Registry's translation, the French text alone being authoritative.

SEVENTY-SIXTH SESSION

In re JIANG

Judgment 1312

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Yue Jiang against the International Atomic Energy Agency (IAEA) on 15 March 1993 and corrected on 20 April, the IAEA's reply of 25 June, the complainant's rejoinder of 30 July and the Agency's surrejoinder of 5 October 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles VII, paragraphs C and F, and XV of the IAEA's Statute, Regulations 3.03(c) and 7.02 and Rules 7.02.1 and 12.01.1(D)(1) of the IAEA's Provisional Staff Regulations and Staff Rules and IAEA circular SEC/NOT/8 of 2 March 1960;

Having examined the written submissions;

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

A. The complainant, a citizen of the People's Republic of China, joined the International Atomic Energy Agency on 27 February 1988. He was granted a fixed-term appointment as a translator at grade P.3 in the Chinese section of the Division of Languages. His appointment was to expire on 26 February 1991. He had previously been working at the Information Centre of the Chinese National Nuclear Corporation.

In accordance with Regulation 7.02 and Rule 7.02.1 of the Agency's Provisional Staff Regulations and Staff Rules he went back to China on home leave for a period that was to last from 22 June to 4 September 1989. The Agency paid him salary in advance for the whole period and gave him a ticket for travel by air from Vienna to Beijing and back.

He told the Director of the Division of Personnel in a letter of 2 September that he was unable to leave China for want of a certificate that he "didn't take part" in the events in Beijing in the spring of 1989. He did not return to duty at the end of home leave.

A telex of 11 September 1989 from the Director of Personnel asked him why not but went unanswered. In a letter of 31 October to the Director he pointed out that he had already accounted for his absence in his letter of 2 September and said he hoped his appointment would be kept open until he returned.

On 1 November the Director of Personnel wrote on the Director General's behalf to the Permanent Representative of the People's Republic to the Agency to ask where the complainant was and why he had not reported for duty. He got no reply. On 15 November the Director sent the complainant a letter through his counsel in Beijing asking once again why he had not come back from home leave and whether he would be able to report for duty and pointing out that if he intended to resign he would have to return to Vienna to do so. The complainant answered in a letter of 6 December that he had no intention of resigning but was still unable to return because he had not yet got the certificate. He repeated the gist of that letter in another of 8 January 1990.

On 18 January 1990 the Director General wrote to the Chinese Governor and Vice-Minister on the Agency's Board of Governors to seek his help in finding out why the complainant was apparently unable to return. He cited resolutions by the General Assembly of the United Nations on international civil servants' privileges and immunities and said that if the complainant was not allowed back the case would have to be put to the Secretary-General of the United Nations.

The Representative of China wrote on the same day to inform the Director of Personnel that the complainant had started divorce proceedings and stood accused of behaviour against "law and morals", that the court had not yet sat and that he would not be allowed to leave the country before his case came up.

By a letter of 16 March the Chinese Governor told the Director General that the reason why the complainant had not come back was that the divorce proceedings were not yet over; his case was an entirely civil one and had nothing to do with politics.

In a letter of 2 April the Director of Personnel informed the complainant of the administrative procedures available to him. He answered on 3 May 1990 that he had indeed filed a suit for divorce on 27 July 1989 but that Chinese law did not require him to attend the proceedings. He also produced a certificate from his counsel stating that his case had been withdrawn on 20 February 1990.

In a letter of 11 July the Director of Personnel informed him that in line with a decision that the Administrative Committee on Co-ordination (ACC) of the United Nations common system had taken in 1983 the Director General was offering him a one-year extension - up to 26 February 1992 - of his fixed- term appointment, which was to expire on 26 February 1991. He enclosed a copy of the contract for signature, asking him to return it to the Agency. Having got no reply, the Director of Personnel sent him another letter on 9 November and a copy of it to his counsel. The complainant answered on 29 November that he had received both letters and on 23 July had returned the copies of his contract duly signed.

The Director of Personnel went to China on mission from 15 to 20 May 1991 to find out just what was going on. In a mission report dated 23 May he concluded that the reasons why the complainant was not being allowed to leave the country related to his private life and had nothing to do with his status as an Agency official. The complainant wrote to the Director General on the same day challenging the Director's conclusions.

On 14 June 1991 the Director of Personnel wrote to the complainant to say that his contract which was due to expire on 26 February 1992 would not be renewed and to explain that the decision followed the Agency's long-standing policy of staff rotation whereby the tenure of appointment for Chinese translators ran from three to five years.

In a letter of 8 January 1992 the complainant asked the Director General to withdraw the decision on the grounds that since his case was an exceptional one the policy of staff rotation mentioned by the Director of Personnel should not apply "mechanically"; he claimed another two years at least. In a letter of 21 January he asked the Director General to review the decision on exceptional grounds and explained that the reason why his request was late was that, not having a copy of the Staff Regulations and Rules, he had not known what the Agency's appeal procedure was. On 30 January the Director General replied that even though the complainant had missed the time limit in Staff Regulation 12.01.1(D)(1) and the request for review was therefore time-barred, he had reconsidered the decision; but he was upholding it.

On 5 March the complainant appealed to the Joint Appeals Committee against the Director General's decision not to renew his appointment. A majority of the Committee's members recommended upholding the decision. The Director General endorsed the recommendation and so informed the complainant in a letter of 5 December 1992, the impugned decision.

B. The complainant has two pleas.

The first is that by not renewing his appointment when he was wrongfully prevented from leaving China at the end of authorised home leave the Director General broke the rule against accepting instructions from any authority external to the Agency.

The reasons the Chinese authorities gave to explain their behaviour changed as time went by: to begin with, it was that he had filed a suit for divorce; then, after he had withdrawn it, they made out that his private life disqualified him for working abroad. The purpose of the Director of Personnel's going to Beijing was to see whether or not the reasons the Chinese had given for refusing him an exit visa were legitimate. But his mission report, which was largely inconclusive, failed to establish that they were. So by preventing the complainant from leaving the country for reasons which the Agency itself finds inadequate the Chinese Government disregarded Article VII, paragraph F, and XV of the IAEA's Statute and exerted improper influence on the Director General.

The Director General has means other than ordinary diplomatic channels of protecting the Agency's independence. He may, for example, require that all letters from an official about his status - resignation, application for early retirement, special leave, and so forth - be despatched at his duty station and through his supervisors. Had the

Director General done so in this case the complainant would have had to be allowed to return to headquarters to demonstrate his freedom of choice unambiguously.

The evidence shows that the Chinese Government's wishes prevailed in the settlement of his case. So by helping to give effect to a decision by a member State the Director General committed a breach of duty and abuse of authority.

Secondly, the complainant alleges that the policy of staff rotation that the Agency gives as the reason for its decision not to renew his appointment was applied only in his case.

Although the Agency has for years applied that policy, which derives from circular SEC/NOT/8 of 2 March 1960, to Professional staff, it has always exempted two groups: language staff and "safeguards inspectors". What is more, the decision to stop exempting them was not taken until 4 June 1991, by the Joint Committee to consider appointments, promotions and extensions of Professional and G.8 staff, and was revoked two days after his own appointment expired, as is plain from a letter that the Director General sent to the president of the Staff Council on 28 February 1992.

As for the "rule" - which the Agency relied on in the internal proceedings - that on average Chinese translators' appointments run from three to five years, it serves merely as a pretext for the Chinese Government to control the careers of Chinese at the Agency by means of "secondment": the United Nations Administrative Tribunal discussed the consequences in Judgment 482 (in re Qiu, Zhou et Yao).

The complainant asks the Tribunal to quash the decisions of 14 June 1991 and 5 December 1992, send his case back to the IAEA for proper action to give him the protection he is entitled to, including reinstatement in his contractual rights, and order the Agency to pay him 10,000 Swiss francs in moral damages and 5,000 in costs.

C. In its reply the Agency states the basis in law for the impugned decision.

In its submission the decision was taken in furtherance of ACC rules that link the preservation of the staff member's contractual rights to the clarification of his case and to the material privileges and immunities. Because the complainant's status in his own country was unclear the Agency decided in July 1990 to offer him a one-year extension of appointment to allow time to shed light on the matter. Only after the Director of Personnel had gone to China and the Agency was satisfied that his privileges and immunities had not been infringed did it decide not to extend his appointment further.

It submits that the impugned decision squares with its rules on fixed-term contracts. Tenure is governed by the rule that "the Agency shall be guided by the principle that its permanent staff shall be kept to a minimum" as laid down in Article VII(C) of its Statute. And under Regulation 3.03(c) of the Provisional Staff Regulations a fixed-term appointment shall "at no time ... be deemed to carry any expectation of or right to extension, renewal or conversion to another type of appointment".

Taking up the complainant's pleas, the Agency observes that the decision not to review his contract was an administrative one which it lawfully took whatever his own wishes might be. So there is no relevance in his argument that he should have been able to return to headquarters to "demonstrate his freedom of choice unambiguously" and in his reference to the rule that all correspondence about a staff member's contractual status ought to be submitted at the duty station and through the supervisor.

The Agency disagrees that preserving the independence of its staff in accordance with Article VII(F) of its Statute means protecting them even beyond the performance of duty. It made persistent efforts to clarify the complainant's situation and went on paying his salary even though at the time he was not actually serving it and was gainfully employed in China.

Also wrong is the allegation that the Director General gave in to pressure from the Chinese Government, as his correspondence with it shows. The Agency never accepted the Government's replies unchallenged and reported the complainant's case to the Secretary-General of the United Nations.

He is mistaken in asserting that the decision to apply the policy of rotation to language staff affected only himself. It was in keeping with the Agency's practice regarding the tenure of language staff and its review of that practice in June 1991 was unrelated to his case.

Lastly, Judgment 482 of the United Nations Administrative Tribunal is immaterial since it sets new requirements as to the status of seconded officials of the United Nations. The Agency "has no practice of secondment of officials in respect of Member States except for provision of cost-free experts".

It asks the Tribunal to hear the Director of Personnel and to dismiss the complaint.

D. In his rejoinder the complainant challenges the Agency's pleas in support of the impugned decision.

It did fail to act in accordance with the ACC rules it cites. When he went to China the Director of Personnel did not fulfil his commission - much narrower though it was than what those rules prescribed - to shed light on the case. The Agency passes off gratuitous allegations as facts. It never established that the reasons the Chinese Government gave for keeping him in China against his will were legitimate. It is wrong to bring up the issue of his privileges and immunities, which the Government sedulously avoided.

Turning to its assertion that the decision under challenge is consistent with its rules on fixed-term appointments, he cites pleas in his complaint which he believes it has omitted to answer. He never said he was on secondment and referred to Judgment 482 of the United Nations Administrative Tribunal only to illustrate the Chinese Government's treatment of Chinese citizens.

Though the Agency did try to clear up his case its attitude changed in the second quarter of 1991. He denies that it went on paying his salary while he was doing no Agency work and that he was at the same time gainfully employed in China.

E. In its surrejoinder the Agency submits that the complainant's rejoinder raises no new issue.

It avers that it did fully satisfy the requirements of the relevant ACC decisions but that they cannot, as the complainant wrongly assumes, be construed as requiring investigation into the merits of a civil law case in any particular country. Neither Agency nor Tribunal is competent to interpret Chinese law or to determine whether a law of a member State has been broken.

It again rejects the complainant's allegation of a change in policy on fixed-term appointments in June 1991. It was just a coincidence that the Joint Committee to consider appointments, promotions and extensions of Professional and G.8 staff met ten days before the letter notifying the non-renewal of his appointment was sent. He is wrong to infer from the Director General's letter to the president of the Staff Association that the Agency reversed its decision after his contract expired.

CONSIDERATIONS:

1. The complainant, a citizen of China, joined the staff of the Agency as a translator on 27 February 1988. His fixed- term appointment was to end on 26 February 1991. In this complaint he is objecting to the Agency's refusing to extend his appointment after 26 February 1992.

2. The material facts are that he went on home leave to China in June 1989 but when the leave expired on 4 September 1989 failed to turn up in Vienna. In a letter he wrote on 2 September to the Director of the Division of Personnel he explained that he was unable to leave China because he had failed to obtain from the Government a "special card" proving that he "didn't take part in the latest counter-revolutionary rebellion". He protested that he had never broken Chinese laws or regulations. There ensued some correspondence and the Agency took informal and then official steps to find out from the Chinese Permanent Mission in Vienna just why he was not being allowed to come back. The Permanent Representative of China informed the Agency by a letter of 18 January 1990 that the complainant had filed a suit against his wife for divorce and she was defending it on the grounds that his behaviour had offended "against law and morals". The divorce court was - said the Representative - "investigating this case" but had not yet sat, and that was why he "could not return to his duty in time".

3. The Government's stand was borne out in a letter of 16 March 1990 from the Chinese Governor on the Agency's Board of Governors, who explained that the suit for divorce was "entirely a civil case" and had "nothing whatsoever to do with politics".

4. The answer seems not to have satisfied the Agency. At all events on 11 July 1990 it told the complainant, who

had by then dropped the divorce suit, that his appointment was extended to 26 February 1992. As the Agency says in its reply, "it was expected that in the meantime the matter could be clarified and positively resolved and that the complainant would be able to resume his duties, thereby enabling him to complete his contractual period with the Agency".

5. That proved a fond hope. The complainant being still refused an exit visa, the Agency decided to send the Director of Personnel in May 1991 to see him and try to sort things out. The salient findings by the Director in his detailed mission report were the following. The complainant was, he said, being held in China against his will but had a job at the Chinese Nuclear Information Centre and was performing it freely. The reasons for not letting him go back to Vienna were seemingly not his political opinions but his private life and by the Agency's lights must be considered insufficient. Yet the decision not to let him leave had - or so it appeared - been taken in accordance with Chinese administrative law, though the Director did not feel competent to judge whether or not that law offended against human rights.

6. It was on the strength of the Director's report that on 14 June 1991 the Agency decided against extending the complainant's appointment beyond 26 February 1992. To be sure, the Director did say in the letter of 14 June 1991 notifying the decision to him that the Agency had told the Chinese Government that the charges against him did not seem, particularly in the absence of court proceedings, to "constitute sufficient grounds for preventing" him from leaving the country. But the Director went on to observe that the privileges and immunities of Agency staff were not at stake since the Government's decision related not to his work for the Agency but to his "personal conduct"; anyway the Agency's "long-standing practice" was to apply "a rotation policy" to its Professional category of staff; in line with that practice the tenure of appointment for Chinese translators had varied from three to five years; and since the complainant would have completed four years' service with the Agency by the end of his current contract it would not be renewed.

7. That is the decision he asked the Director General to review. The Director General having refused by a confirmatory decision of 30 January 1992, he went to the Joint Appeals Committee. The Committee recommended by a majority upholding the earlier decision, and the Director General did so by a letter of 5 December 1992, the decision impugned.

8. Receivability is no longer at issue. Before the Committee the Agency argued that the complainant was out of time in challenging the original decision of 14 June 1991, but the Committee decided that the special circumstances of the case warranted relieving him of the time bar, and the Agency does not demur.

9. The complainant's pleas may be readily inferred from the foregoing narrative. The first is that the Agency acted in breach of the rule against its taking instructions from a government by yielding to growing pressure from the Chinese not to extend his appointment. Secondly, he contends that the grounds stated by the Agency for its decision are mistaken both in fact and in law. In his submission the alleged "long- standing practice" of rotation of Professional staff never applied to translators; that policy was broadened to cover translators only a few days before being applied to him and ceased to cover them only a few days after the end of his appointment; and besides, it was applied only to translators of certain nationalities, and they included the Chinese because of instructions the Chinese Government had given in breach of the material provisions of the Staff Regulations.

10. The Agency's reply is that it fully observed the rules laid down by the Administrative Committee on Co-ordination about safeguarding the contractual rights of staff in the event of breach of their privileges and immunities. It did its utmost to shed light on the case and protect its employee properly. It paid his salary. It made sure that his privileges and immunities were not at stake. And although in the end it refused to extend his contract the reason was perfectly sound and it committed no breach of the rule against acting on government instructions.

11. The Tribunal can rule on the case without holding the hearings for which each of the parties has applied.

12. As the Tribunal has consistently held, a decision to renew or not to renew a fixed-term contract is at the discretion of the international organisation, but the exercise of its discretion is subject to review, for example where the decision rests on a mistake of fact or of law: see Judgment 1317 (in re Amira) also delivered this day. In this instance the Agency took the impugned decision in the belief that it had done its utmost to shed light on a case in which the official's privileges and immunities were not in the last analysis at stake, and it therefore felt able to apply its usual rules on the rotation of staff.

13. There is no denying the difficulty that international organisations face in sorting out such cases. The Agency made laudable attempts to get a change of mind in the Chinese Government. There is merit, too, in its contention that it "had to address the competing interests of providing protection to its staff member on the one hand, and of being able to perform its functions, on the other".

14. Yet it is plain on the evidence that the complainant was barred from returning to perform his duties in Vienna for reasons that the Agency rightly considered to be immaterial. That is clear, for example, from the above-quoted letter of 14 June 1991 from the Director of Personnel. The complainant's starting proceedings for divorce - which he later dropped anyway - obviously affords no proper grounds for breach of his rights as an international official. Circumstances relating to an official's private life - even though they may prompt civil or penal proceedings - are relevant in the area of administration only insofar as they may affect his performance of official duties. But in that event only the organisation that employs him would be competent to determine the issue. The Agency had and still has the duty to safeguard its employee's right to work in full independence for his employer.

15. Its duty to safeguard the complainant's rights in that way was the more compelling because the reasons which it held to warrant non-renewal are highly dubious. The alleged policy of rotating Professional staff was not, as it makes out, "long-standing" in its application to translators and indeed, as is plain from the letter of 28 February 1992 signed by the Director General, anything but consistent. Besides, even supposing that translators get tenure for only three to five years, it is hard to see why the Agency could not extend the complainant's appointment beyond a total of four. There was, after all, nothing in his performance that it could plead in support of so limiting his total tenure.

16. The conclusion is that neither the Director General's decision of 5 December 1992 nor the one of 14 June 1991 that it confirmed can stand, and the complainant must succeed in his application for referral of his case to the Agency so that it may reinstate him in his contractual rights pending clarification of his position. Since this judgment gives him full satisfaction there are no grounds for allowing his claim to damages for moral injury. But he is entitled to costs and is awarded 5,000 Swiss francs, the sum he claims under that head.

DECISION:

For the above reasons,

1. The Director General's decisions of 14 June 1991 and 5 December 1992 are set aside.

2. The complainant is referred to the Agency for reinstatement in his contractual rights pending clarification of his position.

3. The Agency shall pay him 5,000 Swiss francs in costs.

4. His other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.