

The Administrative Tribunal,

Considering the complaint filed by Mr A. H. against the International Organization for Migration (IOM) on 8 March 2006, the IOM's reply of 9 May, the complainant's rejoinder of 8 June, the Organization's surrejoinder of 7 July, the additional submissions filed by the complainant on 12 July and the Organization's comments thereon of 25 October 2006;

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;

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

A. The complainant, a German national born in 1949, joined the IOM in 1979 and was successively assigned to various duty stations. Suffice it to indicate that in January 1998 he was appointed as Regional Representative, at grade D.1, at the Subregional Office for South-eastern, Central and Eastern Europe in Vienna, Austria. In September 2000 the complainant's title was changed to Coordinator for the Follow-up to the 1996 Commonwealth of Independent States Conference and he was informed of the terms of reference for that position.

On 5 August 2002 the Director General wrote to the complainant inviting him to enter into dialogue about possible rotation in the summer of 2003 because by that time he would have been posted to Vienna in a leadership position for at least five years. The complainant subsequently wrote to the Director General stating that the rotation policy was unclear to him and that he did not believe he was due for rotation since the terms of reference for his position had been completely changed only two years ago. A further exchange of correspondence followed, in which the Director General reiterated that the complainant was subject to rotation, while the complainant maintained the opposite view.

By a letter of 4 September 2002 the Director General informed the complainant that the funding of his position was to be discontinued in 2003. He would therefore have to accept assignment to a position elsewhere. Between February and August 2003 the complainant was temporarily assigned to Iraq as a Regional Emergency Coordinator. By a letter of 25 June 2003 the Director General acceded to the complainant's request to remain in Vienna, on his return from Iraq, with the proviso that it would be for one more year only, that is to say until the summer of 2004.

Having noted that the complainant had been on the rotation list for three years, the Director General wrote to him on 1 September 2004 to encourage him to cooperate in identifying his next posting. He stated that if the complainant expressed no particular preference, he would assign him to the post of Regional Representative of the IOM's Mission with Regional Functions in Islamabad, Pakistan, which had to be filled promptly. The complainant replied on 4 October that he had already fully satisfied "the requirements of current rotation practice" and pointed out that the proposed position was at P.5.

The Director General informed the complainant on 22 October 2004 that, in recognition of his mother's situation and the school year for his child, he was ready to offer him one of three positions, namely Regional Representative based in Islamabad, Chief of Mission in Berlin, Germany, or Chief of Mission in Bern, Switzerland. The complainant replied on 10 November 2004 that Staff Rules concerning rotation were being bypassed and that he was being discriminated against after having fulfilled the rotation requirements in terms of "functional" as well as "physical" rotation. He also pointed out that he should not be involuntarily transferred to a position of a lower grade and that he wanted to stay in Europe for family reasons. By a letter of 14 December 2004 the complainant appealed against the decision taken by the Director General to transfer him to Islamabad.

On 26 January 2005 the Director General replied to the complainant's letter of 10 November 2004 stating that his duty travel to Iraq could not be considered as rotation because it was a short-term assignment and that he had

consequently decided to assign him to the position of Chief of Mission in Berlin no later than July 2005. He emphasized that it was a D.1 position that would satisfy the complainant's wish to be based in Europe. By a letter of 21 February the complainant requested, in accordance with paragraph 5 of Annex D to the Staff Rules, that the Director General reconsider his decision on the grounds that he had already fully satisfied the requirements of "functional" and "geographical" rotation. Indeed, after his period of service in Iraq he was assigned to the position of Regional Representative and Chief of Mission in Vienna in October 2003. The Director of Human Resources Management subsequently notified the complainant of the Director General's decision not to withdraw his "offer" to transfer him to Berlin. On 20 April 2005 the complainant lodged an appeal with the Joint Administrative Review Board (JARB), appealing against both his inclusion in the rotation exercise and the Director General's decision of 26 January. He sought the annulment of the decision to transfer him to Berlin. By way of interim relief, he wanted action on the transfer decision to be suspended until a final decision had been rendered on his claims contesting the legality of that decision.

On 19 May 2005 the Director General informed the complainant that he had decided to postpone his transfer to Berlin until 1 July 2006, as due to, *inter alia*, the preparation of a conference in Vienna, it was necessary for the complainant and other staff members to remain in their current posts. He assumed that the complainant would therefore withdraw his appeal. The complainant replied on 24 June 2005 that since the rotation decision had been maintained he would not withdraw his appeal. He filed a further appeal in September 2005, putting forward the same arguments as in his appeal of 20 April.

In its report dated 14 December 2005, the JARB found that the complainant was subject to rotation and did not recommend annulling the decision to transfer him. However, it held that his transfer should be suspended pending a final decision on his case. It also recommended that the Organization compensate the complainant for the travel costs he incurred in appearing before the JARB as well as his legal fees.

By a letter of 20 December 2005, which is the impugned decision, the Director of Human Resources Management informed the complainant that the Director General considered his decision concerning the complainant's transfer to be final. Consequently, the complainant would be transferred to Berlin unless he could identify, by the end of April 2006, another vacant position that met both his needs and those of the Organization. He added that the complainant's travel costs would be compensated. By a letter of 11 February 2006 the complainant informed the Director General that he intended appealing to the Tribunal and he requested the suspension of the transfer decision until a decision was rendered by the Tribunal.

B. The complainant contends, firstly, that the Director General's decision to transfer him to the position of Chief of Mission in Berlin is tainted with procedural irregularities. Indeed, the Organization did not publish an annual compendium of vacancies to be filled by rotation, as required by Staff Rule 8.112 concerning advertisement of vacancies; neither did it seek the advice of the Appointments and Postings Board as required by Staff Rules 8.11 and 8.111. He also points out that the IOM indicated in its position paper to the JARB that the rotation policy outlined in the Staff Regulations and Staff Rules had been suspended and drew attention to an Information Note on Human Resources Policy presented to the IOM's Council in October 2000, according to which the rotation process had been discontinued since 1998. The complainant submits that no provision in the Staff Regulations and Staff Rules empowers the Director General to suspend the application of particular rules and that, in accordance with the Tribunal's case law, any authority is bound by the rules it has made until it amends or repeals them. He takes the view that a statement made in an Information Note on Human Resources Policy submitted to the Council does not have the force of an amendment made in compliance with the procedure laid down in Staff Regulations and Staff Rules. Indeed, neither the JARB nor the IOM has produced evidence showing that, as required by Staff Regulation 8.1, the Staff Association was consulted on proposed amendments to suspend the Staff Rules concerning rotation.

Secondly, he asserts that he has already satisfied the criterion of "functional rotation". Indeed, Staff Rule 8.113 provides, *inter alia*, that "[a]ll non-elected IOM professional staff [are] subject to assignment to any of the activities or offices of IOM". In his view, the JARB erred in law in concluding that the Staff Rules concerning rotation did not contemplate the possibility of "functional rotation", *i.e.* transfer from one activity to another, and consequently erred in declining to examine the evidence he produced in that regard. He contends that the impugned decision is tainted with an error of law since it was based on the JARB's erroneous conclusions.

Thirdly, the impugned decision was based on an error of fact. Although the decision to transfer him to Berlin was taken in implementation of the rotation principle, he argues that he was not due for rotation. Noting that Staff Rule 8.113 refers to a "Standard Assignment Length", he argues that for his duty station the length of assignment would

normally be five years. In his particular case the five-year period would start to run either from October 2003, when he started to serve as Regional Representative and Chief of Mission in Vienna, or from January 2005, when the Mission in Vienna changed title, and its status and functions were modified. He adds that having been assigned to the position of Regional Emergency Coordinator in Iraq, he had also fulfilled the “geographical rotation” requirement.

The complainant lastly contends that the Director General acted arbitrarily and misused his authority. The fact that three posts were offered to him, including one at grade P.5, and another at P.4, shows that the Director General’s primary concern was to move him from his current position, rather than to assign him to a position where his qualifications and experience might best be used. He points out that on 2 May 2005 the Director General rejected his request for suspension of the decision to transfer him and that 17 days later informed him that, after considerable reflection, he had decided to postpone his transfer until 1 July 2006 in order not to jeopardise the work in progress.

He asks the Tribunal to set aside the decision of 20 December confirming his transfer to the position of Chief of Mission in Berlin. He wants it to order the IOM to pay him damages for moral injury and compensation for the “additional expenditure incurred by him from 1 July 2006 until the date of implementation of the Tribunal’s judgment by reason of maintaining his home in Vienna while residing in Berlin” and by reason of having to commute between the two cities. He also asks the Tribunal to order the Organization “to restore 20 days of annual leave to compensate [him] for the fact that, in order to spend time with his family, [he] will have had to draw on his leave entitlement”. He further claims costs in the amount of 8,000 Swiss francs.

C. In its reply the IOM asserts that there has been no breach of the Staff Regulations and Staff Rules. It explains that Staff Regulations are established by the IOM Council and, in accordance with Staff Regulation 12.1, may be amended by that body, whereas Staff Rules are established by the Director General to give effect to the Regulations, as required by Staff Regulation 12.2. It adds that, in accordance with the Tribunal’s case law, the body competent to adopt or repeal a rule may suspend it.

The Organization submits that, from 2001, senior officials who had been in their current position for four years or more were subject to rotation. It acknowledges that the annual compendium and the review of rotation by the Appointments and Postings Board had been discontinued. Those eligible for rotation are informed, each year, by the Director General of their eligibility and invited to enter into a dialogue on possible postings. It points out that the policy has a degree of flexibility in its application to allow the Director General to respond to staff members’ needs whilst acting in the best interest of the Organization.

Contrary to the complainant’s assertion, the defendant contends that the JARB did not make an error in concluding that the Staff Rules concerning rotation did not contemplate the possibility of “functional rotation”. Rotation implies movement from one location to another, to exercise similar or different activities. The IOM also rejects the complainant’s argument that his temporary duty in Iraq should be considered as “geographical” rotation because it was neither a transfer nor a rotation: he received a daily subsistence allowance during that assignment and did not benefit or ask to benefit from the entitlements related to relocation.

The IOM denies that the Director General’s objective was to remove the complainant from Vienna rather than to serve the interests of the Organization. In its view, the position offered by the Director General met the complainant’s particular needs, i.e. to remain in Europe. It emphasizes that the only unresolved rotation case from the JARB’s caseloads for 2002 and 2003 is that of the complainant and that he had been stationed in Vienna for over eight years. It stresses that, in accordance with the Tribunal’s case law, the Director General has wide discretion in determining transfers.

D. In his rejoinder the complainant reiterates his pleas. He points out that the Organization did not supply a copy of the rotation policy allegedly applicable since 2001 and that applying such a policy without having taken the requisite statutory measures to amend the relevant provisions of the Staff Regulations and Staff Rules is contrary to due process.

He also asserts that, according to the JARB’s report, the Director of Human Resources Management stated that the IOM recognised that the notion of “functional rotation” existed. He explains that during his assignment to Iraq he did not seek to benefit from relocation entitlements because he was based in a crisis area and therefore could not “relocate the family home”.

Having received the Director General's reply to his request of 11 February 2006 to suspend the transfer decision to Berlin, after having filed his complaint with the Tribunal, the complainant provides details of the additional expenditure incurred due to the Director General's decision not to suspend his transfer and seeks reinstatement of his entitlement to education grant for the school year 2006-2007.

E. In its surrejoinder the Organization maintains its position. It asserts that the IOM Council, the Staff Association and affected staff members have been informed of the suspension of the rotation policy. It adds that none of the staff members who have been subject to rotation in the last five years has alleged that he or she did not know that the rotation policy set out in Chapter 8 of the Staff Regulations and Staff Rules had been suspended.

Regarding "functional rotation", it emphasizes that it is important to consider Staff Rule 8.113 in its entirety and not only to the words "activities or offices" stated in the first sentence of the provision. Indeed, a careful reading of Staff Rule 8.113 shows that "rotation" means the physical movement of staff members from one duty station to another. It reiterates that under no circumstances could the complainant's duty travel to Iraq be considered as a "rotation".

F. In his additional submissions the complainant notes that the Organization has produced no evidence to support its assertion that the Staff Association had been consulted on the proposed amendment to Chapter 8 of the Staff Regulations and Staff Rules and did not object to the suspension of the provisions concerning rotation policy. He also contends that the suspension was not brought to the attention of staff members.

G. In its final comments the IOM produces the minutes of a meeting held by the Appointments and Postings Board on 27 February 2002 attesting that the Board had no objections to proposed staff movements. In the IOM's view, it shows that the Board, which was established to advise the Director General on appointments and postings of staff, had no objections to the suspension of the policy. It emphasizes that the Board is composed of three representatives of the Administration and three representatives of the Staff Association. It further points out that the Information Note on Human Resources Policy is the official document through which the Administration reports annually to the IOM Council on any developments in the Organization's human resources policies.

## CONSIDERATIONS

1. The complainant, who in 2005 was posted to Vienna, impugns the decision of the Director General to transfer him to Berlin. This decision was made in agreement with the conclusions of the JARB, in its report dated 14 December 2005, and was notified to the complainant by the Director of Human Resources Management in a letter of 20 December 2005. The JARB recommended that the implementation of the transfer to Berlin be suspended until a final decision was made on the case but the Director General disregarded that recommendation.

2. The complainant's claims are set out under B, above.

The grounds for his complaint are as follows: (i) disregard for standard rotation procedure as provided in Staff Rules 8.112 and 8.113; (ii) error of law consisting in the fact that his changes of job function ("functional rotation") were not considered as satisfying the criteria for rotation; (iii) error of fact in not considering that his assignment to the position of Regional Emergency Coordinator for Iraq, from February to August 2003, fulfilled the "geographical rotation" requirement; and (iv) misuse of authority by the Director General in basing the decision to transfer him not on the needs of locations that would benefit from his experience and where he would improve and acquire new skills, but only on the desire to remove him from Vienna.

3. The claim of error of fact is unfounded. In accordance with the JARB's report, the Tribunal states that the transfer from Vienna to Iraq did not constitute rotation. Since the assignment was temporary and the complainant was allocated a daily subsistence allowance and not a transfer allowance for the duration of his duty travel to Iraq, that duty travel cannot be considered as "rotation" in the sense of being a regular assignment in another geographical location.

4. The claim of error of law is also unfounded. The complainant bases his claim on Staff Rule 8.113(1), which provides in part that "[a]ll non-elected IOM professional staff [are] subject to assignment to any of the activities or offices of IOM" (emphasis added); in his view, that phrasing points towards the existence of the concept of "functional rotation". The question raised concerns the interpretation of "rotation" in light of Rule 8.113.

The Tribunal states that an interpretation, according to which rotation is always a geographical movement of the staff member to a new post, is preferable. This interpretation is based on the practice heretofore used by the Organization concerning rotation. Moreover, the use of the term “duty station” in paragraphs 1, 4 and 5 of Rule 8.113, as well as the reference to “family living conditions”, and the “[n]eed that staff members [...] serve in different geographical areas” contained in the Principles for Rotation listed under Rule 8.113(6)(d) and (g), implies that rotation is the transfer from one place to another.

5. The claim of disregard for standard rotation procedure as provided in Staff Rules 8.112 and 8.113 is founded. According to Rule 8.112 headed “Advertisement of Vacancies”:

“All posts scheduled to become vacant within a given calendar year, as a result of expiration of the Standard Assignment Length (SAL), retirement or other foreseeable causes, will be published in an annual compendium. [...]”

and under Rule 8.11:

“An Appointments and Postings Board (APB) [...] shall be established for the purpose of advising the Director General, pursuant to the following policy and procedures, on appointments and postings of staff [...].”

The provided procedure has not been followed in this case. The Organization states that, according to Staff Regulation 12.2, the Director General has the power of suspending Staff Rules which he did with regard to the rotation procedure laid down in Rules 8.112 and 8.113. The Organization also notes that the Director General has the authority outside the rotation policy to transfer individuals at any time according to the needs of the Organization. It should be noted that there is no dispute between the parties that the rotation policy, as provided by the above-mentioned Staff Rules, has not been followed in this case.

6. The Tribunal states that: (a) the Director General has to apply the Rules which are in force even if he has the power of amending or suspending them; and (b) the above-mentioned Staff Rules were in force over the period from 5 August 2002, when the Director General wrote to the complainant inviting him to enter into dialogue on rotation, to December 2005, when the administrative proceeding was concluded with the impugned decision.

Regarding point (a), the Tribunal is of the opinion that any authority is bound by the rules it has itself issued until it amends, suspends or repeals them. The general principle is that rules govern only what is to happen henceforth, and it is binding on any authority since it affords the basis for relations between the parties in law. Furthermore, a rule is enforceable only from the date on which it is brought to the notice of those to whom it applies (see Judgment 963, under 5). A competent body adopts rules in order to regulate its exercise of discretionary power in making specific decisions. It would radically contrast with the finality and essence of a rule (which is by nature general and abstract) to allow that in making a decision the authority can disregard a rule that was adopted in order to limit the authorities’ power concerning particular subjects and instead create an opportunity for expanding one’s power. Obviously, the procedure to adopt rules must be different from the procedure to make decisions, because rules are general and apply to many (undefined) and therefore must be published accordingly, whereas decisions are more precise and apply to few (defined).

Regarding point (b), there is no evidence given to prove that Staff Rules regarding staff rotation were no longer in effect during the period from August 2002 to December 2005. The documents provided by the Organization, including those sent with its final comments of 25 October 2006, are merely reports on the recent activities of the Organization and do not state the rules or the amendments, suspensions or cancellations thereof. Furthermore, paragraph 50 of the Human Resources Report, dated 22 October 2001, and paragraphs 94 and 95 of the Information Note on Human Resources Policy in the IOM, dated 24 October 2000, do not exclude the publication of the vacancies arising in a given calendar year and the participation of the Appointments and Postings Board in the proceedings for the transfers according to the rotation process. The provided documents list several incidents that illustrate specific situations in which the rules were followed or disregarded but do not prove a clear change in rules.

According to the above considerations, the impugned decision must be annulled. There is therefore no need to consider the final contention by the complainant of misuse of authority.

7. As regards the requested damages for moral injury, the Tribunal, considering that the complainant had been

in Vienna longer than the regular five-year period, awards one euro. The complainant is also entitled to 15,000 euros for additional living and travel expenses covering the period from 1 July 2006 until the date the Tribunal's judgment is delivered. The Tribunal orders the reinstatement through the school year 2006-2007 of the complainant's entitlement to education grant in respect of the costs of his son's education in Vienna, as it is considered part of the request for compensation for "maintaining his home in Vienna". The complainant is not entitled to have 20 days of annual leave restored in compensation for the days used to visit his family given the proximity of the cities, the possibility of weekend travel, and the fact that annual leave covers absence from work and is not specified only to be used for leisure vacations. The complainant is entitled to 4,000 euros for legal costs. The Tribunal states that the complainant is not entitled to any other compensation.

## DECISION

For the above reasons,

1. The impugned decision is annulled.
2. The IOM shall pay the complainant one euro in compensation for moral injury.
3. It shall pay him the sum of 15,000 euros in material damages.
4. It shall reinstate the complainant's entitlement to an education grant in respect of the costs of his son's education in Vienna.
5. The IOM shall also pay the complainant the sum of 4,000 euros for legal costs.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet