Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MANCO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Seth Levine, OSLA

Counsel for Respondent:
Miouly Pongnon, Office of the Director-General, UNON

Introduction

1. The Applicant is an Investigator with the United Nations Office of Internal Oversight Services (OIOS) in Nairobi, Kenya.

2. The Applicant is challenging the decision requiring him to either renounce his permanent resident status in New Zealand or apply for citizenship there should he wish to take up the offer of a P-4 Investigator position with OIOS in Nairobi.

Facts

3. On 9 February 2009 the Applicant was sent an Offer of Appointment regarding a P-3 Legal Investigator position with OIOS in Nairobi, which he took up on 20 May 2009. The Offer of Appointment stated the following:

> Please be advised that should you transfer to or be appointed to United Nations Headquarters, New York on a long-term appointment in the future, in accordance with the Staff Regulations and Rules applicable to such situations, you will be required to become a citizen of New Zealand or renounce your permanent resident status.

4. On 12 March 2010, the Applicant was offered a P-4 Investigator position in Nairobi. He received an email on 22 March 2010 from the Human Resources Management Services of the United Nations Office at Nairobi (HRMS/UNON) stating:

> As you may be aware, candidates selected for appointment in the Professional category and above, holding permanent residence in a country other than his or her country of nationality and who is granted a fixed term appointment of one year or longer, under the Staff Rules will have to renounce the permanent resident status or provide proof of application for citizenship prior to the appointment. Before we can proceed with processing the 2 year appointment, we would appreciate to receive satisfactory proof that you have either applied for citizenship or have renounced the permanent resident status in New Zealand.

5. This policy[1] was reiterated to the Applicant by HRMS/UNON during a phone call on 26 March 2010. He was advised by HRMS/UNON that a mistake had been

[1] Whenever the word "policy" appears, it is being used *mutatis mutandis* with the word "practice".

made in the original Offer of Appointment which did not contain the same policy as the email of 22 March 2010.

6. On 29 March 2010, the Applicant applied for New Zealand citizenship at a cost of NZD 460.

7. On 21 October 2010, the Office of Staff Legal Assistance (OSLA) wrote a letter on behalf of the Applicant to the Chief of HRMS/UNON, requesting reimbursement of NZD 460 and the discontinuance of this policy, both with regard to the Applicant and in general. The letter stated that the lack of a response within fourteen days would be treated as an "adverse administrative decision". The letter was sent to HRMS/UNON on 3 November 2010.

8. On 17 January 2011, the Applicant requested a management evaluation of the decision taken by HRMS/UNON on 17 November 2010 in regard to the expenses incurred for his citizenship application and the insistence of HRMS/UNON to apply this policy to him.[2]

9. The Management Evaluation Unit (MEU) responded to the Applicant on 3 March 2011, stating that he would be reimbursed NZD 460 by UNON. However, his request regarding the legality of the disputed policy was considered as not receivable. The MEU considered that the request for management evaluation of the application of this policy was time barred, as the administrative decision that could have been contested was taken on 22 March 2010.

10. The Applicant submitted his application to the Tribunal on 9 May 2011. The Respondent filed a reply to the application on 13 June 2011.

11. On 5 March 2012, the Respondent submitted an "expert report" on staff rule 1.5(c), pursuant to Case Management Order 026 (NBI/2012). By its Order No. 101 (NBI/2012) of 26 July 2012, the Tribunal ruled that this report would not be admitted as evidence in a hearing on merits, as it offered "only a litany of the procedural steps for the implementation of article 1.5(c)" of the Staff Rules.

[2] Application, page 3.

12. The Respondent submitted in his reply that the Applicant's application was not receivable *ratione temporis.* On 9 July 2012, the Tribunal issued Judgment UNDT/2012/104, a Judgment on Receivability, in which it declared that "the failure of the administration to notify the Applicant in writing leaves this matter receivable *ratione tempori*s." The case was also deemed receivable *ratione materiae,* although the issue of noncompliance would be decided on the merits of the case.

13. A hearing was held in this case on 23 August 2012. The Applicant gave evidence, along with Ms. Deborah Ernst (Chief, Staff Administration Section, HRMS/UNON) for the Respondent.

14. In the course of proceedings, Counsel for the Respondent asked the Applicant the two following questions:

a. "Do you recall stating in your application filed on 9 May 2011 that the decision you are appealing is one dated 17 November 2010?"

b. "Could the Applicant produce a copy of the decision that was communicated to him on 17 November 2010?"

15. These two questions were refused, with reasons to be given at a later date.

Applicant's submissions

16. The Applicant has repeatedly stated that there is no legal basis to the policy requiring either the surrender of his permanent resident status or an application for citizenship in New Zealand. In his view this policy has been misapplied since 1953, as the requirement implemented by the Secretary General in 1954 (ST/AFS/SER.A/238) and replaced by ST/AI/2000/19 applies only to non-United States staff members serving in the United States.

17. The Applicant states in his application that there is no General Assembly Resolution, Secretary General's Bulletin, Administrative Instruction, nor mention in the Staff Rules and Regulations of this policy other than in regard to staff members serving and holding permanent residency in the United States.

18. The Applicant also produced an interoffice memorandum of 4 August 2005 from the Office of Legal Affairs (OLA) to the Office of Human Resources Management (OHRM), which stated that although this policy has been consistently applied to permanent resident status in any country of which the staff member is not a national, it "is not reflected in any current administrative issuance."

19. Counsel for the Applicant argued during the hearing of 23 August 2012 that the 25th report of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) of 1 December 1953 on staff members holding permanent resident status has no legal foundation, being merely a report.[3] These and other guidelines issued on permanent residency – notably the Interim Guidelines of 1 July 2009[4] – hold no legal force, following *Villamoran.*[5]

20. During the hearing of the case, Counsel for the Applicant further stated that the Applicant sought damages in relation to the uncertainty the alleged misapplication of this policy has caused him to fear: in relation to his ability to be promoted; his immigration status; his ability to travel to his home in New Zealand; and with regard to his family. Counsel asked for moral damages on behalf of the Applicant, reminding the Tribunal that in the case of *Valimaki-Erk*, three months' net base salary was awarded in damages to the Applicant.[6] Counsel differentiated *Valimaki-Erk* from the present case by emphasising that the present Applicant was "misled from the outset" as to the scope of the disputed policy.

21. The Applicant is seeking a rescission of the decision to enforce this policy with regard to him and discontinuance of its application in general. He states that the policy is unlawful and contrary to the terms and conditions of his employment.

Respondent's submissions

22. The Respondent still submits, even after the issuing of Judgment UNDT/2012/104, that this application is not receivable *ratione temporis* in

[3] A/2581.
[4] "Interim Guidelines for implementation of transitional measures for the United Nations contractual reform for currently serving staff members *other than* those serving in United Nations peacekeeping and political missions".
[5] *Villamoran* UNDT/2011/126.
[6] *Valimaki-Erk* UNDT/2012/004.

accordance with Article 8.3 of the UNDT Statute and staff rule 11.2(c). The Respondent states that the disputed administrative decision was taken on 22 March 2010, whereas the Applicant did not submit a request for a management evaluation until 17 January 2011.

23. The Respondent further submits that the application is not receivable *ratione materiae*, as the Applicant has not alleged that the disputed policy results in "noncompliance" with his terms of appointment. The Respondent states that the Tribunal is therefore deprived of jurisdiction in accordance with art. 2.1(a) of the UNDT Statute. Further, the policy in question is, according to the Respondent, an integral term of the Applicant's appointment and therefore does not constitute noncompliance.

24. In his Reply, the Respondent submitted that the authority for this policy exists and derives from the necessity for the Secretary-General to enforce staff rule 1.5, that the policy is informed by "the view of the General Assembly that international officials should be true representatives of the culture and personality of the country of which they were nationals" and that allowing staff members to change their nationality after recruitment would undermine the principle of geographical distribution of professional grade posts among member States. Moreover, the Respondent states that the policy has been uniformly applied since 1954, concurrent with staff regulation 1.1(c) which mandates the Secretary-General to enforce the policy with regard to all staff members. The error contained in the Offer of Appointment of 9 February 2009 did not modify or suspend the application of this policy with regard to the Applicant. The Respondent states that the Tribunal should not create an unwarranted exception to this policy by granting the Applicant relief.

25. The Respondent also stated that a staff member cannot file an appeal with the Tribunal seeking to change or improve legitimate terms of appointment. The Respondent maintains that the policy is valid; it has not been displaced by another staff rule or regulation, and the former Administrative Tribunal also confirmed its validity and viability in *Fischman*[7] and *Moawad*.[8]

[7] UNAdT Judgment No. 326, *Fischman*, (1984).

26. Counsel for the Respondent argued during proceedings that damages are not warranted in this case, as the fact that the Applicant's application for New Zealand citizenship was eventually rejected was not causally related to the Organization's position in regard to permanent resident status. Further, the Applicant's claim for damages was not part of his original application to the Tribunal.

Considerations

27. The issues for examination in this Judgment are:

a. Reasons for the refusal of two of Counsel for the Respondent's questions during the hearing;

b. The legality of the disputed policy; and

c. Whether the policy was "noncompliant" with the Applicant's terms of appointment.

On the refusal of two of Counsel for the Respondent's questions during proceedings

28. During the hearing of 23 August 2012, the Tribunal rejected two of Counsel for the Respondent's questions to the Applicant. These reasons for the refusal of these questions are being set out.

29. Both questions relate directly to the issue of receivability. As rightly pointed out by Counsel for the Applicant at the time, this issue was comprehensively dealt with in the Judgment on Receivability in this matter.[9]

The legality of the disputed policy

30. The Staff Regulations state the following as part of their scope and purpose:

> For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose **employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General**

[8] UNAdT Judgment No. 819, *Moawad*, (1997).
[9] *Manco* UNDT/2012/104.

> **Assembly pursuant to Article 101, paragraph 1, of the Charter**. (emphasis added)

31. Incidentally, art. 101, para. 1 of the Charter of the United Nations states that "staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

32. In *Valimaki-Erk*, the Tribunal stated the following at para. 47:

> [T]he status of United Nations staff and their recruitment conditions are governed solely by the Staff Regulations and Rules and by any administrative instructions issued by the Secretary-General in application thereof. While the discretionary authority of the Secretary-General allows him, on a case-by-case basis, to refrain from recruiting a staff member for the sole reason that he or she holds permanent resident status in a country, the Secretary-General is acting *ultra vires* in requiring offices of the Organization to apply an additional condition for the international recruitment of all staff members, that is, to require that they relinquish their permanent resident status in a country other than their country of nationality if they wish to receive an offer of appointment. Furthermore, it is a well established principle that for a regulation to be binding on the relevant individuals it must be published, and therefore, clearly, it must exist in writing.

33. The Provisional Staff Rules, promulgated on 2 September 2010 before the "adverse administrative decision" was taken, address the rules applicable to international recruitment of staff members and scenarios where a staff member wishes to change his or her nationality or permanent resident status:

> **Rule 1.5**
> **Notification by staff members and obligation to supply information…**
>
> (c) A staff member who intends to acquire permanent residence status in any country other than that of his or her nationality or who intends to change his or her nationality shall notify the Secretary-General of that intention before the change in residence status or the change in nationality becomes final.
>
> **Rule 4.3**
> **Nationality**
> (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.

> **Rule 4.5**
> **Staff in posts subject to international recruitment…**
> (d) A staff member who has changed his or her residential status in such a way that he or she may, in the opinion of the Secretary-General, be deemed to be a permanent resident of any country other than that of his or her nationality may lose entitlement to home leave, education grant, repatriation grant and payment of travel expenses upon separation for the staff member and his or her spouse and dependent children and removal of household effects, based upon place of home leave, if the Secretary-General considers that the continuation of such entitlement would be contrary to the purposes for which the allowance or benefit was created. Conditions governing entitlement to benefits for internationally recruited staff in the light of residential status shall be set by the Secretary-General as applicable to each duty station.

34. As *Valimaki-Erk* stated at para. 49:

> The above provisions make several mentions of a scenario involving staff members who hold permanent resident status in a country which is not their country of nationality, and while these provisions require them to notify the Secretary-General of any relevant change and stipulate that staff members may lose certain entitlements, nowhere do they require staff members to relinquish their status. It follows that the practice of requiring international staff members to relinquish their permanent resident status runs counter to the Staff Regulations and Rules applicable at the time when the contested decision was taken.

35. Further, art. 2.1(a) of the Statute of the Tribunal describes a "contract" and "terms of employment" as including "all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance". There is no mention in the Statute of an administrative practice or policy forming part of an individual's contract or terms of employment.

36. The Administrative Tribunal of the International Labour Organisation addressed the issue of administrative practices potentially forming part of a staff member's terms of employment in its Judgment No. 486, *In re Léger*.[10] That case was also related to the permanent resident status of a professional grade staff member:

> The Tribunal has not given a narrow construction to "terms of appointment[”]; it has treated the expression as sufficiently wide to cover obligations arising from the relationship created by the appointment. It has held that a statement by the Director of a practice which he intends to follow can under certain conditions create such an obligation. Such statements of practice often relate, as in this case, to the way in which the Director intends to administer a staff

[10] *In re Leger*, ILOAT Judgment No. 486.

> rule and thus clarify and amplify it. But just as a staff rule must not conflict with the staff regulation under which it is made, so a statement of practice must not conflict with the rule which it is elaborating.

37. The statement of practice contained in the letter of 22 March 2010 conflicts with the above-mentioned staff rules on nationality and permanent residency. Elaborating upon staff rules 1.5(c), 4.3 and 4.5(d) in force at the time of the decision, there is not and should not be any obligation on a staff member to renounce permanent resident status or apply for citizenship in that country upon employment with the Organization. These rules impose only the obligation for a staff member to inform the Secretary-General of any intent to change his or her nationality or permanent resident status. An obligation to renounce the latter upon employment cannot be logically inferred from the aforementioned rules.

38. Further, the Administrative Tribunal of the World Bank held, in its judgment *de Merode*:

> The practice of the organization may also, in certain circumstances, become part of the conditions of employment. Obviously, the organization would be discouraged from taking measures favorable to its employees on an *ad hoc* basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation.[11]

39. The only legal obligations established by the General Assembly in direct relation to the disputed policy affect only those staff members both serving and holding permanent residency in the United States. The requirement was originally implemented by the Secretary General in 1954 (ST/AFS/SER.A/238), updated in 1982 by ST/AI/294, and replaced by ST/AI/2000/19, which states:

> **Section 5**
> **United States permanent resident status**
>
> 5.1 Pursuant to staff rule 104.4 (c) [now staff rule 1.5(c)], staff members intending to acquire permanent resident status in any country other than that of their nationality or who intend to change their nationality must notify the Secretary-General of that intention before the change in resident status or in nationality becomes final. Such staff members should inform the Office of

[11] *Louis de Merode and Others v. The World Bank*, WBAT Reports [1981], Decision No. 1.

> Human Resources Management in writing prior to making their application for permanent resident status or naturalization, as the case may be.
>
> 5.2 In accordance with United States law, a permanent resident of the United States who is a United Nations staff member may not continue to hold permanent resident status unless within a period of 10 days she or he signs a waiver of the rights, privileges, exemptions and immunities which would accrue to him or her as a staff member of the United Nations…
>
> 5.6 Subject to this section, staff members who have permanent resident status in the United States are required to renounce such status and to change to G-4 visa status upon appointment and staff members who seek to change to permanent resident status will not be granted permission to sign the waiver of rights, privileges, exemptions and immunities required by the United States Government for the acquisition or retention of permanent resident status.

40. The Respondent's witness, Deborah Ernst, was nonetheless adamant that the disputed policy was one of global import, linked to the politics of the concept of geographical distribution. However, the witness conceded that geographical distribution itself is based on nationality. The Tribunal wishes to emphasise that holding permanent resident status in a country may be a pathway to citizenship, but at the time of recruitment by the Organization it has no impact at all upon a staff member's nationality. This policy cannot be justified under the head of ensuring geographical distribution of staff members. The question may be asked what interest the Organization has in implementing this policy at all, in view of the principle that when a staff member holds two nationalities, the choice of nationality upon his or her recruitment is left to the Secretary-General.[12] Given this, surely the Secretary-General does not also need to have an input on a staff member's permanent resident status.

41. Counsel for the Respondent's closing submissions make reference to the confirmation of the 25th ACABQ report by the Fifth Committee in their report A/2615. Counsel writes that "reports of the Fifth Committee on the contested policy have the force of law on par with General Assembly decisions".

42. Whilst it is perfectly legitimate for the Secretary-General not to ignore a recommendation or stated policy of the General Assembly, the Secretary-General cannot and is not mandated, in the absence of any express statutory provision, to incorporate into the terms of employment of a staff member such policy or

[12] ST/SGB/2011/1, rule 4.3(b).

recommendations. To condone this would be tantamount to giving both the General Assembly and the Secretary-General an absolute licence to impose or incorporate into terms of employment any item or matter that is not part of the Staff Regulations or Rules.

43. Counsel for the Respondent relied heavily on *Khavkine* to support her submission that the Secretary-General is bound to implement this policy as part of the Applicant's contract of employment.[13] The Tribunal wishes to recall and emphasise what is stated in *Tadonki*:

> It follows that disputes arising out of a contract of employment should be dealt with according to fair procedures and the provisions guaranteeing the right to work should be interpreted according to international human rights norms.[14]

44. The General Assembly, in the code of conduct for Judges, enjoins the Judges to be mindful of human rights principles.[15] Bearing that in mind, in the context of the modern law of employment and human rights, it is inconceivable to countenance a situation where an individual should be sanctioned in his employment opportunities or tenure because he holds one nationality yet resides in another country.

45. According to *Villamoran*:

> At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions… Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

46. In her closing submissions, Counsel for the Respondent "readily concedes the policy is nowhere encanted [sic] in a single terse Staff Regulation, Rule or other administrative issuance." Yet the Tribunal is bound by the hierarchy of norms as laid out by *Villamoran.* Administrative practices, administrative policies, and reports of the Fifth Committee do not feature at all in this hierarchy. The disputed policy is therefore also outside this hierarchy.

[13] UNAdT Judgement No. 66, *Khavkine* (1956).
[14] *Tadonki* UNDT/2009/016.
[15] A/RES/66/106, art. 6(b), 7(g).

Noncompliance of the policy with the Applicant's terms of appointment

47. With regard to whether this application is receivable *ratione materiae* the Tribunal repeats its statement in its Judgment on Receivability in this matter, that:

> [A]lthough there may not be a specific reference to the fact that the policy is noncompliant with the Applicant's terms of appointment, there is a clear inference to this noncompliance by the Applicant's very challenge to the policy. The Applicant has also made it reasonably clear that he is challenging this particular policy.

48. Inasmuch as this policy is illegal and finds no basis in any legal instrument recognised by *Villamoran*, it is also noncompliant with the Applicant's terms of appointment.

Judgment

49. This "global policy" in its current, practised form is unlawful and illegitimate. It finds no basis whatsoever in any of the recognised legal norms of the Organization to justify its imposition upon staff members other than those serving and holding permanent residency in the United States.

50. The Tribunal orders the immediate rescission of the disputed policy in relation to the Applicant. His future applications for professional grade postings shall not be subject to this policy.

51. The question of moral damages was raised at the hearing of this case by Counsel for the Applicant. Counsel for the Respondent objected on the ground that this request had not been made in the original application. However, the Tribunal considers that the plea for damages was made fully and properly at the hearing, reflected by the fact that Counsel for the Respondent was able to make a reply to the request at the time.

52. The Tribunal awards three months' net base salary to the Applicant in moral damages to allay the uncertainty that this policy has created with regard to both his professional and personal life.

53. The Tribunal also RECOMMENDS to the Secretary-General, given the increasing frequency of cases disputing this policy, that the proposed revision of the policy in question be accelerated, finalised and promulgated as soon as possible.[16] In the global community that is today's United Nations, this policy has no place.

54. "Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international".[17] The Tribunal therefore urges the Secretary-General to revise this policy, which has prevented staff members from becoming truly global citizens, in light of the Staff Regulations and the modern realities of the Organization.

(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

[16] A/65/202, para 22(c).
[17] ST/SGB/2009/6, reg. 1.1(a).