Registry's translation, the French text alone being authoritative.

SIXTY-NINTH SESSION

In re BARAHONA (No. 2) and ROYO GRACIA

Judgment 1019

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Oscar Barahona against the International Criminal Police Organization (Interpol) on 19 September 1989, Interpol's reply of 16 October, the complainant's rejoinder of 20 November 1989 and Interpol's surrejoinder of 25 January 1990;

Considering the complaint filed by Miss Maria Felisa Royo Gracia against Interpol on 22 September 1989, Interpol's reply of 16 October, the complainant's rejoinder of 20 November 1989 and Interpol's surrejoinder of 24 January 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 3, 23, 36, 37, 38 and 53 of the Staff Regulations and Article 103(3) and Appendix VII of the Staff Rules of Interpol;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants joined the staff of Interpol as "translator/revisers". Miss Royo Gracia took up duty on 1 August 1983 and Mr. Barahona on 1 March 1984. They were dismissed on 16 June 1989 on the transfer of the Organization's headquarters from Saint-Cloud to Lyons.

In keeping with Article 2(3) of Section 2 of Appendix VII to the Staff Rules individual decisions were communicated to the complainants in minutes of 12 October 1988 abolishing their posts on 19 June 1989 and saying that identical ones would then be created in Lyons, which they were offered. The minutes gave them until 18 December 1988 as a "period for consideration"; if they refused the transfers they would have their appointments terminated and be given six months' notice of termination; the six months would start on the day after the date of expiry of the "period for consideration" and would expire at the date of abolition of their posts. If, after accepting their transfer to Lyons, they changed their minds Article 2(6) would apply: they would not lose the benefit of any "period of notice of termination of appointment" which would still have been left to run if they "had not initially accepted" their transfer. Under the heading "Grounds" the minutes told them that by virtue of Articles 1 and 2(1) of Section 2 of Appendix VII they had an acquired right to keep Saint-Cloud as their duty station and that the length of notice was determined according to Article 5 of Section 1 of Appendix VII and a Staff Instruction of 11 December 1974. Article 5 provides that an official "who took up his post before the date of entry into force of the Staff Regulations and the present Rules" shall be entitled to the period of notice "applicable to him under the terms of his employment agreement or of any Staff Instructions issued before that date". The Staff Instruction of 1974 increased the period from three to six months for officials with over five years' seniority.

On 7 November 1988 Mr. Barahona submitted to the Secretary General a "request for review" of the minute of 12 October 1988, and Miss Royo Gracia did so on 10 November. They alleged, among other things, breach of their right to a period of notice starting at the date at which they might change their minds about acceptance of transfer and they reserved their right to appeal against any further decision the Secretary General might take to their detriment in furtherance of the decisions of 12 October 1988. By a letter of 6 December Mr. Barahona notified to the Secretary General his consent to the transfer but said he reserved his rights in full. Miss Royo Gracia sent the Secretary General a similar letter on 9 December. On 8 February 1989 the Secretary General rejected their requests for review as irreceivable on the grounds that the decisions of 12 October 1988 had caused them no injury. In a letter of 28 April 1989 Mr. Barahona informed the Secretary General that he had changed his mind about the

transfer and was asserting his acquired right to his duty station. Miss Royo Gracia wrote a similar letter on 9 May. By decisions of 17 May 1989 the terms of the decisions of 12 October 1988 were applied to them. On 12 June 1989 Mr. Barahona submitted to the Secretary General a request for review of the decision of 17 May. Miss Royo Gracia did so on 14 June. They also sought leave to appeal directly to the Tribunal. The Secretary General gave them such leave in decisions of 23 June 1989.

B. The complainants maintain that the impugned decisions were in breach of their acquired rights, which the Staff Regulations and Staff Rules expressly safeguard. Since they had asserted their acquired right to their duty station after consenting to transfer subject to the reservation of their rights, the period of notice should have been six months, not just the period they would have been entitled to had they not at first consented to their transfer. The decisions are in breach of Article 103(3) of the Staff Rules too in that the period of notice was reckoned not from the date of notification of their termination but from the day after the date of expiry of the "period for consideration". That was contrary to the rule against retroactivity because Interpol later converted into a period of notice of termination the time that elapsed from the date of expiry of the period for consideration up to the date at which they asserted their acquired right to their duty station.

The complainants submit that the Organization adopted the Staff Rules and the appendices thereto unilaterally: the staff representatives on the joint advisory committee set up to look at the drafts of the Staff Regulations and Staff Rules were given little time to do so.

Mr. Barahona asks the Tribunal (1) to order that the period of notice of his termination start at 28 April 1989, the date at which he asserted his acquired right to his duty station; (2) to rule that he was not terminated before that date and that the period of notice cannot therefore have expired on 16 June 1989; and (3) to award him compensation in lieu of the part of the period of notice in which he did not work because of the transfer of his post to Lyons on 19 June 1989, the sum to be equivalent to his gross salary, plus compensation for the leave days he would normally have been entitled to, plus interest at the rate of 4 per cent a year.

Miss Royo Gracia asks the Tribunal (1) to order that the period of notice of her termination start at 9 May 1989, the date at which she asserted her acquired right to her duty station; (2) to rule that she was not terminated, and that the period of notice cannot therefore have started to run before that date; and (3) to award her compensation equivalent to the sums she would have been paid had the period of notice started to run on 9 May 1989.

C. In its replies Interpol explains that the complainants' initial consent to their transfer to Lyons cancelled their acquired right to their duty station at Saint-Cloud. By later changing their minds they unilaterally broke their contracts of service, thereby causing injury to the Organization in that it had to look belatedly for replacements. Yet by virtue of Article 2(6) of Section 2 of Appendix VII to the Staff Rules the Organization did them the favour of letting them change their minds. According to 2(6) when someone changes his mind about going to Lyons his status is the same as it would have been had he refused the transfer by the date of expiry of the period for consideration had he then refused to go to Lyons. So he has to work out the period of notice, which is deemed to have started at the same date as that at which it would have started had he not first consented to transfer. That is why the complainants did not work out a shorter period of notice but completed the six-month period that would have begun on the day after the date of expiry of the period for consideration had they by then notified their refusal to go to Lyons. So there was no breach of their acquired right to six months' notice of termination. The special procedure that was followed in these cases constitutes a derogation from Article 103(3) of the Staff Rules and was allowed because of the peculiar importance of the transfer of headquarters.

The impugned decisions were not in breach of the rule against retroactivity - a plea that the complainants put forward for the first time and that is anyway irreceivable - since they gave effect to a provision of the Staff Rules that had come into force long before the complainants changed their minds about the transfer.

Lastly, Interpol denies that the Staff Regulations and Staff Rules were adopted unilaterally: the staff representatives were duly consulted through the joint advisory committee.

D. In their rejoinders the complainants seek to refute in turn each of the pleas in the Organization's replies. They contend that their qualified consent to transfer did not cancel their acquired right to their duty station at Saint-Cloud and that indeed they continued to exercise that right up to the date of their termination. They did not do so by any "favour" of the Organization's. The Secretary General must have known which rights they wanted to reserve since he had earlier got their first requests for review, which he rejected as irreceivable. They neither broke their

contracts of service nor harmed Interpol's interests. They never received formal notification of termination, the decisions of 12 October 1988 being mere proposals. They discuss the starting date of the period of notice. They maintain that the new rules on notice are less favourable than the old ones. In their submission the Staff Regulations and Staff Rules were hastily adopted to fill a lacuna. Lastly, Miss Royo Gracia amends her claims by adding a claim to compensation for several days of leave with pay.

E. In its surrejoinders the Organization invites the Tribunal to reject the pleas in the complainants' rejoinders and enlarges on its own arguments. It submits that it was the minutes they were sent on 12 October 1988 that constituted the decisions to terminate their appointments. Those minutes referred to the abolition of their posts and the creation of identical ones in Lyons, which they were offered, and explained what the legal effects - transfer or termination - would be of whatever decisions they took on those offers. Since they worked out the six months' period of notice they are not entitled to compensation. As for the drafting of the Staff Regulations and Staff Rules, there were consultations with professors of law on the subject as early as 1983.

CONSIDERATIONS:

1. Interpol, an organisation that has its headquarters in France, decided in 1988 to move from Saint-Cloud to Lyons, and it did so in June 1989. It invited its staff to agree to the transfer on terms that were set out in the Staff Regulations and Staff Rules, in particular in an appendix to the Rules that contained special provisions for the purpose.

The Staff Regulations are stated to "set out the rules and procedures regulating the administration of the Organization's officials" and "define the fundamental conditions of employment and the basic duties and rights" of those officials. Article 23 of the Regulations empowers the Secretary General to transfer an official "from one post to another and from one duty station to another" for several reasons, and one of the reasons is the transfer of the official's post to another place. Such transfer, says the article, "shall not lead to any downgrading". Article 36 lays down general rules on termination of service and is supplemented by 37, which requires notice of termination, and 38, which is about termination indemnity. The Staff Regulations provide for the approval of a set of Staff Rules by the Executive Committee of Interpol to implement the broader provisions of the Regulations.

The Staff Rules consist of 161 articles and 7 appendices. Appendix VII is headed "Transitional measures" and Section 2 contains the special provisions about the transfer of headquarters from Saint-Cloud to Lyons.

Some staff members were informed on recruitment of the future transfer to Lyons, others were not. Article 2 of Section 2 of Appendix VII applies to those who were recruited earlier, who on taking up duty were not warned of the risk of transfer, and who as headquarters officials had reason to believe that they would pursue their career at Saint-Cloud.

The article says that posts held by such officials at Saint-Cloud are abolished and that at the same time the same posts are created in Lyons and offered to them. If the official accepts the offer he is transferred to Lyons, but if he refuses it he has his appointment terminated in accordance with arrangements that are discussed below.

It is the Secretary General who, in exercise of the authority vested in him by Article 3 of the Staff Regulations, takes the individual decisions applying the arrangements for transfer.

2. Some rules rank above others. According to Article 3 of the Staff Regulations the Staff Rules must respect the Regulations. But Appendix VII to the Rules has the same force in law as the Rules themselves and so may qualify them. The Secretary General exercises his executive authority in accordance with the Rules.

The Regulations say that the Secretary General shall submit the Rules for approval to the Executive Committee, and that procedure has been duly followed.

Although the Regulations do not lay down any other formal requirement such as consultation of the staff, the staff representatives were informed of the draft Regulations and Rules through membership of a joint advisory committee. The complainants cite comments the staff representatives made at the time and it is clear both that the staff were then given their say and that the time they got for looking at the drafts was, though short, long enough. It is mistaken to speak of a travesty of consultation: even supposing that the Organization was under a duty to consult the staff the consultations it did hold discharged that duty.

Consultation does not require negotiation, let alone approval. The staff representatives merely state their opinion, and it is not binding on the Administration. In any event there are no grounds for contending that the Staff Regulations and Staff Rules are flawed for want of approval by the staff representatives.

3. Miss Royo Gracia joined the general secretariat of Interpol in 1983 and Mr. Barahona in 1984 as "translator/

revisers": at the time the transfer of headquarters was not yet planned, and so the material rule was Article 2 of Section 2 of Appendix VII.

Article 2(3) reads:

"A decision shall be communicated to each official concerned and shall indicate in particular:

(a) the date on which he must present himself at his new post, assuming that he accepts his transfer to Lyons;

(b) the period granted to him to consider his decision, this period may not be less than two months;

(c) the period of notice of termination of appointment to which he is entitled in conformity with Article 5 of Section 1 of the present Appendix, and the date from which this notice shall run, should he not have expressly accepted his transfer in writing at the end of the period granted to him to consider his decision. ...".

4. The complainants each got from the Secretary General a text dated 12 October 1988 informing them of the transfer of the Organization's headquarters to Lyons and saying that at 19 June 1989 their posts at Saint-Cloud would be abolished and identical ones, which they were offered, would be created at the new headquarters. They were allowed until 18 December 1988 to make up their minds (the "period for consideration"). They had, said the texts, two options: express, written consent to the transfer to Lyons, and express or implied refusal. If they accepted, the texts of 12 October 1988 constituted decisions to transfer them. If they refused, their appointments would end on expiry of a six-month period of notice that would start on 19 December 1988 and so go right up to the date of the transfer. They would also be paid a termination indemnity.

On getting the texts of 12 October 1988 the complainants submitted to the Secretary General "requests for review". Before the expiry of the prescribed "period for consideration" they conveyed to the Secretary General their express acceptance of the posts that were to be created in Lyons, though they added that at the same time they wished to reserve their rights in full.

The Secretary General took the view, notwithstanding the reservation, that the complainants had "expressly accepted" their transfer and therefore in February 1989 he rejected their requests for review as irreceivable on the grounds that, since they had accepted the offers, the matter of notice and the amounts of the termination indemnities were irrelevant.

5. But the cases took another turn when the complainants changed their minds. Mr. Barahona did so in a letter of 28 April 1989 and Miss Royo Gracia in one of 9 May. Some days later, on 17 May, the Secretary General acknowledged their letters and told them that they were dismissed.

After making further requests for review of the decisions of 17 May the complainants sought and were granted leave to appeal directly to the Tribunal. The complaints are therefore receivable.

What is more, since they raise the same issues they may be joined to form the subject of a single ruling.

6. What the complainants want is that the notice of their termination be deemed to have started at the date at which they asserted their acquired right to their duty station: 28 April 1989 in Mr. Barahona's case and 9 May 1989 in Miss Royo Gracia's. They are asking the Tribunal to take those dates for the purpose of reckoning the amount of the compensation to be paid to them against the period of notice. They also claim sums corresponding to several days' leave. They do not object to the length of the period of notice, which was six months. If they succeeded they would be entitled to compensation for the remaining period of notice reckoned as from the day at which they had their appointments terminated.

The main issue is the date at which notice of termination began. In the Organization's submission it should be 19 December 1988.

7. Article 2(6) of Section 2 of Appendix VII covers the contingency of withdrawal of consent to transfer. It reads:

"If, after accepting his transfer to Lyons in conformity with (5) above, the official concerned changes his mind about the transfer or does not present himself at the post to which he has been transferred, he shall not, however, lose the benefit of:

(a) the period of notice of termination of appointment which might still be left to run,

...

if he had not initially accepted his transfer."

The texts of 12 October 1988 cited that provision.

Though the actual wording of 2(6) is not quite clear its meaning is beyond doubt when it is seen in the context of the circumstances in which it was applied: the Organization's intent was to put on a par everyone who refused transfer, whatever the date of refusal might be. Had the complainants not at first consented to the transfer they would have been granted six months' notice starting, as the texts of 12 October 1988 said, on 19 December 1988.

8. The complainants do not really challenge that but take up a different stance. They submit that the texts of 12 October 1988, which asked them to make up their minds within the two months, did not amount to decisions but were mere proposals of transfer and did not determine Interpol's position. They made requests for review before the "period for consideration" expired and the Secretary General rejected them as irreceivable on the grounds that the texts were not actionable; so by the Organization's own admission the texts did not amount to decisions and the Secretary General is estopped by his own earlier ruling on the requests from contending that they did.

But Interpol's objections to the receivability of the requests for review rested on the fact that the complainants had consented to their transfer and on the conclusion therefrom that the issues their requests raised were no longer of any relevance. It is true that the validity of their consent is in doubt because they qualified it with reservations that were at variance with the terms of Appendix VII. But there is no need to rule on that issue, which the parties do not address anyway. The material point is that the decisions that were notified to the complainants on 8 February 1989 determined, and indeed determined correctly, the Organization's position at a particular time. Since they rejected the requests for review they conferred on the complainants no rights they may require Interpol to respect, let alone estopped the Organization from treating the texts of 12 October 1988 as decisions.

9. Those texts undoubtedly constitute actionable decisions. That is plain from their wording, and the fact that they offered options makes no difference. Interpol set the starting date of the period of notice of termination in case the offer of transfer were refused - the date being 19 December 1988 in the complainants' case - and thereby took decisions. The decisions were not contrary to the Staff Regulations. Article 37 provides that, save in cases which it exhaustively lists, an official who has his appointment terminated shall be entitled to a period of notice, and the decisions gave effect to that rule.

There may be more room for doubt about whether Interpol complied with Article 103(3) of the Staff Rules, which says that the period of notice "shall run from the date on which the decision to terminate the appointment is notified". But in fact the decisions show no flaw. For one thing, since Article 103 and Article 2 of Section 2 of Appendix VII of the Staff Rules are on a par in law the material rule is that the particular qualifies the general, and so there is no need to construe 103. The plea is unsound in fact anyway since the texts of 12 October 1988 did set the starting date of the period of notice.

The plea of breach of the Staff Regulations fails.

10. Another plea partly overlaps the preceding one: the complainants allege breach of the rule against retroactivity. Their argument is that Interpol retroactively and unlawfully treated as a period of notice the time that had elapsed from the date of expiry of the "period for consideration" up to the date at which they announced their refusal to go to Lyons - a period in which they were employed at Saint-Cloud.

The Organization's retort is that the plea is irreceivable because the complainants have advanced it for the first time in their pleadings to the Tribunal.

That objection is unsound. Though a complainant may not submit to the Tribunal any claim which he did not make in the internal proceedings a new plea is another matter. The plea of breach of the rule against retroactivity comes within the ambit of their claims and makes no difference to their scope.

The general principle the Tribunal will apply is that, save where there is reversal of an earlier decision - and in this case there was not - an administrative decision may not retroactively impair a right or alter any state of fact.

The complainants' later refusal to go to Lyons was not the only fact that determined their status: it was also relevant that they had consented in December 1988 to their transfer, and that earlier consent prompted decisions that determined the rights and obligations of both sides. The complainants unilaterally broke the agreement thereby concluded with Interpol and must therefore be deemed never to have consented to their leaving their posts at Saint-Cloud by virtue of decisions that were to take effect only in the future. If there was anything retroactive about the period of notice, that was attributable, not to any decision of Interpol's, but to their own shift of position.

On that score the effect of the decisions of 8 February 1989 is immaterial for the reasons already stated in 8 above.

There was no breach of the rule against retroactivity and the plea therefore fails.

11. The complainants allege breach of their acquired rights, which, they observe, the Staff Regulations and Staff Rules expressly safeguard.

The case law already acknowledges the importance of acquired rights to international civil servants and there is no need to go over it in detail here: a reference to Judgment 832 (in re Ayoub et al.), and particularly to what is said under 13, will suffice.

The Staff Regulations of Interpol recognise the doctrine: according to Article 53 they "may be amended or supplemented" only "without prejudice to the rights the Organization's officials have acquired" thereunder. That is an affirmation of the rule that the official may plead an acquired right not only where it is contractual but even when staff regulations have been amended.

Section 2 of Appendix VII is much more explicit since it covers the very contingency that is relevant to these cases: Article 2, which applies to the complainants, is headed "Officials of the Organization who have an acquired right with regard to the location of their duty station".

The text is not to be taken literally. It cannot mean that the Organization needs its staff's consent to decide on a matter like the transfer of its headquarters. A decision of that kind is inherently immune to review. Besides, that is not the thrust of the complainants' plea. The doctrine is relevant rather in considering the consequences transfer may have for the official's career.

The complainants' case is that when they resolved once and for all not to go to Lyons they still held their acquired rights because the consent they had given in December 1988 had been subject to the reservation of all their rights. Working at Saint-Cloud in the ensuing months was an assertion of their acquired right to their duty station. The construction which Interpol put on the rules so as to make the period of notice start on 19 December 1988 was in breach of their rights.

The position of staff to whom Article 2 applies is determined by a provision of the Staff Regulations. Since the Tribunal may not review the policy decision to move to Lyons the only effect it can give to the doctrine of acquired rights as recognised by Interpol is to determine whether the arrangements for carrying out the move were properly objective. Since the transfer did disrupt the lives of its staff the Organization had a duty to ensure that there was no undue or pointless detriment to their interests.

The consequences of the change which the transfer brought in the conditions of their employment are to be gauged against cardinal principles such as equality of treatment, good faith and the rule against retroactivity - the last of which has already been discussed in 10 above.

Interpol would have acted in breach of an official's acquired rights had it required him to choose between compulsory transfer and straightforward resignation, together with the consequences of resignation. Fortunately it did nothing of the kind, and its approach, complicated though it may have been, did respect the complainants' basic rights.

Interpol abided by the rules of good faith and indeed the other principles mentioned above by treating the staff who changed their minds about transfer as if they had respected the time limits set in Article 2. For the sake of efficiency the time limits had to be short. But by allowing a change of mind without detriment to rights the Organization enabled anyone who had not had time to think the consequences over thoroughly within the two months to ponder further before making up his mind once and for all. That was no breach of acquired rights but proper respect for them. But for Appendix VII, the common law would have applied and the treatment of the complainants would have been too strict since Interpol would have been free to treat them as having resigned. The approach it did adopt respected the principle of equality and duly applied the doctrine of acquired rights.

It appears from the foregoing that Interpol complied with its obligations: the detriment the transfer caused to the legitimate interests of its staff was objective and admissible.

12. In his original complaint Mr. Barahona claims further days of leave. Miss Royo Gracia makes a similar claim in her rejoinder. Their claims are not substantiated, however, and must therefore fail.

13. As to the Organization's refusal to change the date of their termination, they made no claim in that regard by the deadline for internal appeal and the Tribunal therefore declines to entertain the matter.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.