

## SIXTY-EIGHTH SESSION

### *In re* VILLALOBOS BASURTO

#### Judgment 1006

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Gaby Rosa Villalobos Basurto against the World Tourism Organization (WTO) on 23 December 1988 and corrected on 7 March 1989, the WTO's reply of 12 June as corrected on 12 July, the complainant's rejoinder of 5 August, the WTO's letter of 16 August to the Registrar of the Tribunal, the complainant's comments thereon of 18 September, and the WTO's surrejoinder of 13 October 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulation 16 of the WTO Staff Regulations as in force up to 31 December 1987 (now Rule 14.6 of the Staff Rules), Rule 29 of the WTO Staff Rules and the Rules of the Joint Appeals Committee of the Organization;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Regulation 16 of the WTO Staff Regulations as in force up to 31 December 1987 read:

"(a) An official's home shall be deemed to be in the country of which he is a national at the time of his appointment. An official's home shall remain unchanged for the duration of his service unless the Secretary-General decides that there are compelling reasons for permitting a change.

(b) The home of an official of the General Service category who has been locally recruited shall be deemed to be at the duty station.

(c) A non-locally recruited official of the General Service category who acquires voluntarily the nationality of the country of the duty station shall be reclassified as locally recruited, and his entitlement to home leave travel expenses, expenses upon termination and education grant shall thereupon cease."

The complainant is a Peruvian citizen by birth. She arrived in Spain in the summer of 1971. In 1972 she married a Spaniard and thereby acquired Spanish nationality as well. She bore a son in 1974. In 1976 she joined the General Service category of staff of the WTO in Madrid and was granted local status. On 22 March 1977 an ecclesiastical court of the Archdiocese of Madrid-Alcalá granted her a decree of indefinite separation from her husband and custody of her son, but no alimony. On 24 December 1979 the Spanish courts recognised the effect of the decree in civil law.

On 7 November 1979 she wrote a memorandum to the Administration of the WTO asking that her home be deemed to be in Peru as from the date of annulment of her marriage. The Secretary-General stated in a memorandum of 13 November that he agreed. In accordance with Regulation 16 the complainant got the benefits of non-local status and was granted permission on 16 November to go on home leave to Lima. She also went on home leave in 1981, 1983, 1985 and 1987.

By a memorandum of 4 March 1988 the Chief of the Personnel Section informed the complainant on the Secretary-General's behalf that the decision of 13 November 1979 had been wrong and was reversed forthwith. On 25 March 1988 she appealed to the Joint Appeals Committee under Rule 29 of the Staff Rules. Its chairman submitted an undated and unsigned report in August. The Secretary-General wrote on 2 September asking the chairman to say whether the report was final. The chairman replied on 16 September that it was and confirmed the Committee's view that the reversal of the 1979 decision had been correct, though the Committee suggested reconsidering the matter. By a letter of 26 September 1988, the decision impugned, the Secretary-General rejected the appeal.

B. The complainant has three main pleas. (1) The decision of 13 November 1979 to change her home from Madrid to Peru is a term of her contract. The Secretary-General's grant of her request marked the conclusion of an

agreement on the matter and the new term so introduced into her contract may not be altered without her consent. She discusses the case law on the enforcement of contracts and the doctrine of acquired rights.

(2) The grounds the Secretary-General gave for reversing the 1979 decision are invalid. They were that the decision had rested on mistakes of fact, which could not be regarded as "compelling reasons for permitting a change", the term in Regulation 16(a). The basic rule in 16(a) was that a staff member's home was in the country of his nationality, but there were two exceptions. One (16(b)) was that for a locally-

recruited member of the General Service category of staff the home was the duty station; the other (16(c)), which at the material time applied only to that category, was that someone who was not locally recruited but acquired the nationality of the country of the duty station lost non-local status. The Secretary-General could under 16(a) change the staff member's home if there were "compelling reasons". The decision being discretionary, however, it is irrelevant that in 1979 the Secretary-General misconceived the facts, even supposing he did, since he was in good faith. The complainant too was in good faith, there being no evidence of dishonest intent on her part.

(3) She alleges abuse of authority.

(a) Other measures have been taken to her detriment: a warning imposed on 28 September 1988 which the Secretary-General later withdrew, transfer to a less responsible post, and an unwarranted rebuke on 13 December 1988. Her work for the Staff Association, which she describes, prompted the WTO to act against her, and the impugned decision, which shows the same hostility, was taken for improper reasons.

(b) Paragraph 21 of the Joint Appeals Committee's rules require communication of its reports to the Executive Board for information. In a paper it put to the Board on 13 October 1988 the WTO merely said that Board members might on request have a summary of the Committee's report on the complainant's case. The summary distorted the report and did not even mention the suggestion for reconsidering the matter. That is further evidence of abuse of authority.

The complainant asks the Tribunal to quash the impugned decision, order that Lima be deemed to be her home as from 4 March 1988 and award her 30,000 French francs in costs.

C. The WTO replies that Regulation 16(a) required that there be "compelling reasons" in 1979 for changing the complainant's home to Peru for the decision to be valid. Since there were not the decision cannot stand. What the then Secretary-General said in his memorandum of 13 November 1979 was that the main reason for it was the change in civil status brought about by the church decree. But under Spanish law at the time that decree did not annul the complainant's marriage: she could not marry anyone else and she kept her status as a married woman and Spanish citizenship.

Though the decree was made on 22 March 1977 it took no effect in civil law until 24 December 1979 whereas the decision had been taken in November 1979.

Two other possible reasons for the change are invalid. One, that she had not lived in Madrid before marriage, was simply not true. The other, that she had custody of her son, was also invalid because again the decision did not take effect in civil law until afterwards.

The factual basis of the earlier decision being mistaken, the Secretary-General was free in 1988 to reverse it.

Since there were no valid grounds for the 1979 decision there can have been no valid contract between the parties on the matter. Moreover, her good faith is in doubt because the matter was settled in 1979 in a few days even though not until much later did she produce evidence in support of her request.

She shows no link between the decision she impugns and recent incidents in her career, which came later anyway.

The Joint Committee's report was communicated in full to the members of the Executive Board at its November 1988 session in Fez.

D. In her rejoinder (1) the complainant cites the opinion of a Spanish advocate in answer to the Organization's argument that the church decree did not end her marriage. In her submission the opinion affirms that the decree took immediate effect in civil law under the Spanish Civil Code and the Concordat of 1953 between the Holy See

and Spain. The only purpose of her going to the civil court was to have the decree recorded in a civil register.

(2) In any event the Secretary-General took the decision in 1979 at his discretion and the factual accuracy of the grounds for it is immaterial. The speed in handling the matter in 1979 is no evidence of the complainant's bad faith and she had no reason to conceal the evidence, which was in her favour and indeed satisfied the WTO for many years.

(3) She presses her plea of breach of contract, which she observes the WTO briefly dismisses.

(4) She enlarges on her plea of abuse of authority and, for reasons she explains, doubts that the Joint Committee's full report was made available to the Executive Board.

E. In its surrejoinder the Organization enlarges on its pleas in answering the complainant's charges that it acted dilatorily and in breach of her contract and abused its authority. It seeks to refute the pleas put forward in her rejoinder.

#### CONSIDERATIONS:

1. By a decision dated 13 November 1979 the then Secretary-General of the WTO granted the complainant non-local status. The present Secretary-General reversed that decision on 4 March 1988 and confirmed the reversal on 26 September 1988 after an internal appeal, the reason given being that there were no grounds on which the former Secretary-General could have properly reached his decision.

2. Even if that decision was based on facts that were wrong and even if there was misinterpretation of Regulation 16, it was in any event too late by 1988 to reverse a decision that the Organization had already abided by for almost nine years.

The complainant is accordingly entitled to have the impugned decision set aside.

Application for the striking out of evidence

3. In a letter of 16 August 1989 the Organization asks that an item of evidence the complainant appends to her rejoinder be struck from the case records.

There is no need to rule on that application since the item is immaterial to the Tribunal's ruling.

#### DECISION:

For the above reasons,

1. The Secretary-General's decision of 26 September 1988 is set aside.

2. The Organization shall pay the complainant 1,000 Swiss francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner