



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos: UNDT/GVA/2012/034
UNDT/GVA/2012/046
Judgment No.: UNDT/2012/136
Date: 11 September 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

RAHMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN EX PARTE
MOTION FOR RECUSAL**

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
HRLU/UNOG

Introduction

1. By his application of 13 April 2012, the Applicant contests the decision of the Deputy Secretary-General to reassign him from his temporary position in the Office for Partnerships of the United Nations Conference on Trade and Development (UNCTAD) in New York back to his former position in UNCTAD in Geneva.

2. Due to technical difficulties, the Geneva Registry of the United Nations Dispute Tribunal (“the Tribunal”) could only acknowledge receipt of the application on 4 May 2012. The application was then registered under Case No. UNDT/GVA/2012/046.

3. By his subsequent application of 16 April 2012, the Applicant contests the decision not to select him for the position of the Director of the Division on Africa, within the Least Developed Countries and Special Programmes of UNCTAD. This application was registered under Case No. UNDT/GVA/2012/034.

Facts

4. On 17 May 2012, the Applicant filed a motion requesting that Case No. UNDT/GVA/2012/046 be transferred to the New York Registry. He explained that he had originally filed his case with the New York Registry, that all of the decision makers and potential witnesses in the case were located there and that his Counsel was also based in the United States.

5. By Order No. 097 (GVA/2012), issued on 22 May 2012, the Tribunal asked the Applicant to indicate whether a change of venue was also sought in relation to Case No. UNDT/GVA/2012/034.

6. On 23 May 2012, the Respondent filed a motion objecting to the change of venue of Case No. UNDT/GVA/2012/046, alleging that both cases were thematically linked; that potential witnesses in Case No. UNDT/GVA/2012/034

were located in Geneva, and that time and resources would be wasted as a result of the requested transfer.

7. Also on 23 May 2012, the Applicant filed a motion for change of venue in relation to Case No. UNDT/GVA/2012/034, reiterating that his duty station at the time of the contested decision was New York and emphasising that both cases are closely related.

8. On 1 June 2012, the Tribunal issued Order No. 103 (GVA/2012), outlining that “it is in the interests of expediency that both cases be decided in Geneva”, as well as rejecting the Applicant’s motions for change of venue pursuant to arts. 6.2 and 19 of the Tribunal’s Rules of Procedure.

9. On 6 August 2012, the Applicant filed an *ex parte* Motion for Recusal under art. 28(2) of the Tribunal’s Rules of Procedure, requesting the recusal of Judge Jean-François Cousin from these two cases.

10. The two cases concern the consequences of the Applicant’s June 2009 allegation of serious wrongdoing against Kobsak Chutikul, a senior advisor to the Secretary-General of UNCTAD, Supachai Panitchpakdi. At the time of the allegations the latter, a former Thai cabinet minister, was running for re-election. Chutikul, also a former Thai politician and a failed mayoral candidate of Bangkok, was managing Panitchpakdi’s political campaign.

11. The Applicant reported wrongdoing by Chutikul to the Office of Internal Oversight Services (OIOS) and subsequently filed a complaint to the Ethics Office against Supachai Panitchpakdi. The Ethics Office found a *prima facie* case of retaliation, which they later confirmed following a further review by OIOS.

Applicant’s submissions

12. The Applicant submits that as Judge Cousin served as a paid advisor to the Supreme Administrative Court of Thailand between 2002 and 2003, his involvement in these cases “could be seen as a potential conflict [of interest]”.

13. The Applicant further submits that “[d]uring this time period, there were close connections between the Thai courts and the Government and Thai courts were perceived as being heavily influenced by political pressure.” He substantiates this claim with a February 2002 article from the Economist, a 2010 admittance by a retiring President of the Thai Supreme Administrative Court as to the existence and extent of political interference in the Thai judicial system and an April 2012 Bangkok Post article alleging Thai political institutions’ scrutiny of Thai courts.

14. In 2002 Supachai Panitchpakdi was the Deputy Prime Minister of Thailand. Kobsak Chutikul was a member of the Thai Parliament and Vice-Chairman of the Thai House Foreign Relations Committee within the same timeframe. As a result, the Applicant claims that the nexus between Judge Cousin’s “prior professional responsibilities and two of the principals of the case would appear to fall within the purview of Article 27(2)(a) and (c) and indirectly Article 27(2)(b) on conflict of interest.”

Judge Cousin’s response

15. On 21 August 2012, Judge Cousin responded to the Applicant’s Motion for Recusal. In his letter to the President of the Tribunal, Judge Cousin stressed that he does not directly or indirectly know the two Thai nationals implicated in these cases, and that he has no vested interest in the outcomes of the cases.

16. The honourable Judge went on to say that he had “no further comment to make other than to consider the motion as a crude attempt to circumvent Order No. 103 (GVA/2012)”.

Consideration

17. Article 27 of the Tribunal’s Rules of Procedure reads as follows:

Conflict of interest

1. The term “conflict of interest” means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her.

2. A conflict of interest arises where a case assigned to a judge involves any of the following:

(a) A person with whom the judge has a personal, familiar or professional relationship;

(b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;

(c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge’s participation in the adjudication of the matter would be inappropriate.

18. It is trite law and a well settled principle that any person whose rights have to be determined is entitled to a fair hearing in public before an independent and impartial tribunal. This principle is embodied in a number of international instruments on human rights.¹

19. The Tribunal endorses what it said in *Campos*:²

It is well settled that impartiality is determined according to two tests, subjective and objective. The European Court of Human Rights held that “*the existence of impartiality for the purpose of Article 6-1 must be determined according to a subjective test, that is on the basis of the personal conviction of the judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.*”³

20. On the objective test the European Court observed:

Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a

¹ See for example Article 10 of the Universal Declaration of Human Rights; Article 6.1 of the European Convention on Human Rights; Article 14 of the International Covenant on Civil and Political Rights.

² *Campos* UNDT/2009/005.

³ *Saraiva v Portugal*, Judgment of 22 April 1994, Series A No. 286-B, p.38, paragraph 33.

certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public.⁴

21. The European Court further stated that “*what is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified*”.⁵

Conclusions

22. The Tribunal would refer to the matter of Arbitration between The Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland.⁶ In that matter, Mauritius sought to challenge one of the arbitrators chosen by the United Kingdom government on the ground that he had previously served as an adviser to the British government and had on one occasion acted in an advisory capacity as a member of a Board to interview candidates for the post of Legal Adviser to the Foreign and Commonwealth Office.

23. The Arbitral Tribunal rejected the request for the recusal of the arbitrator. On the issue of an arbitrator having previously held a senior position in government or having acted as counsel before being nominated a judge or arbitrator, the Arbitral Tribunal observed that it was not aware of any case under the Law of the Sea Convention where such a judge or arbitrator had been successfully challenged.⁷ The Arbitral Tribunal also referred to the *MOX Plant case*⁸ where a person had served as arbitrator although he had previously held the position of Legal Adviser at the Foreign and Commonwealth Office. On the issue of the arbitrator having acted in an advisory capacity on the Board of interview, the Arbitral Tribunal held that such a limited activity, which did not involve his advice on legal issues, “is not the kind that would give rise to justifiable doubts as

⁴ *Hauschildt v Denmark*, judgment of 24 May 1989, Series A No. 154, p.21, paragraph 48

⁵ *Nortier v The Netherlands*, 23 August 1993, paragraph 33.

⁶ Decision of The Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea, 30 November 2011.

⁷ Paragraph 174.

⁸ *MOX Plant Case (Ireland v United Kingdom)*, Press Release of 2 June 2003, released by the Permanent Court of Arbitration.

to his impartiality and independence concerning the case to be decided by the Arbitral Tribunal”.⁹

24. The request for the recusal of Judge Cousin is based on the mere fact that he had served as an adviser at the Court in Thailand and nothing more. The Applicant has made general and vague averments of an alleged professional relationship that may have existed between Judge Cousin and the people who were based in the Court in Thailand, and in Thai politics, at the material time.

25. The Tribunal is not prepared and does not give any credence to those concerns of the Applicant that the position that Judge Cousin occupied in Thailand several years ago as an adviser would make it objectively impossible to deal with the case. On the subjective test there is equally no factual justification to conclude that the judge would harbor any personal bias against the Applicant.

26. The request for recusal is therefore rejected.

(Signed)

Judge Vinod Boolell

Dated this 11th day of September 2012

Entered in the Register on this 11th day of September 2012

(Signed)

Legal Officer for
Jean-Pelé Fomété, Registrar, Nairobi

⁹ Paragraph 183.