



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Shamilla Unnikrishnan, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Bettina Gerber, UNOG

Introduction

1. The Applicant is a former staff member of the Office of the High Commissioner for Human Rights (OHCHR) in Geneva where he served on a temporary assignment as a Human Rights Officer at the P-3 level. He filed an Application on 22 July 2012 contesting a decision taken by the Human Resources Management Service (HRMS), United Nations Office in Geneva (UNOG) to determine his nationality as German instead of Tunisian for United Nations purposes.

2. The Respondent filed a Reply on 27 August 2012 and argued that the contested decision was taken lawfully and was consistent with the applicable rules. It was argued that while the Applicant held both Tunisian and German nationalities, he was more closely associated with Germany than with Tunisia and that therefore the Administration was right to determine his nationality as German. The Respondent submitted that the decision to determine the Applicant's nationality as German was a valid exercise of discretionary power.

Facts

3. The Applicant holds both German and Tunisian nationalities. He was born, bred and educated until post-secondary level in Germany. He has ancestral ties to Tunisia.

4. His Personal History Profile (PHP) indicates his place of birth as Germany, he holds a German High School diploma and studied at three different German Universities and also gained some of his professional experience in Germany. Between 1991 and 1993, the Applicant spent a cumulative period of three months at two summer universities in Tunisia.

5. From 20 September 1999 and 20 December 1999, the Applicant held a "Special Service Agreement" with the United Nations Development Programme (UNDP) in Geneva. For this appointment, his nationality was listed by the UNDP as Tunisian and he held the status of a consultant.

6. From July 2010 to December 2010, the Applicant worked as a consultant for OHCHR during which period he was granted a Swiss legitimization card indicating his nationality as Tunisian and his status as “consultant.”

7. Another legitimization card was issued to the Applicant in January 2011 as a dependent spouse of an international civil servant and indicated his nationality as German.

8. On 23 October 2011, the Applicant received an offer letter for a temporary appointment with OHCHR, UNOG. The letter which was signed by Elisenda Martinez, Human Resources Officer (HRO), HRMS, UNOG stated in part:

We take note of your dual nationality (Tunisian and German). A Staff member’s nationality for purposes of the United Nations Staff Regulations and Rules is the nationality of the State with which the Staff member is, in the opinion of the Secretary-General, most closely associated. Based on the Personal History document that you have submitted and information that we have on your file, you will be considered as a national of Germany for the purposes of the United Nations.

9. The accompanying email to this letter indicated further that the Applicant would be considered as a national of Germany but if his nationality had been ascertained as Tunisian in a previous assignment, OHCHR would “normally” keep the same nationality.

10. The Applicant signed the offer letter without making any reservations regarding his status indicated as a German national.

11. The Applicant started working at OHCHR on 21 November 2011 as a Human Rights Officer on a temporary appointment at the P-3 level. A Personnel Action (PA) for this appointment was initiated by a Human Resources Assistant other than Ms. Mahfoudhi who had previously been handling the issue. The Applicant’s nationality was however not indicated on the PA.

12. On 30 December 2011, Ms. Mahfoudhi asked the responsible Human Resources Officer whether she would agree to record the Applicant’s official United Nations nationality as German.

13. The HRO, HRMS, UNOG agreed to this in writing on 4 January 2012 and stated, “Yes. Bearing in mind *inter alia* that the candidate has signed the [offer letter] indicating German as his UN nationality without reservation.” The PA was thus completed to reflect his German nationality.

14. The Applicant was informed that a correction of his PA for his initial appointment had been done since the nationality field had been left blank when the PA was first generated.

15. On 31 January 2012, the Applicant wrote to Ms. Mafoudhi informing her that a wrong nationality had been inserted in his PA since he was a Tunisian at birth and had been recognized as such in his work with the United Nations since 1999. He thus requested her to correct the PA to reflect his Tunisian and not German nationality and submitted supporting documents regarding his previous employment with UNFPA and with OHCHR as a consultant.

16. By an email dated 28 February 2012, Ms. Mafoudhi wrote to the Applicant stating that his nationality had been recognized previously for UN purposes as German and that she would check the issue again with the responsible HRO. The Applicant responded by an email dated 29 February 2012 reiterating that his nationality had always been recorded as Tunisian in his previous appointments with the United Nations.

17. The UNOG Administration however maintained that it had ascertained the Applicant’s nationality as German and not Tunisian.

18. The Applicant requested a management evaluation of the decision to determine his nationality as German for United Nations purposes on 2 March 2012. The Management Evaluation Unit responded on 23 April 2012 having determined that HRMS, UNOG had correctly exercised its discretionary power and upheld the contested decision.

19. Just before this judgment was issued, on 16 December 2013, the Applicant filed a Motion in which he requested for anonymity and also requested the Tribunal, in the event that his Motion was denied, that he be allowed to withdraw

his Application. The ground for the Applicant's Motion is that matters of nationality are "an extremely delicate subject in Tunisia particularly in light of the recent heightened political tensions and the volatile security situation in the country."

20. The Tribunal, having considered the Applicant's submissions, grants his request to have his name redacted from this Judgment and rejects his request to withdraw the Application at this late stage.

Applicant's case

21. The Applicant's case is that while the rules provide that the United Nations may only recognize one nationality per staff member, once a determination of a staff member's nationality has been made, it cannot be subsequently changed unless requested by the staff member. He therefore argues that the decision to change his recognized nationality from Tunisian to German was unlawful.

22. Since he had always been previously recruited as a Tunisian, the Applicant had no grounds to believe this previous determination of his nationality would be changed. He also argued that HRMS UNOG had indicated to him that if his nationality had been ascertained as Tunisian in previous circumstances with the United Nations, the same would be maintained.

23. The Administration failed to take reasonable factors into account when determining his nationality as German and not Tunisian and thus abused its discretionary power.

24. The decision taken by the Administration effectively forces him to renounce his German nationality.

25. His motives for lodging the present Application are purely sentimental as he has no entitlements linked to his nationality. His sole prayer is for the correction of his nationality from German to Tunisian.

Respondent's case

26. The Respondent's case is that the Administration correctly exercised its discretionary power based on reasonable criteria in determining the Applicant's nationality as German for UN purposes based on the information contained in his PHP.

27. The Applicant did not submit any evidence that he is more closely associated with Tunisia than with Germany.

28. When he was recruited earlier as Tunisian national, the Applicant was a consultant and not a staff member and was therefore not covered by the staff rules.

29. The fact that precedent consultancy contracts with UNDP and OHCHR as well as Swiss legitimization cards reflected the Applicant's Tunisian nationality are of no significance for the determination of the Staff member's nationality by HRMS, UNOG.

30. The Respondent prays that the Application be rejected.

Issues

31. The Tribunal has framed the following question as the singular legal issue arising out of this case thus:

- a. Was the Secretary-General's discretion properly exercised in deciding to ascertain the Applicant's nationality as German for purposes of his employment with the United Nations Organization?

Consideration

Whether the Secretary-General's discretion was properly exercised in deciding to ascertain the Applicant's nationality as German for UN purposes

32. The Applicant contends that exercise of discretion by the Administration in this case was unlawful and that his nationality ought to have been determined

as Tunisian. On the other hand the Respondent's case on this is that based on reasonable criteria, the Applicant is more closely associated with Germany than Tunisia and that therefore the contested decision was lawfully taken and constituted a valid exercise of discretion by the Administration.

33. Rule 4.3 of the Staff Rules and Staff Regulations of the United Nations which is relied upon by the Respondent states:

- 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 purposes of the Staff Regulations and the Staff Rules shall be the nationality of the State to which the staff member is, in the opinion of the Secretary-General, most closely associated.

34. The rationale for this rule is to avoid administrative problems created when a staff members posses more than one nationality.¹ As such, in cases where a staff member possesses dual nationality, it is for the Secretary-General to exercise his discretion in determining which of the two nationalities, a staff member is most closely associated with. The nationality determined to be closest to the staff member will then be deemed to be the staff member's nationality for purposes of the Staff Rules and Regulations.

35. In the present case, the Applicant validly possesses both Tunisian and German nationalities. He grew up and was educated in Germany for most of his life, where he also worked and gained some professional experience; in total spending over 25 years in that country. He has never lived in Tunisia for a prolonged period throughout his life; he did not receive his primary, secondary or tertiary education in Tunisia except for Arabic language courses taken for a cumulative period of three months between 1991 and 1993.

36. The Applicant submitted that time spent in a country is not the only decisive factor in determining nationality, arguing that his ancestral links to Tunisia should be considered as a determinative factor in this case since his

¹¹ Former Administrative Tribunal of the United Nations, Judgment No. 62 (1955).

mother and siblings continue to reside in Tunisia and he has travelled there whenever time permitted.

37. The Tribunal is of the view that where a staff member possesses dual nationality, a number of criteria must go into the determination of which nationality a staff member is most closely associated with for United Nations purposes. These may include factors such as the nationality of birth, family ties, time spent in a country, the will of a staff member, investment's made, education *et cetera* which all go to the making of this decision and all of which must be considered in comparison and in relation to each other.

38. The Appeals Tribunal held in *Islam*² that the Administration must base its decisions on objective criteria supported by documentary evidence; therefore each of the criteria pleaded must be supported by documentary evidence as proof. For his assertion that his nationality ought have been ascertained as Tunisian and not German, the Applicant ought to have tendered evidence to show that he is indeed more closely associated with Tunisia and not Germany.

39. From the records, it is clear that the Applicant has not adduced any evidence to show that he has closer ties to Tunisia than to Germany. The only document produced with a bearing on this issue is his PHP whose perusal only leads the Tribunal to simply conclude that the Applicant is more closely associated with Germany than with Tunisia.

40. The Applicant decried the reliance on his PHP by the Administration to determine his nationality, arguing that a PHP only records the professional, employment and education history of a staff member and does not constitute a biographical record reflecting all the factors relevant to the determination of which of a staff member's nationalities is more germane.

41. While indeed, a PHP cannot be considered as the sole source of information on this issue, in the present case, the Applicant's PHP gives significant insights into which of the two countries in question the Applicant has more ties with. There is nothing irregular with the use of the PHP for this purpose,

² Judgment No. UNAT-2011-115.

especially in light of the fact that all the information relied upon, as presented in the PHP, are provided by the Applicant himself. The Applicant also did not submit other documentation that show Tunisia to be his closest country of nationality.

42. The Applicant's argument that his acquisition of Tunisian nationality at birth coupled with his ancestral ties to the country form part of the relevant criteria is correct, but is not the sole or exclusive determinative criterion or one carrying greater weight than the other factors.

43. The Applicant cited Judgment No. 1300 (2006) decided by the former Administrative Tribunal of the United Nations to support his case. In that case, the Tribunal seemed to recognize a staff member's will as the decisive factor in the determination of which nationality would be recognized by the United Nations. It was held that "the Administration is not required to make extensive inquiries into the most germane of a staff member's nationalities if the staff member personally, and of his or her own free will requests modification of his or her status within the Organization." It also held that "the Administration is justified in presuming that the nationality which a staff member wishes to adopt is appropriate when such a request is based on the standard criteria for the acquisition of nationality."

44. As stated earlier, this Tribunal holds that no single criteria forms the exclusive basis for making a determination of nationality for UN purposes but that all relevant factors have to be objectively considered in comparison to each other to determine which country a staff member is most closely associated with. In the present case and on a balance of probabilities, all relevant factors taken together point towards the fact that the Applicant is more closely associated with Germany than with Tunisia.

45. He lawfully and validly holds both Tunisian and German nationalities but happens to be, in the firm opinion of the Tribunal, to be most closely associated with his German than Tunisian nationality.

46. The Applicant's argument that he had been previously appointed as a Tunisian and that he was entitled to expect the same assignment of nationality is

not relevant here by reason of the fact that in his previous appointments he was not a staff member but a consultant. Different rules apply to the appointment of consultants and staff members. The Applicant had never been a UN staff member before 2011 and was therefore not covered by the Staff Rules during those periods.

47. The Staff Rules are only applicable to staff members and demand that the country of nationality to be recognized by the United Nations is that which one is most closely associated with. At the time that his nationality was ascertained as Tunisian, he was a consultant and not covered by the Staff Rules.

48. Contrary to the Applicant's argument, this is not a case in which the Applicant is being forced to renounce his German nationality. Indeed staff rule 4.3 has been held to be one whose purpose is not to bring indirect pressure on staff members to renounce any one of their nationalities.³ The Applicant's dual nationality has not been challenged by the Organization and the decision to recognize his German nationality for UN purposes does not impact on his right to hold a dual nationality.

49. An exercise of discretion by the Secretary-General will not be interfered with provided the discretion has not been exercised in an arbitrary or abusive manner.⁴ There is no evidence in the instant case that this discretion was exercised in an arbitrary or abusive manner and neither did the Administration make a mistake regarding the Applicant's nationality; there is also no evidence of any improper motive on the part of UNOG HRMS in determining the Applicant's nationality as German.

50. In the circumstances therefore, the Tribunal finds and holds that UNOG HRMS officials had correctly applied the staff rules with regard to determining the Applicant's nationality for UN purposes and does not see any prejudice or harm that is caused to the Applicant in any way.

³ Former Administrative Tribunal of the United Nations, Judgment No. 62 (1955).

⁴ Judgment No UNDT/2011/024.

Conclusion

51. In light of the provisions of staff rule 4.3, and in absence of any evidence that the discretion granted the Secretary-General by that rule has been exercised arbitrarily, in an abusive manner or vitiated by improper motives, the Tribunal finds that the Administration was correct in determining the Applicant's nationality as German.

52. This is especially so since the Applicant has not adduced any evidence that he is in fact more closely associated with Tunisia rather than Germany according to the requirement of the Staff Rule.

53. The Tribunal therefore finds and holds that the Secretary-General's discretion was properly exercised in deciding to determine the Applicant's nationality as German for UN purposes.

54. The Application is hereby dismissed.

(Signed)

Judge Nkemdilim Izuako

Dated this 16th day of December 2013

Entered in the Register on this 16th day of December 2013

(Signed)

Shamila Unnikrishnan, Officer-in-Charge, UNDT Nairobi