Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2389

The Administrative Tribunal,

Considering the second complaint filed by Mr B. H. against the Universal Postal Union (UPU) on 5 September 2003 and corrected on 10 November, the Union's reply of 18 December 2003, the complainant's rejoinder of 26 February 2004 and the UPU's surrejoinder of 2 April 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant, a German national born in 1948, joined the UPU in Bern, Switzerland, in 1994. His current grade is P.3, and he has held a permanent appointment since 1998. In 2002 he asked for his name to be added to the list of staff eligible for home leave. His request was accepted, as was that of another staff member, Mr K. (see Judgment 2390, also delivered this day), in office notice 15/2002 of 11 March 2002. Following an objection by the Director of Finance, however, the two staff members' eligibility for home leave was reviewed and, in a letter of 21 June 2002, the Director General informed the complainant that the addition of his name to the list "had been made by mistake and [was] not in compliance with Article 4.4 of the Staff Regulations of the International Bureau of the UPU". He explained that, since the complainant was resident in Switzerland at the time of his recruitment, he was "locally recruited"; besides, he had "never taken home leave". The Director General therefore rescinded the decision concerning the complainant contained in office notice 15/2002.

On 9 July the complainant asked the Director General to reconsider his decision. On 19 July the latter informed him that since two staff members were objecting to the UPU's practice, he was willing to undertake a detailed review of the rules and regulations concerned. He added that an enquiry would be conducted among other organisations to ascertain their practice on this issue. In a letter of 3 April 2003 the Director General confirmed his decision of 21 June 2002. Referring to a report on the matter by the Head of Legal Affairs, which he attached to his letter, he explained that the complainant was "considered as internationally recruited", but that since he had not needed to become an expatriate in order to take up his duties at the UPU in view of the fact that he was resident in Switzerland prior to his appointment, he did not meet the conditions laid down in Rule 105.3, paragraph 2*. On 1 May the complainant filed an appeal against that decision with the Joint Appeals Committee. In its report dated 5 June the Committee reached the same conclusion as the Director General and recommended rejecting the appeal. In a letter of 10 June 2003, which constitutes the impugned decision, the Director General dismissed the appeal.

B. The complainant contends that the existing rules and regulations are unambiguous and that he "obviously" met the conditions for entitlement to home leave. Apart from the above-mentioned Staff Rule 105.3, paragraph 2, Staff Regulation 4.5 states that "[t]he allowances and benefits normally available to internationally recruited staff members shall include: […] home leave". Regulation 5.3, which provides that "[a] staff member whose home country is the country of his official duty station or who continues to reside in his home country while performing his official duties shall not be eligible for home leave", does not give a definition of the "home country". Lastly, Administrative Circular (PER) No. 12/Add 1 of 14 June 1993 indicates that the home leave country is "normally the country of which the staff member is considered to be a national". According to the complainant, this means that the country of home leave should be the country of a staff member's nationality. In the light of his family situation, it is important that he should maintain a link with "his only real roots". He considers that by refusing him home leave "on the grounds that he had not been obliged, as a result of his recruitment, to transfer his residence from his home country to the country where the [UPU] has its headquarters", the Director General added a condition which is not stipulated in the relevant provisions.

Subsidiarily, he notes that according to Regulation 12.3, "[i]n case of doubt as to the interpretation or application of the Staff Regulations and Rules, the Director General shall be guided by the practice of the United Nations and

of the other specialized agencies belonging to the United Nations family and by the case law of the […] Tribunal". In his view, the impugned decision is based on an interpretation which is not consistent with the practice of the United Nations or that of many other specialised agencies, and he points out that, according to the Tribunal's case law, any ambiguity in the regulations should be construed in favour of the staff rather than the organisation.

The complainant asks the Tribunal to set aside the impugned decision, to order the UPU to readmit him to the list of staff eligible for home leave and to award him costs.

C. In its reply the Union points out that the fact that the term "normally" is used in Regulation 4.5 shows that there is no automatic entitlement to home leave and that the latter is not granted if the Director General considers that to do so would be contrary to the purpose for which it was established, as in this case. At the time he was recruited, the complainant had been residing in Switzerland for more than 30 years. The fact that he kept up contacts with his family in Germany does not make Germany his "home". It maintains that it has always considered that a staff member who, at the time of his recruitment, had been residing continuously in Switzerland for many years had established his home in his country of residence, regardless of his nationality. According to the defendant, this practice is consistent with both the letter and the spirit of the current regulations and is no different from the practice followed by several specialised agencies and by the United Nations Office in Geneva. It considers that the complainant's claim to home leave is abusive since it is "obvious" that his home is in Switzerland.

D. In his rejoinder the complainant accuses the UPU of bad faith in its argumentation. He denies that the inclusion of his name on the list of those eligible for home leave was the result of a "mistake". That decision, which was approved by the Deputy Director General and the Director General, was taken after many discussions between qualified people and a survey among several international organisations. He is shocked at the way the defendant casts doubt on his links with his home country, the only one of which he is a national. He believes the Union is wrong to interpret the word "normally" as allowing it a broad discretion to decide when claims for allowances and benefits are justified. That is its own interpretation and does not reflect that of other organisations. He argues that since the UPU defines the "home" solely on the basis of nationality, it is only in the case of staff with several nationalities that the Union enjoys broad discretion. He points out that all the organisations based in Switzerland that replied to the survey allow their staff in the professional category who are not Swiss nationals to take home leave, even if they were resident in Switzerland at the time of their recruitment. He adds that, contrary to its allegations, the UPU follows no constant practice in that respect. Even if it did, that practice would not be in accordance with its Staff Regulations and Rules.

E. In its surrejoinder the Union countercharges the complainant with bad faith. It explains that a preliminary survey conducted in February 2002 was very summary and that the two following surveys revealed different practices between organisations, especially in individual cases such as those of the complainant and his colleague, Mr K. It submits that its refusal to grant him home leave has always been based on the relevant provisions of the Staff Regulations and Rules, which it has not contravened. While recognising that "the home leave country is normally the country of which the staff member is a national, that is, the country whose nationality he possesses", it emphasises the significance of the term "normally" that appears in several provisions – which allows the possibility of exceptions – and asserts that "[i]t is wrong to maintain […] that the home leave country is defined solely on the basis of nationality", since the concept of residence must also be taken into account. The fact is that the complainant has not had his main residence in Germany since 1963, the year he moved to Switzerland. In the circumstances, his application for home leave is abusive since it is incompatible with the purpose of that benefit. It maintains that it has never granted home leave to staff who at the time of their recruitment had been residing continuously in Switzerland for many years.

CONSIDERATIONS

1. The complainant was born in 1948 in the Federal Republic of Germany, the country whose nationality he has always retained. He lived there until 1951, before attending primary school in Canada and the United States of America. From 1961 to 1963 he attended secondary school alternately in Germany and in Switzerland. He completed his higher studies in Switzerland, where he has resided continuously since 1963, except for a few months in Milan and two years in Greece for work-related reasons.

2. On 14 November 1994 the complainant joined the UPU as an accountant in the Finance Section under a short-term contract, which was extended several times until the spring of 1996. He was appointed on 3 April 1996

as First Secretary at grade P.3 in the same section and was given a permanent appointment as from 1 April 1998. He had been residing for many years in Switzerland, where he held a settlement permit of indefinite duration issued by the cantonal aliens police authorities, and where he still resides today. After he was recruited, the complainant received a category D identity card (*carte de légitimation D*), which is issued to international civil servants by the Federal Department of Foreign Affairs and which mentions their immunity from legal process in the performance of their duties.

3. In an office notice of 11 March 2002, the complainant's name was added, at his request, to the list of internationally recruited staff members entitled to home leave for the current year. On 21 June 2002 the Director General went back on that decision, however, on the grounds that it had been taken in error, since the complainant was resident in Switzerland at the time of his recruitment. Having been asked by the complainant to review his decision, the Director General confirmed it on 3 April 2003.

The complainant filed an appeal with the Joint Appeals Committee asking for confirmation of his entitlement to home leave. The Committee recommended that the Director General dismiss the appeal on the grounds that the complainant had not become an expatriate as a result of his appointment in 1996 and that he "[did] not fulfil the condition of continuing to reside in a country other than that of his nationality, in order to perform his official duties in the organisation".

On the basis of that recommendation, the Director General rejected the appeal in a letter of 10 June 2003, which constitutes the impugned decision.

4. Entitlement to home leave is governed by Article 4.5 of the Staff Regulations of the International Bureau of the UPU and by Staff Rule 105.3. Its scope has been set out in detail in Administrative Circular (PER) No. 12/Add 1 of 14 June 1993.

Staff members eligible for home leave may return to their home countries every two years, at the Union's expense, for the purpose of spending a substantial period of annual leave there. The Director General may request a staff member on his return from home leave to furnish satisfactory evidence that this requirement has been fully met (Staff Rule 105.3, paragraphs 1 and 12). Home leave is normally granted to internationally recruited staff members (Regulation 4.5), though only to those who meet the conditions set out in Rule 105.3.

Internationally recruited staff members are eligible for home leave provided, in particular, that while performing their official duties they continue to reside in a country other than that of which they are nationals (Rule 105.3, paragraph 2a). According to paragraph 3 of Administrative Circular (PER) No. 12/Add 1, home leave does not apply to staff members performing their official duties in their home country, which is normally the country of which they are considered nationals, in other words, the country of the staff members' nationality or, in the case of several nationalities, the country with which, in the opinion of the Director General, they are most closely associated (Regulation 4.6).

5. The defendant acknowledges that the complainant is considered as having been internationally recruited. However, it refuses to grant him home leave on the grounds that, at the time of his recruitment, he had been settled in Switzerland for many years and that he has maintained only occasional ties with his home country. The complainant contends that this position is not in keeping with the provisions of the Staff Regulations and Rules, under which, according to him, all internationally recruited staff members who are not Swiss nationals but are resident in Switzerland at the time of their recruitment are eligible for home leave, at least if they maintain links with the country of their nationality.

6. The complainant's argument finds no solid support either in Regulation 4.5 or in Rule 105.3. Under that Rule, it is not sufficient for entitlement to home leave that internationally recruited staff members be serving in a country other than that of which they are nationals; they must also meet the required conditions. Thus, paragraph 2a of the Rule stipulates that a staff member shall be eligible for home leave provided that while performing his official duties he continues to reside in a country other than that of which he is a national. This condition is clearly not met in the case of a staff member who lived in his home country only during his early childhood and who, at the time of his appointment, had been residing for several decades, practically without a break, in the country where he performs his official duties. The complainant does not deny that this is his situation.

7. The defendant's position is consistent not only with the clear wording of the relevant Staff Regulations and

Rules, but also with their purpose.

The object of home leave is not primarily to make a monetary concession to staff members or, in broad terms, to allow them a purely material benefit. It is justified, generally speaking, by the fact that it is to the advantage of the international organisations that their staff members should maintain their links with their home country (see Judgments 271, under 4 and 6, and 937, under 12). This country is not necessarily that of the staff member's nationality. It could be the country with which he has the closest connection outside the country in which he is employed (see Judgment 1985, under 9), for instance the home country of his wife or of children whom he may have adopted or taken in but who he believes should keep up their connections with their native environment. Thus, according to Staff Rule 105.3, paragraph 4c, the Director General, in exceptional circumstances, may authorise a staff member to take home leave in a country other than the country of his nationality, provided that the latter can show that he maintained his normal residence in that other country for a prolonged period preceding his appointment, that he continues to have close family or personal ties in that country and that his taking home leave there would not be inconsistent with the purpose and intent of Staff Regulation 5.3.

Thus, the purpose of home leave is to enable staff members who, owing to their work, spend a number of years away from the country with which they have the closest personal or material ties to return there in order to maintain those connections. Regulation 5.3, which denies home leave to staff members whose home country is the country of their official duty station or who continue to reside in their home country, is therefore self-explanatory. Regulation 4.5, paragraph 2, reflects the same reasoning, insofar as it provides that a staff member may lose entitlement to home leave if, following a change in his residential status, he is, in the opinion of the Director General, deemed to be a permanent resident of any country other than that of his nationality, provided that the Director General considers that the continuation of such entitlement would be contrary to the purposes for which the benefit was created.

The complainant is not unaware of the purpose of the provisions to which he refers. He implicitly recognises the consequences, namely that a staff member – who, at the time of his recruitment, is resident in the country where his duty station is located and maintains no particular personal ties with the country of his nationality – cannot claim to be eligible for home leave since he did not leave the latter country to take up his appointment. This is probably why the complainant places such emphasis on the family and personal ties he said he has maintained with his home country, even though he has not lived there for several decades. However, the Tribunal is not convinced by his arguments that those ties have been so uninterrupted and so close as to make him eligible for home leave.

8. The complaint must therefore be dismissed without any need for the Tribunal to look more closely at the arguments put forward by the complainant regarding the limits within which the defendant may interpret the Staff Regulations and Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

____* Staff Rule 105.3, paragraph 2, reads as follows:

“A staff member shall be eligible for home leave provided the following conditions are fulfilled:

a While performing his official duties he continues to reside in a country other than that of which he is a national.

[…]”

Updated by PFR. Approved by CC. Last update: 17 February 2005.