

EIGHTY-FOURTH SESSION

In re Umar

Judgment 1733

The Administrative Tribunal,

Considering the complaint filed by Mr. Ijaz Umar against the International Atomic Energy Agency (IAEA) on 22 October 1996 and corrected on 19 November 1996, the IAEA's reply of 25 February 1997, the complainant's rejoinder of 26 March and the Agency's surrejoinder of 30 June 1997;

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

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. Paragraph 68 of Section 3, Part II, of the IAEA Administrative Manual and paragraph A.2 of a staff notice, SEC/NOT/1309, issued on 31 January 1990 say that applicants for posts subject to geographical distribution must have the sponsorship of the government of their country.

The complainant, a citizen of Pakistan who was born in 1943, joined the staff of the Agency in 1974. At the material time he belonged to the General Service category of staff and was an inspection assistant in the Division of Operations of the Department of Safeguards. On 4 May 1995 he applied for a post as a safeguards inspector at grade P.3. The notice of vacancy said: "appointment is subject to government endorsement".

The Director General having approved the reserve list of applicants for P.3 and P.4 posts, of which the complainant was one, the Deputy Director General of the Department asked the Director of the Division of Personnel in a memorandum of 12 July 1996 to seek the Director General's approval for offering him a post as safeguards inspector.

Having got a letter from the Permanent Mission of Pakistan in Vienna stating that "the Pakistan Atomic Energy Commission [was] not in a position to sponsor Mr. Umar's candidature", the Director of Personnel wrote to the Director General on 15 July to ask his opinion. By a memorandum of 18 July to the Director General the acting Director of Personnel proposed offering appointments to five candidates on the reserve list. They included the complainant. On 22 July the Director General wrote on the memorandum of 15 July that for want of government sponsorship Mr. Umar could not be appointed. On the same day he wrote on the memorandum of 18 July with the following words: "Approved - with the exception of Mr. Umar, who was not sponsored by the govt. of Pakistan". By a letter of 31 July 1996 the head of the Recruitment Unit told the complainant that his application had been unsuccessful, but he did not say why.

By a letter of 11 September 1996 the complainant asked the Director General to reconsider or, failing that, to allow him to go directly to the Tribunal. In a letter of 9 October 1996 - the impugned decision - the Director General refused to review his decision on the grounds that the situation had not changed, but he agreed to waive the internal appeal procedure.

B. The complainant has three pleas. First, he submits that the requirement of government sponsorship infringes Article VII.D of the IAEA Statute, which says that the paramount consideration in recruitment is "to secure employees of the highest standards of efficiency, technical competence, and integrity". Paragraph 68 of the Manual, however, makes government sponsorship the paramount consideration. That, in the complainant's view, has deprived the Agency of the services of many applicants from developing countries.

Secondly, citing the case law, he contends that the Agency is in breach of Article VII.F of its Statute: submitting to a veto from a member State amounts to accepting instructions from it. He asserts that an international civil servant can never be truly independent of a government to which he owes his

appointment.

Lastly, to set such a condition on recruitment or on promotion from the General Service to the Professional category offends against the independence of the international civil service.

He asks the Tribunal to declare null and void the rules on government sponsorship in the Manual and in the staff notice of 31 January 1990; to quash the Director General's decision of 9 October 1996; to order the Agency to promote him as from 12 July 1996 to a P.3 post as a nuclear safeguards inspector; and to award him 35,000 Austrian schillings in costs.

C. In its reply the Agency explains that, although at the outset the requirement of government sponsorship was needed for the purpose of recruiting competent staff, it has become a means of obtaining assurance about a candidate's "credentials", and the Agency's terms of reference make that essential.

It submits that government sponsorship is not inconsistent with Articles VII.D and VII.F of the Statute, since it entails consultation only about a candidate that the Agency has already chosen on merit. Besides, the Director General may waive the requirement if he deems fit, even though he did not in this case, and he has the last word on appointment. The requirement does not impair the independence of its staff. Taken together, Articles VII.D and VII.F reflect the Agency's inability to find the staff it needs without help from its member States.

D. In his rejoinder the complainant questions the usefulness of government sponsorship in obtaining information about someone who, like himself, has been in the Agency's employ for twenty-two years. In his submission the process is more than just consultation: it allows a member State to veto an application. That the Director General may waive the requirement does not make it any more lawful. Neither rule expressly mentions waiver or the circumstances in which it may be granted. The complainant believes that someone of his qualifications and seniority was entitled to an explanation from the Director General for his refusal to waive the requirement.

E. In its surrejoinder the Agency presses its pleas.

CONSIDERATIONS

1. The complainant, a citizen of Pakistan, joined the Agency on 16 April 1974 as a safeguards technician at grade G.4. He was promoted to G.5 on 1 November 1974, to G.6 on 1 January 1978 and to G.7 on 1 January 1984. He now holds a post at step 12 in G.6, which is equivalent to step 12 in G.7 under the old system of numbering.

2. On 4 May 1995 he applied for a post at grade P.3 as a safeguards inspector. The notice of vacancy stated that appointment was "subject to government endorsement".

3. On 18 January 1996 the complainant's first-level and second-level supervisors signed a report appraising his performance. The former stated that "Mr. Umar should not only be promoted to the professional level but be also kept in our Section where he is a very valuable asset". The second-level supervisor stated his "full agreement with the comments made by the supervisor".

4. In accordance with the Agency's special procedure for recruiting safeguards inspectors and the recommendations of the Joint Advisory Panel on Professional and G.8 staff the Director of the Division of Personnel sought on 11 June 1996 the Director General's approval for putting the complainant on a reserve list of P.3 safeguards inspectors. The Director of Personnel said that if the complainant's appointment were approved his contract would have to be superseded by a new fixed-term one for three years. The Director General having given his approval, the Deputy Director General of the Department of Safeguards sought the Director General's approval for offering the complainant appointment to a floating post in the Department. By a memorandum dated 15 July to the Director General the Director of Personnel reported that the Permanent Mission of Pakistan had said that the Atomic Energy Commission of that country "was not in a position to sponsor" the complainant's application. He requested advice.

5. By a further memorandum to the Director General of 18 July the acting Director of Personnel asked that offers of appointment be made to the staff on the reserve list of P.3 safeguards inspectors, who included the

complainant. The Director General wrote his replies, both dated 22 July, on the two memoranda. On the one of 15 July he stated: "My approval was given on the express condition of government sponsorship. In the absence of that sponsorship Mr. Umar is not appointed." On the memorandum of 18 July he wrote: "Approved - with the exception of Mr. Umar, who was not sponsored by the govt. of Pakistan".

6. The complainant was informed on 31 July that on the basis of the completed evaluation, his application had not been successful. No reason was given.

7. The complainant replied on 11 September that it appeared from the endorsement on the memorandum of 15 July that the sole reason for rejecting his application was the failure to secure government sponsorship. He submitted that sponsorship was contrary to the principles of the international civil service and to Articles VII.D and F of the Agency's Statute. In accordance with Staff Rules 12.01.1(D)(1) he asked for review of the decision in the letter of 31 July and, if the Director General was not willing to reverse it, for waiver under Rule 12.02.1(B) of the Joint Appeals Board's jurisdiction and for leave to appeal directly to the Tribunal.

8. The Director General confirmed on 9 October 1996 that he had approved the complainant's inclusion in the reserve list of P.3 safeguards inspectors on the express condition of government sponsorship; that such sponsorship had not been given; and that he saw no reason to reverse his decision but agreed to waiver of the Joint Appeals Board's jurisdiction. That is the impugned decision.

9. Article VII.D of the Agency's Statute provides:

"The paramount consideration in the recruitment and employment of the staff and in the determination of the conditions of service shall be to secure employees of the highest standards of efficiency, technical competence, and integrity. Subject to this consideration, due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible."

Article VII.F reads in part:

"In the performance of their duties, the Director General and the staff shall not seek or receive instructions from any source external to the Agency ..."

10. The Agency says that the requirement of government sponsorship has existed for nearly 40 years and has since the beginning applied to all posts that are subject to geographical distribution. In 1990 the Agency had a particular need for qualified technical staff and its Board of Governors called on member States to suggest competent candidates who would ensure the highest standards prescribed by Article VII.D. The Agency explains that the requirement developed throughout the years into a useful instrument for checking a candidate's credentials. It was and still is of paramount importance in view of the Agency's terms of reference. It is also - says the Agency - of practical use in that many staff came and still come from a national civil service or an institution in the "semi-public sector", such as a research or other institute and they go back to their home country with the useful knowledge they have gained in their scientific fields while working for the Agency. Lastly, the Agency points out that according to Article VII.D "due regard shall be paid to the contributions of members ... and to the importance of recruiting the staff on as wide a geographical basis as possible". Since member States are entitled only to a limited number of staff their interest in the employment of their nationals cannot be ignored. "Some sort of consultation with Member States on the appointment of Agency staff must therefore be held." In practice, once the process of selection is over, the Agency asks the resident representative of a member State whether it will sponsor the chosen candidate.

11. The Agency says that from time to time a member State will refuse sponsorship but that in exceptional circumstances the Director General has waived the requirement when he deemed that necessary in the Agency's interests. That shows, the Agency argues, that the Director General does not seek instructions from a member State but the process is rather one of consultation.

12. In Judgment 431 (*in re* Rosescu) the Tribunal held, in 6:

"The executive head of an organisation is bound at all times to safeguard its interests and, where necessary, give them priority over others. One area in which the rule applies is staff recruitment. If a director-general intends to appoint to the staff someone who is a government official in a member State he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organisation should again consult the

member State, which may have good reason to re-employ him. This does not mean that a director-general must bow unquestioningly to the wishes of the government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forego taking a decision in the organisation's interests for the sole purpose of satisfying a member State. The organisation has an interest in being on good terms with all member States, but that is no valid ground for a director-general to fall in with the wishes of every one of them."

13. The circumstances outlined in that case have no parallel here. The complainant was not being recruited for the first time but had been in the Agency's service for twenty-two years. Pakistan was consulted not about an extension of his contract but about a promotion for which he was fully qualified and it gave no explanation at all for its refusal to "sponsor" him. It did not even say it wished to re-employ him.

14. If Pakistan had given a reason the Director General would have had to consider whether it was sound or not and whether refusing him the appointment was in the Agency's best interests. Since it offered none, he had no basis on which to exercise his discretion. The complainant was fully qualified for promotion; his abilities were well known to the Agency and appreciated. The paramount consideration mentioned in Article VII.D was heeded, namely seeking staff of the highest standards of efficiency, technical competence and integrity. The reason stated by the Agency for refusing him the appointment which he would otherwise have been granted is therefore untenable and acting from that reason amounted to a mistake in law.

15. The complainant has asked the Tribunal to declare that para-graph 68 of Section 3, Part II, of the Manual and paragraph A.2 of staff notice SEC/NOT/1309 are void because they are contrary to Articles VII.D and VII.F of the Agency's Statute and to the general principles of the international civil service. Paragraph 68 is about appointments in the Professional and higher categories of staff and it reads:

"68. Appointments to posts subject to geographical distribution require sponsorship by the competent authorities in the applicant's Member State. This will be obtained by the [Director of the Division of Personnel] before an offer of appointment is made to the selected candidate. Such sponsorship is deemed to have been given if the Member State concerned does not inform [that Director] to the contrary within a reasonable period of time after having been approached in writing by the Agency."

Paragraph A.2 of SEC/NOT/1309 says:

"In the case of posts subject to geographical distribution, due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible. Accordingly, government sponsorship will be required."

16. The requirement of government sponsorship in those two provisions is *ultra vires*. The provisions must comply with the requirements of Articles VII.D and F of the Statute. In the performance of their duties the Director General and staff may not seek or receive instructions from any source external to the Agency. For the Director General to allow a member State a veto on the appointment of a staff member is to "receive instructions" from an external source and an interference with the paramount consideration of securing staff of the right calibre.

17. The Tribunal declares that paragraph 68 of the Administrative Manual and the sentence "Accordingly government sponsorship will be required" in paragraph A.2 of SEC/NOT/1309 are null and void as being contrary to Articles VII.D and F of the Statute.

18. The impugned decision is set aside. Since the complainant would have been promoted if the Director General had not allowed the unreasoned veto by the member State, he is entitled to appointment to a grade P.3 post for a nuclear safeguards inspector under a fixed-term contract for three years as from 22 July 1996, the date of approval of the other appointments from the reserve list of P.3 safeguards inspectors.

19. The complainant is also entitled to the sum of 35,000 Austrian schillings in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The complainant is entitled to appointment as from 22 July 1996 to a post for a nuclear safeguards officer at grade P.3 on a fixed-term contract for three years.

3. The Agency shall pay him 35,000 schillings in costs.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

Mark fernando

James K. Hugessen

A.B. Gardner

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