UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2012-304

Valimaki-Erk

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Mary Faherty Judge Rosalyn Chapman
Judgment No.:	2012-UNAT-276
Date:	1 November 2012
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Brian Gorlick/Esther Shamash

Counsel for Appellant/Respondent: John Stompor

Reissued for technical reasons on 21 January 2013

JUDGE SOPHIA ADINYIRA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/004, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 6 January 2012 in the case of *Valimaki-Erk v. Secretary-General of the United Nations*. The Secretary-General appealed on 6 March 2012, and Ms. Kaisamaija Valimaki-Erk answered on 1 May 2012.

Synopsis

2. The issue before us is the legality of the policy requiring individuals to renounce their permanent resident status that they may have acquired in a country not of their nationality before they can be recruited at the professional level.

3. This policy stemmed from a recommendation in the Report of the Fifth Committee, Document A/2615 dated 7 December 1953. This restrictive policy was guided by the principle of reimbursement to staff members of national income taxation, and the concern by a number of delegates that "a decision [by a staff member] to remain on permanent residence status in no way represented an interest of the United Nations and that, on the contrary, to the extent (if any) that it might weaken existing ties with the countries of nationality it was an undesirable decision".

4. Whilst this practice has been in effect for 59 years at the Organization, the UNDT found that it lacked legal backing.

5. It is legitimate for the Secretary-General not to ignore a recommendation or a stated policy of the General Assembly. We, however, wish to point out that the Fifth Committee in paragraph 73 of its Report (A/2615) required that its decisions taken at the session were to "be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to the policies thus approved *through appropriate amendments to the Staff Rules*" (emphasis added).

6. Since, to date, the contested policy is not reflected in any administrative issuance, we conclude that it has no legal basis, as the Secretary-General has not fully complied with the requirements set by the Fifth Committee for its implementation.

7. However, we note that the geographical distribution of staff recruitment is based on nationality and not on residence status. The policy therefore cannot be justified under the pretext of ensuring geographical distribution of staff members. Bearing in mind the human rights principles and modern law of employment, this policy has no place in a modern international organization.

8. We accordingly affirm the UNDT decision and dismiss the appeal.

Facts and Procedure

9. Ms. Valimaki-Erk is a national of Finland. She has also been a permanent resident of Australia since February 2002. In July 2004, she received an offer of appointment for one year with the Organization as a Procurement Officer at the P-3 level. The letter dated 12 July 2004 attached to the offer clarified that, given the temporary nature of the offer of appointment, Ms. Valimaki-Erk would be allowed to retain her permanent resident status in Australia, but that "[s]hould you be offered a long-term appointment in the future, the personnel policy under the Staff Regulations and Rules in respect of your resident status in Australia would then be applied". The letter did not specify which personnel policy would be applied.

10. After Ms. Valimaki-Erk joined the Organization in September 2004, she applied for a long-term appointment and was selected for the post of Procurement Officer on a two-year appointment in March 2005. She was then informed that the offer of the two-year appointment was conditional upon her applying for Australian citizenship or renouncing her permanent resident status in Australia.

11. As Ms. Valimaki-Erk was not eligible for Australian citizenship and did not want to renounce her permanent resident status in Australia, she was not placed against the post of Procurement Officer.

12. In November 2005, Ms. Valimaki-Erk appealed to the former Joint Appeals Board (JAB) in New York. In May 2007, the JAB issued its report, in which it found that the requirement that Ms. Valimaki-Erk must either apply for Australian citizenship or renounce her permanent resident status in Australia lacked a reasonable basis and recommended that she should not be required to renounce her Australian permanent resident status as a condition of acceptance of the two-year appointment for the post of Procurement Officer. The Secretary-General rejected the JAB's recommendation.

13. Ms. Valimaki-Erk's subsequent application to the former Administrative Tribunal was transferred to the UNDT on 1 January 2010. In Judgment No. UNDT/2012/004, the UNDT concluded that the requirement that Ms. Valimaki-Erk must renounce her Australian permanent resident status as a condition for a two-year appointment lacked a legal basis. The UNDT found that there was no regulation in the Staff Regulations and Rules nor provision in any of the General Assembly resolutions that required staff members to renounce their permanent resident status in a country which is not their country of nationality before receiving a long-term appointment. Consequently, the UNDT was of the view that the Secretary-General was acting ultra vires in requiring offices of the Organization to apply an additional condition for the international recruitment of all staff members. Whilst it rejected Ms. Valimaki-Erk's claims for financial damages, the UNDT found that the unlawful requirement did cause Ms. Valimaki-Erk "some moral injury" and "significant upheaval in her life", for which the UNDT awarded three months' net base salary.

Submissions

Secretary-General's Appeal

14. The Secretary-General states that he understands that the General Assembly's policy in this regard applies to all internationally recruited staff members, irrespective of whether the permanent resident status to be renounced is in the country of the duty station, such as the United States, or elsewhere. Since 1954, the Organization has consistently maintained this practice of requiring individuals to renounce any permanent resident status that they may have acquired prior to their recruitment.

15. The Secretary-General submits that the UNDT erred in law in concluding that the General Assembly had not endorsed the policy underlying the above-mentioned requirement. The legislative history of the General Assembly indicates otherwise.

16. The legality of the policy underlying the above-mentioned requirement has already been examined and confirmed by the former Administrative Tribunal in its *Khavkine* judgment in 1956.[1]

[1] Former Administrative Tribunal Judgment No. 66, *Khavkine* (1956).

17. The Secretary-General maintains that the UNDT erred in law in finding that the Administration exceeded its authority by requiring Ms. Valimaki-Erk to renounce her Australian permanent resident status as a condition of appointment. In his view, the Staff Regulations not only do not restrict the enforcement of the General Assembly's policies but also expressly authorize the Secretary-General to enforce such policies even when they are not set forth expressly in the Staff Regulations and Rules.

18. The Secretary-General also maintains that there was no inconsistency between the provisions of the former Staff Rules requiring staff members to inform the Secretary-General of any intention to acquire permanent resident status and the policy underlying the above-mentioned requirement as a condition of appointment.

Ms. Valimaki-Erk's Answer

19. Ms. Valimaki-Erk contends that the UNDT correctly found that the General Assembly had never endorsed the unwritten policy of requiring individuals to renounce their permanent resident status as a condition of appointment, and that the Secretary-General's reliance on Information Cicular ST/AFS/SER.A/238 dated 19 January 1954 was inapposite, in that this circular had been rescinded and replaced by an administrative instruction and subsequent circular that refer only to prospective or current staff members holding permanent resident status in the United States.

20. Ms. Valimaki-Erk submits that the Secretary-General may not simultaneously argue that he is bound by the General Assembly's resolutions, and that he exercises discretionary authority in their application. The two arguments are mutually exclusive.

21. Ms. Valimaki-Erk maintains that there is no lawfully promulgated rule requiring all staff members at the professional level or above to relinquish their permanent resident status, and that no staff regulation or rule has been amended to give effect to such a policy. In contrast, the Secretary-General has lawfully promulgated Administrative Instruction ST/AI/2000/19 and its accompanying Information Circular ST/IC/2001/27, which affect only non-United States staff members serving in the United States.

22. Ms. Valimaki-Erk also maintains that, given that under Staff Rule 4.3 which has been endorsed by the General Assembly a staff member is entitled to obtain a second or third nationality without affecting his or her conditions of appointment, it is incongruous to suggest

that the General Assembly would have endorsed the policy of precluding appointment if an individual is a national of one country but holds permanent resident status in another country.

23. Ms. Valimaki-Erk stresses that the Secretary-General himself has objected to the policy of requiring the renouncement of one's permanent resident status as a condition of appointment.

Considerations

24. The issue before us is the legality of the policy requiring individuals to renounce a permanent resident status that they may have acquired in a country not of their nationality before they can be recruited at the professional level.

25. It is established in the Report of the Fifth Committee at the eighth session of the General Assembly in 1953, Document A/2615, that the basis of this policy stemmed from the decision of a number of delegations to

> specifically endorse[...] the view expressed by the Advisory Committee in its report that a decision [by a staff member] to remain on permanent residence status in no way represented an interest of the United Nations and that, on the contrary, to the extent (if any) that it might weaken existing ties with the countries of nationality it was an undesirable decision.

26. This restrictive policy was also guided by the principle of reimbursement to staff members of national income taxation. The Fifth Committee, in considering the issue, concurred in the recommendation of the Advisory Committee in para. 66 (a): "that persons in permanent residence status should in future be ineligible for appointment as internationally recruited staff members unless they were prepared to change to a G-4 (or equivalent) visa status".

27. Despite the fact that this practice has been in effect for 59 years at the Organization, the UNDT found that it lacked legal authority as the Fifth Committee recommendation was not endorsed by the General Assembly. The Secretary-General submits that this decision did not require further action by the General Assembly. In support of this assertion, the Secretary-General relies on Judgment No. 66 *Khavkine* (1956) issued by the former Administrative Tribunal of the United Nations (UNAdT).

28. In that case, Mr. Arnold Khavkine, a former Programme Officer of the United Nations Technical Assistance Administration, filed an application with the UNAdT requesting, inter alia, the rescission of the Secretary-General's decision to deny him the right to sign the waiver of privileges and immunities in order to acquire permanent residence in the host country. The essence of Mr. Khavkine's case was that, in the absence of any resolution passed by the General Assembly, the Secretary-General could not rely on the proceedings of the Fifth Committee in support of his refusal to authorize the waiver of privileges and immunities.

29. The UNAdT held:

> [T]his contention is inconsistent with the procedures normally followed by the United Nations. The normal procedure in the General Assembly is that after the adoption of the agenda for the session, items belonging to the same category of subjects are referred to one of the main committees (rule 99). After discussion, the Committee then prepares its report on the item to the General Assembly.
>
> In accordance with rules 67 and 68, the report already adopted by the main committee would not be brought up for discussion unless as many as one-third of the members present should consider discussion necessary. It is clear that the adoption of a report by a main committee, has, after its submission to the General Assembly, the same validity and effect as a specific decision of the General Assembly in respect of the matters contained in the report.[2]

This decision was affirmed by the UNAdT in *Fischman*, Judgment No. 326 (1984).

30. In any event, the Appeals Tribunal notes that paragraph 73 of the Fifth Committee's Report (A/2615) reads:

> It was the understanding of the Committee that these decisions should be recorded in its report to the General Assembly for the guidance of the Secretary-General *in giving effect to the policies thus approved through appropriate amendments to the Staff Rules* (emphasis added).

During the oral hearing in the instant case, held on 23 October 2012, the Secretary-General submitted that the issuance of Information Circular ST/AFS/SER.A/238 on 19 January 1954 satisfied the requirement of paragraph 73. He also relied on the UNAdT's jurisprudence in *Khavkine* and *Fischman*.

[2] Rules 99, 67 and 68 here referenced were subsequently renumbered as the Rules of Procedure of the General Assembly have been amended over the years.

31. In the said circular issued on 19 January 1954 (ST/AFS/SER.A/238), the Secretary-General informed the staff of the decisions adopted by the General Assembly regarding change of permanent resident status by a staff member and the amendments in the Staff Rules to implement those decisions.

32. These amendments provided that staff members who acquired permanent resident status in the country of their duty station would no longer be eligible for certain international benefits,[3] and that staff members intending to acquire permanent resident status or change their nationality would be required to notify the Secretary-General before such change became final.[4]

33. However, the Appeals Tribunal notes there was no provision in the amendments that required international staff to renounce their permanent residence status in a country not of their nationality before they could be recruited.

34. Accordingly, we hold that the Staff Rules that were amended pursuant to the decisions of the General Assembly in 1953 only addressed the scenario in which an existing staff member wished to change his or her nationality or to acquire a permanent residence status and its financial consequences.

35. The Secretary-General invites us to apply the UNAdT's decisions in *Khavkine* and *Fischman*. The decisions of the former UNAdT are not binding on the Appeals Tribunal. However, we wish to comment that the facts of those cases are different from the one before us. Furthermore and more importantly, at the time the UNAdT delivered its opinions in 1956 and 1984, respectively, there were in existence staff rules governing their particular situations and reflecting the decisions of the Fifth Committee.[5]

36. In *Khavkine* the Applicant was contesting the refusal by the Secretary-General to authorize him to sign the waiver of privileges and immunities in order to acquire permanent residence status in the host country. In *Fischman* the Applicant was contesting the decision of the Secretary-General preventing him from taking the steps necessary to change his Argentine nationality to that of the United States. In the present case, Ms. Valimaki-Erk is

[3] See Secretary-General's Bulletin ST/AFS/SGB/94/Rev. 2 of 19 January 1954, especially the amended Staff Rule 104.7 on international recruitment.
[4] See Information Circular ST/AFS/SER.A/238 of 19 January 1954, para. 10, which refers to Staff Rule 104.4.
[5] See footnotes 2 and 3 above.

contesting the decision that required her to renounce her Australian permanent resident status before she could be recruited at the professional level.

37. The Secretary-General submits that, since 1954, the Organization has consistently maintained this practice of requiring individuals to renounce any permanent resident status that they may have acquired in any country prior to their recruitment, although he has conceded that it is not a fair policy. He submits further that the Administration can only change the policy upon a decision by the General Assembly.

38. This Tribunal notes that the Advisory Committee that recommended the policy has now come to recognise the unfairness of the policy. In paragraph 84 of its report A/65/537 of 22 October 2010, it stated:

> with the increasing use of fixed-term appointments, it may not be entirely fair to require a candidate to give up permanent resident status, a decision that has long-term consequences, so that he or she can take up a position that may last only two or three years.

39. Despite the fact that the Administration finds the policy unfair, the Secretary-General insists in his submissions that "the Staff Regulations not only do not restrict the enforcement of the General Assembly's policies but expressly authorise the-Secretary-General to enforce such policies even when they are not set forth expressly in the Staff Regulations and Rules". In support of this position, he cites Staff Regulation 1.1(c), which provides: "The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected".

40. It is legitimate for the Secretary-General not to ignore a recommendation or a stated policy of the General Assembly. We, however, point out that the Fifth Committee, in paragraph 73 of its 1953 report (A/2615), required that its decisions taken at the session were to "be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to the policies thus approved *through appropriate amendments to the Staff Rules*" (emphasis added). Since, to date, the contested policy is not reflected in any administrative issuance, we conclude that it has no legal basis, as the Secretary-General has not fully complied with the requirements set by the Fifth Committee for its implementation.

41. Ms. Valimaki-Erk rightly submits that, although the Secretary-General has discretion in the appointment of staff, he has no discretion to impose unwritten regulations and rules that are prejudicial to staff members.

42. This Tribunal recalls that Article 101(1) of the Charter of the United Nations states that "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly". These Staff Regulations embody the conditions of service and the basic rights and duties and obligations of United Nations staff members. They are supplemented by the administrative issuances in application of, and consistent with, the said Regulations and Rules.

43. To date, no administrative issuance has been promulgated that reflects this contested policy of requiring an individual to renounce his or her permanent resident status in a country not of his or her nationality as a condition for becoming a staff member of the Organization at the professional level.

44. The Appeals Tribunal notes further that Article 101(3) of the United Nations Charter states:

> The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

There is nothing in the United Nations Charter to suggest that geographical distribution is based on resident status. All along, recruitment into the Organization has been based on nationality and not on residence. As per Staff Rule 4.3, the Administration recognises only one nationality. Staff Rule 4.3 "Nationality" provides:

> (a) In the application of the Staff Regulations and Staff Rules, the United Nations shall not recognize more than one nationality for each staff member.
>
> (b) When a staff member has been legally accorded nationality status by more than one State, the staff member's nationality for the purposes of Staff Regulations and the Staff Rules shall be the nationality of the State with which the staff member is, in the opinion of the Secretary-General, most closely associated.

45. The contested policy therefore cannot be justified under the pretext of ensuring geographical distribution of staff members. Bearing in mind the human rights principles and the modern law of employment, this policy has no place in a modern international organization.

46. In view of the foregoing, we hold that the Secretary-General's decision to require Ms. Valimaki-Erk to relinquish her permanent resident status in Australia if she wished to receive a two-year contract as Procurement Officer was unlawful, as it was premised on a practice that has no legal basis.

Judgment

47. The appeal is dismissed and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Adinyira, Presiding	Judge Faherty	Judge Chapman

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar