

APPLICATION FOR REVIEW OF JUDGEMENT NO. 158 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Advisory Opinion of 12 July 1973

A request for an advisory opinion had been submitted to the Court on 3 July 1972 by a letter of 28 June 1972 from the Secretary-General of the United Nations in the following terms:

“The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application for the review of Administrative Tribunal Judgement No. 158, delivered at Geneva on 28 April 1972.

“Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following questions:

“1. Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant’s application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?”

“2. Has the Tribunal committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant’s application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?”

The Court decided, by 10 votes to 3, to comply with the request, and is of the opinion:

with regard to Question I, by 9 votes to 4, that the Administrative Tribunal has not failed to exercise the jurisdiction vested in it as contended in the applicant’s application to the Committee on Applications for Review of Administrative Tribunal Judgements;

with regard to Question II, by 10 votes to 3, that the Administrative Tribunal has not committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant’s application to the Committee on Applications for Review of Administrative Tribunal Judgements.

* * *

For these proceedings, the Court was composed as follows: President Lachs; Vice-President Ammoun; Judges Forster, Gros, Bengzon, Onyeama, Dillard, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda.

President Lachs has appended a declaration to the Advisory Opinion, and Judges Forster and Nagendra Singh a joint declaration. Separate opinions have been appended by Judges Onyeama, Dillard and Jiménez de Aréchaga; and dissenting opinions by Vice-President Ammoun and Judges Gros, de Castro and Morozov.

Judges Petré and Ignacio-Pinto did not take part in the proceedings, having by virtue of Article 24 of the Statute informed the President that they did not consider they should do so.

The Vice-President, Judge de Castro and Judge Dillard, though they had played a full part in the proceedings and participated in the vote, were prevented for reasons of health from taking part in the sitting for the reading of the Advisory Opinion.

Facts and Procedure (paras. 1–13 of the Advisory Opinion)

In its Advisory Opinion, the Court recalls that Mr. Mohamed Fasla, an official of the United Nations Development Programme (UNDP), held a fixed-term contract which was due to expire on 31 December 1969. When his contract was not renewed, he appealed successively to the Joint Appeals Board and to the United Nations Administrative Tribunal. The Tribunal gave its decision in Judgement No. 158 at Geneva on 28 April 1972. On 26 May 1972 Mr. Fasla raised objections to the decision and asked the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion of the Court. This the Committee decided to do on 20 June 1972.

In formulating the request for an advisory opinion, the Committee on Applications exercised a power conferred upon it by the General Assembly of the United Nations in resolution 957 (X) of 8 November 1955, by adding to the Statute of the United Nations Administrative Tribunal a new Article 11 providing *inter alia*:

“1. If . . . the person in respect of whom a judgement has been rendered by the Tribunal . . . objects to the judgement on the ground that the Tribunal . . . has failed to exercise jurisdiction vested in it . . . or has committed a fundamental error in procedure which has occasioned a failure of justice . . . the person concerned may . . . make a written application to the Committee established by paragraph 4 of this article asking the Committee to request

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an advisory opinion of the International Court of Justice on the matter.

"2. . . . the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.

"3. . . . the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court

"4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. The Committee shall be composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly"

Pursuant to Article 65, paragraph 2, of the Statute of the Court, the Secretary-General of the United Nations transmitted to the Court on 29 August 1972 documents likely to throw light upon the question. Pursuant to Article 66, paragraph 2, of the Statute, the United Nations and its member States were informed that the Court would be prepared to receive written statements likely to furnish information on the question put to it. Within the time-limit fixed by an Order of 14 July 1972 (*I.C.J. Reports 1972*, p. 9), i.e., 20 September 1972, the United Nations submitted a written statement on behalf of the Secretary-General, together with the views of Mr. Fasla, transmitted to the Court in accordance with Article 11, paragraph 2, of the Statute of the Administrative Tribunal. Subsequently Mr. Fasla was authorized to present, through the Secretary-General, a corrected version of the statement of his views within a time-limit expiring on 5 December 1972. The time-limit for the submission of written comments under Article 66, paragraph 4, of the Statute of the Court having been fixed by the President at 27 November 1972 and then extended to 31 January 1973, written comments were filed on behalf of the United Nations, comprising the comments of the Secretary-General on the corrected version of the statement of the views of Mr. Fasla, and the comments of Mr. Fasla on the statement submitted on behalf of the Secretary-General. The United Nations and its member States had been informed on 6 October 1972 that it was not contemplated that public hearings for the submission of oral statements would be held in the case; this was confirmed by a decision of the Court on 25 January 1973.

Competence of the Court (paras. 14–40 of the Advisory Opinion)

The proceedings represented the first occasion on which the Court had been called upon to consider a request for an advisory opinion made under the procedure laid down in Article 11 of the Statute of the Administrative Tribunal. Accordingly, although, in the statements and comments submitted to the Court, no question was raised either as to the competence of the Court to give the opinion or as to the propriety of its doing so, the Court examined those two questions in turn.

As to the Court's competence, the Court considered *inter alia* whether the Committee on Applications for Review could be considered one of the "organs of the United Nations" entitled to request advisory opinions under Article

96 of the Charter, and had any activities of its own which enabled it to be considered as requesting advisory opinions on legal questions arising within the scope of its activities, as provided by Article 96. The Court concluded that the Committee was an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court. It followed that the Court was competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal.

The Court then considered whether the character of certain features of the review procedure should lead it to decline to answer the request for an opinion. It found that there did not appear to be anything in the character or operation of the Committee which required the Court to conclude that the review procedure was incompatible with the general principles governing the judicial process, and it rejected the objections based upon what was said to be an inherent inequality between the staff member, on the one hand, and the Secretary-General and member States, on the other. While not considering that the review procedure was free from difficulty, the Court had no doubt that, in the circumstances of the case, it should comply with the request for an advisory opinion.

Scope of the Questions Put to the Court (paras. 41–48 of the Advisory Opinion)

The Court noted that the two questions formulated in the request were specifically limited to the grounds of objection raised and contentions put forward by Mr. Fasla in his application to the Committee. The two grounds advanced corresponded to two of the grounds of objection specified in Article 11 of the Statute of the Administrative Tribunal, namely failure to exercise jurisdiction and fundamental error in procedure. A challenge to a decision of the Tribunal on one of those two grounds could not properly be transformed into a proceeding against the substance of the decision.

Was There a Failure by the Administrative Tribunal to Exercise Jurisdiction Vested in It? (paras. 49–87 of the Advisory Opinion)

In the Court's view, this first ground of challenge covered situations where the Tribunal had either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case.

In that connection, the Court rejected the contentions of Mr. Fasla that the Tribunal had failed to exercise jurisdiction in that it had not fully considered and passed upon his claims for damages for injury to professional reputation and career prospects and for reimbursement of costs, and in that it had omitted to order the recalculation of his remuneration and the correction and completion of his personal record.

The Court next examined certain contentions which had not been fully set forth by Mr. Fasla in his application to the Committee on Applications for Review but which he had enlarged upon in the statement of his views transmitted to the Court, according to which his recall and the non-renewal of his contract had been decided for unlawful reasons constituting a misuse of powers. The Court noted that, in his application to the Tribunal, Mr. Fasla had not requested the rescission of those decisions on grounds of illegality or improper motivation, and that the Tribunal could not be accused of failure to exercise jurisdiction on the ground that it had failed

to take measures which had not been requisite for its adjudication and which none of the parties had asked it to take.

Did the United Nations Administrative Tribunal Commit a Fundamental Error in Procedure Occasioning a Failure of Justice?

(paras. 88–100 of the Advisory Opinion)

The Court first determined the meaning and scope of the concept of fundamental error in procedure which had occasioned a failure of justice. In cases before the Administrative Tribunal the essence of the matter was that a staff member had a fundamental right to present his case, either orally or in writing, and to have it considered by the Tribunal before it determined his rights. An error in procedure was fundamental and constituted a failure of justice when it was of such a kind as to violate that right and in that sense to deprive the staff member of justice.

The Court noted that what Mr. Fasla formulated under the heading whether of failure to exercise jurisdiction or of fun-

damental error in procedure, or both simultaneously, appeared to be essentially the same complaints, concerning for the most part the manner in which the Tribunal had adjudicated the merits of his claims, rather than assertions of errors in procedure in the proper sense of the term. His only complaint concerning an error in procedure was the complaint that the Tribunal's decisions rejecting the claims had not been supported by any adequate reasoning. After considering this complaint, the Court concluded that, having regard to the form and content of the Judgement, its reasoning did not fall short of the requirements of the rule that a judgement of the Administrative Tribunal must state the reasons on which it was based.

The Court finally declared that there was no occasion for it to pronounce upon Mr. Fasla's request for costs in respect of the review proceedings. It confined itself to the observation that when the Committee found that there was a substantial basis for the application, it might be undesirable that the costs should have to be borne by the staff member.

For these reasons, the Court has given the decision indicated above.