

NINETY-SIXTH SESSION

Judgment No. 2302

The Administrative Tribunal,

Considering the complaint filed by Mr J. A. T. against the International Organization for Migration (IOM) on 3 October 2002 and corrected on 25 March 2003, the IOM's reply of 26 June, the complainant's rejoinder of 27 August and the Organization's surrejoinder of 8 October 2003:

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant has Tanzanian nationality and was born in 1949. He served as Regional Representative of the IOM's Mission with Regional Functions in Pretoria, South Africa, under a one-year fixed-term contract from 30 October 2000.

In mid-September 2001 two IOM staff members had sought legal advice alleging indecent assault on the part of the complainant, and steps were being taken to bring criminal charges against him. By a letter of 17 September, which the complainant claims only to have received late on 21 September, the Director General sent the complainant copies of affidavits from the two staff members and asked him to give detailed comments by 21 September.

An application for waiver of the complainant's diplomatic immunity was faxed to the Director General of the IOM on 21 September by the Director of Public Prosecutions: Transvaal. By a fax of even date the Director General waived the complainant's immunity, referring to his power to do so under Section 27 of the Agreement signed between the IOM and the Government of the Republic of South Africa. On 26 September the complainant was arrested and detained overnight. By an e-mail of 27 September he was informed that he was suspended from duty with immediate effect. On 12 October 2001 the IOM extended his contract until 31 January 2002. By a letter of 7 November 2001 he was informed that it would not be renewed upon its expiry.

The complainant sent in a notice of appeal to the Joint Administrative Review Board, directed against the waiver of immunity and his suspension from duty. It was received by the Director of the Administrative Support Department on 1 November. He replied to the complainant on 5 November informing him of the process to be followed before his appeal would be deemed receivable by the Board. Accordingly, on 29 November, the complainant wrote to the Director seeking remedial action in connection with both the waiver of immunity and his suspension from duty. The same day he appealed to the Director General against the decision not to renew his contract, asking for a stay of action in respect of that decision. By a letter of 11 December 2001 the Director General denied that request. Having received no reply regarding his earlier request for remedial action, on 5 January 2002 the complainant lodged an appeal which was referred to the Joint Administrative Review Board; he sought redress in relation to all the above issues.

The Board reported on 25 June 2002. In its conclusions it found that there was "insufficient cause" to recommend the remedial action requested by the complainant. The Director General endorsed that opinion. By a letter of 3 July from the Administrative Support Department, his decision was notified to the complainant.

According to his entry on the complaint form, the complainant is challenging the Board's "decisions" of 25 June

2002, which he implies were communicated to him on 1 October 2002. The IOM submits that it transmitted the report to him on 3 July 2002.

During the course of proceedings held in the District Court of Pretoria, the Director General was asked twice more to furnish waivers of the complainant's immunity. These were provided on 14 November 2002 and 18 March 2003.

B. The complainant states that he is challenging four decisions, namely the one by which the Director General waived his immunity, those suspending him from duty and informing him of the non-renewal of his contract, and the decision of 3 July 2002 by which the Director General endorsed the conclusions of the Joint Administrative Review Board. He asks the Tribunal to find them null and void on the ground that there were procedural flaws.

He contends that the waiver of immunity was not obtained by established diplomatic practice. For one thing, the application was initiated by a private individual in Pretoria and did not emanate from anyone mandated by the Republic of South Africa. The waiver was therefore *ultra vires* and no value can be attached either to the waiver of 21 September 2001 or to that of 14 November 2002. He objects to the fact that the Organization did not inform him that an application for the waiver had been made, adding that it was mere speculation to suggest, as the Organization did, that he would have absconded. He was denied the right to be heard, and despite the serious nature of a waiver of immunity the Director General came to his decision within a single day. In the complainant's opinion, given that there was no clear policy on such a waiver, the IOM should have taken time to consult more widely on the matter. The Organization conspired against him and acted in bad faith since it waived wholesale all the immunities he enjoyed, whereas - unfounded though it was - the original application only sought waiver of the personal immunity that applied to him under Section 20(b) of the bilateral Agreement.

He objects to his suspension from duty on several grounds and asserts that he had a legitimate expectation of a permanent position with the IOM.

The complainant seeks the quashing of the "decisions of the J.A.R.B. as endorsed by [the] Director General", as well as the decisions to waive his diplomatic immunity and not renew his fixed-term contract. He claims one million United States dollars in damages and 90,000 dollars in costs.

C. The Organization replies that the action of waiving the immunity of the complainant was not in any way *ultra vires*. The Director General's actions were in accordance with established international practice. He was under no obligation to advise the complainant of the application for the waiver of immunity, and there is no specified timescale for responding to such an application. The way the Organization responds is within the sole discretion of the Director General, who in this instance was seeking to facilitate the course of justice and acted in the interests of the Organization. The complainant was nonetheless made aware of the accusations against him and was given the opportunity to comment on them, but failed to do so. The IOM observes that the complainant has not provided any proof of his allegation that the application for waiver came from an unauthorised source. Contrary to the complainant's assertions, the Director General waived only those immunities that protected him from criminal prosecution, and not those he enjoyed as an international civil servant.

Furthermore, the decision to suspend the complainant was taken in the best interests of the Organization, given its assessment of the situation at the material time. Its actions did not amount to bad faith.

The IOM submits that it was under no obligation to renew his fixed-term contract and the Director General's decision not to renew it upon its expiry was a proper exercise of his discretionary power. It considers all the complainant's claims to be unfounded.

D. In his rejoinder the complainant presses his pleas and claims. He says that even prior to the date on which it filed its reply the Organization was aware that the District Court of Pretoria had found the waiver of immunity of 21 September 2001 to be invalid. As a result, no South African court could have been vested with any jurisdiction to prosecute him and the decisions taken against him by the IOM from 27 September 2001 were unjustified and cannot stand. In an additional claim he asks the Tribunal to declare invalid the waiver issued by the Director General on 14 November 2002.

E. In its surrejoinder the Organization states that the complainant's discussion as to whether the first or second waivers were valid is not relevant to the complaint. His suspension from duty and the non-renewal of his contract would have occurred independently of the waiver of immunity. The latter action was not in breach of any law or

rights of the complainant. His argument that the waiving of his immunity was the sole cause of his dismissal is fundamentally flawed. The question of whether or not the South African court could have been vested with jurisdiction to prosecute the complainant is not relevant to the complaint either: that is a matter for the South African court to determine. The IOM categorically denies the complainant's accusations of conspiracy against him. It maintains that his claims for relief have no legal basis.

CONSIDERATIONS

1. The complainant, a Tanzanian national, was appointed Regional Representative of the IOM's Mission with Regional Functions in Pretoria on 8 October 2000, under a one-year fixed-term contract running from 30 October 2000 to 29 October 2001.

2. On 13 September 2001 the IOM's Legal Adviser received a fax informing him that two of the Organization's employees were accusing the complainant of sexual harassment. Detailed affidavits written by the staff members concerned were included as attachments to the fax. On 17 September the Director General sent the following letter to the complainant:

"I have received two affidavits from two staff members of IOM Pretoria who are raising extremely serious charges against you. I consider this matter to be of utmost gravity and I hereby enclose the self-explanatory affidavits, requesting you to send me your detailed comments by Friday 21 September, 5 p.m. In the meantime, you are not to take any action whatsoever against the staff members concerned, nor to discuss the matter with them. The staff members concerned have sought legal advice in Pretoria to counsel them in this case and the matter will probably be denounced to the South African Police.

Looking forward to your reaction, I remain, [...]."

This letter was delivered on 19 September, not to the complainant himself but to another staff member. The complainant, who maintains that he found the communication on his desk only on 21 September at 5.45 pm, acknowledged receipt the same day by e-mail addressed to the Director General. He said that since the 24th was a public holiday, he could forward his comments only by 26 September, adding that, while he did not see any ground for a criminal action under the South African penal code, save perhaps a civil suit, he was ready to defend himself "vigorously".

3. Also on 21 September 2001, the Director General received a fax, apparently unsigned, in which the Director of Public Prosecutions: Transvaal, asked that "the Director General [...] be formally and expressly requested, via the Department of Foreign Affairs", to waive any immunity the complainant might enjoy, in accordance with Section 27 of the bilateral Agreement between the Organization and the Government of South Africa. In a fax sent on the same day, copied to the Ministry of Justice and Constitutional Development and the Ministry of Foreign Affairs, the Director General replied that the charge against the complainant was not covered by the immunity from jurisdiction which he enjoyed. Under the terms of the Agreement, he enjoyed immunity from detention and arrest. The Director General concluded that a refusal to waive the complainant's immunity would impede the proper administration of justice and that a waiver would not prejudice the interests of IOM. He therefore decided to waive the immunity enjoyed by the complainant under Sections 19 and 20 of the above-mentioned Agreement.

4. On 26 September 2001 the complainant was arrested and charged with indecent assault. He was released on bail the following day. On that same day, the Director General decided to suspend him from duty with immediate effect. He was retained with full pay, but was asked not to attend the office and not to contact any staff members. The complainant's contract, which was due to end on 29 October 2001, was extended until 31 January 2002 by a decision of 12 October 2001. In a letter dated 7 November 2001, however, the Director General informed the complainant that, in the interests of the Organization, his contract would not be renewed beyond 31 January 2002.

5. On 5 January 2002 the complainant lodged an appeal, which was forwarded to the Joint Administrative Review Board. The complainant's claims concerned in particular the waiver of his diplomatic immunity, the decision to suspend him from duty, the non-renewal of his contract and the damages he had allegedly suffered. On 25 June the Board recommended rejecting the appeal, and the Director General decided on 2 July to endorse that recommendation. His decision was communicated to the complainant on 3 July 2002.

6. The complainant asks the Tribunal to quash that decision, as well as the decisions to waive his diplomatic immunity and not to renew his contract. He also claims one million United States dollars in damages and an award of costs.

7. With regard to the waiver of the complainant's diplomatic immunity, consistent precedent has it that an organisation "has a discretion to assess, in the context of its relations with a Member State, which are beyond the jurisdiction of the Tribunal, whether it is appropriate to lift the immunity from legal process of its employees" (see Judgments 933, 1543 and 2190 in particular). While the Tribunal cannot quash a decision to waive diplomatic immunity, it may nevertheless examine the circumstances in which the immunity was waived and draw the appropriate consequences if there has been a violation of the contractual rights of the officials concerned or of the general principles of law which should be observed by international organisations (see Judgment 2222). In this particular case, the Tribunal cannot quash the decision by which the Director General waived the complainant's immunity from detention and arrest on 21 September 2001, nor, as requested in the rejoinder, the decision contained in the Director General's letter of 14 November 2002 confirming the waiver, nor that contained in the letter of 18 March 2003 which again confirmed the immunity waiver. The fact that the District Court of Pretoria found that the complainant's immunity had been improperly waived cannot cause the Tribunal to quash the decisions taken by the Director General.

8. However, it is appropriate to examine the circumstances in which the Director General took the decision of 21 September 2001 and to assess the effects of any flaws arising prior to the decision. The complainant believes he should have been informed of the possibility that his immunity might be waived and given a chance to defend his case. The Organization rightly points out, however, that the Director General had reason to fear that the complainant would leave the country if he were informed of that possibility, which would have impeded the proper administration of justice and would have been contrary to the interests of the Organization. This explains why such a quick reply was sent to the fax of 21 September 2001 from the Director of Public Prosecutions: Transvaal, concerning the "Application for the waiver of immunity" of the complainant. It is necessary, however, to examine whether a genuine application for waiver was actually made. Even if the complainant's contention that the Organization conspired against him can be disregarded for want of evidence, the fact remains that the fax on the basis of which the Organization agreed to waive his immunity from detention and arrest does not carry the signature of any competent authority, nor any clear indication even that it was officially addressed to the Organization. Moreover, it contains no direct request for the complainant's immunity to be waived. The application is in fact worded as follows:

"I hereby officially request that the Director General of the International Organization for Migration be formally and expressly requested, via the Department of Foreign Affairs [...], to waive any immunity that [the complainant] might enjoy in accordance with Section 27 of the Bilateral Agreement."

This document could not therefore be considered as a properly submitted official request, since it stated, quite rightly, that the request should pass via the Department of Foreign Affairs. This was in fact the view taken by the South African court in charge of the prosecution. The Director General no doubt had the authority to initiate the process of waiving the complainant's immunity, without waiting for a request from the South African authorities, and such action would have been conceivable in the circumstances. But, in the event, he thought he had received a request to waive the complainant's immunity, without having to wait for the Department of Foreign Affairs to deal with it. This mistake cannot be said to have been attenuated by the fact that he copied his fax of 21 September 2001 to the Ministry of Justice and Constitutional Development and to the Ministry of Foreign Affairs. The complainant has therefore grounds to claim, if not the quashing of the decision waiving his immunity, at least compensation for the damage which resulted from the circumstances in which that decision was taken (see again Judgment 2222). The Tribunal finds that this damage will be fairly compensated if the Organization pays the complainant 5,000 Swiss francs.

9. The complainant's claim for the Tribunal to quash the decision of 27 September 2001 suspending him from his duties fails: he was given a chance by the Director General in his letter of 17 September 2001 to defend himself against the serious accusations brought against him, even though he maintains that he only saw that letter on 21 September. The Organization submits that such a measure was inevitable in order to prevent the complainant from continuing in the performance of his duties, considering that one of the plaintiffs was his own assistant. It also points out that the complainant was maintained on full pay and that he was retained as adviser to the acting Regional Representative. There is no flaw in this respect, since the Organization may be deemed to have dealt with that difficult situation in its best interests.

10. Similarly, the claim pertaining to the decision of 7 November 2001 refusing to renew the complainant's contract beyond 31 January 2002 must fail. The Director General, who had agreed to a three-month extension of the complainant's fixed-term contract, acted within his discretion in rejecting the requested renewal and his decision shows neither an error of law nor an error of fact.

11. There is no evidence in the submissions to support the allegations of bad faith and abuse of authority on the part of the Organization.

12. Being partially successful, the complainant is entitled to an award of costs, which is set at 2,000 Swiss francs.

DECISION

For the above reasons,

1. The IOM shall pay the complainant an indemnity of 5,000 Swiss francs.
2. It shall pay him 2,000 francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet