UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/016 (UNAT 1591)
Judgment No.: UNDT/2010/132
Date: 26 July 2010
Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: Víctor Rodríguez

WANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Timothy Lemay

Counsel for respondent:
Ingeborg Daamen, UNOV

Introduction

1. The applicant appealed to the former United Nations Administrative Tribunal (UNAT) against a decision not to grant him his overseas entitlements, in particular an education grant for his daughter and home leave for him and his family. The matter was transferred for decision to the United Nations Dispute Tribunal (UNDT) on 1 January 2010. Both the applicant and the respondent requested that the matter be dealt with on the papers as filed with the former UNAT without the need for an oral hearing.

2. The applicant requests the Tribunal to order that he:

> a) "Receive, and continue to receive during the course of his employment, full home leave and education grant entitlements as and from the date his service with UNOV began", or failing that
>
> b) "the payment of compensation in an amount at least equal to the full value of the entitlements so claimed until his date of retirement in December 2022, taking into account any increases in the value of such entitlements from time to time, plus interest".

The issues

3. The principal issues for consideration in this case are whether the decision to grant the applicant an exception concerning the place of home leave when he was employed at Bangkok was permanent and if the Secretary-General could lawfully reverse that decision.

Facts

4. The applicant was born in China and had Chinese citizenship until he relinquished it on 21 December 1989, when he acquired Austrian nationality. He also held German permanent residence status for a time.

5. He entered into the service of the United Nations between 1984 and 2001 holding a series of short-term and fixed-term appointments. His initial

appointment with the UN Secretariat was in May 2001 when he was assigned to work with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), Bangkok, first on a fixed-term appointment and since May 2003 on a permanent appointment. It was a condition of the applicant's recruitment that he would have to renounce his permanent residence status in Germany as the Human Resources Management Service (HRMS), ESCAP, stated that UN staff members cannot be permanent residents in a country other than the country of their nationality. The applicant complied with this condition.

6. At his request, on 15 January 2002, the Chief, HRMS, ESCAP, approved the designation of Shanghai, China, as his place of home leave.

7. In December 2003, the applicant was selected to the P-3 post, Interpreter, Conference Management Service (CMS), United Nations Office at Vienna (UNOV), and transferred subsequently, on 28 February 2004, from ESCAP to UNOV.

8. On 18 August 2003, before taking up the appointment in Austria, the applicant emailed the following two questions in connection with his transfer to UNOV to the Human Resources Officer (HRO) he was corresponding with:

> - My wife, daughter and I are all Chinese, but with Austrian nationality, and our home leave destination as specified in my permanent contract is Shanghai, China. Will we lose this entitlement after we move to Vienna?
>
> - Will I still be entitled to educational grant for my daughter in Vienna, whose mother tongue is Chinese? Currently I received both the educational grant and the Chinese mother tongue tuition reimbursement for my daughter.

9. On 11 September 2003, the HRO advised the applicant that he would need to obtain clarification from the Office of Human Resources Management (OHRM) at UN Headquarters regarding the first question of home leave and that he would contact the applicant as soon as they had received OHRM advice on this entitlement. As to the second question, the HRO quoted staff rule 103.20 (b) and stated: "As your country of home leave is China, you would continue to be eligible for education grant for your daughter while serving in Austria."

10. On 24 December 2003, the applicant wrote to the HRO asking confirmation of his entitlement to home leave in Shanghai and education grant for his daughter. The HRO replied on 30 December 2003 asserting, *inter alia*:

> Regarding your entitlements, as I mentioned in my previous message …, **you will be entitled to education grant** while serving in Austria since your **country of home leave is China**. I have not consulted yet with OHRM regarding your entitlement to home leave.

11. On 25 February 2004, the HRO requested clarification from OHRM. In his email he expressed his view that the applicant was entitled to the education grant while serving in Austria, but not to home leave.

12. The applicant took up his assignment with CMS/UNOV on 28 February 2004.

13. On 11 March 2004, the same HRO addressed an e-mail to the applicant which read:

> Further to our discussion, I wish to confirm that … you are entitled to education grant while serving in Austria.
>
> HRMS is still awaiting a reply from OHRM regarding your entitlement to home leave.

14. On 29 March 2004, OHRM advised HRMS, UNOV, that the Staff Rules precluded the applicant from both the education grant and home leave entitlement as the applicant had Austrian nationality and resided in Austria. This information was not immediately conveyed to the applicant.

15. Without that knowledge, the applicant enrolled his daughter at the Vienna International School in April 2004.

16. A Personal Action (PA) specifying that the applicant was not entitled to international benefits was issued on 14 May 2004 and transmitted to the applicant. On 8 July 2004, HRMS verbally informed him of the decision.

17. On 9 July 2004, the applicant requested a review of OHRM decision; he noted that receiving the education grant would "alleviate the hardship caused by [his] daughter's disability".

18. On 18 August 2004, the applicant submitted a claim for the education grant for the period April-June 2004. The latter was granted in accordance with staff rule 103.20 (c), which provides:

> If a staff member eligible under paragraph (b) is reassigned to a duty station within his or her home country in the course of a school year, he or she may receive the education grant for the balance of that school year.

19. However, the applicant's further request for an advance on the education grant for the academic year 2004/2005 was denied on the grounds that because he was then serving in the country of his nationality, he was not entitled to the education grant.

20. On 31 January 2005, OHRM confirmed the decision that the applicant was not eligible for education grant and home leave under the UN Staff Regulations and Rules. The possibility for his daughter to receive a special education grant for children with a disability under staff rule 103.20 (k) was raised, but the Medical Service in Vienna informed the applicant that the medical condition of his daughter was not such as to allow him to benefit of this special grant.

21. A PA was issued on 18 August 2005 which retroactively recorded the change in place of home leave to Vienna, effective 28 February 2004.

22. On 23 January 2006, the applicant inquired whether he would be entitled to international benefits if he were to acquire German or Taiwanese nationality. After consultation with OHRM, HRMS advised the applicant that when a staff member has more than one nationality, the one taken into account for the purpose of the UN Staff Regulations and Rules is that with which the staff member is the most closely associated.

23. On 21 February 2006, the applicant asked the Chief, HRMS, to conduct a second review of the decision by OHRM not to grant the international benefits.

24. On 3 April 2006, OHRM responded to the Chief, HRMS, that there was no legal ground which would qualify the applicant for education grant while serving in his country of nationality. It further stated that although ESCAP had determined Shanghai as place of home leave, this determination was not made in accordance with the rules, since it was indicated in the applicant's PHP that his

nationality was Austrian. Finally, it added: "Thus, the decision to determine Austria as the country of home leave is a correction to an erroneous decision in accordance with the Rules."

25. In spite of this, OHRM recognized that the applicant had been "advised (erroneously) by an HRO in UNOV that his entitlement to the education grant, which he received in Bangkok, would continue in Vienna", and that the applicant "counted on the grant when he enrolled his daughter at the private school in Vienna". Because of this, OHRM was ready to grant the applicant a one-time entitlement for the school year 2005/2006 only, as an exception to the rules.

26. On 6 April 2006, the applicant asked why he had been granted payment only for the school year 2005/2006 and pointed out that UNOV had stopped paying the education grant at the beginning of the academic year 2004/2005.

27. On 7 April 2006, OHRM explained to the applicant that the fact that his daughter had attended school in Vienna in 2004/2005 had been overlooked. On the same day, OHRM authorized HRMS, UNOV, to pay the applicant the education grant for the school year 2004/2005 provided that the requirements for making the claim were made.

28. By letter dated 1 June 2006, the applicant requested the Secretary-General to review the administrative decision not to grant him his overseas entitlements, in particular education grant for his daughter and home leave for his family. This request was rejected on 26 June 2006, on the grounds that "the record showe[d] that the decision not to grant [him] education grant and home leave entitlements was made in accordance with the provisions of the relevant rules of the Organization. Specifically, the decision was proper, having been based on the nationality [he] had at the time of the appointment."

29. On 26 July 2006, the applicant submitted an appeal to the Vienna Joint Appeals Board (JAB) and requested conciliation under the auspices of the JAB, This occurred but was not successful.

30. In response to the request for review, the Officer-in-Charge, HRMS, ESCAP, explained that the decision to designate Shanghai as the applicant's place of home leave made four years earlier was based on the fact that "all [the

applicant's] family roots and connections were in Shanghai and [he] didn't have a home or a single relative to return to Vienna, Austria"; second, that HRMS, ESCAP, took into account the delegation of the authority to make such decision, as per ST/AI/234/Rev.1, to the Chief of ESCAP, who, in turn, delegated to the Chief, HRMS; third, that the applicant's permanent address indicated in his PHP was Shanghai, China, and the address at the time of his recruitment was Stuttgart, Germany; fourth, that "it could be inferred then that [the applicant] had met the three conditions set out in staff rule 105.3 (d) (iii)", repeated in section 7 of ST/AI/367, i.e.,

- that he had maintained normal residence in Shanghai for a prolonged period preceding his appointment with ESCAP (by virtue of being his permanent address);
- that he continued to have close family and personal ties in Shanghai (as confirmed in the applicant's e-mail of 14 January 2002);
- that the applicant's taking home leave in Shanghai would not be inconsistent with the purpose and intent of staff regulation 5.3.

31. In a letter dated 10 December 2007, the Secretary-General advised that he had decided to take no further action on the matter.

32. The applicant brought his case before the United Nations Administrative Tribunal (UNAT) in April 2008. Upon the abolishment of UNAT, this case was transferred to UNDT as of 1 January 2010.

Parties' contentions

33. The applicant's principal contentions are:

a. Staff rule 105.3 (d) (iii), as well as sections 6 and 7 of ST/AI/367, provide, as an exception to staff rule 103.20, that in exceptional and compelling circumstances, the Secretary-General may authorize a country other than the country of nationality as the home leave country, if the conditions set out in the same provision are met;

b. ESCAP designated Shanghai as the applicant's home leave destination in strict accordance with the UN Staff Regulations and Rules, taking into account all the relevant considerations such as his permanent residence in Shanghai and the temporary character of his residence in Vienna and Geneva. This change was permanent, in accordance with section 7 of ST/AI/367;

c. As a result, in his case, a country other than the country of nationality is recognized as his "country of home leave", and is thereby deemed his "home country" for the purposes of applying staff rule 103.20. Any other interpretation would render staff rule 105.3 (d) nugatory;

d. The applicant is an internationally recruited staff member who resides and serves at a duty station outside his authorized home country, i.e. China; he is entitled to education grant while serving in Vienna under staff rule 103.20 (b), which establishes that "a staff member who is regarded as an international recruit under rule 104.7, and who resides and serves at a duty station which is outside his or her home country, shall be entitled to an education grant in respect of each child…";

e. It was expressly held out to him on several occasions that his entitlements "fell within the rules". He was led to believe (and believed in good faith) that in accepting the employment with UNOV, he would receive the education grant. As a result, he accepted the post and transferred his family to Vienna in full reliance on that representation;

f. By not paying the education grant that he was promised, the Administration is purporting to unilaterally alter the terms of its contract with him. It is, however, "elementary in the law of employment contracts that any risk of loss occasioned by holding out that a benefit is available should be borne by the party so holding out, the employer, and not the staff member";

g. "When one party makes a representation to another, which induces the other to alter his circumstances to his detriment, an estoppel is raised, the effect of which is that the person who made the representation is prevented or estopped from denying the truth of the representation."

34. The respondent's principal contentions are:

a. The applicant is not entitled to home leave or education grant.

b. In relation to home leave, staff regulation 5.3 stipulates that:

> A staff member whose home country is either the country of his or her official duty station or the country of his or her normal residence while in United Nations service shall not be eligible for home leave.

c. Staff members regarded as international recruits under staff rule 104.7 (a), and who are not excluded from home leave under staff rule 104.7 (c), who reside and serve outside their home country shall be eligible for home leave as far as the staff member continues to reside in a country other that he or she is a national. The Staff Rules define "home country" as the country of nationality. Therefore, since the applicant was indisputably serving in his country of nationality, the entitlement to home leave does not apply. The entitlement to home leave is precluded by the Staff Regulations and Rules, in accordance with General Assembly resolutions and as stated in UNAT Judgement No. 703, *Larsen* (1995);

d. Additionally, the receipt by the applicant of home leave benefits from ESCAP while serving in Bangkok does not create a right to home leave while serving in his country of nationality;

e. Staff rule 103.20 (b) spells out the conditions that have to be met in order for a staff member to be entitled to education grant. Since the applicant resides and serves at a duty station which is not outside his home country, that is, Austria, the applicant does not satisfy the condition set out in staff rule 103.20 (b). This is in line with the

pronouncements of the General Assembly about the education grant;

f. The Secretary-General has already expressed his regret about the incorrect information that the applicant was given about his entitlements. The applicant has been afforded adequate, equitable and appropriate remedy for any administrative error committed by exceptionally agreeing to settle the applicant's education grant claim for academic years 2004/2005 and 2005/2006, "in a spirit of goodwill and for humanitarian reasons, albeit the applicant was not entitled to it";

g. In the light of these factors, the applicant's request for full payment of both said entitlements as and from the date of this service with UNOV is without merit;

h. Although the applicant was informed that he would not be entitled to education grant in July 2004, he did have the option to enroll his daughter in a different educational institution prior to the commencement of the school year 2004/2005. He chose that he would stay in the same school, incurring higher costs;

i. The respondent submits that the applicant's request for "general damages and costs" has no basis as there has been "no violation of the applicant's rights", and "no actual or consequential damage" has been suffered by the applicant as a result of the respondent's actions;

j. As to the claim for costs of the proceeding, the respondent submits that no exceptional causes justifying the award of costs exist.

Discussion

35. The applicant relies on section 7 of ST/AI/367 to argue that the decision to grant him an exception concerning the place of his home leave was permanent. Section 7 refers to a permanent change in the country of home leave but that section must be read in its context:

> Change of country of home leave
>
> 6. In accordance with staff rule 105.3 (d), the country of home leave shall be the country of the staff member's nationality. However, in exceptional and compelling circumstances, the Secretary-General may authorize a country other than the country of nationality as the home leave country, as detailed below.
>
> 7. For a permanent change in the country of home leave to be authorized, the conditions set out in staff rule 105.3 (d) (iii) a must be met, i.e., the staff member must satisfy the Secretary-General:
>
> (a) That he or she maintained normal residence in such other country for a prolonged period preceding his or her appointment;
>
> (b) That the staff member continues to have close family and personal ties in that country;
>
> (c) That the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3.
>
> When such a change is authorized, the Organization shall bear the travel and transportation expenses to the newly designated home country.

36. I note that while the change of the country of home leave referred to in section 7 of ST/AI/367 is stated to be permanent, it is not unconditional. It is subject to the Secretary-General being satisfied of the three matters specified in (a) to (c). This includes the requirement of consistency with the purposes and intent of staff regulation 5.3. That regulation materially reads: "A staff member whose home country is either the country of his or her official duty station or the country of his or her normal residence while in UN service shall not be eligible for home leave."

37. The purpose and intent of staff regulations should be able to be ascertained from the plain meaning of the words in those regulations. In the case of ambiguity of the meaning of the words, the resolutions of the General Assembly such as those referred to by the respondent may be of assistance in the interpretation of the purpose and intent.

38. The starting point in this case is the basic rule in staff rule 105.3 concerning home leave. It gives internationally recruited staff the opportunity to take home leave to visit their home country at UN expense. Rule 105.3 (d) provides that the country of home leave shall be the country of the staff member's

nationality. This means that a staff member working away from the country of his or her nationality is entitled to home leave to the country of his or her nationality. The logical corollary to this is that if a staff member is residing in his or her country of nationality, then there is no entitlement to home leave.

39. There is an unfortunate inconsistency of language between the applicable staff regulation and staff rule. Staff regulation 5.3 refers to "home country" rather than "country of nationality" as in staff rule 105.3.

40. In Judgement No. 703, *Larsen* (1995), the former UNAT found that staff rule 105.3 (b) (i) clearly excludes from the home leave benefit those staff members who reside in the country of which they are nationals. It also held that it is an entirely reasonable interpretation to equate the term "home country" in staff regulation 5.3 to the expression "country of nationality" in staff rule 105.3 (b) (i).

41. I respectfully agree with the interpretation of the former UNAT. I note also that this interpretation is consistent with the spirit and intent of General Assembly resolution 470-V, paragraph 4, which reads: "[a] staff member whose home country is the country of his official duty station or who continues to reside in his country while performing his official duties shall not be eligible for home leave." It is clear that the General Assembly wished to avoid precisely the situation that has arisen in this case.

42. When a person has chosen to change their nationality, it is entirely reasonable to expect that person to accept, for the purposes of the UN Regulations and Rules, that their country of nationality is also their home country. If this were not so, then a staff member would have the dual advantages of nationality of one country as well as the entitlements to home country leave. This is not in accord with the General Assembly resolution or the intent and purpose of the relevant rules.

43. The clear purpose and intent of staff regulation 5.3 is to restrict the entitlement to home leave to those who are serving the UN outside of their home country and by implication their country of nationality.

44. Was the designation of the applicant's place of home leave as China a decision that could be later changed or was it a permanent decision?

45. Staff rule 105.3 (d) (iii), as well as sections 6 and 7 of ST/AI/367, provide, as an exception to staff rule 105.3 (d), that in exceptional and compelling circumstances, the Secretary-General may authorize a country other than the country of nationality as the home leave country, if the conditions set out in the same provision are met.

46. Staff rule 105.3 does not contain an express provision for changing the original home country from the one designated as an exception under staff rule 105.3 (d) when circumstances change, but there are two rules from which it may be reasonably inferred that the reference in section 6 to "permanent" change should not as a matter of policy be interpreted to mean that that decision can never be changed.

47. Rule 104.7 (c) deals with a similar although not identical situation to that of the applicant. It contemplates a situation where a staff member changes their residential status so as to become a permanent resident of a country other than that of his or her nationality. They may thereby lose the entitlements and allowances due to that staff member as an international recruit. The change of status may result in the relinquishing of those benefits.

48. Rule 104.8 concerns the issue of dual nationality. The Secretary-General has the discretion to make a decision about which of more than one nationality should be taken into account for the purposes of the rules. Each of these rules indicates that in the international environment of the UN, the nationality and country of permanent residence of staff members may change and that this can impact on their entitlements under the applicable rules.

49. The ability of the Secretary-General to revoke a previous exception does not render rule 105.3 (d) nugatory, as submitted by the applicant. The Secretary-General continues to have the discretion to make exceptions, but is bound by the conditions in regulation 5.3. It would be contrary to the purpose and intent of the regulations that such an exception should be permanent and immutable. Staff members are entitled to enjoy entitlements which have been acquired by the application of an exception, but only for as long as the circumstances meet the conditions of the exception. If those circumstances materially change, the staff member may lose those acquired rights.

50. In the present case, staff rule 105.3 (d) requires the staff member to satisfy the Secretary-General that he or she has "maintained normal residence in [the] other country for a long period preceding his or her appointment". These words point to the ongoing nature of the assessment, as does staff rule 105.3 (b), which provides that a staff member, to be eligible for home leave, must "[continue] to reside in a country other than that of which he or she is a national" while performing his or her official duties.

51. The fact of the applicant moving to his country of nationality was good reason for the Secretary-General to reassess his eligibility for the exception. While he was serving in Bangkok the applicant was not residing in his country of nationality. When he was recruited to Austria, his official duty station was also the country of his nationality and the important condition of consistency with staff regulation 5.3 was no longer met.

52. The implications of this change of circumstances are that once he began service at the Austrian duty station, he was no longer entitled to home leave or to the education grant. Staff rule 103.20 (b) which governs the education grant also requires that: "(i) The staff member is regarded as an international recruit under rule 104.7 and resides and serves at a duty station which is outside his or her home country."

53. In its resolution 49/241, the General Assembly reiterated its decision that "the repatriation grant and other expatriate benefits are limited to staff who both work and reside in a country other than their home country". It explicitly included the education grant in its discussions of expatriate benefits. This point was discussed by the former UNAT in Judgement No. 781, *Shaw et al.* (1996), where it was held that "[s]taff regulation 3.2 (a) unequivocally excludes from the education grant benefit staff members who reside in the country of which they are nationals." The former UNAT further stated that "[t]he intention of the General Assembly has been made clear in such a manner as not to be in doubt; the Assembly has systematically and authoritatively pronounced the grant as related to the fact of expatriation."

54. I find that the Secretary-General through his Administration was entitled to refuse the applicant's claim for a continuation of the exception to his place of home leave and to reject his application for the education grant.

55. The respondent has consistently acknowledged that it made an error in advising the applicant that he was entitled to the education grant, and that he relied on that incorrect information when choosing to enrol his child at the International School of Vienna. The outcome of that acceptance was that the applicant received two years worth of the education grant to which he would not otherwise have been entitled. That is adequate compensation for the error made and the consequences to the applicant.

Conclusion

56. The Tribunal DECIDES:

1. An exception granted under staff rule 105.3 (d) to authorize that a country other than the country of nationality as the home country is not permanent. It may be changed if the circumstances warrant it;
2. The Secretary-General was entitled to refuse the applicant's requests for home leave and education grant upon taking up duty in UNOV in Vienna because he was a national of and residing in Austria;
3. The respondent has adequately compensated the applicant for the errors which occurred in his case. He is not entitled to any further compensation;
4. The application is dismissed.

(*Signed*)

Judge Coral Shaw

Dated this 26th day of July 2010

Entered in the Register on this 26th day of July 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva