

TWENTY-EIGHTH ORDINARY SESSION

***In re* WALIULLAH**

Judgment No. 190

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Syed Waliullah on 30 August 1971 and the Organisation's reply of 30 September 1971;

Considering the memorandum of 25 October 1971 resuming proceedings in the name of Mr. Waliullah and his children, submitted by Mrs. Waliullah following his sudden decease on 10 October 1971, and the Organisation's reply thereto of 24 January 1972;

Considering Article II, paragraphs 5 and 6(a) and (b) of the Statute of the Tribunal, UNESCO Staff Regulation 4.1 and Staff Rules 104.6(b) and 109.3;

Having heard in oral proceedings on 8 and 9 May 1972 Mr. Richard Hoggart, Mr. Pierre Navaux and Mr. Amadou Seydou, UNESCO officials, as sworn witnesses, together with Mr. Jacques Mercier, counsel for the complainant and his heirs, and Mr. Claude Lussier, Mr. Georges Perrenoud and Mr. Luis Marqués, agents of the Organisation;

Considering that the material facts of the case are as follows:

A. Mr. Waliullah, a distinguished writer and talented journalist, was formerly First Secretary in the Pakistan Embassy in Paris. On 8 August 1967 he was appointed to a P.5 post with UNESCO as programme specialist in the Division of Development of Mass Media in the Department of Mass Communication in the Communication Sector. Re appointment was for two years and was financed out of credits for a P.3 post bearing the code number MC-09 (mass communication). In his complaint Mr. Waliullah contends that in the ensuing months he was given no work suited to his qualifications and that "only after repeated urging was he given short-term or even one-day assignments irrelevant to those for which he had been appointed and not matching his experience and qualifications". He nevertheless successfully completed his probationary period, although his performance report for the period from April to December 1968 contained an unfavourable appraisal. On 5 May 1969 he protested to the Director-General that since he had been given only odd jobs to do no proper opinion could be formed on his abilities. He went on: "I am compelled to wonder if I have not been a victim of misunderstanding. I have learnt recently that my Department considered me to be a 'political' appointee and that there was a strong resentment about my appointment ...". He felt that this had prevented his Department from objectively assessing his qualifications and experience.

B. On 14 August 1969 the Director-General decided to over-rule the performance report in question and had the complainant transferred to the International Campaigns and Development of Cultural Tourism Division, a unit in the Director-General's own office. The complainant's appointment, which had already been extended once to 7 September 1969, was extended further to 14 August 1970. He was transferred to a newly created post, No. SHC/ODG/04, financed, as was confirmed by a minute of the Deputy Director-General dated 21 May 1970, by the freezing of post No. MC-09. In January 1970 his Division was renamed the Protection and Development of the Cultural Heritage Division and became part of the Social Sciences, Human Sciences and Culture Sector. On 22 July 1970 the Assistant Director-General in charge of this Sector sent a minute to the Bureau of Personnel, and a copy to Mr. Waliullah, stating that this post would cease to exist. At the same time he expressed the view that Mr. Waliullah was a very valuable staff member whose services he would greatly like to retain, but he was not sure that any vacancies would arise in the Department in the near future. On June 1970 the same high-ranking official instructed the Department Director to look for another assignment for Mr. Waliullah as a matter of urgency. In October/November 1970 the complainant was assigned to the Secretariat of the General Conference of the Organisation as secretary of the Programme Committee. At the end of October 1970, however, he was informed that he could not be so employed after 31 December 1970, the date of expiry of his final appointment. On 20 November 1970 the Director of the Bureau of Personnel informed him that he had taken note of his application for

two other posts and that if he were unsuccessful his appointment would terminate on 31 December 1970 in accordance with Staff Rule 104.6(b) relating to fixed-term appointments. The complainant contested this decision on 11 December 1970. On 12 January 1971 it was confirmed and he appealed to the Appeals Board. The Board held that Staff Rule 104.6(b) relating to fixed-term appointments was inapplicable both because the original appointment had on its expiry been "neither extended nor converted as such except for a period of one month up to 7 September 1969", and because Mr. Waliullah had had several transfers. The Board therefore recommended on 24 May 1971 that if it proved impossible to keep Mr. Waliullah the Organisation should pay him compensation equivalent to the sums he would have received had his appointment been extended to 31 December 1972. On 23 August 1971 the Director-General informed the complainant that he could not endorse the Appeals Board's recommendation, but could offer him a one-year appointment at grade P.4 in the UNESCO office in Bangkok. On 30 August the Director of the Bureau of Personnel explained that the appointment would be for an initial duration of two years and that the remuneration would be much the same as the complainant's previous remuneration.

C. The complainant refused this offer on the grounds that it would entail unwarranted demotion. On 30 August 1971 he appealed to the Administrative Tribunal, praying it:

"to quash the decision of the Director-General of UNESCO of 20 November 1970 and 23 August 1971;

to invite him accordingly to offer the complainant renewal of his contract for a period and on terms equivalent to those of his original appointment. Should the Administration consider such a measure 'impossible or inappropriate', the Tribunal should award him: (1) compensation equivalent to the salary which he would have received had he remained in the service of the Organisation up to the date of the decision;

(2) compensation equal to two years' full salary for his legitimate expectations of renewal of contract for a period equivalent to that offered to him by the Organisation on his taking up his original appointment;

(3) considering the special difficulties faced by the complainant because of the international economic situation and the professional and moral prejudice suffered by him, compensation equivalent to one year's salary;

(4) finally, a sum amounting to Sw.frs. 6,000 to cover expenses and fees occasioned by the present complaint."

D. The complainant having died on 10 October 1971, his widow resumed proceedings in accordance with Article II, paragraph 6, of the Statute of the Tribunal, and lodged an amended statement of claims. She prays the Tribunal:

(a) to quash the decision of 20 November 1970, confirmed on 23 August 1971, and to award compensation amounting to two years' full salary in respect of the late complainant's legitimate expectations of renewal of contract for a period equivalent to that offered by the Organisation at the time of his original appointment; (b) to award additional compensation amounting to one year's salary as partial damages for the grave moral prejudice suffered by the late complainant and his family owing to his unwarranted treatment, which affected his health; and (c) to grant a sum amounting to Sw.frs. 6,000 to cover the expenses and fees incurred by Mrs. Waliullah.

E. Before the present Tribunal the counsel for the complainant and his widow contends that Staff Rule 104.6(b) was inapplicable to the complainant, since it provides that a fixed-term appointment "shall, unless extended or converted, expire according to its terms, without notice or indemnity". In view of the many transfers and reassignments which occurred throughout the complainant's career, the Appeals Board was right, he contends, in holding that the complainant was not given a single appointment, but a succession of appointments which exceeded the fixed duration of his original appointment, which therefore reached its term without being either extended or converted as such. The matter does not therefore fall within the Director-General's discretion, and the Tribunal is fully competent to censure the irregularities committed. Besides, the Administration could not invoke Staff Rule 104.6(b) even if it were applicable because of the impropriety which it committed in appointing the complainant without having available or providing a post with precise functions for him. It appointed him because it wished to have a staff member of his nationality at a high grade, but failed to concern itself with the question as to whether it had assignments for him which matched his qualifications and grade, as the spirit and letter of Staff Regulation 4.1 require. That regulation provides, among other things, that when an appointment is made the Director-General must notify to the staff member in writing the title and character of the post to which he is appointed. By infringing this regulation the Organisation deprived itself of the right to invoke Staff Rule 104.6. Moreover, the complainant would not have resigned from the public service of his country had he not expected to make his career in UNESCO. His expectations had been encouraged both by his supervisors' favourable reports and by the oral statements of the Administration's representatives. In a minute of 21 May 1970 to the Assistant Director-General in

charge of the complainant's Sector the Deputy Director-General noted that Mr. Waliullah's post would be financed out of the Sector's budget from 1 January 1971. That constituted a manifest commitment on the part of the Organisation to continue the complainant's contract.

F. The Organisation contests all these arguments. It considers, among other things, that Staff Rule 104.6(b) is in fact applicable: however many extensions of appointment the complainant received they were fixed-term extensions and did not alter the character of the appointment, which continued to be a fixed-term appointment, and did not entail any "conversion" of the appointment into an indeterminate appointment. The transfers did not in any way affect the duration of the appointment, the two notions being distinct in law. The complainant did not contest the propriety of those transfers at the time. The Director-General could not endorse the Appeals Board's interpretation of Staff Rule 104.6(b), one which had particularly serious consequences, but sought to take account of its opinion in offering the complainant a post (in Bangkok). The complainant's assignment as secretary of the Programme Committee, an essentially temporary one, did not alter his position and afforded him no grounds for any expectations whatsoever. Contrary to what the Appeals Board held, it could not give him any "legitimate expectation of having his services retained". The Deputy Director-General's minute of 21 May 1970 was not addressed to the complainant. It related exclusively to budget matters and in any case was written by someone who was not qualified to decide on the renewal of the appointment - a decision which only the Director-General can take. Contrary to the complainant's claim, therefore, the minute could not constitute "an almost formal assurance". Moreover, the minutes which the complainant's supervisors wrote to find him other assignments were not tantamount to a promise of renewal of his appointment. Thus the present case reveals none of the irregularities which, according to the case law of the Tribunal, afford grounds for the Tribunal to interfere with a decision not to renew an appointment. The non-renewal of the complainant's contract was in fact in the Organisation's interests. The post in Bangkok was fully suited to his qualifications and skills. The Organisation points out that under Staff Regulation 1.2 the Director-General may assign staff members to any post in the Organisation, including field posts. The complainant was wrong in contending that his name never appeared in the UNESCO staff list; the Organisation appends to its memorandum a copy of the list, which includes his name. The letter of appointment of 7 June 1967 and the notice of personnel action of 25 August 1967 met the requirements of Staff Regulation 4.1 since they specified the title and character of the post in question. The terms of such a letter do not in any way prevent transfers or subsequent changes in the tasks to be carried out during the period of the appointment. Whatever the method of financing his appointment, which was moreover made at the repeated insistence of his Government, the complainant was assigned work which his supervisors thought necessary and appropriate, and he received a report which contained an exact appraisal of the way in which he performed that work. Moreover, he had the opportunity to contest the propriety of the transfers and assignments at the time if he thought them contrary to the Staff Rules; he did not do so and his claims on this score are therefore time-barred and irreceivable. The Organisation denies that the complainant was given oral assurances that his appointment would be extended. In any case such assurances could not have any legal effect.

G. As regards the resumption of proceedings by the widow of Mr. Waliullah, the Organisation objects to the suggestion that unwarranted treatment suffered by the late complainant lays any responsibility whatsoever on the Organisation for Mr. Waliullah's state of health after he left its service. Since the complainant died ten months after he ceased to be a UNESCO staff member, the Organisation raises the question as to whether his right of access to the Tribunal has devolved on his widow. It expresses doubts as to whether his widow and children can appeal to the Tribunal under Article II, paragraph 6(b), of the Statute of the Tribunal. It contends that the complainant's widow cannot lodge with the Tribunal claims which the deceased himself was not entitled to submit. She persists in the claim submitted by the deceased for the quashing of the Director-General's decision not to renew the appointment. Since renewal is now impossible, the claim for the quashing of the decision not to renew has no purpose. In the memorandum resuming proceedings Mrs. Waliullah claims compensation amounting to one year's salary. This claim was made in the complainant's original memorandum, but the grounds invoked are not the same in the two memoranda. The question accordingly arises as to whether such a claim is receivable. It is based on an allegation of "grave moral prejudice" suffered by the late complainant and his family. Yet according to a principle of law the right to claim compensation for moral prejudice does not devolve on the heirs of the deceased (*actio personalis moritur com persona*). The Organisation also contests the existence of such prejudice. It vigorously protests against the allegation of "unwarranted treatment" and points out that he received not only several renewals of appointment but also an advantageous offer which he declined. For the record the Organisation observes that it was prepared to pay Mr. Waliullah US\$4,809.59 on termination of his appointment and that this sum was paid to his widow once the formalities of termination of employment had been completed. The Organisation has also met Mrs. Waliullah's request for a one-year extension, to 31 December 1972, of the period within which she and her two children are entitled to repatriation at the Organisation's expense.

H. The Organisation therefore prays that the complaint be dismissed.

CONSIDERATIONS:

As to the receivability of Mrs. Waliullah's complaint:

Article II, paragraph 6, of the Statute of the Tribunal provides as follows:

"The Tribunal shall be open (a) to the official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death:".

It follows that the widow of an official or former official may resume proceedings before the Tribunal instituted by her husband before his death, but that she may not submit any claims other than those which her husband was entitled to present, and specifically may not make a personal claim and in particular claim compensation for any injury which she alleges that she herself has suffered.

The Tribunal is thus open to Mrs. Waliullah in respect of the claims filed with it before Mr. Waliullah's death, subject to any changes resulting from the fact of his death.

As to the legality of the decision impugned:

Under Staff Regulation 4.1: "As stated in Article VI.4 of the Constitution, staff members are appointed by the Director-General. When an applicant is appointed, terms of appointment are notified to him in writing, by the Director-General or by his authorised representative, and such notification together with his acceptance in writing, alone shall constitute his contract of employment. The terms of appointment shall include provision for a period of probation and for the period of notice of separation required, and shall specify the title and character of the post, to which he is appointed."; and Staff Rule 104.6(b) provides that:

"A fixed-term appointment may, at the discretion of the Director-General, be extended, or converted to an indeterminate appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity." From the evidence in the file it is clear that the letter of 2 June 1967 by which the Director of the Bureau of Personnel offered Mr. Waliullah an appointment in UNESCO did in fact indicate "the title and character of the post" to which he would be appointed if he accepted, and that, similarly, the notice of personnel action dated 25 August 1967 stated the character of the post, service and division to which Mr. Waliullah would be assigned.

Thus the complainant's claim that the provisions of Staff Regulation 4.1, cited above, were not properly applied is without foundation.

Secondly, in extending the complainant's original two-year contract successively to 7 September 1969, 14 August 1970, and 31 December 1970 the Director-General acted within the authority conferred on him by Staff Rule 104.6(b), quoted above.

Thirdly, in transferring Mr. Waliullah during the period of his appointment, as thus properly extended, to a different service the Director-General was simply applying the provisions of Staff Regulation 1.2 under which he has authority to assign an official in the best interests of the Organisation; the complainant's attention had, moreover, been specially drawn to the above-mentioned provision in the letter of 2 June 1967 referred to above. Mr. Waliullah alleges that the Organisation did not in fact employ him on the work for which he had been recruited for a period of two years, and was thus gravely at fault; even supposing that the truth of this allegation were established, it would not be such as to vitiate the impugned decision not to renew his contract.

Lastly, the minutes of 21 May, 3 June and 22 July 1970 merely show the Organisation's wish to find some means of retaining the complainant's services after the expiry of his appointment on 31 December 1970 and the attempts made to that end. They contain no promise either of a further extension or of a new appointment, still less any commitment. On the contrary, having received a copy of the minute of 22 July 1970, the complainant was informed that his appointment would probably not be renewed. The fact that during the period of his appointment Mr. Waliullah was assigned the duties of secretary of the Programme Committee for the duration of the General Conference did not give him any reasonable ground for thinking that the assignment for the duration of the

Conference was such as to entitle him to a new appointment. Mr. Waliullah could not justifiably rely on the oral assurances, which were in any case of a vague nature, allegedly given to him by certain officials of the Organisation in respect of a possible extension after 31 December 1970.

In any case, the offer made to the complainant by the Organisation of a new contract involving appointment to a P.4 post at Bangkok at a salary substantially equivalent to his previous salary did not imply any demotion, entailing as it did the conclusion of a new contract. To avoid incurring the injury for which he has claimed compensation the complainant could have accepted that offer, which in the circumstances of the case appeared to be a reasonable one.

It follows from what has been said above that Mr. Waliullah had no right to the renewal of his contract of employment and consequently his widow's claim to compensation for non-renewal is without foundation.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 15 May 1972.

(Signed)

M.. Letourneur
André Grisel
Devlin

Bernard Spy