

H. and others

v.

ICC

131st Session

Judgment No. 4354

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr G. H. (lead complainant), Mrs J. A., Mr C. E.-O., Mr P. J. H., Ms S. M., Mr R. C. P. and Mrs C. V. d. W. against the International Criminal Court (ICC) on 30 April 2018 and corrected on 28 May, the ICC's reply of 5 September, corrected on 14 September 2018, the complainants' rejoinder of 27 February 2019, corrected on 16 March, the ICC's surrejoinder of 17 June, the additional submissions filed by the complainants on 26 November 2019 and the ICC's final comments thereon of 25 February 2020;

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

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainants challenge the implied rejection of their request to correct and update judicial salary and pension.

In September 2004 the Assembly of States Parties to the Rome Statute of the International Criminal Court adopted Resolution ICC-ASP/3/Res.3, which included the conditions of service and compensation of judges. It provided that their conditions would be reviewed by the Assembly as soon as practicable following the review of the conditions of service of the Judges of the International Court of Justice (ICJ). On 3 May 2007 the United Nations General Assembly adopted a resolution

applying the post adjustment mechanism to the calculation of the salary of ICJ Judges. In December 2007, the Assembly of States Parties amended the pension scheme regulations for ICC Judges, but not their salary.

In August 2016 the budget proposal for 2017 included an update to ICC judicial salaries, but the Committee on Budget and Finance (CBF) of the Assembly of States Parties rejected it in October 2016. The CBF referred the matter to the Assembly of States Parties warning that any changes in the judicial salaries would require a thorough review of all the Judges' conditions of service. On 24 November 2016, at its fifteenth session, the Assembly of States Parties adopted a resolution requesting the Bureau to consider a revision of the Judges' remuneration and report back to the Assembly at its next session in December 2017.

On 15 February 2017 the complainants, who were Judges of the ICC, wrote to the Presidency of the ICC requesting that the ICC review, update and correct the judicial conditions of service in terms of both salary and pension without further delay. They set a time limit at 31 May 2017, which they later – on 10 April 2017 – extended to 31 January 2018 to allow time for a diplomatic solution to be reached. In November 2017 the CBF informed the Assembly of States Parties that, although the Bureau had been asked to consider a revision of the Judges' remuneration and to report to the Assembly at its sixteenth session, no outcome on this matter was available. The CBF stressed that the annual remuneration of Judges would have to be considered by the Assembly of States Parties as a policy matter, and that any changes would require a thorough review of all their conditions of service, bearing in mind that any decision would have budgetary implications.

On 4 December 2017 the sixteenth session of the Assembly of States Parties started and, on 14 December, the Assembly adopted a resolution requesting the Bureau to establish a working group to “discuss a mechanism to consider a revision of the judges' remuneration” in implementation of Resolution ICC-ASP/3/Res.3 and to report thereon to the Assembly at its seventeenth session. The resolution was published on the Assembly website on 18 December 2017.

On 31 January 2018 the deadline set by the Judges for a decision from the Assembly of States Parties on Judges' remuneration expired. On 30 April 2018 the complainants filed a complaint with the Tribunal indicating on the complaint form that they impugned the implied rejection of their requests of 4 December 2017. They explained that the Assembly

of States Parties had failed to take a decision in favour of updating the judicial salary, and that the resolution of 14 December 2017 was effectively a failure to take a decision on the request that they formally made in February 2017.

The complainants ask the Tribunal to order the ICC to review, update and correct Judges' conditions of service effective as of 31 January 2018. They ask that the review, updating and correction include the following specific measures:

- a. ensure compliance with the principle of judicial independence and the Noblemaire principle; or at the very least, order that there must be an upwards adjustment of salary by 26.7 per cent;
- b. apply the post adjustment regime to ICC Judges in the same manner as it is applied to the Judges of the ICJ;
- c. pay to the complainants arrears of all unpaid post adjustment supplements;
- d. "make corrective lump-sum payments to the [complainants] as compensation for the effective violation of article 49 of the Rome Statute, in light of the solid freezing of the ICC judicial salary since the very inception of the Court";
- e. make the judicial pension compliant with the Noblemaire principle and the principle of judicial independence; at the very least, the 2007 amendment to the pension regime must be set aside, as it was an unlawful amendment; and the original pension regime must be fully reinstated;
- f. contribute to Judges' medical insurance coverage; at the very least, the ICC must pay medical insurance supplements to Judges in *pari passu* to similar supplements paid to other officials and staff of the ICC in the Professional and higher categories;
- g. make available to ICC Judges dependency allowance in *pari passu* to similar allowance paid to other officials and staff of the ICC in the Professional and higher categories; and
- h. make the ICC Judges' life insurance benefits compliant with the Noblemaire principle and the principle of judicial independence.

The ICC asks the Tribunal to reject the complaints as irreceivable *ratione materiae* and *ratione temporis*, or alternatively as devoid of merit.

CONSIDERATIONS

1. Nine complaints were filed in the Tribunal on 30 April 2018. Four of the complainants were then retired Judges of the ICC, their terms of office having concluded in March 2018. One has since withdrawn his complaint, which the Tribunal recorded at its 127th Session. The other five complainants were then, and remain, serving Judges of the ICC though, again, one has withdrawn her complaint and this was recorded by the Tribunal at its 128th Session. Their grievances concern the salaries paid to Judges of the ICC and their pension and other entitlements.

The complaints raise the same facts and questions of law and they are therefore joined to form the subject of a single judgment.

2. For a period of time, at least some of the Judges of the ICC had been seeking a review of their salaries, pension entitlements and other emoluments. On 15 February 2017, a group of Judges, constituting the majority of them, requested the Presidency of the ICC to review, update and correct judicial salaries, pensions and other emoluments and that this be done by 31 May 2017. The request took the form of a memorandum to the Presidency dated 15 February 2017 with four accompanying documents. The first and most significant was a document entitled “Judges’ Request for Review and Correction of Conditions of Service (Salary and Pension)” styled the “Main Request”. Another was a “Memorandum of Law” supporting the Main Request and the third and fourth were addenda to the Request. For reasons that will become apparent shortly, it is desirable to set out a significant portion of the Main Request. It commenced with a page and a half of what might best be described as recitals setting out some of the background and the rationale for the request in a summary form. It then said:

“NOW THEREFORE we the undersigned judges of the Judicial Divisions:

1. REQUEST the ICC to review, update and correct judges’ conditions of service, in line with the principles and considerations indicated above;
2. FURTHER REQUEST in particular, without limitation to the generality of the foregoing, that the review, updating and correction of judges’ conditions of service will need to include the following specific measures:
 - a. make the judicial *salary* compliant with the Noblemaire principle and the principle of judicial independence
 - b. make the judicial *pension* compliant with the Noblemaire principle and the principle of judicial independence

- c. contribute to judges' medical insurance coverage, as is consistent with the Noblemaire principle and the principle of judicial independence
 - d. make the judges' life insurance benefits compliant with the Noblemaire principle and the principle of judicial independence
 - e. fully pay judges the arrears of all unpaid post adjustment, being an outstanding debt owed to the judges
 - f. make a corrective lump-sum payment as compensation for the effective violation of article 49 of the Rome Statute, in light of the solid freezing of the ICC judicial salary for over 14 years now
3. FURTHER REQUEST the ICC to undertake the above mentioned review, updating and corrections without further delay, in any event no later than 31 [May] 2017, in light of the imminent end of tenure of some of the judges who have been adversely affected by the errors identified above.

The Hague

DATED 20 January 2017

SIGNED [...]"

Seven signatures appear on the document after the word "SIGNED". In the covering memorandum it was said: "The three judges in the Presidency were not approached to sign any of these documents, since the Request will be presented to them. But of the remaining 15 judges, 12 have signed the Request in one form or another."

3. The date of 31 May 2017 in the original February 2017 request was later altered, by memorandum to the Presidency dated 10 April 2017, to 31 January 2018. The relevant part of the memorandum read, after referring to the 15 February 2017 communication: "[...] we hereby defer until 31 January 2018 the time within which the requested review is to be completed". The complainants elected to frame their request in the form of what can reasonably be described as an ultimatum requiring something to be done by a time nominated by them with some of the Judges, though by no means all of them, alluding to the possibility of legal action thereafter.

4. At the sixteenth session of the Assembly of States Parties held in December 2017, the Assembly on 14 December 2017 passed a resolution in the following terms:

“N. Salaries of the judges of the International Criminal Court

The Assembly of States Parties,

Noting the request by the Court for a revision of the judges’ remuneration in implementation of resolution ICC-ASP/3/Res.3,

Considering the conclusion of the Committee on Budget and Finance that the annual remuneration of judges would have to be considered by the Assembly as a policy matter and would require a procedure to review the salary scheme for judges,

1. *Requests* the Bureau to establish a working group, based in The Hague and open only to States Parties, to discuss a mechanism to consider a revision of the judges’ remuneration in implementation of resolution ICC-ASP/3/Res.3 and to report thereon to the Assembly at its seventeenth session. [...]

5. The relief the complainants seek in these proceedings is an overarching first “order” that the ICC “review, update and correct ICC judges’ conditions of service [...]”. The second and other order, contains eight paragraphs mainly requiring the ICC to address, in a specified way, particular aspects of the salaries and benefits paid or provided to judges and then to pay the salary or provide the benefit. While the language used differs in some respects, for the most part the proposed orders mirror, in substance, the terms of the Main Request set out earlier but in a form directing the ICC to take a certain action in relation to each element addressed in the Main Request.

6. Article VII of the Tribunal’s Statute creates time limits within which to bring proceedings in the Tribunal. Article VII operates on the basis that either there has been a final decision or a failure to take a decision on the claim within the specified time of sixty days of notification of the claim which can be treated as a final decision. However it is clear from their pleas in their brief, the complainants approach the operation of Article VII in these proceedings on the basis that the ICC had failed to take a decision on their claim within sixty days of it having been notified. Accordingly, so the complainants argue, they can have recourse to the Tribunal and the complaints are receivable, as Article VII, paragraph 3, provides. The complainants say the claims were notified to the Assembly of States Parties on 4 December 2017 when its sixteenth session commenced. No decision was taken. On this analysis sixty days later, the ninety-day time limit began to run. Necessarily implicit in this analysis by the complainants is that the operative date of 31 January

2018 for the satisfaction of their claims in their entirety was an essential part of their claims. Were it otherwise, it cannot be said there was a failure to take a decision on their claims because the first step demanded by the claims was a review. A procedure to begin that process was, in relation to remuneration, agreed to by the Assembly.

7. A decisive issue in these proceedings is whether there was a failure to take a decision on the complainants' claims, on the one hand, or a decision on their claims on the other. The ICC argues, amongst other things, the complaints are time-barred because there was a decision by the Assembly of States Parties on the complainants' claims and they did not commence proceedings within the specified time of ninety days. There are innumerable decisions of the Tribunal emphasising the importance of this time limit. One is Judgment 3947, consideration 5, citing Judgment 3559:

“With respect to Article VII, paragraph 2, of the Tribunal’s Statute, the Tribunal’s case law requires strict adherence to the ninety-day time limit on the grounds that time limits are an objective matter of fact and that strict adherence is necessary for the efficacy of the whole system of administrative and judicial review of decisions. It was relevantly stated in Judgment 3559, consideration 3, that:

‘Article VII, paragraph 2, of the Tribunal’s Statute provides that “[t]o be receivable, a complaint must [...] have been filed within ninety days after the complainant was notified of the decision impugned”. It is not within the competence of the Tribunal to extend this period of time set forth by the Statute. As the Tribunal has repeatedly stated, this time limit is an objective matter of fact and the Tribunal will not entertain a complaint filed after it has expired. Any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties’ legal relations, which is the very justification for the time bar. [...]”

8. The repository of the power to alter judicial salaries and other allowances was the Assembly of States Parties by operation of Article 49 of the Rome Statute of the International Criminal Court. That Article provides:

“The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.”

Also relevant is Article 112 of the Rome Statute that establishes the Assembly of States Parties and confers on it a range of powers consistent with it being the supreme governing body of the ICC.

9. The Assembly of States Parties had been presented, on this general topic of salaries and benefits, with two options on 20 November 2017 before its December 2017 session. The two were firstly, determine that the salaries were adequate but could be reviewed in the future or, alternatively and secondly, determine that a procedure should be established to review the salary scheme for Judges. The proponent of these alternatives was Ambassador H. who had earlier gauged there was insufficient support amongst States Parties to actually increase judicial salaries.

10. The Assembly of States Parties' decision to adopt the second option constituted an unambiguous decision to reject the claims of the complainants that judicial salaries, pensions and other emoluments be reviewed, updated and corrected by 31 January 2018. Clearly, in context, "updated and corrected" meant increased or improved by the nominated date. That would not and could not occur because the repository of the power to do so, the Assembly of States Parties, could not and would not, it can readily be inferred, meet before 31 January 2018. Thus the decision of the Assembly of States Parties was an express final decision, adverse to the complainants, refusing to agree to an essential component of their claims, namely by when the changes were, at the latest, to take effect. The complainants do not say in these proceedings that each complainant was not notified of the decision on the date it was made or shortly thereafter. It was published on the Assembly website on 18 December 2017. Accordingly, each complainant had ninety days in which to file a complaint as provided by Article VII, paragraph 2, of the Tribunal's Statute. That is to say, on or about 18 March 2018. As noted earlier, all the complaints were filed on 30 April 2018. They were filed out of time and are obviously not receivable. Accordingly, the complaints should be dismissed.

In these circumstances, it is unnecessary to address the bases on which the ICC argues that the Tribunal has no jurisdiction to deal with these complaints.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 27 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

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

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ