is impossible to admit that there is unity between the two orders; that the order of December 1953 was based on the demand for the personal appearance of the complainant before the Grand Jury to give testimony whilst that of 22 March 1954 was based on the duty of the complainant to defend himself before the court seized of an indictment against him; that whereas the purpose of the order of December 1953 was to oblige the complainant to go to New York, the order of 22 March 1954 required him to satisfy the requirements of the judicial authorities of the United States as formulated at that date, which included the possibility, for the complainant, to arrange for himself to be represented;

That the two orders have thus a different basis (subpoena before the Grand Jury on the one hand and, on the other hand, writ of summons before the court) and a different purpose (personal appearance in the first case and freedom to be represented in the second case, at the time of formulation of the order);

Considering that at the time when the first order was given the complainant had not yet become involved as an accused person, as was the case when the order of 22 March 1954 was given;

Considering that it was thus that the Appeals Board, on 8 March 1954, considered that the Director-General was not, on the basis of the facts existing at that date, justified in giving this order;

Considering therefore that the two orders must be considered as distinct and subjected to separate examination through separate procedures;

ON THE ORDER OF 3 and 11 DECEMBER 1953:

Considering that the defendant Organisation pleads that the order has been replaced and completely rescinded by the subsequent order of 22 March 1954;

Considering nevertheless that in fact the order of December 1953 has never been explicitly withdrawn as regards the part subsisting after the notification dated 17 December of the same year and that, besides, this order has in no way become non-executable as long as it is not established that the procedure before the Grand Jury which gave rise to the issue of the subpoena has finally been dropped;

That the statements subsequently made by the defendant Organisation as to the total rescission of the order are devoid of relevance, as the situation must be determined at the time when the Appeals Board issued its opinion, whereas the Organisation participated in the meetings of the Appeals Board to defend there the measures impugned and against the claim of the complainant;

Considering that it is thus the duty of the Tribunal to examine the validity of this order;

Considering that this order obviously does not concern the actual service of the international Organisation; that the latter must enjoy the full sovereignty of its authority and must not be to any extent subject to external influence emanating from any one of its States Members; that in this respect most strict and clear provisions guarantee its complete independence and that of its officials;

Considering *inter alia* that Article VI, paragraph 5, of the Constitution of UNESCO specifies the following:

"The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the

discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organisation. They shall refrain from any action which might prejudice their position as international officials. Each State member of the Organisation undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties,";

Considering that it is specified in UNESCO Staff Regulation 1.2 that the members of the staff are responsible to the Director-General "in the exercise of their functions";

Considering, besides, that Staff Regulation 1.4 provides that members of the Secretariat shall conduct themselves at all times in a manner consonant with the good repute and high purposes of the Organisation and their status as international civil servants; that they shall not engage in any activity that is incompatible with the proper discharge of their duties; that they shall avoid any action, and in particular any kind of public pronouncement which would adversely reflect upon their position as international officials; that while they are not expected to give up their religious or political convictions or national sentiments, they shall at all times exercise the reserve and tact incumbent upon them by reason of their international responsibilities; that Staff Regulation 1.9 provides that on accepting appointment each staff member shall subscribe to a declaration whereby he undertakes to exercise the functions entrusted to him with the interests of the Organisation only in view;

Considering that it does not follow from the above mentioned texts that the conduct of an official with regard to the Government of his country, although outside the actual service of the international Organisation, is entirely outside the control of the disciplinary authority of the Organisation;

That on the contrary this is the case when that conduct is judged to be seriously likely to affect the dignity of the official and the prestige of the organisation to which he belongs - a point of fact of which the appreciation will vary according to the circumstances of each case;

That the validity of the order in dispute therefore depends entirely on whether; if on 3 and 11 December 1953, this fact was established to the point that the intervention of the authority of the Director-General was justified;

Considering that the Appeals Board formally expressed the view that at that date disciplinary action was not justified, the circumstances required for such action not being met since there was only a question, in the case of the complainant, of abstention from appearing in New York as a witness in the investigation of the Grand Jury;

Considering that the opinion thus expressed by the Appeals Board should be subscribed to and that in consequence the order of 3 and 11 December 1953 should be rescinded;

ON THE ORDER OF 22 MARCH 1954:

Considering that as regards the said order the Tribunal can only note that it has not thus far been the subject of an appeal before the Appeals Board;

That Article VII of the Statute of the Tribunal 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;

Considering in fact that the time limit provided for in Article 10 of the Provisional Rules of the Appeals Board for filing an appeal against the order in question has now expired; but that if no appeal was made, this is obviously because, in the view of the complainant, no distinction was to be made between the order of 3 and 11 December 1953 and the order of 22 March 1954;

That it is therefore in the strict interests of impartial justice that the time limit for appeal be re-opened as from the date of the present judgment so that the complainant may exercise his right freely and completely before the Appeals Board to challenge the validity of the order under dispute, particularly in setting forth all the considerations relating to the circumstances under which the penal procedure taken against him was opened and followed, taking into account the nature of the indictment to which he has to reply.

ON THE GROUND AS AFORESAID

The Tribunal,

Rejecting all wider or contrary conclusions,

Declares in law that the orders made in December 1953 and in March 1954 are distinct and must be the subject of separate appeals procedures;

Declares the complaint receivable and founded in so far as it relates to the order of 3 December 1953 repeated on 11 December following;

Orders the rescission of the said order;

For the remainder, declares the complaint at present irreceivable in so far as it relates to the order of 22 March 1954;

Declares that the time limit of fifteen days statutorily granted to the complainant to file an appeal against this order with the Appeals Board is re-opened as from the date of the present judgment;

As regards the statement of Mr. Harry Dawes, in so far as it is made in his own name, declares it receivable in form, founded in so far as it relates to the order of 3 and 11 December 1953, and irreceivable for the rest;

Considering that the statement cannot give rise to the granting of damages and that the fact that it is received cannot entail any consequence other than the granting of expenses incurred in connection with the statement;

Orders the defendant Organisation to pay the complainant the sum of three hundred dollars by way of participation in expenses;

Further orders the defendant Organisation to bear such expenses as may be justified by the declarant Dawes, up to a maximum of one hundred dollars;

In witness of which judgment, pronounced in public sitting on 6 September 1954 by His Excellency M. Albert Devèze, President, Jonkheer van Rijckevorsel, Acting Vice-President, and M. Iasson Stavropoulos, Deputy Judge called upon to sit owing to the inability of a titular judge to attend, the aforementioned have hereunto subscribed their signatures as well as myself, Wolf, Registrar of the Tribunal.

Signatures:

Albert Devèze  
A. van Rijckevorsel  
Iasson Stavropoulos  
Francis Wolf