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

EIGHTY-THIRD SESSION

In re Bardi Cevallos

(Application by UNESCO for review)

Judgment 1668

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 24 September 1996 for review of Judgment 1525, the reply of 14 October from Mr. Hugo Bardi Cevallos, the Organization's rejoinder of 19 November and the complainant's surrejoinder of 2 December 1996;

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

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1525 of 11 July 1996 the Tribunal allowed a complaint from Mr. Bardi Cevallos. It set aside a decision by the Director-General of UNESCO and referred the complainant back to the Organization "for reconsideration of his right to renewal of appointment". The gist of its reasoning was that the decision not to renew his appointment showed a procedural flaw in that it had been taken before the Senior Personnel Advisory Board (SPAB) had expressed an opinion on his case. What was needed - held the Tribunal - was a new decision after the SPAB had expressed its views.

By this application the Organization is seeking review of that judgment on the grounds that are set out below.

2. As the Tribunal has often said, its judgments carry the authority of *res judicata* and only in quite exceptional circumstances will it review them. Several pleas for review are inadmissible, such as a mistake of law or misreading of the evidence. Other pleas may be admissible provided that they are material to the Tribunal's ruling. They include the overlooking of some material fact, or a material error, i.e. a mistaken finding of fact which calls for no appraisal and which is to be distinguished on that score from a misreading of the evidence: see for example Judgments 442 (*in re* Villegas No. 4), 1309 (*in re* Ahmad No. 3) and 1353 (*in re* Louis No. 4).

3. The Organization's first plea is that the Tribunal committed a mistake of fact in Judgment 1525. It held that the procedure to be followed before the SPAB was governed by the Rules of Procedure of Personnel Advisory Boards in their version dated 20 November 1967, the one in force at the material time. The Organization points out that that version was repealed by circular 1751 of 16 January 1991. Only an excerpt of that circular was submitted to the Tribunal. A new version of the Rules came into force on 19 July 1995, i.e. at a date subsequent to the material facts.

(a) The Tribunal does not keep a full stock of the rules on the functioning of the Organization. At its session in May 1996 it wanted to consult the text of the Board's Rules of Procedure for the purpose of entertaining the defendant's objections as to the competence of that body. It therefore applied to the secretariat of the Organization for the text and was sent by fax the text of 19 July 1995. It then asked for the text of the Rules of 20 November 1967 in their English and French versions. The Organization did not, however, tell it of the date of repeal of the 1967 Rules or explain that for some time the procedure of the Board had not been governed by any written rules at all. Any mistake on that score in Judgment 1525 is attributable to the Organization's failure to provide full information.

In any event it is immaterial to the outcome.

(b) The complainant cited the Rules of Procedure in support of his contention that the Board was entitled thereunder to ask for and obtain certain information before giving its views.

Yet even in the absence of written Rules of Procedure the Board continued to function in accordance with unwritten rules that were akin both to those that had been in force earlier and to those that came in later. That is borne out by what the Organization says in its rejoinder about the reasons for the repeal of the old Rules and their eventual replacement by the new ones.

So any mistake of fact there may have been was irrelevant to the *ratio* of the judgment.

(c) The Organization objects to the statement in the judgment that it was common ground that the Rules of 20 November 1967 were the material provisions. It points out, quite rightly, that neither of the parties took up the issue.

As has been said, the Tribunal relied on the information supplied by UNESCO in holding that those Rules did apply. In the absence of comment from the parties it inferred that there were no objections to the relevance of those rules.

4. The Organization's second plea is that there was a mistaken conclusion under 3 that the Board was some sort of decision-making body that had to sort out staff problems, whereas in fact there is no such thing as co-management.

Since what the Organization is pleading is a mistake of law its plea is inadmissible. It is wrong anyway since the Tribunal did not hold that the Board was a decision-making body, but merely that it gave its opinion in the context of a procedure aimed at finding fair expedients.

5. Thirdly, the Organization argues that the Tribunal misconstrued Judgment 969 (*in re* Navarro). It interprets the passage in that judgment under 21 starting "As for the failure of the headquarters Board of Appeal to make any recommendation" to mean that the Director-General was free to take a decision without any recommendation from the Senior Personnel Advisory Board.

Here again the Organization is pleading a mistake of law, and that is not admissible.

But again the plea is devoid of merit anyway. The passage in question must be read in full and in context. Moreover, Judgment 1525 shows that the material issue was not the same in this case as in Navarro since here the lack of the prior opinion was due solely to the Administration's failure to let the Board have the information it had asked for.

6. UNESCO's fourth plea is that the Tribunal misread and misapplied Judgment 1289 (*in re* Enamoneta). It says that in this case, as in that one, the Personnel Advisory Board did express an opinion - namely that not enough had been done to look for another post - and so the Director-General was free to dispense with any formal recommendation, the Board having expressed its opinion.

Again, that goes to an issue of law and is an inadmissible plea. But again it is devoid of merit. Contrary to what UNESCO makes out, the SPAB was entitled to seek information on the possibilities of redeploying Mr. Bardi Cevallos and the Administration failed to answer, though the request was quite reasonable, the Board needing the information to make up its mind. The Board cannot properly be accused of meddling in the area of the Director-General's own competence.

7. The Organization's fifth and last plea is that the Tribunal should not have sent the complainant's case back "for reconsideration of his right to renewal of appointment". It maintains that a fixed-term appointment confers no "right" to renewal of an appointment.

That plea again goes to the law and is not one that the Tribunal will entertain. Besides, it is mistaken. The Tribunal did not say that the complainant had any right to renewal; it merely ordered the Organization to take a new decision on the issue in accordance with due process. The text of the judgment is quite clear on that score.

8. Mr. Bardi Cevallos has entered a counterclaim to payment by the Organization of interest at the rate of 10 per cent a year on the sums due in accordance with Judgment 1525 as from the date of notification of that judgment and until the date of notification of this one.

Such a counterclaim would be receivable in the context of an application for execution, which does not require prior exhaustion of any internal remedies: see Judgments 732 (*in re* Loroch No. 3) under 2 and 1328 (*in re* Bluske No. 3) under 17. But, apart from the award of costs, Judgment 1525 does not order the payment of any sums of money. There is therefore no call for any order imposing on the Organization the penalty of payment of interest: see Judgment 1117 (*in re* Massie and others).

The Organization must follow the procedure ordered in Judgment 1525 and take a new decision, whatever the financial consequences may be.

9. Mr. Bardi Cevallos engaged a lawyer to reply. He is entitled to the costs he seeks and the amount does not appear too high.

DECISION

For the above reasons,

1. The Organization's application is dismissed.

2. The counterclaim by Mr. Bardi Cevallos to payment of interest is dismissed.

3. The Organization shall pay him 5,000 French francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

Michel Gentot
Julio Barberis
Egli
A.B. Gardner

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