

NINETIETH SESSION

In re Krutzsch

Judgment No. 2032

The Administrative Tribunal,

Considering the complaint filed by Mr Walter Friedrich Krutzsch against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 22 December 1999 and corrected on 17 January 2000, the OPCW's reply of 16 February, the complainant's rejoinder of 17 April, and the Organisation's surrejoinder of 24 May 2000;

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

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

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

A. The complainant, a German national born in 1927, was employed by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons as a legal expert under a series of intermittent short-term contracts between January 1994 and May 1997. On 23 May 1997 the Preparatory Commission ceased to exist. Thereafter he was intermittently employed by the OPCW under a series of short-term contracts until December 1998. Staff members of the Preparatory Commission benefited from immunity from taxation on their salaries. The complainant's status as a staff member was expressly stated in his letters of appointment, which also made reference to his rights under the staff regulations and staff rules.

In 1995 the complainant declared his 1994 income to the tax authorities in Germany. This included the income he earned while employed by the Preparatory Commission. At the same time he informed the tax authorities that the Preparatory Commission was an intergovernmental organisation and that its staff members were exempt from taxation. This information was disregarded and the complainant's tax liability was assessed at 15,864 German marks.

After a series of communications with the German tax authorities, the German delegation to the Preparatory Commission, and the German Ministry of Foreign Affairs, on 18 March 1996 the Berlin tax office informed the complainant that he had been granted a partial deferment of his 1994 taxes in the amount of 12,833 marks. He was nevertheless ordered to pay a non-deferred amount of 3,031 marks by 9 April 1996. He was also informed that should his tax-exempt status be rejected he would be liable for interest of 0.5 per cent per month on the deferred amount.

The complainant paid 3,031 marks on 29 March 1996 to the Berlin tax office and requested a refund from the Preparatory Commission in an internal memorandum of 31 October 1996 addressed to the Director of the Administration Division. In November 1997 the OPCW refunded the complainant 3,031 marks on the condition that he was to return the money to the Organisation if the German authorities later exempted him from paying tax on his Preparatory Commission earnings.

Thereafter the OPCW applied to the Government of Germany for a refund of the amount it had reimbursed the complainant. On 2 July 1998 the Head of the Permanent Representation of the Federal Republic of Germany informed the OPCW's Director of the Administration Division that the basis for the tax assessment "was **not the salary that Dr. Krutzsch** received from the [Preparatory Commission], but **other income**"; therefore it was correct to have required him to pay taxes. Consequently, on 23 July 1998 that Director requested that the complainant return the money he had been reimbursed in November 1997.

After another series of discussions and correspondence, on 10 December 1998 the Director of the Administration Division again requested the complainant to return the 3,031 marks until he was able to show that it was clearly attributable to his Preparatory Commission income and not income from other sources. Furthermore, the Director

informed him that the OPCW would reimburse future taxes paid by him on income earned from the Preparatory Commission only if the Organisation was reimbursed by the Government of Germany. Additionally, since there was no tax reimbursement agreement between the Organisation and Germany, the OPCW could not guarantee that it would reimburse him for any future taxes paid on his earnings received from the Organisation.

On 21 December 1998 the complainant filed an appeal against this decision with the Appeals Council. In its report dated 4 October 1999 the Council found that the complainant had not exhausted all remedies within the German fiscal system and recommended that the Organisation wait before pursuing the refund of the 3,031 marks until the German tax authorities had determined the final amount it would require the complainant to pay.

On 5 October 1999 the complainant received, following his request, a written statement from a German tax office that, without his income from the Preparatory Commission, he would have paid no tax for the year 1994. On 19 October he sent a copy of this statement to the Director-General. In a letter of 5 November 1999 the Director-General rejected the complainant's appeal. That is the impugned decision. On 12 November 1999 the Director-General informed the complainant that while it was not for him to evaluate the "evidentiary status" of the statement from the German tax office, he would nevertheless transmit it to the Appeals Council to be dealt with under its rules of procedure.

B. The complainant contends that he is exempt from taxation under the Convention which created the OPCW, the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies, and Article 3.3 of the Preparatory Commission's Staff Regulations. He submits that immunity from taxation is necessary for "the independent exercise of the staff members' functions" and argues that it is the OPCW that should take up his cause with the German authorities; to require a staff member to resolve such an issue is tantamount to inviting instructions from a government, which is contrary to the principles of the international civil service. Furthermore, he argues that to make the refund of taxes contingent upon a tax reimbursement agreement between an organisation and a member State offends against the practice of international organisations. Different categories of staff are thus created, which violates the principle of equal treatment.

He submits that the statement he forwarded to the Director-General from a German tax office provides the required proof that he would not have been liable for taxes in 1994 without his salary from the Preparatory Commission.

The complainant contests the Organisation's view that it is not obliged to "absorb the loss" of taxes not refunded by a member State. His salary included a "staff assessment" which is meant to ensure that the Organisation has the resources to make refunds to staff members even without being reimbursed by a member State. During the appeals procedure the OPCW submitted that the complainant's case was "exceptional" because of his continued resident status in Germany. He contends that this is discriminatory and against Staff Rule 1.5.02. Finally, he argues that there has been an unconscionable delay in resolving his tax liability issue. Not only has the problem been unresolved for nearly five years, but it has caused him a great deal of financial uncertainty.

He requests the Tribunal to: (1) quash the decision that he should repay 3,031 German marks; (2) order the OPCW to reimburse him: for any taxes he has paid or is required to pay on salary, allowances, and other benefits received from the Preparatory Commission; for any taxes he has paid or is required to pay on his OPCW salary, allowances, and other benefits; for any interest he may be required to pay to the German tax authorities on the deferred tax amounts; and (3) order that he be paid costs.

C. In its reply the Organisation points out that the complainant has been reimbursed 3,031 marks for the taxes he paid. However, it now claims this money back, contending that the reimbursement was premature because it learned that the tax assessment was based on more than just his income from the Preparatory Commission.

The OPCW makes several pleas that the complaint is irreceivable. It argues that only the tax reimbursement in respect of 1994 is at issue. Claims relating to other years are hypothetical because the complainant has not formally submitted any other requests for reimbursement; therefore such claims are irreceivable in the context of the present case. Alternatively, in the event that the complainant has already submitted such claims to the Organisation, they are premature because it has yet to give a final ruling. His entire complaint is irreceivable because "he still has to demonstrate that he has exhausted his [...] legal remedies in Germany". Finally, it argues that the complaint cannot be receivable until the complainant has clarified a number of issues put to him by the OPCW.

The concept of the staff assessment at the OPCW is "only notional" and no money is credited to the Organisation's budget. Therefore, it has no means of reimbursing a staff member for taxes paid if it is not reimbursed by a member State. The burden is on the complainant to prove that the taxes were assessed on the income paid by the OPCW, and he has failed to do so.

D. In his rejoinder the complainant contends that he was entitled, under the staff regulations and staff rules, to a refund of taxes. He objects to the OPCW's argument that its accounting method does not allow it to reimburse taxes without receiving a refund from the member State concerned; this is no excuse for not following its Staff Regulations.

The Organisation's insistence that the complainant must exhaust all national remedies has placed the burden to protect his immunity from taxation on him, which breaches the Organisation's obligations. He submits that the Organisation has been unreasonable in the level of proof it requires him to provide; it wants him to furnish a "notional tax return" which is incompatible with the German tax system. Nevertheless, he has submitted other proof that he would not have been liable for taxes in 1994 without his income from the Preparatory Commission but the Organisation has ignored it.

The complainant refutes the OPCW's statement that he has not formally submitted any other requests for reimbursement of taxes. In fact he sent a letter to the Director of the Administration Division on 30 November 1999 claiming reimbursement of the taxes paid for the years 1995 and 1997. He also submitted proof that he would not have been liable for those payments without his income from either the Preparatory Commission or the OPCW. He asks the Tribunal to take note of this formal request and the fact that it went unanswered for more than sixty days.

E. In its surrejoinder the Organisation maintains that it was an error to reimburse 3,031 marks to the complainant. It was done before it knew that his tax liability was based on more than just his income from the Preparatory Commission. Since the complainant has not shown that his income from the Commission alone would have incurred the tax liability it has demanded the money back.

On the issue of the claims for reimbursement for the years 1995 and 1997, the date on which he submitted them "is irrelevant since it relates to a matter upon which no administrative decision has been taken". The complainant must wait for a decision from the Director-General before he can file a complaint with the Tribunal. The OPCW presses the other pleas in its reply.

CONSIDERATIONS

1. The complainant challenges a decision of his former employer, the OPCW, requiring him to refund the sum of 3,031 German marks which it had paid to him in reimbursement of German income tax for the year 1994 that he had paid.
2. On 13 January 1993 the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter "the Chemical Weapons Convention") was opened for signature. Upon its entry into force the OPCW would be established under Article VIII of the Convention. During the signing ceremony of the Convention, the signatory States adopted a resolution (hereinafter "the Paris Resolution") establishing the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (hereinafter "the Preparatory Commission"), an intergovernmental organisation composed of all signatory States. The Preparatory Commission was mandated to appoint its Executive Secretary and to establish a Provisional Technical Secretariat. The property, functions and recommendations of the Commission would be transferred to the OPCW at the first session of the Conference of the States Parties. On 29 April 1997 the Convention entered into force. The OPCW and its organs came into existence. On 14 May 1997 the Conference of the States Parties approved the Protocol regarding the Transfer of Assets, Liabilities, Records and Functions from the Preparatory Commission to the OPCW. On 23 May 1997 the First Session of the Conference of the States Parties concluded and the Preparatory Commission ceased to exist.
3. The complainant, a German citizen and resident of Germany, was intermittently a staff member of the Preparatory Commission between January 1994 and May 1997, under a series of short-term contracts at grade P.4 as a legal expert on the Chemical Weapons Convention. His letters of appointment provided for rights concerning

immunity from taxation on earnings received from the Preparatory Commission as derived from the Paris Resolution. Paragraph 18 of the text attached to that Resolution states that:

"The Host Country undertakes to accord the Commission, its staff, as well as the delegates of signatory States such legal status, privileges and immunities as are necessary for the independent exercise of their functions in connection with the Commission and the fulfilment of its object and purpose ..."

4. The Headquarters Agreement concluded between the Preparatory Commission and the Kingdom of the Netherlands, including Germany as a member State, states in Article 11(d)(i) that:

"Staff members below rank P.5 and staff members having Netherlands nationality shall enjoy privileges and immunities in conformity with Article VI of the Convention on the Privileges and Immunities of the Specialized Agencies ..."

5. Section 19 (b) of Article VI of that Convention provides that officials of specialised agencies are exempt from taxation in respect of the salaries and emoluments paid to them.

6. Regulation 3.3 of the Preparatory Commission's Staff Regulations, which were adopted by the Commission, including Germany as a member State and which entered into force on 1 October 1993, reads:

"a. In the event a staff member is subject to national income taxation with respect to the net salaries and emoluments actually paid to him or her by the Commission, the Executive Secretary is authorised to refund to him or her the amount of those taxes paid.

b. Payments made in accordance with the provisions of the present Regulation shall be reimbursed as prescribed by the provisions of a Tax Reimbursement Agreement, bilaterally negotiated between the Executive Secretary and the Member State concerned."

7. The temporary presence of the complainant in the Netherlands during periods of employment with the Preparatory Commission and the OPCW was not sufficient to affect his status as a resident of Germany for German national tax purposes. Accordingly, the complainant was assessed for German national income tax for the year 1994 and by an internal memorandum dated 31 October 1996, the complainant:

- informed the Commission that an amount of 15,864 marks had been assessed by the German tax authorities as being owed by him on the salary and emoluments he had received from the Commission;
- declared that he had contested this assessment with the German tax authorities and said that they had agreed to defer the payment of 12,833 marks on the proviso that, should the tax assessment be upheld, the complainant would be liable to pay the balance plus 0.5 per cent interest per month; and
- said he had been requested to pay immediately the sum of 3,031 marks.

8. On 15 October 1997 the complainant filed a claim with the OPCW for reimbursement of the sum of 3,031 marks in accordance with Staff Regulation 3.3 for taxes paid to the German authorities for 1994. On 16 October 1997 the Head of the Human Resources Branch requested the Director of the Administration Division to approve the refund to the complainant. That request was made on the understanding that, should the German tax authorities exempt him from paying tax on his earnings from the Commission, he would refund the amount. The reimbursement was duly made and thereafter the OPCW requested the German authorities for a refund. The German authorities replied by letter dated 2 July 1998:

"It is true that the income tax for Mr. *and* Mrs. Krutzsch in 1994 was put at 3.031-. DM. The basis for this was **not the salary that Dr. Krutzsch** received from the [Preparatory Commission], but **other income**. In addition income of **Mrs.** Krutzsch was taken into account. The income that was taken into account falls ... clearly under the German tax authority."

9. On 10 December 1998 the OPCW demanded that the complainant refund the sum of 3,031 marks until he could show that that sum was clearly attributable to his Preparatory Commission income separate from other income. The complainant contested this administrative decision and filed a statement of appeal on 21 December 1998 with the Appeals Council. On 4 October 1999 the Council completed its report on the matter and forwarded it to the

Director-General. It found that the complainant had not exhausted the remedies under the German fiscal system and that he had not clarified the income upon which the tax he was claiming was based. Shortly afterwards, the complainant received a written statement dated 5 October 1999 from a German tax office comparing what his tax assessments would have been without earnings received from the Organisation and with such earnings in the years 1994 to 1998. According to that document, the tax assessment without such earnings would have been "zero" in 1994. This statement was forwarded to the Director-General on 19 October 1999 who received it on 25 October. In a letter of 5 November 1999, the Director-General's final decision on the appeal was conveyed to the complainant. The decision was to continue to claim the refund of 3,031 marks unless the complainant could "demonstrate conclusively that the DM 3,031 tax levied ... was exclusively on [his] Preparatory Commission salary and emoluments". That is the impugned decision.

10. By a letter dated 12 November 1999, the Director-General responded to the complainant regarding the fiscal statement of 5 October 1999 which the complainant had submitted to him in support of his claim. The Director-General said that consideration of the statement "would have been outside the procedure". He asserted, without any explanation, "that the document [was] from a private tax office and not from the German Government tax authorities"; the complainant was again reminded that he could appeal against the tax assessment to German authorities.

Analysis

11. The only issue to be decided in this case is whether the complainant was properly reimbursed for the tax, in the amount of 3,031 marks, assessed by the German authorities for the year 1994, since no other requests for tax reimbursements have been formally submitted by the complainant and no other demands for repayment thereof have been made by the Organisation. Accordingly, the Tribunal will only render a decision on this matter for the 1994 tax year.

12. The Tribunal cannot accede to the complainant's request that it render a decision with regard to assessments that have not been made and claims that have neither been asserted by him nor responded to by the Organisation. That is not to say, however, that the consideration given by the Tribunal to the claim which is before it will not provide some guidance to the parties and assist them in finding a solution to similar problems if they arise in years to come.

13. The Tribunal finds the position of the Organisation with regard to the statement issued by a German tax office on 5 October 1999 to be wholly incomprehensible. That fiscal statement is not, as the Director-General asserts in his letter of 12 November 1999, from a private tax office, (a position not repeated in the Organisation's pleadings before the Tribunal), but even if it were, it is, in the absence of any evidence to the contrary, quite enough to prove that the complainant incurred German taxes in 1994 solely because he had received income which was in principle exempt from tax; if he had not received the tax-exempt income he would not have been taxed in 1994. The production of such evidence was the very condition which the Director-General purported to place upon the complainant in the impugned decision and it was fulfilled even prior to the date of that decision. The assertion that the statement was received only after the date of the Appeals Council's report and that it should have been sent directly to the Appeals Council to be taken into consideration together with other evidence is irrelevant. The OPCW's argument that the complainant must prove his case "beyond a reasonable doubt" is entirely mistaken; the impugned decision reflects a similar error in requiring that the complainant prove "conclusively" that his German tax was imposed upon his Preparatory Commission income. While the complainant no doubt has the burden of proving his case, this will be determined on the weight of the evidence submitted.

14. Nor is there any justification for the Organisation's objection to the fiscal statement on the grounds that it is "hypothetical". Where a State imposes tax upon its nationals who are international civil servants in receipt of income - some of which is tax exempt and some of which is not - the only proper method of determining how much tax should actually be paid is to calculate the hypothetical amount which would be due if the exempt income had not been received. The complainant has done just that and has shown that if he had not been in receipt of income from the Commission he would not have been subject to German tax on his (and his wife's) remaining income.

15. The provisions of the Preparatory Commission's Staff Regulation 3.3 do not make a staff member's right to reimbursement contingent upon the existence of an agreement between the Commission and the relevant member State. The Regulation clearly mandates an agreement between the Commission and the member States in order to give effect to the tax exempt status of the staff members and not for the purpose of protecting the tax revenues of

those States. It would be strange indeed if the absence of such an agreement could be invoked by an international organisation or its member States to deprive some staff members and not others of their tax-exempt status. If a member State in breach of its international obligations taxes the exempt income of a staff member, the reimbursement of that tax cannot be made to depend upon the grace and favour of that State.

16. Nor does the Tribunal find any merit in the Organisation's submission that the charges it makes upon the complainant's earnings by way of staff assessment⁽¹⁾ are purely "notional" with the consequence that "there is no budget or resources from which taxes can be refunded if the State Party does not actually refund the OPCW for the amount of taxes collected". That is simply a matter of the Organisation's own internal management and cannot be used as a weapon to deprive the complainant of his rights. One of the purposes of staff assessment is surely to put the Organisation in funds to protect its employees against States which refuse to recognise their tax-exempt status. If the Organisation chooses to credit its member States with the amount of such assessments without actually collecting them it can only blame itself for any resulting loss.

17. The Tribunal notes that while the Organisation suggests it was an error for the complainant to have been given the rank of a full-time staff member, it does not seek to deny him that status. Nor does it at any time deny the complainant's claim to be entitled to exemption from national taxes on his income from the Preparatory Commission. Rather it takes the position that because he is and was at all material times a resident of Germany it is for him alone to fight out the question of tax exemption with the German authorities. This is wholly unacceptable. If the Organisation does not (and clearly now it cannot) contest the exempt status of the complainant, it is its duty to protect him against the claims of the authorities of a member State, to reimburse him the amount of tax he has paid to the State, and to employ its own considerable power, authority and influence to have the German authorities change their position. Exemption from national taxes is an essential condition of employment in the international civil service and is an important guarantee of independence and objectivity. It cannot be made to depend upon the whim of national taxing authorities who will be understandably reluctant to admit any exceptions to their claims. By requiring him to appeal against his German tax assessment while conceding the tax-exempt status of his Preparatory Commission income the Organisation has failed in its duty to the complainant.

18. The complaint must be allowed and the impugned decision must be set aside. The complainant is entitled to a declaration that he had the right to be reimbursed for the German income tax actually paid by him in respect of the year 1994.

19. The complainant is entitled to his costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside and it is declared that the complainant was entitled to be reimbursed by the OPCW for the German income tax actually paid by him in respect of the year 1994.
2. The OPCW shall pay the complainant 1,000 euros in costs.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

James K. Hugessen

Florida Romero

Catherine Comtet

1. Under the terms of Staff Rule 3.3.01 pertaining to the Preparatory Commission's Staff Regulation 3.3, staff assessment is "an amount consisting of the difference between the net and gross salary as it appears in the salary scale for staff members ..."

Updated by PFR. Approved by CC. Last update: 19 February 2001.