

A.
v.
IOM

131st Session

Judgment No. 4339

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. d. C. A. against the International Organization for Migration (IOM) on 21 February 2019 and corrected on 27 March, IOM's reply of 1 July, the complainant's rejoinder of 14 October 2019 and IOM's surrejoinder of 20 January 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant contests the change of her nationality for administrative purposes.

The complainant joined IOM at its Headquarters in Geneva (Switzerland) in June 1991 as a Bolivian national. In October 1991 she acquired Swiss nationality, thus having dual citizenship. On 26 March 2007 she received an advance of funds from IOM and it was agreed that a portion of the amount advanced would be offset against and recovered by the Organization from her terminal emoluments, including repatriation grant.

In August 2007 the complainant was promoted to grade P-5 but, given her Swiss nationality, she was informed that she would not be given a diplomatic licence plate or an exemption from the payment of Value Added Tax because she was not entitled to diplomatic status in a country of which she was citizen.

In July 2010 the complainant received an advance for the payment of her son's school fees. Later that year she undertook the ordinary formalities for her home leave to Bolivia, but she was informed on 26 November 2010 that, as a national of the country of her duty station, she was not entitled to home leave and would have to bear the cost of the tickets for her planned leave herself.

In August 2011 her request for an education grant for her son was rejected for the same reason.

On 13 March 2012 the Administration contacted the complainant concerning the funds advanced in March 2007 informing her that, although there had been an agreement that the amount would be deducted from her terminal emoluments, it would not be possible to do so because “[she] ha[d] changed [her] nationality to Swiss”, hence making her ineligible for a repatriation grant. She was further informed that IOM would deduct a sum each month from her salary until the remaining amount was fully paid. On 25 April 2012 she submitted an Action Prior to the Lodging of an Appeal contesting the 13 March decision, to which the Administration replied on 29 May 2012. She did not file an appeal with the Joint Administrative Review Board (JARB).

On 30 October 2017 the complainant had a meeting with the then Chief of Human Resources policy and advisory services, Ms H., to discuss the Organization's rotation policy. The complainant asserts that, during that meeting, she was told, for the first time, that the 2007 change of her nationality from Bolivian to Swiss was a “mistake” and that she could revert to her Bolivian nationality for administrative purposes, as other staff in similar situations had done. The complainant recorded the said discussion in a “note to file” addressed to Ms H. The latter never confirmed the statement concerning the alleged “mistake”.

On 21 December 2017 the complainant submitted a request for review against IOM's decision to “unilaterally and illegally” change her nationality from Bolivian to Swiss for entitlements purposes. She alleged that, as she was unaware until the meeting of 30 October that the change in her nationality had been a “mistake”, her request was made within 60 days and was therefore receivable. She asked the Director General to order IOM to immediately change her nationality for entitlements purposes back to Bolivian, with retroactive effect from 2007, and to pay her all the amounts that were wrongly or irregularly deducted from her salary, entitlements and other emoluments, with

interest at the rate of 5 per cent per annum. The request for review was rejected as time-barred on 22 February 2018 on the ground that the various decisions the complainant was referring to had not been contested within the applicable time limits. On the same day the complainant requested to change her nationality back to Bolivian, which was accepted effective from 1 March 2018.

On 22 March 2018 she filed an appeal with the JARB against the decision rejecting her request for review and the unilateral change in her nationality. She essentially reiterated the claims she had made on 21 December 2017 and asked to be reimbursed for all the legal fees she had incurred.

The JARB issued its report on 25 October 2018 in which it concluded that the appeal was time-barred, and thus irreceivable, based on the fact that the complainant had never contested the administrative decisions related to the change in her nationality taken in 2007, 2010, 2011 and 2012 despite her full awareness of those decisions. By a letter of 28 November 2018, which constitutes the impugned decision, the complainant was informed that the Director General agreed with the JARB's analysis and had concluded that her appeal was time-barred.

The complainant asks the Tribunal to set aside the JARB's finding that her appeal was time-barred, as well as the impugned decision, and to order IOM to immediately change her nationality for entitlements purposes back to Bolivian with full retroactive effect from 2007, through the date she filed her complaint. Subsidiarily, she asks that IOM proceed to such change effective from 1 December 2014, when the new Staff Regulations and Rules entered into force. She further requests payment of all amounts that were wrongly or irregularly deducted from her salary or withheld from her since 2007, moral damages in an amount equal to at least 100,000 Swiss francs, with 5 per cent interest on all the amounts sought, legal fees and such other relief as the Tribunal may deem necessary, fair and reasonable.

IOM asks the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and unfounded. Concerning the complainant's claim for moral damages, the Organization submits that it goes beyond what was sought in the internal appeal and should therefore be rejected.

CONSIDERATIONS

1. The complainant was, at relevant times, a member of staff of IOM. She joined the Organization in June 1991 as a Spanish translator/ reviser at grade P-4 based in Geneva. She was, by birth, a Bolivian national and had spent her childhood in Bolivia. In October 1991 the complainant acquired Swiss nationality.

On her complaint form, the complainant requests oral proceedings. However, the Tribunal considers that it is sufficiently well informed about the case by the evidence in the file and does not therefore deem it necessary to hold such a hearing. That request is thus denied.

2. The complainant, on her account of the facts that in these respects are not contested, informed IOM's Director of Human Resources of her acquisition of Swiss nationality at the time it occurred. The acquisition of dual nationality appeared to have, at the time, no impact on the payment or provision of benefits to her such as home leave and education grant for her son. However, in 2007, on the complainant's promotion to grade P-5, it did have an impact in that IOM informed her that she would not be given a diplomatic license plate or an exemption from the payment of Value Added Tax. In 2010 she was refused home leave entitlements having regard to her Swiss nationality and, in 2011, IOM refused the education grant for her son. There is, potentially, in these proceedings a legal issue about how or whether, under the then prevailing Staff Regulations and Rules, the complainant's acquisition of Swiss nationality impacted on her entitlement to various benefits in 2007, 2010, 2011 and subsequently. The relevant Staff Regulations and Rules concerning nationality were amended effective from December 2014.

3. IOM's approach to the effect of the complainant's Swiss nationality on the payment or provision of benefits became, in 2012, a focal point of a dispute about whether an advance of funds made by IOM to the complainant in 2007 could or would be offset against a repatriation grant. At the time of the advance in 2007 it was agreed between the complainant and IOM that the funds would be offset and recovered by IOM by deducting the sum advanced from the complainant's terminal emoluments. However, in March 2012 the complainant was informed that it would not be possible to deduct the sum advanced from a repatriation grant entitlement, as the complainant had no such entitlement. That was

because, as the complainant was informed in writing on 13 March 2012, “[she] ha[d] changed [her] nationality to Swiss”. She was informed that it had been decided that 800 United States dollars would be deducted from her salary until the debt was satisfied. While the complainant submitted an Action Prior to the Lodging of an Appeal in accordance with Annex D to the Staff Regulations and Rules in relation to this decision, the appeal was not pursued by the complainant before the JARB.

4. In October 2017 the complainant had occasion to discuss her status for the purposes of IOM’s rotation policy with the then Chief of Human Resources policy and advisory services. On the complainant’s account of the conversation, she was told, for the first time, that the change of her citizenship for IOM benefits purposes in 2007 from Bolivian to Swiss had been a “mistake” and that she should be able to revert to her Bolivian nationality for the purpose of entitlements and other emoluments.

5. On 21 December 2017 the complainant submitted a request for review of “IOM[’s decision] to unilaterally and illegally change [her] registered citizenship with IOM for the purposes of home leave, relocation grant, educational grant and other IOM entitlements and emoluments, from Bolivian citizenship [...] to [her] subsequently acquired (by naturalization) Swiss citizenship”. She requested that her nationality be changed immediately back to Bolivian “with full retroactive effect to 2007” for entitlements purposes and that she be paid all amounts that were wrongly or irregularly deducted from her salary, entitlements and other emoluments. She particularised, in this regard, home leave and the education grant for her son. As it eventuated, the complainant requested that her nationality be changed back to Bolivian for IOM administrative purposes and this request was accepted with effect from 1 March 2018.

6. The request for review was rejected. The complainant appealed to the JARB, which concluded that the appeal was time-barred and therefore not receivable. In a decision dated 28 November 2018 the Director General adopted the same position and rejected the appeal and the complainant’s request for remedies. This is the impugned decision.

7. The complainant identified in her rejoinder the relevant question concerning time limits as being whether an affirmative decision had been made to change her nationality to Swiss for administrative purposes at IOM. This may, in the abstract, be correct. But if there had been such a decision, the decision would have been taken by 2010 and the complainant would have been aware of it in 2010 at the latest (when she was refused home leave entitlements on that basis) and she should have challenged the decision at that time. The complainant was obviously time-barred when she intended to challenge that decision on 21 December 2017. Moreover, the substance of what the complainant is seeking is, centrally, the payment or repayment of sums claimed or amounts deducted on the basis that she was Swiss. The complainant had to challenge each administrative decision refusing payment or requiring repayment at the time it was made in the period 2007 to 2012. She did not do so. Each decision had an immediate, material, legal and adverse effect on the complainant and had to be challenged at the time. The Tribunal does not accept the argument of the complainant that the existence of the “mistake” referred to in consideration 4 above was a new fact of which she was not aware. The complainant was aware that her nationality was being treated as Swiss rather than Bolivian and that was the footing on which benefits were either ceasing to be provided or not being paid. This was so, whether this is characterised as a “mistake” or not. Accordingly, the impugned decision is correct and her claim was time-barred. The complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ