UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/63
Judgment No.: UNDT/2015/090
Date: 24 September 2015
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

BRESSON-ONDIEKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Marisa Maclennan, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a P-5 level staff member with the Department for General Assembly and Conference Management ("DGACM") in New York, contests the refusal of the Office of Human Resources Management ("OHRM") of the Department of Management to recognize her niece ("Ms. N") as a dependent child.

2. In her application dated 21 October 2014, the Applicant submits that the Respondent misinterpreted and misapplied the applicable rules. Further, she submits that the Administration gave her a legitimate expectation that her request would be granted once she provided the documents requested by OHRM. The Applicant further submits that the denial of her request was contrary to the spirit of the Organization's policy on recognition of dependency status, as staff rule 3.6(a)(ii) intends to cover cases where the child is factually the equivalent of a natural, step or adopted child, but cannot be legally recognized as such, which is exactly the Applicant's case. The Applicant requests that the decision be rescinded and reversed.

3. In his reply dated 21 November 2014, the Respondent submits that the Organization correctly interpreted and applied its rules. The Republic of Seychelles—the country of nationality of the Applicant and her niece—has in place a statutory provision for adoption, however, the Applicant's niece is over 18 years old and therefore cannot be adopted by the Applicant under the laws of Seychelles. Therefore, she cannot be deemed to be the Applicant's dependent child under the relevant rules. The Respondent also submits that the Applicant failed to demonstrate that she has "legal responsibility" for her niece in accordance with staff rule 3.6(a)(ii)(c), namely that she may be compelled by law to provide support for Ms. N. The Respondent submits that the Applicant's claim of legitimate expectation is unfounded as the Administration merely requested documentation to enable

a determination of the dependency status; there was no express commitment in writing to the Applicant that her niece would be recognized as a dependent child. The Respondent submits that the Applicant's claims are without merit and should be dismissed.

4. By Order No. 11 (NY/2015), dated 22 January 2015, the Tribunal granted leave to the Applicant to file a submission addressing the issues raised by the Respondent. The Tribunal also requested the parties to state whether they considered that a hearing was necessary.

5. On 4 February 2015, the parties filed their submissions pursuant to Order No. 11 (NY/2015). The Applicant requested an oral hearing in this matter whereas the Respondent requested the Tribunal to determine the matter on the documents before it. The Applicant submitted that a hearing would enable a full and just consideration of the facts, law and merits of the case. The Applicant indicated that she and her husband would want to testify, particularly regarding their financial and parental responsibility over Ms. N. She also requested leave to file "additional supporting documentation relating to [her] legal responsibility for Ms. [N]". The Respondent submitted that there was no need for a hearing as the facts are not in dispute.

6. By Order No. 218 (NY/2015), dated 8 September 2015, the Tribunal granted leave for the Applicant to file a submission with the "additional supporting documentation relating to the Applicant's legal responsibility for Ms. [N]" and for the Respondent to file and serve a response to the Applicant's submission. On 15 September 2015, the Applicant filed the documentation relied on, explaining also that

> [b]ecause the Applicant's responsibility towards … Ms. N and finances are shared with her husband …, his name appears on many of the documents. In order to support this connection the Applicant respectfully submits their marriage license.

7. On 18 September 2015, the Respondent filed a submission in response submitting that the additional documents filed by the Applicant do not establish that the Applicant has legal responsibility for Ms. N, and therefore support the contention that Ms. N cannot be recognized as a dependent child under staff rule 3.6(a). The Respondent submitted further that a letter appended by the Applicant from the Government of Seychelles dated 16 February 2015 not only acknowledges that Ms. N cannot be recognized as a dependent under the Staff Regulations and Rules, but also confirms that the Applicant does not have legal responsibility for Ms. N under the law of Seychelles.

8. In light of the record before the Tribunal, including the latest documentation filed by the Applicant, the Tribunal considered that this matter could be decided on the papers without the need for a hearing.

Background

9. It is a matter of record that Ms. N's parents divorced in September 1997, with the High Court of Zimbabwe granting sole custody to the mother (the Applicant's sister) and ordering that the biological father "pay $500 per month by way of maintenance for the minor until she attains the age of 18 or becomes self-supporting whichever occurs first".

10. In May 2013, the Applicant's sister died unexpectedly, leaving behind one child, Ms. N, who had been living with her mother in Zimbabwe. Ms. N was born in in 1994 and was 19 years old when her mother passed away.

11. Sometime in 2013, presumably after the death of her mother, Ms. N moved from Zimbabwe to Nairobi, Kenya, to reside with her paternal uncle.

12. Five years prior to these events, sometime in 2008, Ms. N was granted Seychelles citizenship. The Applicant is also a national of Seychelles. After Ms. N's

mother passed away in May 2013, the Applicant and her spouse lodged an application with the Seychelles Supreme Court to adopt Ms. N.

13. On 6 June 2013, Ms. N's father signed an affidavit before a notary public stating that he had no objection to the offer by the Applicant and her spouse "to take over the responsibility of providing for all the financial needs of" his daughter, Ms. N.

14. Sometime in June 2013, the Applicant contacted OHRM, requesting that Ms. N be considered as her dependent child.

15. In an email dated 3 July 2013, Ms. AT of the Learning, Development and HR Services, OHRM, advised the Applicant as follows (emphasis in original):

> In order to have your niece added as your UN recognized dependent, the following documentation is required:
>
> – An official letter from the Seychelles government advising that there is no statutory provision for adoption for children age 18 or older;
>
> – Proof of full-time school attendance and/or high school diploma;
>
> – Proof of [Ms. N]'s acceptance to an educational institution at the duty station;
>
> – Proof of financial support from you directly to [Ms. N], i.e. wire transfers, cancelled checks or money order receipts. You cannot attest to sending cash.
>
> – The original or true certified copies of your sister's death certificate, [Ms. N]'s birth certificate & passport, your sister's divorce decree and the affidavit from [Ms. N]'s father.

16. Approximately nine months later, on 9 April 2014, the Applicant provided OHRM with a letter from the Ministry of Social Affairs, Community Development and Sports, Republic of Seychelles. The letter explained that Ms. N was residing in Nairobi, Kenya, with her paternal uncle. It also stated that the Applicant and her spouse had lodged an application to adopt Ms. N at the Seychelles Supreme Court so

that she could reside with them in the United States, although "[t]he Supreme Court may not entertain the adoption application when it is heard next month". The letter stated *inter alia* (emphasis added):

> The Seychelles law, *Children Act provides for adoption of a child below the age of 18 years and the child must be resident in Seychelles*. The Supreme Court may not entertain the adoption application when it is heard next month.
>
> …
>
> It is in this context that the Social Services of Seychelles, wanting what is in the best interest of [Ms. N], is rendering its support for the adoption in the States.

17. By email dated 30 May 2014, the Applicant was notified of OHRM's denial of her request for recognition of Ms. N as her dependent child on the ground that Ms. N did not meet the criteria for being recognized as a child/dependent child under the Staff Regulations and Rules. Reference was made to staff rule 3.6(a)(ii) and sec. 3.2(a) of ST/AI/2011/5 (Dependency status and dependency benefits). OHRM also referred to "prior advice given by [OHRM], where adoption is allowed in a country but restricted due to factors unique to the individuals concerned (i.e. being older than 18 years old), the national law prevails".

18. On 25 July 2014, the Applicant requested management evaluation of "the decision to deny recognition of her 'non-adopted' child as a dependent".

19. On 23 September 2014, the Applicant was advised of the Secretary-General's decision to uphold the contested decision.

20. In September 2014, Ms. N. enrolled in a college in New York. The Applicant submits that she is covering Ms. N's entire tuition and related costs (amounting to approximately USD27,000 per year), as well as her medical insurance. It is common cause that Ms. N has not been adopted by the Applicant or her spouse.

Applicable law

21. Staff rule 3.6 (Dependency allowances) states:

> (a) For the purposes of the Staff Regulations and Staff Rules:
>
> ...
>
> (ii) A "child" is any of the following children for whom the staff member provides main and continuing support:
>
> a. A staff member's natural or legally adopted child; or
>
> b. A staff member's stepchild who is residing with the staff member; or
>
> c. A child who cannot be legally adopted, for whom the staff member has legal responsibility and who is residing with the staff member.
>
> (iii) A "dependent child" is a child for whom the staff member provides main and continuing support and who meets one of the following criteria:
>
> a. The child is under the age of 18 years;
>
> b. The child is between the ages of 18 and 21 years and attends university or its equivalent full-time; the requirement of residing with the staff member does not apply in this case;
>
> c. The child is of any age and has a disability that is permanent or for a period that is expected to be long-term that prevents substantial gainful employment;

22. ST/AI/2011/5 (Dependency status and dependency benefits) states:

> *Entitlement to dependency benefits*
>
> 1.5 Eligible staff members shall be entitled to receive dependency benefits for those dependants whose dependency status has been recognized, provided the conditions of the present instruction are met.
>
> …
>
> *Dependency status of a child or children*
>
> 3.1 In accordance with staff rule 3.6(b), a natural child, a legally adopted child, or a stepchild, provided the stepchild resides with the staff member, shall be recognized as a dependent child when the following conditions are met:

(a) The child is under 18 years of age or, if in full-time attendance at school, university or a similar educational institution, under 21 years of age; and

(b) The staff member establishes that he or she provides main and continuing support to the child. This shall normally be done by the staff member's submitting a certification to that effect. Such certification must be supported by documentary evidence satisfactory to the Secretary-General, if a child:

(i) Does not reside with the staff member;

(ii) Is married; or

(iii) Is recognized as a dependant under the special conditions defined in section 3.2.

3.2 Other children who fulfil the age, school attendance and support requirements specified in section 3.1 may be recognized as dependent children under staff rule 3.6(b) when all the following requirements are met:

(a) Legal adoption is not possible because there is no statutory provision for adoption or any prescribed court procedure for formal recognition of customary or de facto adoption in the staff member's home country or country of permanent residence;

(b) The child resides with the staff member;

(c) The staff member can be regarded as having established a parental relationship with the child;

(d) The child is not a brother or sister of the staff member; and

(e) The number of children for which dependency benefits are claimed under the present subsection does not exceed three.

3.3 For the purposes of section 3 of the present instruction, the residency requirement shall be deemed fulfilled when a dependent child attends a boarding school or another educational institution under similar arrangement.

Consideration

23. The main issue in the present case is whether the Applicant's niece, Ms. N, may be considered a dependent child pursuant to staff rule 3.6 (Dependency allowances) and ST/AI/2011/5 (Dependency status and dependency benefits) for

the purpose of seeking related benefits and entitlements. This determination is a question of interpretation and not one of exercise of discretion. This case therefore can be decided on the question of construction and interpretation of the relevant legal provisions.

Whether Ms. N is a "child" within the meaning of staff rule 3.6

24. Staff rule 3.6(a)(ii) (Dependency allowances) defines the term "child" as follows:

> (ii) A "child" is any of the following children for whom the staff member provides main and continuing support:
>
> a. A staff member's natural or legally adopted child; or
>
> b. A staff member's stepchild who is residing with the staff member; or
>
> c. A child who cannot be legally adopted, for whom the staff member has legal responsibility and who is residing with the staff member.

25. It is not in dispute that Ms. N is not the Applicant's natural child, adopted child or stepchild. Therefore, the issue is whether Ms. N falls under the final category of staff rule 3.6(a)(ii)(c), i.e., a child who cannot be legally adopted and for whom the Applicant has legal responsibility. (The Tribunal need not concentrate on the element of joint residency as Ms. N is apparently enrolled in college, so the joint residency requirement would not apply.)

26. Ms. N does not fit the description of a child as she had reached the age of majority at the time of the adoption application, both under the Seychelles law and under general international standards. See Seychelles' Children Act (1982, with subsequent amendments), defining "child as "a person under 18 years of age"; Seychelles' Age of Majority Act (1980), stating that "[a] person shall for all purposes attain the age of majority on the date he attains the age of 18 years"; and art. 1 of the 1990 UN Convention on the Rights of the Child (ratified by the Seychelles on

7 September 1990), stating that "[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

Meaning of the phrase "legal adoption is not possible"

27. The Respondent contends that since Seychelles has a statutory provision for adoption, the Applicant's niece cannot be regarded as a "child who cannot be legally adopted" within the meaning of the relevant rule.

28. The phrase "[a] child who cannot be legally adopted" is defined in the relevant administrative instruction (see sec. 3.2(a) of ST/AI/2011/5). The administrative instruction sets out the situations where "legal adoption is not possible", namely where "there is no statutory provision for adoption or any prescribed court procedure for formal recognition of customary or de facto adoption in the staff member's home country or country of permanent residence".

29. As the Appeals Tribunal stated in *Scott* 2012-UNAT-225,

> [w]hen the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

30. There is to my mind no ambiguity in the applicable instruments, and their plain reading is that the phrase "a child who cannot be legally adopted" is applicable only in the absence of any adoption system whatsoever in the country, be it in the civil courts or customary courts. In Judgment No. 1075, *El-Zohairy* (2002), the United Nations Administrative Tribunal examined a similar provision in a previous administrative issuance in finding that legal adoption was not possible as

the applicant's national and religious laws did not contemplate the possibility of adoption at all. The Administrative Tribunal held that the staff member was entitled to receive dependency benefits, having been legally responsible for the child as a result of a custodial order and having paid for the maintenance of the child.

31. It is common cause that the Applicant's country of nationality, Seychelles, has a statutory provision for adoption, which provides for adoption of a child below the age of 18 years. Thus, there *is* a statutory provision for adoption in Seychelles, and the requirements of staff rule 3.6(a)(ii)(c) and sec 3.2 (a) of ST/AI/2011/5 have not been met with respect to Ms. N, whose adoption is no longer possible not due to the absence of a statutory provision or prescribed court procedure, but due to the fact that she has reached the age of majority.

32. The Applicant submitted, *inter alia*:

> There is no distinction between the benefits which a child of a staff member receives between ages 18–21 if the child is a natural child or was legally adopted. The latter is the case even though the child can no longer be "reached" by the adoption law in most countries after age 18. The UN does not cease to pay benefits for adopted children, or for natural children for that matter, who hit majority at 18—just because a local law may no longer recognize them as the ward of their parents or guardians.

33. This argument is not persuasive. The Organization's acceptance of a child between the ages of 18 and 21 who attends university or its equivalent full time as a "dependent child" hinges on the prior recognition of this person as a "child" under staff rule 3.6(a)(ii). In the present case, such recognition of Ms. N is not possible because she is over 18 years old and beyond the reach of adoption provisions under Seychelles laws.

Whether the Applicant has legal responsibility over Ms. N

34. To establish legal responsibility, the Applicant must demonstrate that she may be compelled by law to provide support for Ms. N. The Applicant has not presented any evidence that she has any legally enforceable responsibility for her niece. To the extent the Applicant seeks to rely on the affidavit of Ms. N's biological father from June 2013, in which he expressed no objection to the offer by the Applicant and her spouse "to take over the responsibility of providing for all the financial needs" of Ms. N, the Tribunal notes that under the terms of the Order of the High Court of Zimbabwe of 1997, Ms. N's father's legal responsibility to provide for her ceased when she attained the age of 18, i.e., before her mother's demise.

35. In her last bundle of documents, the Applicant also provided a letter from the Office of the Secretary of State, Seychelles Ministry of Foreign Affairs, addressed to her Counsel, requesting "an amicable solution" of the Applicant's claims. As highlighted in the Respondent's response, this letter confirms that the law of Seychelles "does not allow for adoption over the age of 18 years old"; that the Applicant does not have legal responsibility under the laws of Seychelles for Ms. N; and that she could not be recognized as a dependent under the Staff Rules.

36. As the Applicant does not meet the requirements of staff rule 3.6(a) and ST/AI/2011/5, the Applicant cannot claim dependent child status for Ms. N, any exercise of discretion not being a matter for the Tribunal.

Claim of legitimate expectation

37. The Applicant submits that, by the email dated 3 July 2013, the Administration gave rise to legitimate expectation on the Applicant's part that Ms. N would be recognized as her dependent child.

38. Legitimate expectation may result in the creation of an enforceable legal right, although the application of the doctrine is subject to a number of qualifications

(*Candusso* UNDT/2013/090). A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way, by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation, and the other party does so (*Checa-Meedan* UNDT/2012/009). Where a staff member claims that she had a legitimate expectation arising from a promise made by the Administration, such expectation must not be based on mere verbal assertions, but on a firm and express commitment made individually to the staff member by a competent authority of the Administration (*Abdalla* 2011-UNAT-138; *Ahmed* 2011-UNAT-153; *Igbinedion* 2014-UNAT-411; *Samuel Thambiah* UNDT/2012/185).

39. It is unclear from the record what information had been provided to the Administration by the Applicant by July 2013, but it is apparent to the Tribunal from the surrounding circumstances and subsequent exchanges that the purpose of the OHRM's email of 3 July 2013 was to request documentation enabling the Organization to determine the dependency status. The Applicant has not averred that, subsequent to the email of 3 July 2013, she acted in reliance on some representation by a competent official that Ms. N would be necessarily registered as her dependent child. Rather, what transpired in the months following the email of 3 July 2013 was that the Applicant collected the documents requested of her and submitted them to OHRM for further review.

40. Furthermore, based on the documents, it appears that Ms. N travelled to the United States in August 2014 and was enrolled in college in September 2014—several months after OHRM's written refusal of 30 May 2014 to approve the Applicant's request.

41. In the Tribunal's view, in the circumstances of this case, the email of 3 July 2013, although it could have been worded in clearer terms, could not be reasonably construed as creating a legitimate expectation that the question of

dependency had been conclusively decided and that Ms. N. would be necessarily recognized as the Applicant's dependent child.

Conclusion

42. The application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 24th day of September 2015

Entered in the Register on this 24th day of September 2015

(*Signed*)

Hafida Lahiouel, Registrar, New York