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Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

Switzerland

FEDERAL COURT

MS. X. V. THE COUNCIL OF STATE OF THE CANTON OF GENEVA: JUDGEMENT OF 2 APRIL 1987[1,2]

Expulsion of a staff member of an international organization pursuant to the Federal Act of 26 March 1931 on the Stay and Establishment of Aliens — Decision challenged through an appeal under public law and through an appeal under administrative law — Inadmissibility of the appeal under public law — In the absence of any provision of federal law, including international agreements concluded by Switzerland establishing special treatment of international civil servants, they remain subject to ordinary law — Appellant's claim of violation of personal freedom and of the prohibition of arbitrary action

(Second Court of Public Law)
Hearing of 2 April 1987
Mr. PATRY presiding

EXPULSION, PURSUANT TO ARTICLE 10 OF THE FEDERAL ACT OF 26 MARCH 1931 ON THE STAY AND ESTABLISHMENT OF ALIENS (LSEE), OF A STAFF MEMBER OF AN INTERNATIONAL ORGANIZATION

Federal Act on Judicial Organization (OJ) 100 (b), *101* (c); *LSEE 10, 11, 25; Regulation of 1 March 1949 for the Implementation of the LSEE (RSEE) 16; Interim Arrangement on Privileges and Immunities of the United Nations, article V.*

1. According to article 25, paragraph 1 (*f*), of the LSEE, the Federal Council is authorized to establish a special treatment to be applied, in the area of the policing of aliens, to representatives of foreign States or members of international agencies. It has not, however, made use of that power, so that international civil servants remain subject to the ordinary regime, except as provided by treaties.

2. The international agreements concluded by Switzerland do not exempt a United Nations staff member, at least when he is not assimilated to a diplomatic agent, from the risk of expulsion pursuant to article 10 of the LSEE and do not enable him to benefit from any special procedure.

Facts (summarized):

A. A foreign national, against whom a number of complaints had been made and who had been employed as a secretary by an organization associated with the United Nations, had been expelled from Swiss territory by a decision of the Geneva Department of Justice and Police on the ground that she had demonstrated her inability to adapt to the established order in Switzerland.

B. The Geneva Council of State rejected the appeal she lodged against that decision.

C. The person concerned challenged the latter decision through an appeal under public law and through an appeal under administrative law.

Law:

1. (*a*) The two appeals were lodged against the same decision and are supported by practically identical arguments. It is therefore justifiable to combine the two cases and to rule in one and the same judgement.

(*b*) The appeal under public law to the Federal Tribunal against a cantonal decision for violation of the constitutional rights of citizens is not admissible if the alleged violation can be brought before the Federal Tribunal by other legal means (art. 81, para. 2, OJ).

In so far as violation of the constitutional rights of citizens may also be claimed within the context of an appeal under administrative law (*Collection of Judgements of the Swiss Federal Tribunal* (AFT 110, I (*b*), 257, para. 1), it must first be considered whether that legal recourse is available to the appellant.

(*c*) An appeal under administrative law is admissible against final decisions which were rendered by cantonal authorities (art. 98 (*g*), OJ) and which are based on federal public law (art. 5, Federal Act of Judicial Organization of 16 December 1943 (PA), or which should have been so based (AFT 101, I (*b*), 380). In the present case, the decision of the Council of State was indeed a final decision at the cantonal level, in accordance with article 4 of the Act for the implementation in the canton of Geneva of the Federal Act on the Stay and Establishment of Aliens, dated 21 February 1934; moreover, since the case is one of expulsion pursuant to article 10, paragraph 1 (*b*), and article 11, paragraph 3, of the LSEE and of article 16, paragraph 3, of the RSEE, the conditions for inadmissibility which are provided for under article 100 (*b*) of the OJ with regard to the policing of aliens are not fulfilled (AFT 103, I (*b*), 374, para. 2, 97, 1 63). Whether the Council of State was competent to take the contested measure on the basis of these provisions is in fact a question of substance and not a question of admissibility.

(*d*) Since the appellant — who wishes to live and work in Geneva — was personally affected by the decision being challenged, she has an interest, deserving of protection within the meaning of article 103 (*a*) of the OJ, in the annulment or modification of that decision.

Apart from this, the appeal under administrative law lodged by the appellant satisfies the other conditions of articles 97 et seq. of the OJ; it is therefore admissible, which means that the appeal under public law is inadmissible (art. 84, para. 2, OJ).

2. The appellant maintains, first of all, that the decision to expel her was rendered by an incompetent authority.

(*a*) According to article 25, paragraph 1 (*f*), of the LSEE, the Federal Council is authorized to establish special treatment to be applied, within the area of the policing of aliens, to the representatives of foreign States or to the members of international agencies. Since the Federal Council has not made use of this power, it must be concluded that it wished to subject international civil servants to the ordinary regime, except as provided in treaties.

At the time when the decision to expel the appellant was rendered, she was a staff member at the United Nations. Since she was not assimilated to diplomatic agent within the meaning of article V, section 16, of the Interim Arrangement on Privileges and Immunities of the United Nations (*Systematic Collection of Federal Law* (RS) 0.192.120.1), her status was governed by art. V, sect. 15, of that Arrangement. Accordingly, she could not invoke her limited immunity from legal process (art. V, sect. 15 (*a*)), since she was not summoned before a tribunal to answer for acts performed in her official capacity. With regard to her residence in Switzerland, however, she does enjoy a special status within the limited context of article V, section 15 (*d*), of the Arrangement. That provision states in fact that United Nations officials, together with their spouses and relatives dependent on them, are immune from immigration restrictions and alien registration. Unlike article 46, paragraph 1, of the Vienna Convention on Consular Relations (RS 0.191.02), the Arrangement does not even specify that they are exempt from the provisions relating to residence permits. It follows, however, from the practice of the Federal Department of Foreign Affairs that dispensing with the formalities for registration is interpreted as exemption from the residence permit. Nevertheless, it cannot be concluded from that usage that United Nations staff members cannot be expelled pursuant to article 10 of the LSEE if the measure concerned is unrelated to the provisions limiting the number of foreign workers or to registration requirements.

(*b*) It is true that some headquarters agreements provide that the expulsion of international civil servants is subject to a special procedure requiring the consent of the Ministry of Foreign Affairs and consultation with the organization (Philippe Cahier, thesis, Geneva, 1959, p. 302). However, inasmuch as the headquarters agreements concluded by Switzerland do not contain such a provision (Philippe Cahier, op. cit., p. 303), it must be concluded that our country has wanted to subject international civil servants to ordinary law, at least when they are not assimilated to diplomatic agents. Moreover, it is generally accepted that it is important to the State of residence to be recognized as fully competent to ensure good order in its territory, except in the case of an explicitly agreed derogation (Christian Dominicé, "La détermination du domicile des fonctionnaires internationaux", Third Juridical Seminar, Geneva, 1964, p. 124). In the absence of any provision of federal law — including international agreements concluded by Switzerland — which could exempt the person concerned from the risk of expulsion or which enables her to benefit from a special procedure, the appellant remains subject to ordinary law.

(*c*) Furthermore, it is beyond doubt that in the Canton of Geneva, the Department of Justice and Police is the cantonal authority for the policing of aliens within the meaning of article 15 of the LSEE (art. 1 of the Act for the implementation in the Canton of Geneva of the LSEE). In particular, it rules on

expulsions (art. 3 of the Act), and its decisions can be challenged before the Council of State (art. 4, para. 1, of the Act; ATF 99 I (*a*) 323, para. (*b*)). Therefore the Geneva authorities were in fact competent to rule. As to whether, in the light of the relations existing between the Confederation and international organizations, it is desirable for a cantonal authority to expel a person without prior discussion with the organization concerned, that question is beyond the Federal Tribunal's power to consider (art. 104 (*c*), OJ).

. . .

4. With regard to substance, the appellant claims violation of personal freedom and of the prohibition of arbitrary action. These claims are, however, directly linked to the question whether or not the cantonal authority applied federal law correctly in confirming the contested measure of expulsion (art. 104 (*a*) and art. 114, para. 1, OJ).

(*a*) According to article 10, paragraph 1 (*b*), of the LSEE, an alien may be expelled from Switzerland when his general behaviour and his actions give reason to conclude that he is unwilling or unable to adapt to the established order in the country which offers him hospitality. Article 16, paragraph 2, of the RSEE cites as examples some cases in which the aforementioned conditions are fulfilled. An expulsion judgement will, however, be rendered only if it seems appropriate to all of the circumstances (art. 11, para. 3, LSEE); in order to judge the matter, the authority must take account, in particular, of the gravity of the offence committed by the alien, the duration of the alien's residence in Switzerland and the harm which the alien and his family would suffer as a result of the expulsion (art. 16, para. 3, RSEE). The cantonal authorities are, in principle, competent to examine the question of the desirability of the expulsion order and to make a comparison of the interests involved. Therefore, within the context of the appeal under administrative law now before it, the Federal Tribunal will not disagree with the opinion of the cantonal authorities unless there are pressing reasons to do so; it will intervene only in cases in which the evaluative power has been exceeded or abused (art. 1 (*a*), OJ; AFT, 105 I (*b*) 169, para. 6 (*a*), 98 I (*b*) 3, item 1).

(*b*) (Examining the circumstances of the case at hand, the Federal Tribunal arrives at the conclusion that there has been no violation of federal law, and no exceeding or abuse of the evaluative power.)

(*c*) In the last document she submitted, the appellant is essentially challenging the manner in which the expulsion was carried out. On that question, there is certainly reason to doubt that the cantonal authority respected all of the appellant's rights, in particular, article 16, paragraph 8, of the RSEE, which prescribes that the Canton must grant the alien an appropriate period of time to leave Switzerland unless, by way of exception, it is essential that he should depart at once. However, the questions involved relate to the execution of the expulsion measure, on which the Federal Tribunal has no reason to rule, since by virtue of article 101 (*c*) of the OJ, an appeal under administrative law is not admissible against measures relating to the execution of decisions. In any case, even in the context of an appeal under public law which is based on article 4 of the Constitution, the appellant could complain only against final decisions rendered at the cantonal level (art. 87, OJ).

Those of the appellant's complaints which are manifestly unrelated to the decision being challenged are therefore not admissible.

For these reasons, the Federal Tribunal:

1. Declares that the appeal under public law is not admissible . . .

NOTES

[1]Published in the journal *La Semaine judiciaire*, vol. 109, 1987, pp. 517-524.
[2]Translation prepared by the Secretariat of the United Nations.