106th Session **Judgment No. 2806**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review and interpretation of Judgment 2691 filed by the International Organization for Migration (IOM) on 18 April 2008, the reply by Mr A. H. (the complainant in that judgment) of 1 August, the Organization's rejoinder of 29 September and Mr H.'s surrejoinder of 10 October 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

CONSIDERATIONS

1. Facts relevant to this case are set out in Judgment 2575, delivered on 7 February 2007, concerning Mr H.'s first complaint and in Judgment 2691, delivered on 6 February 2008, concerning his application for execution of that judgment. The IOM requests review and interpretation of Judgment 2691 by which the Tribunal ordered it to execute Judgment 2575 and specified in order 2 that:

> "The Organization must immediately reinstate the complainant in his former post in Vienna, and put him on travel status for the period from 8 February 2007 until his effective reinstatement."

2. In Judgment 2575 the Tribunal annulled a decision to transfer the present respondent, Mr H., i.e. the complainant in the aforementioned case, from Vienna to Berlin. No action was taken to return him to Vienna following the Tribunal's decision. Instead, on 13 February 2007, the Director General informed him, amongst other things, that pursuant to Staff Rule 8.111.12 he had decided to transfer him within grade to Berlin with immediate effect. In Judgment 2691, the Tribunal found that the decision of 13 February 2007 was not "a new decision", pointing out that:

> "It concern[ed] the same person [Mr H.], the same subject matter (the transfer to Berlin) and the same cause (implementation of Staff Rule 8.11) as in the decision which was annulled by Judgment 2575."

The Tribunal added that that decision was "no more than an attempt to implement, by a different route, the very decision annulled by Judgment 2575". It concluded that it contravened that judgment and declared that it was "null and void *ab initio*".

3. The IOM seeks review of Judgment 2691 on the ground that there was a "failure to take full account of particular facts". It asserts that it did reinstate Mr H. to Vienna and that "the Tribunal [has] failed to take this fact into full consideration". It argues that "[b]y making a new decision on […] 13 February 2007, the Organization considered the transfer decision of 20 December 2006 as null and void". It adds that it complied with the other orders made in Judgment 2575 and submits that:

> "There was [nothing] more the Organization could do to implement Judgment 2575 given, *inter alia*, that the terms of reference of [Mr H.'s] previous position had been substantially modified and that the reconfigured post had been filled."

4. There is an element of inconsistency in the IOM's assertion that it "did reinstate [Mr H.] to Vienna" and its argument that it could not reinstate him in his previous position. Moreover, its assertion that it "did reinstate" him is inconsistent with the submissions it made in opposition to Mr H.'s application for execution of Judgment 2575 that led to Judgment 2691. In those submissions, the IOM argued that the Tribunal did not rule that Mr H. should have been reinstated in the

same position that he had held prior to Judgment 2575, nor that he should not have been "moved" from a post in Vienna to another post. In its submissions during the proceedings on Mr H.'s application for execution the Organization did not rely on the fact that it had reinstated him, it cannot therefore now rely on that "fact" as the basis for review of Judgment 2691 (see Judgments 570 and 2776). Indeed, there was no reinstatement, contrary to what the IOM claims. As already indicated, no steps were taken to return Mr H. to Vienna. The decision of 13 February 2007 did not purport to bring about that legal result and, in any event, could not bring about that result as it was void *ab initio*.

5. Additionally, the IOM argues that, in Judgment 2691, "the Tribunal fail[ed] to take into full consideration the fact that the Organization's options, after having implemented the decision [in Judgment 2575], were limited to Berlin". On this basis, it contends that, had the Tribunal taken into account the fact that Mr H.'s position had already been filled and that the limited number of D.1 posts had been taken into account, it "would have come to the conclusion that the Organization had implemented Judgment 2575 and that the decision […] of 13 February 2007 was a new decision". Again, the limited nature of the "options" available to the Organization was not a matter that was raised by it in its submissions either in the proceedings that led to Judgment 2575 or those that led to Judgment 2691. The IOM cannot now rely on it as a basis for review. Further, even if the limited nature of the options available to it had been taken into account, that would not of itself have led to the conclusion for which it now contends. Given that in December 2005 the Director General had refused to accept the recommendation of the Joint Administrative Review Board that Mr H.'s transfer to Berlin be suspended pending a final decision on his case, it would have been necessary to reinstate Mr H. in his post in Vienna and to take a decision in accordance with the rotation procedure laid down in Staff Rules 8.112 and 8.113 in order for the Tribunal to conclude that the Organization was not attempting to circumvent its decision and implement, by a different route, the very decision annulled by Judgment 2575 but was, in truth, taking a new decision.

6. Additionally, the IOM requests interpretation of Judgment 2691 regarding the following matters. First, it claims that it is not clear what deductions may be made from the daily subsistence allowance which it was ordered to pay by order 2 of the aforementioned judgment. That order clearly and unambiguously requires that Mr H. be "put […] on travel status for the period from 8 February 2007 until his effective reinstatement". It gives rise to no question as to the amount, if any, that may be recovered by the IOM for mobility or other allowance. In substance, the Organization is not seeking interpretation of Judgment 2691 but advice as to an entirely different issue. That is not a matter within the competence of the Tribunal in a proceeding of this kind. Only when that issue is the subject of a final decision and a subsequent complaint can it be determined by the Tribunal. In the meantime, Mr H. is entitled to be paid in accordance with order 2 of Judgment 2691. Additionally, he should be paid interest at the rate of 8 per cent per annum on the amounts payable, calculated monthly, from 8 February 2007 until actually paid.

7. The Organization also suggests that there is ambiguity in Judgment 2691 insofar as it was said in consideration 9 that Mr H. "must immediately be reinstated, at least administratively, in his former post in Vienna and must be placed on travel status for the period from 8 February 2007 until his reinstatement" (emphasis added). It asks whether the phrase "at least administratively" requires it to reverse previous staff movements or to create a new D.1 post in Vienna. The phrase concerns none of these issues and no ambiguity is occasioned by it. It merely acknowledged that there might be some delay in Mr H.'s actual return to Vienna. It conveyed nothing more and certainly did not deal with the issue raised by the Organization. However, to ensure compliance with Judgment 2575, the Tribunal states that, if the post previously occupied by the respondent is not vacant, he is to be reinstated in Vienna in a senior post appropriate to his qualifications and experience at a salary not less than that applicable to his former post, and to a D.1 post if one is vacant.

8. Lastly, the IOM requests clarification of the statement in consideration 8 of Judgment 2691 that "the impugned 'decision' cannot be considered a new decision". In that regard it states that "it remains unclear whether the Tribunal considers that the power […] to transfer [o]fficials within grade under Staff Rule 8.111.12 no longer has a legal basis distinct from that of the power to transfer through rotation (Rules 8.112 and 8.113)". The Tribunal had no occasion to and did not rule on that question. Rather, it held that in the circumstances before it there had been no decision, merely an attempt to circumvent the Tribunal's decision and implement, by a different route, the very decision annulled by Judgment 2575. This request, also, is a request for advice, not for interpretation. For the reasons given above, it must also be rejected.

9. For the reasons already indicated, Judgment 2575 can only be implemented by the actual reinstatement of Mr H. in a post in Vienna. If the IOM wishes to take a new decision aiming at transferring him to Berlin, it must be taken in accordance with the rules relating to rotation. If not, for the reasons given in Judgment 2691, it will not be a new decision.

10. In his reply, the respondent seeks moral damages. The Tribunal held in Judgment 1504 that it was not appropriate to make a counterclaim for moral damages in the context of submissions on an application by an organisation for review of a judgment. It pointed out that the complainant's claim in that case arose out of a separate cause of action and that it should therefore be pursued separately. The same is true in this case. Accordingly, the claim for moral damages is rejected. The respondent is, however, entitled to costs in the amount of 4,000 euros as claimed.

11. Like all judicial bodies, the Tribunal has inherent jurisdiction and power to take action to ensure that its judgments are implemented. That power may be exercised in any proceedings where a question is raised with respect to the implementation of a judgment. Accordingly,

an order will be made for a penalty to be paid in the event that Mr H. is not posted to Vienna within 30 days.

DECISION

For the above reasons,

1. The application is dismissed.

2. The IOM shall, within 30 days of the date of delivery of the present judgment, reinstate the respondent, Mr H., the complainant in Judgment 2575, in his previous post in Vienna or, if that post is not vacant, it shall appoint him to a senior post in Vienna appropriate to his qualifications and experience at a salary not less than that applicable to his former post, and to a D.1 post if one is vacant. The Organization shall pay the respondent the sum of 10,000 euros by way of penalty for each month or part month of delay beyond 30 days.

3. Unless already paid, the Organization shall, within 30 days of the date of the present judgment, pay the respondent in full the daily subsistence allowance for the period from 8 February 2007 until the date of his actual reinstatement in Vienna with no deductions of any kind. It shall also pay interest on the sums that should have been paid at the rate of 8 per cent per annum, calculated monthly, from 8 February 2007 until the date of actual payment.

4. It shall pay the respondent 4,000 euros in costs.

In witness of this judgment, adopted on 7 November 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, Mr Agustín Gordillo, Judge, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Mary G. Gaudron
Agustín Gordillo
Giuseppe Barbagallo
Dolores M. Hansen