UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2012-304

Valimaki-Erk

(Respondent/Applicant)

v.

Secretary-General of the United Nations

JUDGE SOPHIA ADINYIRA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/004, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 6 January 2012 in the case of *Valimaki-Erk v. Secretary-General of the United Nations*. The Secretary-General appealed on 6 March 2012, and Ms. Kaisamaija Valimaki-Erk answered on 1 May 2012.

Synopsis

2. The issue before us is the legality of the policy requiring individuals to renounce their permanent resident status that they may have acquired in a country not of their nationality before they can be recruited at the professional level.

3. This policy stemmed from a recommendation in the Report of the Fifth Committee, Document A/2615 dated 7 December 1953. This restrictive policy was guided by the principle of reimbursement to staff members of national income taxation, and the concern by a number of delegates that "a decision [by a staff member] to remain on permanent residence status in no way represented an interest of the United Nations and that, on the contrary, to the extent (if any) that it might weaken existing ties with the countries of nationality it was an undesirable decision".

4. Whilst this practice has been in effect for 59 years at the Organization, the UNDT found that it lacked legal backing.

5. It is legitimate for the Secretary-General not to ignore a recommendation or a stated policy of the General Assembly. We, however, wish to point out that the Fifth Committee in paragraph 73 of its Report (A/2615) required that

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that the General Assembly would have endorsed the policy of precluding appointment if an individual is a national of one country but holds permanent resident status in another country.

23. Ms. Valimaki-Erk stresses that the Secretary-General himself has objected to the policy of requiring the renouncement of one's permanent resident status as a condition of appointment.

Considerations

24. The issue before us is the legality of the policy requiring individuals to renounce a permanent resident status that they may have acquired in a country not of their nationality before they can be recruited at the professional level.

25. It is established in the Report of the Fifth Committee at the eighth session of the General Assembly in 1953, Document A/2615, that the basis of this policy stemmed from the decision of a number of delegations to

> specifically endorse[...] the view expressed by the Advisory Committee in its report that a decision [by a staff member] to remain on permanent residence status in no way represented an interest of the United Nations and that, on the contrary, to the extent (if any) that it might weaken existing ties with the countries of nationality it was an undesirable decision.

26. This restrictive policy was also guided by the principle of reimbursement to staff members of national income taxation. The Fifth Committee, in considering the issue, concurred in the recommendation of the Advisory Committee in para. 66 (a): "that persons in permanent residence status should in future be ineligible for appointment as internationally recruited staff members unless they were prepared to change to a G-4 (or equivalent) visa status".

27. Despite the fact that this practice has been in effect for 59 years at the Organization, the UNDT found that it lacked legal authority as the Fifth Committee recommendation was not endorsed by the General Assembly. The Secretary-General submits that this decision did not require further action by the General Assembly. In support of this assertion, the Secretary-General relies on Judgment No. 66 *Khavkine* (1956) issued by the former Administrative Tribunal of the United Nations (UNAdT).

28. In that case, Mr. Arnold Khavkine, a former Programme Officer of the United Nations Technical Assistance Administration, filed an application with the UNAdT requesting, inter alia, the rescission of the Secretary-General's decision to deny him the right to sign the waiver of privileges and immunities in order to acquire permanent residence in the host country. The essence of Mr. Khavkine's case was that, in the absence of any resolution passed by the General Assembly, the Secretary-General could not rely on the proceedings of the Fifth Committee in support of his refusal to authorize the waiver of privileges and immunities.

29. The UNAdT held:

> [T]his contention is inconsistent with the procedures normally followed by the United

31. In the said circular issued on 19 January 1954 (ST/AFS/SER.A/238), the Secretary-General informed the staff of the decisions adopted by the General Assembly regarding change of permanent resident status by a staff member and the amendments in the Staff Rules to implement those decisions.

32. These amendments provided that staff members who acquired permanent resident status in the country of their duty station would no longer be eligible for certain international benefits,[3] and that staff members intending to acquire permanent resident status or change their nationality would be required to notify the Secretary-General before such change became final.[4]

33. However, the Appeals Tribunal notes there was no provision in the amendments that required international staff to renounce their permanent residence status in a country not of their nationality before they could be recruited.

34. Accordingly, we hold that the Staff Rules that were amended pursuant to the decisions of the General Assembly in 1953 only addressed the scenario in which an existing staff member wished to change his or her nationality or to acquire a permanent residence status and its financial consequences.

35. The Secretary-General invites us to apply the UNAdT's decisions in *Khavkine* and *Fischman*. The decisions of the former UNAdT are not binding on the Appeals Tribunal. However, we wish to comment that the facts of those cases are different from the one before us. Furthermore and more importantly, at the time the UNAdT delivered its opinions in 1956 and 1984, respectively, there were in existence staff rules governing their particular situations and reflecting the decisions of the Fifth Committee.[5]

36. In *Khavkine* the Applicant was contesting the refusal by the Secretary-General to authorize him to sign the waiver of privileges and immunities in order to acquire permanent residence status in the host country. In *Fischman* the Applicant was contesting the decision of the Secretary-General preventing him from taking the steps necessary to change his Argentine nationality to that of the United States. In the present case, Ms. Valimaki-Erk is

[3] See Secretary-General's Bulletin ST/AFS/SGB/94/Rev. 2 of 19 January 1954, especially the amended Staff Rule 104.7 on international recruitment.
[4] See Information Circular ST/AFS/SER.A/238 of 19 January 1954, para. 10, which refers to Staff Rule 104.4.
[5] See footnotes 2 and 3 above.

41. Ms. Valimaki-Erk rightly submits that, although the Secretary-General has discretion in the appointment of staff, he has no discretion to impose unwritten regulations and rules that are prejudicial to staff members.

42. This Tribunal recalls that Article 101(1) of the Charter of the United Nations states that "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly". These Staff Regulations embody the conditions of service and the basic rights and duties and obligations of United Nations staff members. They are supplemented by the administrative issuances in application of, and consistent with, the said Regulations and Rules.

43. To date, no administrative issuance has been promulgated that reflects this contested policy of requiring an individual to renounce his or her permanent resident status in a country not of his or her nationality as a condition for becoming a staff member of the Organization at the professional level.

44. The Appeals Tribunal notes further that Article 101(3) of the United Nations Charter states:

> The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

There is nothing in the United Nations Charter to suggest that geographical distribution is based on resident status. All along, recruitment into the Organization has been based on nationality and not on residence. As per Staff Rule 4.3, the Administration recognises only one nationality. Staff Rule 4.3 "Nationality" provides:

> (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.

45. The contested policy therefore cannot be justified under the pretext of ensuring geographical distribution of staff members. Bearing in mind the human rights principles and the modern law of employment, this policy has no place in a modern international organization.

46. In view of the foregoing, we hold that the Secretary-General's decision to require Ms. Valimaki-Erk to relinquish her permanent resident status in Australia if she wished to receive a two-year contract as Procurement Officer was unlawful, as it was premised on a practice that has no legal basis.

Judgment

47. T47.