

L. (No. 5)

v.

ICC

(Application for review)

131st Session

Judgment No. 4355

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 4182 filed by Mr C. L. on 9 July 2019 and corrected on 24 July, the reply of the International Criminal Court (ICC) of 26 November, the complainant's rejoinder of 13 December 2019 and the ICC's surrejoinder of 9 March 2020;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

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

On 3 July 2019 the Tribunal delivered in public Judgment 4182 concerning the complainant's fifth complaint against the ICC, in which he challenged the decision not to place him on the shortlist for the D-1 position of Director of the Division of External Affairs and Field Operations for which he had applied as a priority candidate.

Referring in particular to considerations 6 and 7, the complainant asks the Tribunal to review its judgment alleging a material error. He asks the Tribunal to determine whether the Human Resources Section (HRS) exceeded its authority by rejecting his application for the contested D-1 position, whether the rejection of his application by HRS without transmission to the Interview Panel amounted to a breach of procedure; and whether the ICC erred in law by relying on paragraph 35 of Information Circular ICC/INF/2014/011 Rev.1 as the legal basis for the HRS decision. He further asks the Tribunal to determine whether the ICC erred in fact

when it considered that he lacked the required experience in managing and leading field operations for the purpose of – at least – his eligibility for the position, without prejudice to his suitability; whether the ICC misused its authority by summarily dismissing his application for the position at stake without forwarding it to an interview panel for purposes which are alien to the alleged motivation of that rejection, namely retaliation; and whether the ICC had demonstrated bias, ill will, malice, bad faith and/or improper purpose justifying an award of punitive damages. Finally, he asks the Tribunal to grant him the remedies he initially claimed, that is to say his appointment as Director of the Division of External Affairs and Field Operations or compensation for economic loss.

The ICC asks the Tribunal to reject the application as irreceivable on the ground that the material errors alleged by the complainant do not afford admissible grounds for review. In the alternative, it asks the Tribunal to reject the application for review on the ground that the complainant is in fact trying to reopen his fifth complaint, which, in any event, has been rendered *res judicata* by Judgment 3908, delivered in public on 24 January 2018, concerning his third complaint. In that judgment, the Tribunal held that the ICC did not take adequate steps to reassign the complainant after the abolition of his post, and that the decisions to reject his candidature for a number of available positions on the basis that he was not suitable as part of an assessment in a competitive selection process, fell short of what was required on the part of the ICC.

CONSIDERATIONS

1. This is an application to review Judgment 4182. That judgment was delivered in public on 3 July 2019 as was another judgment concerning the complainant, Judgment 4183. Yet another judgment, Judgment 3908, concerning the complainant was delivered earlier on 24 January 2018. In this last mentioned judgment, the complainant was substantially successful in challenging his treatment following a decision to abolish his post in June 2015 as part of the significant reorganization of the ICC and his separation from the ICC on 27 October 2015. The Tribunal was satisfied that the ICC had not complied with its legal obligations in relation to possible reassignment of the complainant to other positions within the organization following the decision to abolish

his post. The complainant was awarded material damages in a significant sum, namely 180,000 euros, and moral damages of 40,000 euros, a total of 220,000 euros.

2. The subject matter of Judgment 4182 was an application the complainant made in 2015 for a newly created position. He applied for the position on 7 July 2015, that is to say during the period in which the ICC was obliged to seek to reassign the complainant following the decision to abolish his post. While the ICC did not raise in the proceedings leading to Judgment 4182 any question of *res judicata*, it does so in this application for review. No doubt this approach is prompted, at least in part, by the ICC's success in Judgment 4183, delivered at the same time as Judgment 4182, in resisting a legal challenge by the complainant to the ICC's response to applications made by him for appointment to specific positions in the reassignment period on the grounds of *res judicata*. At the very least and on the assumption that the application for review was meritorious, no purpose would be served by reopening the issues raised in the proceedings leading to Judgment 4182 if the fate of those proceedings will be determined against the complainant by the application of the principle of *res judicata*.

3. The Tribunal is satisfied that *res judicata* does apply to any argument related to flaws that may have attended the decisions arising from the application made on 7 July 2015. At that time the ICC was legally obliged to take all reasonable and lawful steps to facilitate the reassignment of the complainant following the abolition of his post. The Tribunal concluded in Judgment 3908 that the ICC failed to do so. Necessarily this overarching conclusion would comprehend any specific unlawful conduct concerning the consideration of any particular application by the complainant for another position during the reassignment period.

4. Accordingly, the application for review should be dismissed.

DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 19 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ