



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-137

**Cherif
(Appellant)**
v.
**Secretary General
Of the International Civil Aviation Organization
(Respondent)**

JUDGMENT

Before: Judge Mark P. Painter Presiding
Judge Kamaljit Singh Garewal
Judge Jean Courtial

Judgment No.: 2011-UNAT-165

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Appellant: Self-Represented

Counsel for Respondent: John Augustin

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. Mr. Taieb Cherif was the Secretary General of the International Civil Aviation Organization (ICAO) when he filed this case with the former Administrative Tribunal. He was thus suing himself. He has since retired.
2. Mr. Cherif impugns two decisions taken by the ICAO Council (Council), the governing body that employed him. In those decisions, the Council required that the Secretary General obtain the concurrence of the President of the Council when hiring anyone above the P-4 level, thus restricting Mr. Cherif's authority, as Secretary General, to hire employees.
3. The United Nations Appeals Tribunal (Appeals Tribunal) holds that the impugned decisions, made by the governing body of the ICAO, are not justiciable by this court as they are not, within the mandate of the Appeals Tribunal, administrative decisions. The appeal is dismissed.

Facts and Procedure

4. Mr. Cherif was appointed Secretary General of the ICAO on 1 August 2003. He held this title until his retirement on 1 August 2009.
5. On 28 July 2009, Mr. Cherif filed an appeal with the former Administrative Tribunal against two decisions taken by the Council: C-DEC 186/1 (20 January 2009) and C-DEC 186/12 (18 March 2009). Mr. Cherif contends that the adoption of these decisions "severely circumscribes [his] ability, as Chief Executive Officer of ICAO, to make appointments to the Secretariat and [his] ability to exercise judgement with regard to such appointments". Mr. Cherif, who retired three days after filing his complaint, requests damages in the amount of three million Canadian Dollars.
6. In decision C-DEC 186/1, the Council announced inter alia that it had "decided that as of 20 January 2009, it would require the written approval of the President of the Council for any hiring, appointment and promotion of P-4 employees and above". On 18 March 2009, the Council amended its decision through the issuance of decision C-DEC 186/12 by requiring,

subject to certain exceptions, “the written approval of the President of the Council for any hiring, appointment, promotion, extension and termination of P-4 employees and above”.

7. Mr. Cherif alleges that these decisions constituted an “abuse of power, abuse of purpose, harassment and discrimination of the Council”.

8. Following the abolishment of the former Administrative Tribunal in December 2009, and prior to the Respondent receiving a copy of the appeal, the case file was transferred to the Appeals Tribunal.

9. On 19 January 2011, in response to separate procedural requests submitted by Mr. Cherif on 4 December 2010 and by ICAO on 17 December 2010, this Court noted that neither of the parties’ submissions addressed the question of whether the case was receivable by the Appeals Tribunal. Consequently, before ruling on either of the motions, the Appeals Tribunal issued Order No. 36 (2011)¹ in which it requested that the parties submit briefs on the issue of receivability.

10. Mr. Cherif and ICAO submitted their briefs on 31 January 2011 and 1 February 2011, respectively.

Submissions

Mr. Cherif’s Submission

11. Under Article 7 of the Statute of the former Administrative Tribunal, “[a]n application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary General, except where the Secretary General and the applicant have agreed to submit the application directly to the Administrative Tribunal”. Mr. Cherif contends that the need to first submit his request to the Advisory Joint Appeals Board (AJAB) is obviated because “the Secretary General and the applicant (which in this case [are] one and the same) can agree to submit the application directly to the [Appeals] [T]ribunal”.

¹ *Cherif v. Secretary General of the International Civil Aviation Organization*, Order No. 36 (2011).

ICAO's Submission

12. ICAO contends that the two decisions that Mr. Cherif is appealing are not administrative decisions but rather regulatory as they fall within the Council's purview who, under Article 58 of the Convention on International Civil Aviation,² can determine and modify the Secretary General's conditions of employment.

13. ICAO further expresses that apart from cases where the Appellant and the Secretary General agree to a direct submission in front of the Appeals Tribunal, the Appellant must, which did not occur in this instance, first seek a review of the decision in front of the AJAB and exhaust the internal remedies available to him.

14. While ICAO's Regulations and Rules did not anticipate a situation in which the Secretary General would be the one contesting a decision, "staff members are required to seek a review from the authority taking the administrative decision". Whereas administrative decisions are usually taken by the Secretary General, in this case the decision making body was the Council to which the Secretary General is directly accountable and which, similarly to the Secretary General's authority to appoint staff members, is the appointing authority for the Secretary General.

15. ICAO contends that based on the authority vested in it, including having the right to waive the Secretary General's immunity, Mr. Cherif should have either exhausted the internal remedies available to him or obtained the Council's agreement to file directly in front of the Appeals Tribunal rather than be the judge of his own cause. The fact that Mr. Cherif proceeded at his own behest results in there being no actual agreement between the parties for the appeal to proceed directly to this Tribunal which, in accordance with the jurisprudence of the former Administrative Tribunal,³ renders the appeal non-receivable.

16. ICAO adds that one of the conditions to submit a case directly to the Appeals Tribunal is that the facts of the matter have been agreed upon by the parties. Seeing that no agreement as to the facts was obtained prior to the filing of the appeal and that no such statement of facts exists, Mr. Cherif cannot appear directly before the Appeals Tribunal thereby rendering his appeal non-receivable.

² Convention on International Civil Aviation, Chicago, 4 April 1947.

³ Former Administrative Tribunal Judgment No. 369, *Roy* (1986).

17. ICAO contends that, in addition, the appeal against the two decisions is time-barred.

18. ICAO submits that under both the Rules of the former Administrative Tribunal and the current agreement between the United Nations and ICAO prescribe that unless there are exceptional circumstances warranting a waiver of the time limits, which *El Khatib*⁴ defined as being those outside an applicant's control, an application is only receivable if filed within 90 calendar days of the receipt of a contested decision.

19. The two decisions that Mr. Cherif is contesting were taken on 20 January 2009 and 18 March 2009. Consequently, a timely appeal had to be filed by 20 April 2009 and 16 June 2009, respectively. Mr. Cherif did not file his appeal until 28 July 2009, which is more than three months and one month after the respective deadlines for filing an appeal had passed, thereby rendering Mr. Cherif's appeal not receivable as its filing was time-barred.

Considerations

20. Leaving aside the troubling issues of whether (1) Mr. Cherif, as Secretary General of ICAO, could agree with himself to submit the matter directly to this Court, (2) whether the facts have been agreed upon, and (3) whether the case is time-barred, we see a more basic problem with this case—the subject matter is not proper for this Court's adjudication.

21. The caption of the case suggests the result. Without proper names, it would be Secretary General v. Secretary General. The mandate of this, and the former Administrative Tribunal, is limited to situations where a staff member is contesting the application of an administrative decision, usually taken on behalf of the Secretary General.

22. Mr. Cherif, now the former Secretary General, who was the Secretary General of ICAO when he filed this case, is challenging the decision of the governing body—the Council—of ICAO. While Mr. Cherif might possibly be considered a staff member of ICAO for some limited purposes, here he is challenging regulatory decisions. This is not a case where the Secretary General's employment terms have been stripped from him in violation of a contract.

⁴ *El Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment 2010-UNAT-029.

23. The two decisions Mr. Cherif is contesting are not, within the mandate of the Appeals Tribunal, administrative decisions. They are decisions of the governing body pertaining to terms of its relationship with its employee, the Secretary General. Under Article 58 of ICAO's Convention, the Council can determine and modify the Secretary General's conditions of employment: "Subject to any rules laid down by the Assembly and to the provisions of this Convention, the Council shall determine the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State."⁵ That is exactly what happened here.

24. The Council's decisions to restrict the Secretary General's hiring authority are within its powers.

Judgment

25. This appeal is dismissed for want of subject-matter jurisdiction.

Original and authoritative version: English

Dated this 21st day of October 2011 in New York, United States.

(Signed)

Judge Painter, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Courtial

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar

⁵ Convention on International Civil Aviation, Chicago, 4 April 1947, Article 58, Chapter XI.