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

SEVENTY-FIFTH SESSION

In re AHUES

Judgment 1299

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Claudio Ahués against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 10 August 1991, UNESCO's reply of 18 September, the complainant's rejoinder of 14 December 1991, the Organization's surrejoinder of 31 January 1992, its further submissions of 15 September and the communication of 12 November 1992 from the complainant's counsel informing the Registrar that he declined to comment on UNESCO'S further submissions;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Rules 103.12, 105.3, 105.4 and 107.1 and paragraph 7(a) of the Statutes of the Appeals Board of UNESCO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Chilean citizen, has been an official of UNESCO since 1980. He is employed in the Spanish Translation Section at the Organization's headquarters in Paris.

In 1971 he married a Chilean woman who bore him a son in February 1979. In November 1986 he became the father of twin girls by another woman. He so informed the Organization, which recognised them as his dependants as of 1 December 1986. A Chilean court annulled his marriage in September 1987 and he so informed the Bureau of Personnel on 28 October 1987.

In a minute of 8 September 1987 he applied for authorisation of travel to visit his family in Santiago. The authorisation was granted and the visit took place between 14 December 1987 and 13 January 1988.

On 9 November 1989 he made a similar application, but explaining that he wanted to exchange his airline tickets for the journey from Paris to Santiago and back for tickets for his son to go from Santiago to Paris and back. By a minute of 4 December a personnel officer told him that he was refused travel to Chile for the purpose of a visit to family because his two daughters lived in Paris, his duty station. The minute went on to say that under Staff Rule 105.4(a) a staff member is entitled to travel for the purpose of visiting family when the spouse and dependent children reside outside the country of the duty station; "it was owing to an error that you were authorized to travel in 1987"; and "you will remember that it was only on return from that trip that you informed the Organization that your marriage had been annulled (cf. your note of 28.10.87)".

The full text of Staff Rule 105.4(a) reads:

"A staff member who is assigned for a period of one year or more to a duty station outside the country of his recognized home and whose spouse and dependent children reside outside the country of the duty station, shall be entitled once in every year of continuous service in which home leave under Rule 105.3 is not due, to travel at the expense of the Organization for the purpose of visiting his spouse or dependent child, provided that the staff member's service outside the country of his recognized home is expected to continue at least six months beyond the date of his return; this condition may be waived in exceptional cases when the exigencies of the service make it necessary to do so."

On 27 December 1989 the complainant submitted to the Director-General a protest against the decision of 4 December in accordance with paragraph 7(a) of the Statutes of the Appeals Board. The Director of the Bureau of Personnel rejected his protest in a letter of 20 March 1990, but having got no answer within the prescribed time limit of one month, he had meanwhile appealed to the Appeals Board, on 14 February 1990, against the implied

rejection. In its report of 8 April 1991 the Board recommended granting him entitlement to travel for the purpose of visiting his family and dealing according to the material rules with his application for exchange of his tickets for tickets for his son to go to Paris.

The Director-General rejected the Board's recommendation in a letter of 16 May 1991, the decision he impugns.

B. The complainant puts forward three pleas in support of his complaint.

First, he challenges the Organization's allegation that it made an mistake in 1987. The Bureau of Personnel was wrong when it stated on 4 December 1989 that he did not inform the administration until his return from Santiago of the annulment of his marriage: he did so on 28 October 1987 and did not leave for Chile until 14 December. The administration might therefore have withdrawn the authorisation it had given on 9 September had the change in his marital status affected his entitlement to visit his family. In fact it did not, and besides the Organization relies solely on the fact that two of his children are living at his duty station. It knew full well that he had two daughters when it granted him leave to travel in 1987 because he had reported their birth to the Bureau of Personnel on 3 November 1986.

Secondly, it is in his view wrong to infer from Rule 105.4(g) that the exchange of entitlement that is authorised for a spouse may not be allowed for a child. The rules may not expressly provide for such exchange but neither do they forbid it; and the Organization has authorised it more than once and has never refused an application for it. That goes to show that there is an established practice in the matter.

Thirdly, he objects to the Director-General's interpretation of 105.4(a), which the impugned decision rests on and which is that a staff member is entitled to visit his family only if all his dependent children reside outside the duty station. The reference in the French version of the rule to visiting spouse or dependent children - "les enfants à charge" - is a general one and the mere choice of the conjunction "or" instead of "and" in both language versions shows that it contemplates the contingency of division in the family. It would therefore be absurd to withhold the entitlement if any one of an official's children lives at the duty station. That is borne out by the English version of 105.4(a), which gives the purpose of the entitlement as visiting the spouse "or dependent child", i.e. in the singular. So 105.4 plainly provides for UNESCO to bear the costs of visiting the family when either the spouse or a dependent child resides outside the duty station. It follows that there is no need to construe the rule, and no amount of searching in the preparatory work on the text - which the Director-General mentions in the impugned decision - can pervert the obvious meaning.

The complainant seeks the quashing of the decision and in consequence the reimbursement of the costs of his son's journey from Santiago to Paris on 27 December 1989 and back again on 30 January 1990. He also seeks costs.

C. In its reply the Organization rejects the complainant's claims.

It submits that he may not properly rely on entitlement to visit his family in 1989. When the impugned decision was made his family status did not meet the requirements of 105.4(a). After the annulment of his marriage, which he reported in October 1987, his only dependants were his three children. Two of them - his daughters - were living with him at his duty station and his son at Santiago. So it was wrong to grant him authorisation to visit his family at the Organization's expense in December 1987.

The complainant argues as if the material text did not use the conjunction "and" between "spouse" and "dependent children" in both the English and French versions of the clause preceding the first comma in 105.4(a). The text of 105.4(a) may be split into two: the first - from "A staff member" to "at the expense of the Organization" - identifies the staff members who are entitled to family visit; the second - from "for the purpose of visiting his spouse" to "the exigencies of the service make it necessary to do so" - states the purpose of the entitlement. One of the conditions in the first part is that the "spouse and dependent children reside outside the country of the duty station". But since not all the complainant's dependent children reside outside France he does not fulfil the condition and that is the reason for the impugned decision. That construction also squares with practice, as is borne out by the fact that few staff members have been granted the travel entitlement in the last few years.

As to the second part of 105.4(a) the contingency of a "divided family" was indeed contemplated, but the divided members of the family must reside outside the duty station. Furthermore, the conjunction "or" does not alter the requirement that for the staff member to be entitled to family visit none of his dependants may reside with him at

the duty station; it simply means that the spouse or dependent children may reside at different places outside the duty station and the staff member may visit any one of them. Had the second part also read "spouse and dependent children" it would have meant that a qualifying staff member was entitled to not just one journey, but more than one to visit all the members of his family. That would be at variance with 105.4(e), which stipulates that "the travel expenses occasioned by a family visit shall be borne by the Organization up to an amount not exceeding the cost of a return journey between the staff member's duty station and his recognized home".

The English version of 105.4(a) must be interpreted in such a way as to reconcile the two versions. In support of its case and subsidiarily, the Organization describes at length the historical background to Rule 105.4(a), the preparatory work and United Nations practice.

In answer to the complainant's application for leave to commute his own entitlement the Organization points out that he may not ask for something that depends on a right that he himself fails to qualify for. Even if he did qualify he could not demand an exchange of entitlement in favour of his son because Rule 105.4(g) does not expressly provide for it.

D. In his rejoinder the complainant disclaims liability for the mistake UNESCO made in 1987. He observes that the Organization's reply deals at length with contrived "issues", whereas the only material one is whether UNESCO may withhold a staff member's entitlement to family visit when one of his dependent children resides outside the duty station.

He submits that 105.4(a) may not be split up but must be read as a whole. A text may not be taken out of context, nor construed in disregard of the author's intent, particularly when as here it contains its own definition of the purpose it seeks. And since the purpose is to let the staff member visit spouse or children, there is no reason to require that all members of his family be separated from him.

Any reconciliation of the English and French versions of 105.4(a) must reflect the draughtman's true intent.

As for the Organization's practice, what matters is not the number of staff who have had entitlement to family visit but the criteria applied in granting it. On that score the Organization is silent. Yet the criteria are essential in determining whether a staff member's family visit may be exchanged for a visit by a dependent child. The complainant says he knows of at least two cases in which UNESCO allowed exchange. If it persists in denying such practice it must offer evidence in support.

The complainant asks the Tribunal to order the Organization to produce full information on its practice.

E. In its surrejoinder, the Organization states again the reasons why the complainant was not entitled to family visit in 1989. It rejects the methods of construction he uses as irrelevant. As for the exchange of entitlement to family visit, it rejects the two precedents he cites, one of them being hypothetical and the other being just a mistake.

F. At the Tribunal's instructions the Organization has entered further submissions giving information on its practice in applying 105.4(a) from 1986 to 1992. It provides two lists, one of cases in which staff exercised entitlement to family visit when they were living alone at the duty station, the other of staff members who surrendered to a spouse their own entitlement.

CONSIDERATIONS:

1. The complainant objects to a decision that the Director-General of UNESCO notified to him by a letter of 16 May 1991 to reject a recommendation by the Appeals Board in its report for allowing his claim to travel from Paris to Santiago and back for the purpose of visiting his son. The Director-General explained:

"Under Staff Rule 105.4(a) you may have entitlement to such travel only if all of your dependent children reside outside the country of your duty station. The construction which the Administration puts on that provision is fully in keeping with the draughtsman's intent, as the records of the preparatory work show."

Rule 105.4(a) is reproduced in full under A above.

The material issue is whether UNESCO may refuse a staff member's entitlement to what is termed "family visit" when just one of his dependent children lives "outside the country of [his] duty station" and the others do not.

2. In support of his claim the complainant submits that the rule requires the Organization to pay the staff member the costs of travel for the purpose of family visit if either the spouse or a dependent child lives outside the country of the duty station.

(1) He argues that the first part of the rule establishes the principle of entitlement to those costs whereas the second sets the conditions in which the staff member who qualifies may exercise it and its purpose, which is stated to be that of visiting the spouse or dependent child. In the complainant's submission the intent is to avoid keeping members of the family separate for long periods and it is impossible to fulfil that intent if entitlement is refused simply because the staff member's spouse or any of the children is resident at the duty station. Any other construction would in his view mean drawing a distinction between members of the same family, and that is not socially acceptable.

(2) The complainant points out that the English version of 105.4 uses the singular "child" in referring to "the purpose of visiting his spouse or dependent child", as does Rule 107.1(a)(v), which requires the Organization to pay an official's travel expenses on family visit under Rule 105.4 from his duty station to the place of residence "of his spouse or child" and return.

(3) Citing the records of the preparatory work, he observes that changes made in the text when the Staff Rules were amended in 1971 bear out his position: the conjunction "and" in the second part of 105.4(a) was then removed and the expression "neither his spouse nor any of his dependent children resides at the duty station", which had been in the earlier version, was dropped.

(4) He recalls that in 1987 he was granted the right to visit his son at Santiago although his daughters were, then as later, living with him in Paris. He infers the existence of a practice in his favour and asks the Organization to respect it. In the context of this argument he cites case law which says that where a text is unclear it must be construed in the light of practice.

3. The Organization replies that neither the text of Rule 105.4(a) nor the historical background to it nor practice supports the complainant's case.

(1) It submits that he is ignoring the use of the conjunction "and" in the first part of 105.4(a). That part defines which staff members may be entitled to visit family, whereas the second part is about the purpose of the visit. Only a staff member who lives without family at the duty station is entitled to the costs of travel for the purpose of visiting family.

(2) As to the second part of the provision UNESCO agrees that it relates to the case of a family whose members are not all living together; but the purpose is to provide against the contingency where members of one and the same family are living in different places and the official has to choose to go to one of those places. If the conjunction in the second part were "and" instead of "or" a staff member whose spouse and dependant children were scattered in several places would be entitled to travel to each one of them. That would be absurd and at odds with Rule 105.4(e), which says that the maximum amount to be borne by the Organization in travel expenses is the cost of a journey from the staff member's "duty station" to his "recognized home" and back.

(3) The English version of 105.4(a) must be so construed as to reconcile both versions.

(4) The preparatory work, in UNESCO's submission, shows the author's intent to limit entitlement to a staff member all of whose dependants are living outside the country of the duty station.

(5) The practice of other international organisations in the matter squares with UNESCO's interpretation, and the entitlement it granted to the complainant in 1987, which was just a mistake, sets no valid precedent.

!J22!sides, a father has no right to surrender his own entitlement in favour of a son: Rule 105.4(g) says that there may be exchange only between spouses. As to the social aspect of the matter, UNESCO makes other provision for entitlement to the costs of travel where family members are separated: for example in Rule 105.3 on home leave and in Rule 103.12(r) on travel arising under the education grant.

The Tribunal holds that the actual wording of Rule 105.4(a) is not clear enough to allow of a ruling and that comparison between the English and French versions fails to resolve the issue.

Between the first and second parts of the provision there is inconsistency. In the first part the entitlement is granted on two conditions: the official must be assigned for at least one year outside the country "of his recognized home", and his "spouse and dependent children [must] reside outside the country of the duty station".

The second part identifies the purpose of the entitlement as being to visit the official's "spouse or dependent child", though the French text uses the plural ("enfants à charge"). Apart from that difference between the two language versions, which does not appear critical, both contain the internal contradiction.

How then is it to be resolved?

5. The first part of the rule is the main clause and the second is subordinate.

Since the first part governs the remainder it appears unlikely that the purpose is to allow the staff member to visit family in conditions that differ from those set out in the very definition of the entitlement. It follows that the purpose of the visit must be interpreted as a choice: to visit either spouse or children, if they do not live in the same place, but still subject to the conditions that govern the exercise of that right, viz. provided that they reside "outside the country of the duty station".

6. The plea that the complainant founds on the reference in Rule 107.1(a)(v) to the place of residence of spouse "or child" is unconvincing. Although the rule contains the words "or child" it is qualified by the initial reference to "family visit under Rule 105.4" and cannot therefore serve to alter the requirements in 105.4(a) that the staff member must meet to qualify for the benefit.

7. The obscurity of the text prompts reference both to the "preparatory work" on the rule and to the Organization's practice in applying it. Both parties abundantly refer to them in the pleadings and they are mentioned in the text of the impugned decision.

8. The "preparatory work" suggests that the draughtsman's intent was to provide for entitlement to the costs of travel on family visit in cases where all members of the family were living outside the country of the duty station.

9. As UNESCO points out, the decision to confer entitlement was based on a recommendation which the Consultative Committee of the United Nations on Administrative Questions (CCAQ) made in 1957 and which reappeared in a document that the Food and Agriculture Organization of the United Nations put to the CCAQ in 1971. According to the terms of the recommendation entitlement was to be "limited to staff with family members recognized for this purpose and who are not accompanied by any such family members".

Up to 1972 the text of Rule 105.4(a) provided that any staff member in the Professional category or above whose recognised home was outside the country of his duty station was entitled, insofar as the requirements of the service permitted, to travel at the expense of the Organization "for the purpose of visiting his spouse or dependent child" on condition that "neither his spouse nor any of his dependent children" resided at his duty station or had travelled at the Organization's expense in the twelve months immediately following his appointment or return from home leave.

The material point is that at that time the staff member was entitled to the costs of family visit if neither the spouse nor any of the dependent children resided at the duty station.

10. In 1971 the Director of the Bureau of Personnel of UNESCO sent the Assistant Director-General in charge of Administration a draft amendment to Rule 105.4 in both English and French versions. Both versions contained the conjunction "and" in the first part of 105.4(a) and "or" in the second. The Assistant Director-General having suggested that "or" be used in the first as well for the sake of consistency, the Director answered that such a change would be fundamental since it would entitle a staff member to travel outside the country of the duty station at the Organization's expense if just one of his dependants was not living with him at the duty station; until then the entitlement had been granted only to someone whose dependants all resided outside the country of the duty station; for that reason it was necessary to keep "and" in the first part of the rule. Inasmuch as "and" remained in the final version that explanation seems to have been found cogent.

conclusion to be drawn from the preparatory work is that the intent was to confine entitlement to a staff member whose family members were all resident outside the country of the duty station.

11. The Organization's practice fully bears out that interpretation. In supplementary submissions the Organization informs the Tribunal how it applied Rule 105.4(a) from 1986 to 1992, a period that the Tribunal holds to be long enough for consistent practice to be established.

Lists that the Organization produces show that it granted headquarters staff twenty-four travel authorisations during that period. In all cases but one - that of the complainant himself in 1987 - the entitlement to family visit under 105.4(a) was granted to staff whose family was not living at headquarters. Forty authorisations went to staff living in the field, and there were no exceptions. The authorisation UNESCO gave the complainant in 1987 was, as it maintains, clearly just a mistake, and a single mistake of that kind neither detracts from the general thrust of the practice nor confers any entitlement on the complainant for the future.

12. The conclusion is that the Director-General's decision in the letter of 16 May 1991 is in line with the proper interpretation of Rule 105.4(a): entitlement to the costs of travel for the purpose of family visit may be granted only if all the dependent children of the staff member are living outside the country of the duty station.

13. The decision of 16 May 1991 being upheld, the costs that the complainant's son incurred for travel from Santiago to Paris on 27 December 1989 and back again on 30 January 1990 are not to be borne by the Organization.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
Mella Carroll
E. Razafindralambo
A.B. Gardner

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