Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

BRESSON-ONDIEKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Marisa Maclennan, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a P-5 level staff member with the Department for General Assembly and Conference Management ("DGACM") in New York, contests the refusal of the Office of Human Resources Management ("OHRM") of the Department of Management to recognize her niece ("Ms. N") as a dependent child.

2. In her application dated 21 October 2014, the Applicant submits that the Respondent misinterpreted and misapplied the applicable rules. Further, she submits that the Administration gave her a legitimate expectation that her request would be granted once she provided the documents requested by OHRM. The Applicant further submits that the denial of her request was contrary to the spirit of the Organization's policy on recognition of dependency status, as staff rule 3.6(a)(ii) intends to cover cases where the child is factually the equivalent of a natural, step or adopted child, but cannot be legally recognized as such, which is exactly the Applicant's case. The Applicant requests that the decision be rescinded and reversed.

3. In his reply dated 21 November 2014, the Respondent submits that the Organization correctly interpreted and applied its rules. The Republic of Seychelles—the country of nationality of the Applicant and her niece—has in place a statutory provision

a determination of the dependency status; there was no express commitment in writing to the Applicant that her niece would be recognized as a dependent child. The Respondent submits that the Applicant's claims are without merit and should be dismissed.

4. By Order No. 11 (NY/2015), dated 22 January 2015, the Tribunal granted leave to the Applicant to file a submission addressing the issues raised by the Respondent. The Tribunal also requested the parties to state whether they considered that a hearing was necessary.

5. On 4 February 2015, the parties filed their submissions pursuant to Order No. 11 (NY/2015). The Applicant requested an oral hearing in this matter whereas the Respondent requested the Tribunal to determine the matter on the documents before it. The Applicant submitted that a hearing would enable a full and just consideration of the facts, law and merits of the case. The Applicant indicated that she and her husband would want to testify, particularly regarding their financial and parental responsibility over Ms. N. She also requested leave to file "additional supporting documentation relating to [her] legal responsibility for Ms. [N]". The Respondent submitted that there was no need for a hearing as the facts are not in dispute.

6. By Order No. 218 (NY/2015), dated 8 September 2015, the Tribunal granted leave for the Applicant to file a submission with the "additional supporting documentation relating to the Applicant's legal responsibility for Ms. [N]" and for the Respondent to file and serve a response to the Applicant's submission. On 15 September 2015, the Applicant filed the documentation relied on, explaining also that

> [b]ecause the Applicant's responsibility towards … Ms. N and finances are shared with her husband …, his name appears on many of the documents. In order to support this connection the Applicant respectfully submits their marriage license.

7. On 18 September 2015, the Respondent filed a submission in response submitting that the additional documents filed by the Applicant do not establish that the Applicant has legal responsibility for Ms. N, and therefore support the contention that Ms. N cannot be recognized as a dependent child under staff rule 3.6(a). The Respondent submitted further that a letter appended by the Applicant from the Government of Seychelles dated 16 February 2015 not only acknowledges that Ms. N cannot be recognized as a dependent under the Staff Regulations and Rules, but also confirms that the Applicant does not have legal responsibility for Ms. N under the law of Seychelles.

8. In light of the record before the Tribunal, including the latest documentation filed by the Applicant, the Tribunal considered that this matter could be decided on the papers without the need for a hearing.

Background

9. It is a matter of record that Ms. N's parents divorced in September 1997, with the High Court of Zimbabwe granting sole custody to the mother (the Applicant's sister) and ordering that the biological father "pay $500 per month by way of maintenance for the minor until she attains the age of 18 or becomes self-supporting whichever occurs first".

10. In May 2013, the Applicant's sister died unexpectedly, leaving behind one child, Ms. N, who had been living with her mother in Zimbabwe. Ms. N was born in in 1994 and was 19 years old when her mother passed away.

11. Sometime in 2013, presumably after the death of her mother, Ms. N moved from Zimbabwe to Nairobi, Kenya, to reside with her paternal uncle.

12. Five years prior to these events, sometime in 2008, Ms. N was granted Seychelles citizenship. The Applicant is also a national of Seychelles. After Ms. N's

mother passed away in May 2013, the Applicant and her spouse lodged an application with the Seychelles Supreme Court to adopt Ms. N.

13. On 6 June 2013, Ms. N's father signed an affidavit before a notary public stating that he had no objection to the offer by the Applicant and her spouse "to take over the responsibility of providing for all the financial needs of" his daughter, Ms. N.

14. Sometime in June 2013, the Applicant contacted OHRM, requesting that Ms. N be considered as her dependent child.

15. In an email dated 3 July 2013, Ms. AT of the Learning, Development and HR Services, OHRM, advised the Applicant as follows (emphasis in original):

> In order to have your niece added as your UN recognized dependent, the following documentation is required:
>
> – An official letter from the Seychelles government advising that there is no statutory provision for adoption for children age 18 or older;
>
> – Proof of <u>full-time</u> school attendance and/or high school diploma;
>
> – Proof of [Ms. N]'s acceptance to an educational institution at the duty station;
>
> – Proof of financial support from you directly to [Ms. N], i.e.

the purpose of seeking related benefits and entitlements. This determi a

7 September 1990), stating that "[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

Meaning of the phrase "legal adoption is not possible"

27. The Respondent contends that since Seychelles has a statutory provision for adoption, the Applicant's niece cannot be regarded as a "child who cannot be legally adopted" within the meaning of the relevant rule.

28. The phrase "[a] child who cannot be legally adopted" is defined in the relevant administrative instruction (see sec. 3.2(a) of ST/AI/2011/5). The administrative instruction sets out the situations where "legal adoption is not possible", namely where "there is no statutory provision for adoption or any prescribed court procedure for formal recognition of customary or de facto adoption in the staff member's home country or country of permanent residence".

29. As the Appeals Tribunal stated in *Scott* 2012-UNAT-225,

> [w]hen the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

30. There is to my mind no ambiguity in the applicable instruments, and their plain reading is that the phrase "a child who cannot be legally adopted" is applicable only in the absence of any adoption system whatsoever in the country, be it in the civil courts or customary courts. In Judgment No. 1075, *El-Zohairy* (2002), the United Nations Administrative Tribunal examined a similar provision in a previous administrative issuance in finding that legal adoption was not possible as

the applicant's national and religious laws did not contemplate the possibility of adoption at all. The Administrative Tribunal held that the staff member was entitled to receive dependency benefits, having been legally responsible for the child as a result of a custodial order and having paid for the maintenance of the child.

31. It is common cause that the Applicant's country of nationality, Seychelles, has a statutory provision for adoption, which provides for adoption of a child below the age of 18 years. Thus, there *is* a statutory provision for adoption in Seychelles, and the requirements of staff rule 3.6(a)(ii)(c) and sec 3.2 (a) of ST/AI/2011/5 have not been met with respect to Ms. N, whose adoption is no longer possible not due to the absence of a statutory provision or prescribed court procedure, but due to the fact that she has reached the age of majority.

32. The Applicant submitted, *inter alia*:

> There is no distinction between the benefits which a child of a staff member receives between ages 18–21 if the child is a natural child or was legally adopted. The latter is the case even though the child can no longer be "reached" by the adoption law in most countries after age 18. The UN does not cease to pay benefits for adopted children, or for natural children for that matter, who hit majority at 18—just because a local law may no longer recognize them as the ward of their parents or guardians.

33. This argument is not persuasive. The Organization's acceptance of a child between the ages of 18 and 21 who attends university or its equivalent full time as a "dependent child" hinges on the prior recognition of this person as a "child" under staff rule 3.6(a)(ii). In the present case, such recognition of Ms. N is not possible because she is over 18 years old and beyond the reach of adoption provisions under Seychelles laws.