FIFTY-FIRST ORDINARY SESSION

In re ACOSTA ANDRES, AZOLA BLANCO

and VELIZ GARCIA (No. 2)

(Application for review)

Judgment No. 570

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the European Southern Observatory (ESO) on 31 January 1983 for review of Judgments Nos. 507 (in re Azola Blanco and Véliz García) and No. 508 (in re Acosta Andres), the reply filed by Miss Maria Isabel Acosta Andres, Mr. Marcial Azola Blanco and Mr. Tomás Véliz García on 9 March 1983, the Organisation's rejoinder of 18 April and the surrejoinder filed by Miss Acosta Andres, Mr. Azola Blanco and Mr. Véliz García on 28 April 1983;

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

Having examined the written evidence;

CONSIDERATIONS:

1. The respondents contend that the Tribunal is incompetent to review its own judgments since its Statute by Article VI provides that these judgments shall be final and without appeal. This article embodies the finality principle which in one form or another is a feature of all jurisdictions. There is however another principle which likewise in one form or another is to be found in most jurisdictions and this is that no court or tribunal is tied to what it has written per incuriam. The principle of finality is vital to the administration of justice but judges are human and can make slips and the principle does not go so far as to require that errors arising through accident or inadvertence or the like can never be corrected; if it went as far as that, the principle could be made an instrument of injustice. The article does not therefore preclude the exercise of a limited power of review.

2. Accordingly, the jurisprudence of the Tribunal has recognised the power and has indicated the sort of cases in which it may be exercised. They include an omission to take account of particular facts; a material error involving no exercise of judgment and therefore distinguishable from misappraisal of fact which does not warrant review; an omission to pass judgment on a claim; and the discovery of a so-called "new" fact, i.e. one which the applicant discovered too late to cite in the original proceedings. An error within these categories constitutes a basis for the exercise of the power to review. It does not necessarily mean that the jurisdiction will be exercised. As the Tribunal has said repeatedly, judgments may be reviewed only in exceptional circumstances. This means not only that the categories will be narrowly construed, but also that in each case there must be found some exceptional circumstance, such as accident or inadvertence, strong enough to justify the displacement of the principle of finality.

3. The Organisation pleads in the first place that the Tribunal omitted to take account of material facts. In support of such a plea, the Organisation should

(1) particularise each fact that was ignored;

(2) identify the passages in the dossier which show that the Organisation was relying upon the fact:

(3) demonstrate from the terms of the judgment submitted for review that the Tribunal could not have reached the conclusion it did if it had taken the fact into account.

4. What the Organisation does in the argument which the Tribunal is now considering is to assert that the Tribunal failed to take into account "the overall, complete and true picture of ESO's economic situation". It supports this assertion by reference to numerous documents which have not previously been put before the Tribunal. The

question which the Tribunal had to decide was, as the Organisation correctly notes, whether the Organisation's economic problems were permanent o; transitory. Even if the new documents are taken into account, it appears to the Tribunal that the answer to this question must depend upon an appraisal of all the relevant facts and not upon the finding of a particular fact. In any event the Tribunal cannot take new documents into account without a plea that they were not and could not have been discovered in time to cite in the original proceedings. There is no such plea.

5. The Organisation pleads in the second place a material error or mistaken finding of fact. It points to three statements of fact, all in paragraph 6 of Judgment No. 507, the judgment to be reviewed. The paragraph related to information given to the Organisation's Council in November 1981 and to decisions taken thereon. The statements are:

(1) that the Organisation had not found it necessary to touch the cost variation reserve;

(2) that the Director-General did not propose any increase in the contribution level for 1982;

(3) that the Council approved the proposal, "the only economies resolved upon being in relation to the Chile staff".

6. In support of this plea the Organisation should show that the above facts are either falsified or not sustained by the evidence in the dossier. But, save in one small respect, the Organisation does not contradict or qualify any of the above statements. The one qualification is that the Organisation asserts that economies were being made not only affecting the Chile staff but "on all levels"; it does not say whether or not these further economies were part of the Council decision to which the judgment was referring. Apart from this, it relies upon a general plea that the three statements "do not take into account ESO's real economic situation and the gravity of its permanent structural problems, and therefore constitute factual errors". This is an allegation of misappraisal.

7. The Organisation pleads in the third place that the judgment fails to take into account "ESO's true economic situation in the light of Chilean social and labour law". The object of this plea, which on the face of it looks redundant, seems to be to introduce an allegation that the Tribunal made an incorrect finding of fact in relation to Chilean law. The plea correctly regards Chilean law as a question of fact. It is not binding on the Tribunal and its relevance in this case is as an aid to the interpretation of the contract between the parties. In paragraph 3 of the judgment submitted for review, the Tribunal stated that the effect of certain decisions of the Supreme Court of Chile was "summed up in the complainants' argument in terms which the Organisation does not dispute". The Organisation, while not denying that it failed to challenge the summary, wishes now to dispute it and to put in evidence the opinions of experts who take the contrary view. This is not permissible.

8. The Tribunal has dealt with the present application in detail so as to clear up any misunderstandings there may be about the nature of the power to review. So examined the case suggests three rules for applicants to bear in mind. They are:

(1) A review is normally confined to the facts in the dossier of the case whose judgment is being submitted for review. It is useless for the applicant to refer to facts outside the dossier unless he introduces them specially as new facts and justifies their introduction accordingly.

(2) A fact which can be found without the exercise of judgment, sometimes called a primary fact, is an act or omission which can be proved by oral or written testimony, the only question for the judge being whether he accepts or rejects the testimony. The three facts recorded in paragraph 5 above are all primary facts. On the other hand, the "factual error" referred to in the same paragraph is beyond doubt an error in appraisal.

(3) It is useless to present an application which in substance is inviting the Tribunal to have second thoughts. If it can have second thoughts, it can also have third and fourth thoughts and there can be no finality. To displace the principle of finality, the applicant must show the exceptional case in which insistence upon it would be unjust. Such is the case of a "new" fact which the applicant could not reasonably be expected to have discovered in time. Such also is the case of a "slip" where, as it is sometimes put, "even Homer nods". Such cases are likely to be very rare and it is likely also that they can be presented without any elaborate argument.

9. The Tribunal observes that the Organisation emphasised at the outset of its argument that it would not have filed this application "if the consequences of the two decisions were strictly limited to its three former employees". Under the principle of res judicata the consequences are so limited. There is nothing to prevent the Organisation

from advancing in any future case the argument and evidence which it failed to introduce in the two cases under consideration.

Application that the compensation ordered by Judgments Nos. 507 and 508 should be paid

in United States currency

10. The Organisation objects that this application, made by the respondents in their surrejoinder, is irregular. The objection is upheld. The application has no place either in response to an application for review or in a surrejoinder of any sort. Apart from this objection, the further pleadings which both sides wish to file are disallowed. In this connection, counsel for the Organisation enquires by letter of 28 July 1983 what procedure is open to an applicant or complainant when the surrejoinder contains an irregularity or states a material fact not previously mentioned which the applicant/complainant wishes to challenge. The correct procedure is for the applicant/complainant to notify the Registrar without any accompanying argument that he objects to the irregularity or disputes the fact, as the case may be. If then the Tribunal considers that further pleadings are necessary, the President will notify the parties in accordance with Article 9(2)of the Rules.

DECISION:

For the above reasons,

1. The application for review of Judgments Nos. 507 and 508 is dismissed.

2. The application that the sums ordered to be paid by the said judgments shall be paid in United States currency is dismissed.

3. The Organisation shall pay $500 to each respondent as costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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