Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1971

Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

CONTENTS (continued)

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. Italy

SUPREME COURT (SECOND PENAL SECTION)

ITALIAN REPUBLIC v. A. AND ANOTHER:
DECISION OF 21 MAY 1969 [1]

Immunity from criminal jurisdiction of a member of the family of a permanent representative to FAO—Interpretation of article XI, section 24 of the Headquarters Agreement between Italy and FAO in conjunction with the Vienna Convention on Diplomatic Relations

A, the son of the permanent representative to FAO of a Member Nation and another defendant were arrested in 1968 on a charge of larceny with aggravating circumstances.

A entered a plea of diplomatic immunity and requested his release from detention by virtue of article XI, section 24 of the Headquarters Agreement concluded between FAO and Italy on 31 October 1950,[2] which provides that permanent representatives and the members of their mission shall be entitled to the same privileges and immunities, subject to corresponding conditions and obligations, as the Government accords to diplomatic envoys and members of their missions of comparable rank accredited to the Government.

The court of First Instance (Tribunale di Roma) [3] recognized that the privileges and immunities of diplomatic envoys included, both under customary international law and under the Vienna Convention on Diplomatic Relations, [4] immunity from arrest and exemption from criminal jurisdiction and extended also to members of the family forming part of the household of the diplomatic envoy. Nevertheless, the Court dismissed the plea of immunity affirming, *inter alia*, that the immunities under the FAO Headquarters Agreement were more limited than those of diplomatic envoys since, as it appeared from various provisions of the Agreement, these immunities were based on, and operative solely with regard to the activities of the permanent representative relating to FAO; they were granted so as to protect the independent exercise of his functions and not for the personal benefit of the individual concerned.

The Court further held that in the case of A, diplomatic immunity was also excluded by the express provisions of Article 38, paragraph 1 of the Vienna Convention under which

[1] No. 176, published in *Jus gentium*, Rome, Vol. VIII, p. 334.

[2] United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No. 61.V.3), p. 187.

[3] Judgement of 25 January 1969 published in *Rivista di Diritto Internazionale* 53: 571-584, with comment by M. Politi, *ibid.*, pp. 526-550.

[4] United Nations, *Treaty Series*, vol. 500, p. 95.

citizens of the receiving State and persons having their permanent residence in its territory enjoy immunity only in respect of official acts. The Court pointed out that A and his father were Italian citizens by birth and had been resident in Italy before taking up residence in the sending State where they were naturalized. The Court considered that in view of the existence of ancestral landed interests and of the brevity of the residence abroad, both A and his father must be considered as having their permanent residence in Italy. Furthermore, having been naturalized in the sending State while still being a minor, A had not thereby lost his Italian nationality as he had acquired the foreign nationality "independently of his own will" within the meaning of article 8 of the Italian Nationality Law. [5]

A contested before the Supreme Court the decision dismissing his plea of immunity and requested the suspension of his case, but the Court of First Instance proceeded to the trial and on 22 February 1969 both A and the other defendant were found guilty and sentenced to imprisonment and the payment of fines. [6] The defendants appealed against this judgement to the Court of Appeal. [7]

Reviewing the judgement of 25 January 1969 in which the Court of First Instance rejected A's plea of diplomatic immunity, the Supreme Court held that the privileges and immunities of permanent representatives to FAO were exclusively governed by the Headquarters Agreement, which provided for limitations only in the case of persons who were Italian citizens or were engaged in any trade or industry in Italy. [8] The principle that privileges and immunities are conferred not for the personal benefit of the individuals themselves but in the interests of FAO—referred to in provisions of the Headquarters Agreement applicable to different categories of persons [9]—did not limit the scope of the immunities. Rather it constituted an affirmation of the purpose for which these immunities were granted, and is an application to a specific situation of the principle *ne impediatur legatio*.

On the question of citizenship, the Supreme Court held that article 8 of the Nationality Law did not relate to the naturalization of a minor, such cases being governed by Article 12, paragraph 2 from which provision it followed that A lost his Italian citizenship when he was naturalized in the sending State. Consequently the limitation of immunities under section 24, paragraph (*c*) of the Headquarters Agreement was not applicable in his case.

The Supreme Court accordingly quashed the judgement of the Court of First Instance of 25 January 1969 on the ground that the Italian Courts lacked jurisdiction.

The Court of Appeal, [10] seized with the appeal lodged by the defendants against the judgement of 22 February 1969 rendered by the Court of First Instance, found that A should not have been tried until the Supreme Court had pronounced itself on the preliminary question of his immunity from criminal jurisdiction. In the light of the judgement of the Supreme Court, the Court of Appeal held that A enjoyed immunity from jurisdiction and—on considerations not relevant to this summary—acquitted the other defendant on the grounds of insufficient evidence.

---

[5] Law of 13 June 1912, reproduced in United Nations Legislative Series, *Laws Concerning Nationality* (United Nations publication, Sales No. 1954.V.1), p. 267.

[6] Judgement of the Tribunale di Roma of 22 February 1969.

[7] For the outcome of the proceedings before the Court of Appeal, see the last paragraph of this summary.

[8] Article XI, section 24, paragraph (*c*) of the Headquarters Agreement.

[9] See article XII, section 26, paragraph (*b*), article XIII, section 29, paragraph (*a*) and article XIV, section 31, paragraph (*b*).

[10] Judgement No. 3 of 13 January 1970 of the Third Section of the Rome Court of Appeal.

2. Switzerland

REPUBLIC AND CANTON OF GENEVA: COURT OF CIVIL JUSTICE

STAHEL v. BASTID:
DECISION DELIVERED BY THE FIRST CHAMBER ON 14 MAY 1971

Appeal against a decision by which the Court of First Instance had declared itself incompetent to hear an action brought against an employer's deputy member of the ILO Governing Body—The immunities from jurisdiction enjoyed by the members of the Governing Body can be claimed only during the meetings in which they have to take part

The Court heard an appeal against a decision in which the Court of the First Instance had declared that it was not competent to hear an action brought against an employers' deputy member of the Governing Body of the International Labour Organisation, on the grounds that, under article 15 of the Headquarters Agreement of 11 March 1946 between the ILO and Switzerland, [11] the defendant enjoyed immunity from legal process, the judge being obliged automatically to declare an exception for reasons of public order.

The Court pointed out that, under article 3 of the Headquarters Agreement, the ILO enjoyed the immunities known in international law as diplomatic immunities. Under the provisions of the Vienna Convention on Diplomatic Relations, [12] immunity from civil jurisdiction did not apply in the case of "a real action relating to private immovable property situated in the territory of the receiving State" (article 31, paragraph 1 (*a*)). The Court observed that those conditions had not been fulfilled and that the case in litigation clearly was a personal claim.

The Court also pointed out that article 21 of the Headquarters Agreement stipulated that the immunities provided for therein were "designed solely to ensure the free functioning of the International Labour Organisation and the complete independence of its agents". It added that the signatories to the Vienna Convention had also acknowledged the same principle in "realizing that the purpose of privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions".

The Court further asserted, in accordance with the opinion expressed by the Permanent Mission of Switzerland to international organizations after the appellant had brought the matter before the Geneva Justice and Police Department, that the immunities from jurisdiction enjoyed by the members of the ILO Governing Body—who were not officials and were not under the authority of the Director of the International Labour Office within the meaning of article 21 of the Headquarters Agreement—were not enjoyed on a continuous basis, but rather, intermittently; the person concerned therefore could claim such immunity only during the conferences in which he had to take part and during the meetings of the International Labour Conference. Although judicial precedent indicated that the case was one in which the judge was obliged automatically to declare an exception for reasons of public order, it was obvious that, in the case of privileges valid only intermittently, the person wishing to take advantage of them during judicial proceedings must demonstrate the *de facto* circumstances (conferences, meetings of international bodies in which he took part) which entitled him to immunity on a particular date. It was the duty of the person concerned to specify the exact dates of the meetings which he had attended or would be required to attend in his capacity as a deputy member of the Governing Body. During those periods, he was not bound by the proceedings required for the preliminary investigation, which should

[11] United Nations, *Treaty Series*, vol. 15, p. 379.

[12] *Ibid.*, vol. 500, p. 95.

therefore be suspended. On the other hand, the Court asserted, there had been no grounds for declaring the unconditional incompetence of the Geneva courts which, except during the aforementioned periods, remained competent to hear the case. Nor was it a question, in the absence of any conclusive proof regarding the facts which would have established temporary immunity from legal process during the preparation of the proceedings relating to the preliminary investigation, of retroactively nullifying any of those proceedings. During subsequent phases of the preliminary investigation, the defendant, by virtue of the privileges he enjoyed intermittently, naturally retained the right to have the investigation suspended during his periods of immunity.

In the light of the foregoing, the Court rescinded the judgement delivered by the Court of the First Instance; it declared the Geneva courts competent, within the limits described above, to hear the case and referred it back to the court for further action and a new judgement.

---

3. United States of America

(*a*) UNITED STATES COURT OF CLAIMS

FRANK S. SCOTT JR. v. THE UNITED STATES; ALVIN C. WARNICK AND BARBARA W. WARNICK v. THE UNITED STATES: JUDGEMENT OF 16 OCTOBER 1970 [13]

American citizen living in a foreign country and exempted therein from income tax under an agreement between that country and an international organization—Such tax exemption does not by itself preclude a finding of "bona fide *residency" in a foreign country within the meaning of section 911* (a) (*1*) *of the United States Internal Revenue Code*

The case concerned two United States citizens, employed as university professors, who had accepted temporary positions with the Food and Agriculture Organization of the United Nations to render services in Argentina pursuant to an agreement between FAO and Argentina. The agreement made applicable to the plaintiffs the Convention on the Privileges and Immunities of the Specialized Agencies which provides in section 19 that "Officials of the specialized agencies shall

"...

"(*b*) enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations". [14]

Under the FAO-Argentina agreement therefore, Argentina did not impose its income tax on the plaintiffs.

On their federal tax returns, the plantiffs excluded the amounts paid by FAO, as income received from foreign services "while a *bona fide* resident of a foreign country ... for an uninterrupted period which includes an entire taxable year" (section 911 (*a*) (1) of the Internal Revenue Code). The exclusions having been disallowed in full, the plantiffs paid the amount allegedly owing and filed a refund claim with the District Director. Upon denial of the claim,

[13] 432 F. 2d 1388 (Ct. Cl. 1970).

[14] With respect to officials of the United Nations, the Convention on the Privileges and Immunities of the United Nations provides in Section 18 (*b*) that they shall be "exempt from taxation on the salaries and emoluments paid to them by the United Nations".

they began suit in court. The Government argued as its principal point that the privileges and immunities accorded the plantiffs by the agreement between Argentina and FAO precluded, as a matter of law, a finding of *bona fide* residency.

The Court concluded that both plaintiffs were entitled to refunds. It held *inter alia*

(1) that payment of foreign income tax was not a condition precedent to qualification under the statute relieving certain Americans residing abroad of federal income tax on earnings abroad;

(2) that the fact that an American taxpayer is exempt from foreign income tax under an agreement made by a foreign sovereign with the United States or another country or an international organization would not by itself preclude him from becoming a "resident" of a foreign country within the meaning of the statute referred to above;

(3) that where the plaintiffs each spent a period including one full taxable year in Argentina for professional reasons, and had intent to remain abroad to accomplish their purposes, and became well-integrated in their local milieu, they were both " *bona fide* residents" of Argentina so as to qualify under the statute referred to above even though the Argentina-FAO agreement granted them immunity from Argentina income tax and afforded them some minor privileges under local law.

(*b*) CIVIL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY, PART XXII, SMALL CLAIMS COURT

ESTERYA MENON v. ALICE E. WEIL ET AL.: JUDGEMENT OF 26 MARCH 1971 [15]

Actions instituted against United Nations officials—Suggestion of immunity presented by the Department of State—Court cannot enquire into propriety of the suggestion—Actions dismissed

Mrs. Esterya Menon, the estranged wife of a United Nations field worker of Indian nationality now stationed in South Korea, had instituted actions for support and maintenance against officials of the United Nations Headquarters staff, whom she was suing as "agents" of the absent Mr. Menon, apparently on the ground that in some previous official correspondence with her, they had questioned her status as Menon's wife by reason of certain controversial Turkish divorce proceedings or had otherwise failed to give her satisfaction. The United States Attorney made a suggestion of immunity and moved to dismiss.

The Small Claims Court held that a suggestion of sovereign immunity presented to court by the Department of State through the Attorney General or his local representative should be accepted by the court without further inquiry—even against a claim of prior waiver, or a claim that the assertion of immunity violated an adversary's constitutional rights—and that all further judicial intervention must cease.

The Court observed that where an immunity claim was asserted not by the Department of State but by the alleged sovereign entity itself, the court could enquire whether the activity was governmental or commercial and proceed on the merits in the latter case.

---

[15] 66 Misc. 2d 114, 320 N.Y. S.2d 405 (N.Y.C. Civ. Ct. 1971).

However, in the present case where the Attorney General invoked on behalf of the State Department the applicable immunity provisions of the Convention on the Privileges and Immunities of the United Nations, the court could not enquire into propriety of the suggestion.

The Court therefore dismissed the actions and ordered that any further suit tendered by plaintiff or any agent or assignee against any United Nations personnel be dismissed.
