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

111th Session **Judgment No. 3009**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr B. H. against the Universal Postal Union (UPU) on 22 July 2009 and corrected on 5 August, the Union's reply of 18 September, the complainant's rejoinder of 9 October, the Union's surrejoinder of 23 November 2009, the additional submissions filed by the complainant on 29 November 2010 and the Union's letter of 15 December 2010 to the Registrar of the Tribunal, stating that it had no comment to make;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Information about the complainant's career at the International Bureau of the UPU is given under A in Judgments 2203 and 2389, rendered respectively on his first and second complaints. Briefly, he is a German national, born in 1948, who was employed by the UPU from 1994 to 2010. In 2002 he had asked for his name to be added

to the list of staff eligible for home leave. On 10 June 2003 the Director-General dismissed his request on the grounds that, as he was living in Switzerland before being appointed, he did not meet the conditions laid down in Rule 105.3, paragraph 2, of the Staff Rules. In Judgment 2389, delivered on 2 February 2005, the Tribunal confirmed that decision and dismissed his complaint.

The complainant acquired French nationality on 19 March 2008. On 30 May, relying on Judgment 2389, he made a request to the Director-General for home leave in France or, failing that, in India – the country of origin of his adopted children – or Germany. The Director-General informed him, on 15 July, that his request was rejected. On 25 July the complainant sought a review of that decision but this was confirmed on 15 August. On 18 August 2008 he submitted an appeal to the Joint Appeals Committee.

In its report dated 12 January 2009 the Committee recalled that the complaint leading to Judgment 2389 concerned the complainant's entitlement to home leave in Germany. In its recommendation, it expressed the view that the Director-General could authorise him to take home leave in a country other than that of which he was a national. On 16 February the Director-General asked the Committee to provide him with a "clarified" report, as the first report did not enable him to take a decision. In its revised report of 15 April 2009 the Committee took account of a note from the Director of Legal Affairs dated 27 June 2008, and recommended that the Director-General maintain his decision refusing to grant the leave. By a letter of 29 April 2009 the Director-General informed the complainant that he was maintaining his decision of 15 August 2008. That is the impugned decision.

B. The complainant states that his complaint is prompted by "significant new elements" and that his request is different from that which was examined in Judgment 2389, since he is no longer seeking home leave in Germany, but rather in France or in India. On the basis of consideration 7 of that judgment, he contends that the country of origin of a spouse or of adopted children can be taken into account in determining entitlement to home leave. In view of his connections with

France, the country of origin of his wife, and his wish that his adopted children should maintain ties with India, their country of origin, he considers that he is entitled to home leave in one or other of these countries.

He complains that he was denied access to the Committee's first report and to several documents contained in annexes to the revised report, although he had formally requested these documents in a letter addressed to the Director-General on 5 May 2009. This, in his view, constitutes "flagrant obstruction" and reflects a deliberate policy on the part of the UPU intended to harm him and to prevent him from defending his interests in a fully informed manner. He asks the Tribunal to order that all the documents he has requested be disclosed to him.

The complainant notes that one member of the Committee, Mr G., refused to sign the revised report and he produces Mr G.'s comments, dated 15 April 2009, in which the latter gives the reasons for his refusal, asserting that the changed conclusion in the revised report is unwarranted. Mr G. also indicates that prior to submitting the revised report the President of the Committee made a request to the Tribunal for an interpretation of Judgment 2389, which means, according to the complainant, that she had doubts "regarding the whole matter". In the light of these comments, the complainant states that the fact that the Union had concealed the first report is "very suspicious". He points out that the proceedings before the Committee were surprisingly protracted and that the fact that two of its members changed their minds following oral and written exchanges with the Director-General is curious. He invites the Tribunal to determine whether the alteration of the Committee's conclusions involved any irregularity.

He points out that a note from the Head of the Human Resources and Social Relations Directorate, dated 13 June 2008, indicates that the UPU ought to abide by the principles laid down in Judgment 2389. He also asserts that the note dated 27 June 2008 from the Director of Legal Affairs, on which the Director-General relied in dismissing his request, is flawed in a number of ways: it contains manifestly false statements

and erroneous interpretations, and reveals that delaying tactics were employed.

The complainant asks the Tribunal to set aside the decision of 15 July 2008 and to order that his entitlement to home leave in France or in India be recognised. He also claims an indemnity equivalent to the amount he would receive for at least one period of home leave in France or India, as well as equitable compensation for moral damages and costs.

C. In its reply the Union states that the case now before the Tribunal is identical as to the parties, the purpose of the suit and the cause of action, to the case settled by Judgment 2389. The complaint thus disregards the *res judicata* authority of that judgment and is therefore irreceivable by virtue of Article VI, paragraph 1, of the Statute of the Tribunal.

The defendant explains that the Committee's first report contained contradictions and inconsistencies, which prompted the Director-General to ask it to provide a "clarified" report. An official and final revised report was adopted by the Committee and transmitted to the complainant, in accordance with the Staff Rules. As the first report had thus been "replaced", it was not thought necessary to communicate it to the complainant. The UPU argues that the other documents which were not communicated to him contained no relevant information and would not have been useful to the complainant in defending his interests. It denies that it sought to conceal these documents, which it produces as an annex to its reply, and claims that the internal proceedings were neither flawed nor tainted with misuse of power.

The Union states that the complainant's argument that he is entitled to home leave in France or in India does not follow the "logic" of the relevant provisions of the Staff Regulations and Staff Rules. It explains that entitlement to home leave is granted only if the staff member is resident, when appointed, outside the country in which his/her duty station is located. Only then will the UPU seek to ascertain the country with which the staff member concerned has the closest ties.

Recalling that the Tribunal confirmed this position in Judgment 2389, it argues that its refusal was lawful because, at the time of his appointment, the complainant had for decades been resident in Switzerland, the country where the UPU has its headquarters.

The defendant takes the view that the delay on the complainant's part in requesting home leave and his indifference with regard to the determination of his home country prove that his only purpose is to gain a financial advantage. This attitude is wholly contrary to the purpose and spirit of the entitlement to home leave.

D. In his rejoinder the complainant submits that it was not for the Union to decide unilaterally whether certain documents were relevant, and that it exceeded its authority by refusing to supply him with the documents he had requested. That refusal, he claims, is evidence of a systematic practice designed to hamper staff members in their dealings with the Tribunal.

He draws attention to his dual French-German nationality and argues that in Judgment 551 the Tribunal held that staff members with a nationality other than that of the seat of the employing organisation were entitled to certain advantages in relation to nationals of that country, in order to restore equality of treatment between the two groups of employees.

E. In its surrejoinder the defendant argues that it had no interest in concealing documents which it considered to be confidential or irrelevant, and points out that it provided the documents requested in the course of the proceedings. In its opinion, the complainant is putting forward serious but unsubstantiated accusations for the purpose of discrediting it.

Moreover, although the complainant does not have Swiss nationality, he maintained close ties with Switzerland, since he has been resident there for decades and has raised a family there. As for the allegations concerning the primacy of financial considerations, it is legitimate for the Director of Legal Affairs to spell out to the Director-General the practical implications of certain decisions.

F. In his additional submissions the complainant produces documents relating to the final removal of his family and their installation in France from 8 July 2010, in order to prove that that is the country with which he has the closest ties.

CONSIDERATIONS

1. The complainant, who was born in 1948, had been living in Switzerland since 1963 at the time when he came to work at the UPU in Berne in 1994. As he was a German national, he was recruited internationally rather than locally. Having married a French national in 1992, he subsequently acquired French nationality through a declaration made on 19 March 2008. He and his wife have adopted three children of Indian origin. After retiring in 2010, the complainant elected to be domiciled in France with his family.

By Judgment 2389 the Tribunal dismissed his second complaint seeking recognition of his entitlement to home leave in Germany under Article 4.5 of the Staff Regulations and Rule 105.3 of the Staff Rules. The Tribunal took the view that the complainant did not meet the conditions set out in those texts, because he had not lived in Germany, the country which he claimed as his home, since his early childhood, and at the time of his appointment he had been living in Switzerland, where he was to take up his post, for several decades practically without a break.

2. On 30 May 2008 the complainant submitted a new request to the UPU for home leave in France, or in India, or in Germany. His request was based on a passage in Judgment 2389 indicating that the home country is not necessarily that of the staff member's nationality, but may be the country with which the staff member has the closest connection outside the country where he is employed, for example the country of origin of his spouse, or that of children whom he has adopted or taken in but who he believes should keep up their connections with their native environment (consideration 7).

On 15 July the Director-General announced that he was maintaining the decision which had been impugned in Judgment 2389, and dismissed this new request. When invited to review this decision, he confirmed it on 15 August 2008. The complainant challenged this decision before the Joint Appeals Committee, emphasising that his request was for home leave not in his country of origin but in a country to be chosen from either of the two countries of origin of his spouse and his children respectively. He relied on the fact that Judgment 2389 showed that the country of home leave was not necessarily the country of the staff member's nationality. On 15 April 2009 the Joint Appeals Committee submitted its revised report to the Director-General in which it concluded, by a majority, that "[he] could maintain his decision. On 29 April 2009 the Director-General communicated the report to the complainant and informed him that, on the basis of that conclusion, he was maintaining his decision of 15 August 2008. That is the decision challenged before the Tribunal.

3. The complainant accuses the defendant of having concealed documents which he needed for his defence before the Tribunal, namely the first version of the report of the Joint Appeals Committee and the annexes to that report and to the Committee's final report. He contends that, in spite of a request he had made on receiving the impugned decision, some of those documents had only been brought to his knowledge with the reply to his complaint. This grievance, as framed by the complainant, concerns a violation of the right to be heard, and therefore of the right of the parties to be made aware of and to consult relevant documents in the case file (see Judgment 2927, under 11).

It should be noted, before considering this grievance, that the report on which the impugned decision was based was drawn up in a somewhat unusual manner. In effect, the Joint Appeals Committee had submitted an initial report to the Director-General concluding that he "could authorise the complainant to take home leave in a country other than his country of nationality" given that "his request for home leave in France or in India could be regarded as a new element". The Director-General took the view that there was a contradiction in

the report between the reasoning and the conclusions and that he therefore could not take an informed decision, and he invited the Committee to clarify it. The Committee then discussed the matter anew and reviewed its initial report. In its recommendation, adopted by a majority, it took the view that its initial opinion should be altered to the disadvantage of the complainant. There is no indication in the file that the Director-General exerted any pressure on the Committee to induce it to change its opinion.

There was no rule requiring the defendant to notify the complainant of the Committee's first report, which does not contain the reasons for the impugned decision. It would perhaps have been advisable for the Director-General to give a copy of that report to the complainant when he requested it, but the process of reviewing the report was not concealed from him. The final report communicated to him was entitled "Revised report" and the introduction contains a paragraph explaining the review process. Moreover, the documents sought by the complainant relate to the manner in which the members of the Committee reached their conclusion. Information of that kind is purely internal and does not, in principle, have to be communicated to the staff member concerned.

It follows from the foregoing that the complainant's exercise of his rights of defence has not been hampered in any way, contrary to his assertions, and that the grievance that relevant documents have been unduly withheld, so violating his right to be heard, is unfounded.

4. The complainant's request for home leave in the country of origin of his spouse or his adopted children is based essentially on consideration 7 of Judgment 2389, which he views as an evolution or extension of the Tribunal's case law in the matter.

In that judgment the Tribunal drew attention to the purpose of home leave and recalled that the country of home leave is not

necessarily that of the employee's nationality, and that it may be another country with which he/she has the closest connection outside the country in which he/she is employed (see Judgment 1985, under 9). It observed that this case law is reflected in paragraph 4(c) of Staff Rule 105.3, according to which the Director-General may, in exceptional circumstances, authorise a staff member to take home leave in a country other than the country of his nationality. In this regard in Judgment 2389 the Tribunal gave as an example the home country of the staff member's wife or of children whom he might have adopted or taken in. But like the aforementioned provision, the Tribunal emphasised that the complainant was required to show that he had maintained his normal residence in that country for a prolonged period preceding his appointment, and that there must be close and continuing ties between him and that country, sufficient to give him the right to take home leave there (consideration 7 *in fine*).

The complainant misreads the judgment by overlooking these requirements, especially the first one, non-fulfilment of which resulted in the dismissal of his second complaint. The fact that he has married a French national and adopted Indian children is not sufficient for him to be entitled to home leave in France or in India. He would also have had to have his normal residence, for a prolonged period preceding his appointment, in one or other of those countries, which is not the case.

The complaint must therefore be dismissed, without there being any need for the Tribunal to rule upon the *res judicata* objection raised by the defendant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 May 2011, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet