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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

I. Austria

ADMINISTRATIVE COURT

RÜDIGER M. SAAR *v.* FINANCE DEPARTMENT FOR VIENNA, LOWER AUSTRIA AND BURGENLAND: DECISION OF 17 SEPTEMBER 1976

Diplomatic status enjoyed by certain categories of officials of the International Atomic Energy Agency under the IAEA Headquarters Agreement—Personal character of the tax-exemption deriving from that status

The case concerned a claim for tax exemption in connexion with the purchase of landed property in Austria by five staff members of the International Atomic Energy Agency. The five purchasers, having been ordered to pay a transfer tax on the transaction, appealed against that decision. The Administrative Tribunal ruled that it should have been ascertained whether the persons concerned were included among those referred to in Section 39 of the IAEA Headquarters Agreement of 11 December 1957.[1] Since that article did apply to the five purchasers the competent authority granted the appeals. Consequently the Tax Office ordered the seller's successor to pay the land transfer tax which had originally been charged to the purchasers. Against that decision, the seller's successor argued *inter alia* that the tax-exemption was not a personal exemption but applied rather to the entire legal transaction. This argument was dismissed by the competent authority on the ground that the *personal* tax exemption for diplomats could be inferred unambiguously from the substance of the IAEA Agreement in conjunction with the Vienna Convention on Diplomatic Relations[2] and that there were no legitimate grounds for doubt in that regard.

On appeal, the Administrative Tribunal dealt with the question in the following terms:

> "The appellant's first objection is that staff members of the International Atomic Energy Agency in service category P-5 or above enjoy the privileges of article 34 of the Vienna Convention ... including exemption from land-transfer tax. He asserts that the provision in the contract of sale ..., under which purchasers jointly bear the costs and fees arising from the conclusion and registration of the contract, together with any land-transfer tax and surcharges that may be due, would in the present case mean that the purchasers, although exempt from transfer tax are nevertheless obliged to pay the tax indirectly through the tax liability of the seller (article 17, item 4, of the Land-Transfer Tax Law). As the transfer tax law concentrates on the transfer process, seller and purchasers therefore being legally liable for a single payment under the tax laws, the appellant claims applicability of the provision of article 6, paragraph 1, of the Federal Tax Regulations, under which tax exemption for one joint debtor does not mean

[1] United Nations, *Treaty Series*, vol. 339, p. 111.
[2] *Ibid.*, vol. 500, p. 95.

that the other becomes liable for payment of the tax. Thus, the appellant asserts that tax exemption on the transfer even for only one of the joint debtors would have the effect of exempting the entire transfer from tax.

"According to article 17, item 4 of the Land-Transfer Tax Law, the parties to a sale are liable for the tax. Under article 6, paragraph 1, of the Federal Tax Regulations, persons legally liable for the same tax payment under tax regulations are collectively liable (joint debtors in the sense of article 891 of the General Civil Code). Since in the present case the seller and purchasers are therefore liable for the tax and are joint debtors under article 6, paragraph 1, of the Federal Tax Regulations, the tax authority was entitled to claim payment from the other joint debtor (cf. Commercial Court judgement No. 419/71 of 20 October 1971). The purely personal tax exemption of the purchasers is based on the exemption provisions for staff members of the International Atomic Energy Agency at Vienna under the AIEA Headquarters Agreement . . . , in conjunction with the Vienna Convention on Diplomatic Relations . . . Consequently, the tax exemption provided for therein can never relate to the taxable transaction as such; it can relate only to the parties concerned in the transaction who enjoy diplomatic status and for whom this tax exemption is provided. The argument of the appellant in the proceedings before the Administrative Tribunal is that the restriction of tax exemption to the person of the purchaser does not produce any economic effect, since in the great majority of cases the contract provides that the transfer tax burden incumbent on the purchaser must in fact be borne by the purchaser himself. There is some justification for this argument. However, the fact remains that under the applicable law, this case involves only a personal tax exemption, i.e. one restricted to the person of the taxable individual enjoying the privilege, and not an objective exemption, i.e. one relating to the legal transaction itself. The tax authority therefore did not act illegally in the appeal case by demanding the tax payment from the joint debtor who enjoyed no tax exemption.".

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2. Federal Republic of Germany

FEDERAL SUPREME COURT (BUNDESGERICHTSHOF)

STUDIO-KARTEN GMBH *v.* DEUTSCHES KOMITTEE DER UNICEF E. V.: DECISION OF 16 JANUARY 1976

Claim of unfair competition—The principles which the courts have developed to determine the permissibility under unfair competition law of so-called emotionally-charged advertising by profit-seeking businesses do not apply to the charitable activities of public welfare organizations

The plaintiff, a firm engaged exclusively in the manufacture and sale of Christmas cards, had brought an action against the Deutsches Komittee der UNICEF e. V., an agency handling the sales in Germany of UNICEF Christmas cards. It claimed that its right to compete was impaired by what it considered as "emotionally-charged advertising" on the part of the defendant.

The Court recalled that it had heretofore considered the question of so-called emotionally-charged advertising only in relation to advertising activities of business

firms seeking profits for their own personal gain. In this regard it had repeatedly taken the position that a violation of fair trade practices could exist if appeal was made not to the purchasing interests of the customer but primarily to his sense of social compassion (BGH decision, 1965 GRUR 485, 487—*Versehrten Betrieb* with further references, also BGH decision, 1968 GRUR 44, 46—*Schwerbeschädigtenbetrieb*). It did not follow however that a mere appeal to the feelings of the consuming public could be regarded as unfair competition. A determination of fair competition could not fail to recognize that it was common practice in modern advertising to use a variety of means to appeal to the feelings of the potential customer with the aim of inducing him to buy the advertised goods. When however sales were promoted without any objective reference to the offered goods especially to their particular properties such as quality, good value, or other special performance features (compare BGH decision, 1959 GRUR 277, 279—*Künstlerpostkarten*), with the aim of deliberately and systematically arousing the sympathy of the buyer to the point of causing his feeling of social responsibility to be the decisive motive in the purchase, then honest practices were being violated.

The Court noted that the defendant in the present case was not a profit-seeking enterprise but an agency engaged in charitable activities all over the globe for the benefit of needy children, which sought donations in order to accomplish these social objectives in the public interest and promoted the sale of greeting cards as a supplementary form of activity in order to be able to carry on its charitable pursuits with the profits derived therefrom. In view of those facts which were well-known to the public, the Court went on to say, the contested advertising could not be treated in the same way as so-called emotionally-charged advertising of profit-seeking firms.

The Court noted that, according to the findings of the lower jurisdiction, the defendant advertised its card sales solely for charitable purposes with proper factual references to the organization's well-known charitable objectives and to the intended use of the income derived from such card sales. Such truthful references by a well-known organization could not, in the view of the Court, form the basis for a finding of a dishonest trade practice. From the fact that highly qualified illustrators and advertisers and an immense number of volunteer helpers contributed without charge to the production and distribution of the greeting cards, the plaintiff drew the erroneous conclusion that the defendant through these circumstances alone had gained a competitive advantage which it and other competitors could not match. Rather, the Court observed, it was these special elements, among others, that gave the public the incentive to contribute to the success of the total aid programme by its own participation. When the public, the Court concluded, considered because of all the circumstances the card sales of the defendant from the very outset as a special drive for charity and aid, then the lower jurisdiction had not committed any legal error in considering the defendant's reference in its advertising, which in the final analysis were only made in support of this special drive, to be unobjectionable under unfair competitive law.

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3. United States of America

(*a*) CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY: PART AP-17[3]

THE PEOPLE OF THE STATE OF NEW YORK *v.* MARK S. WEINER: DECISION OF 19 JANUARY 1976

Damage wilfully caused to United Nations property—Motion for dismissal for alleged lack of jurisdiction—Extent of the immunity granted to United Nations officials under the Headquarters Agreement between the United Nations and the United States

The defendant, charged with spraying red paint on the outside wall of the United Nations headquarters, had instituted a motion to dismiss the complaint for lack of jurisdiction. The Court dismissed the motion, holding that neither the fact that the United Nations and/or its representative was the complainant nor the fact that the property involved was internationally owned was such as to deprive the Court of its jurisdiction of the person of the defendant or the subject matter where, by reason of section 7 of the Headquarters Agreement between the United Nations and the United States, infractions on property located within the headquarters district were, for jurisdictional purposes, to be considered solely as crimes committed against property located in New York County. The Court further held that neither the fact that the situs of the offense was the headquarters of the United Nations, nor the fact that the defendant was apprehended by a United Nations guard who himself was an alien and a foreign complainant was sufficient to strip the district attorney of New York County of his authority to prosecute the defendant in view of the applicable provisions of the County Law and the Headquarters Agreement.

As to the alternative motion of the defendant to testify at a preliminary hearing in order to present evidence towards issuance of a cross complaint, it was granted by the Court, which observed that the immunity granted to personnel of the United Nations was not the same as the unlimited immunity granted to a foreign sovereign and was clearly limited to acts normally occurring toward fulfillment of the purpose of the United Nations. The Court referred in this connexion to *United States ex rel.* v. *Fitzpatrick*.[4] It further stated:

> "The defendant alleges that after placing him under arrest, the complainant assaulted him without provocation or cause. If in fact at the hearing of this case there is reasonable cause to believe that such allegations are true, then by 104 and 105 of the Charter and all other relevant statutory authority cited, the logical conclusion is that the complainant would be responsible for his acts if he acted in excess of his authority and became an aggressor... Our system of justice requires restraint from law enforcement officials, and our courts draw a line between proper police procedure and abuse of police authority. Whether the complainant... has stepped over that line is not a matter for the United Nations to decide. It is the responsibility of this court in light of the fact that the "justiciable issue" has been presented to it for determinations of law and fact, and..., this court is also charged with interpretation of the issue of immunity as it applies to the facts of this case...

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[3] 378 N.Y.S. 2d 966.

[4] D.C.N.Y., 214 F. Supp. 425 (433), 1963. For a summary of the case, see *Juridical Yearbook*, 1963, p. 200.

"In addition to the foregoing, there are equitable considerations which motivate this court in reaching its conclusions. There is a limit to which the international agreement creating the United Nations can inure to the detriment, disadvantage, and unequal protection of a citizen of the United States... In order to prosecute the defendant..., [the] Security Officer... will voluntarily testify as a witness for the People. The United Nations takes the position that irrespective of what the direct examination and cross-examination of this witness discloses, he will not have waived immunity by such sworn testimony. The inevitable extension of this position is that even if the witness perjures himself, immunity would still vest, yet the defendant could conceivably be held, tried, and convicted on such testimony. This is so unconscionable that it violates on its face the concepts of fundamental fairness and equal treatment of all persons who seek judicial determination of a dispute. The treaty is not so sacrosanct as to cause a defendant in this court to be placed in a lesser position because the complainant is a representative in the international community. Certainly, the United Nations could not reasonably expect such a retreat from standards of justice which this nation has struggled to maintain since its birth. The immunity for United Nations personnel derived through the treaty is intended to shield the diplomatic corps in our midst. It was not intended to be used by them as a sword to pierce constitutional protections which are inherent in American citizenship. It is inconceivable that the foreign policy of this nation will be impaired by strict maintenance of these constitutional safeguards."[5]

(*b*) NEW YORK COUNTY SUPREME COURT—SPECIAL TERM: PART I

EMMANUEL R. GOLD *v.* THE STATE OF NEW YORK, THE MUNICIPAL ASSISTANCE CORPORATION, THE CITY OF NEW YORK, ABRAHAM D. BEAME, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK AND MICHAEL J. CODD: DECISION OF 13 APRIL 1976

Provision of police protection to persons and property of the United Nations and to foreign embassies within the territorial limits of the City of New York—Power of local authorities in this respect

The plaintiff sought an injunction "restraining the expenditure of the general funds of the City of New York for the purpose of maintaining police protection of the persons and property of the United Nations and foreign embassies within the territorial limits of the City of New York". He based his claim upon Section 10 of the Municipal Home Rule Law, which authorizes the City to make any law for the "government, protection, order, conduct, safety, health and well-being of persons or property *therein*" (emphasis added). Urging that the premises of the United Nations and foreign embassies in question constituted "foreign territory" and were thus not within the City, he contended that the City was powerless to take steps to protect persons or property within the embassies.

The Court observed that the City did not attempt to afford protection within the embassies but rather provided protection "in those areas immediately surrounding" the embassies [Code Affidavit, p. 2] and that such protection, on the public streets of the

[5] For the comments of the Secretariat of the United Nations on this decision, see p. 236 of this *Yearbook*.

City, of visitors and residents alike was plainly within the scope of authority granted the City and its Police Department.

The Court further noted that the Federal Government had taken steps to carry at least part of the financial burden of providing protection in the areas of the embassies, which was the relief sought in this case. But, the Court added, regardless of the source of funds, the respondent had the power, if not the duty, to continue providing police protection. The motion was therefore denied.

(*c*) DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JUAN CARLOS MORENO, JUAN PABLO OTERO AND CLARE B. HOGG *v.* UNIVERSITY OF MARYLAND AND DR. WILSON H. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND: DECISION OF 13 JULY 1976

Policy of the University of Maryland denying holders of G-4 visas, on account of their visa status, legal capacity to establish domicile in Maryland—Due process claim based on establishment by the University of Maryland of an irrebutable presumption with respect to residence and domicile—Jurisdictional issues—Conclusion of the Court to the effect that the challenged policy creates a constitutionally impermissible irrebutable presumption—Granting of the plaintiff's motion for class determination

The three plaintiffs were students at the University of Maryland who resided in the State of Maryland with their parents upon whom they were financially dependent. Their fathers were respectively employees of the International Monetary Fund, the International Bank for Reconstruction and Development and the Inter-American Bank and all held non-immigrant alien visas issued pursuant to 8 USC 1101 (*a*) (15) G (iv) [G-4 visas]. In pursuance of its policies under which students were divided into two classes i.e. "in-state" or resident on the one hand and "out of state" or non-resident on the other, the former being accorded more favourable treatment than the latter with respect to tuition rates, the University of Maryland had examined whether the three plaintiffs were entitled to "in-state" status. It had come to a negative determination predicated upon a conclusion that the parents of the plaintiffs could not be domiciled in Maryland because each was in the country on a G-4 visa. The plaintiffs claimed that the actions of the defendants in denying them "in state" status were in violation of the Due Process, Equal Protection and Supremacy Clauses of the Constitution.

The defendant first argued that the Court lacked subject-matter jurisdiction because the claim was founded upon the Maryland law of domicile and presented no federal question. The Court rejected this argument. It stressed in this respect that it was not the Maryland law of domicile which gave rise to the suit but the policy of the University of Maryland which had been interpreted by the defendants as automatically classifying holders of G-4 visas as non-residents for purposes of tuition on the assumption that no one in the United States on a G-4 visa could ever have the requisite intent to establish a Maryland domicile. The Court observed:

> "The due process claim, premised on an argument that the University of Maryland's policy establishes an irrebutable presumption with respect to residence and domicile for tuition purposes... and the equal protection claim, based on an alleged violation of both the strict scrutiny and the reasonable basis-rational

relationship tests are at the heart of this case. These are matters of federal law."

The defendant also argued that the Court lacked jurisdiction because no Article III, paragraph 2, case or controversy[6] existed between the plaintiffs and the defendant inasmuch as the plantiffs, dependent as they were on their parents, did not pay their own tuition and thus stood to lose or gain nothing by the outcome of the suit. The Court however held that the plaintiffs clearly were presenting a constitutional question "in the context of a specific live grievance" (*Golden* v. *Zwickler*, 394 U.S. 103-110 (1969)) and had an interest adverse to the dependents since the tuition rates charged them as non-residents must be paid in order for them to attend the University of Maryland.

The defendant further contended that the plantiffs lacked standing to sue because they were financially dependent on their parents who, therefore, presumably paid all the tuition costs involved. The Court however observed that the plaintiffs were asserting their own legal rights and interests and had a sufficient stake in the outcome of the suit to establish standing to bring it.

On the merits, the Court noted that while the plaintiffs did not challenge the University of Maryland's policy of charging non-domiciliaries higher tuition rates, they did allege that the University's policy created an irrebutable presumption that non-immigrant aliens holding G-4 visas could not establish a Maryland domicile, a fact which, they argued, was not universally true.

The Court noted that while the University of Maryland determined on a case by case basis for tuition and fees purposes the domicile of "United States citizens and... immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States", a financially independent student in the United States on the basis of a G-4 visa or a student who was financially dependent on a parent holding a G-4 visa was, under the University's policies, automatically "attributed out-of-state status for admission [and] tuition... purposes". So long as the G-4 visa status of the student or his parent continued, any other evidence of domicile brought before the University could not possibly produce a reclassification of the student in question. "The fact", the Court added, "that the State would listen to evidence totally immaterial to its pre-determined conclusion concerning the domicile of a G-4 alien did not make that conclusion any less irrebutable".

The Court then examined whether the presumed fact was universally true, i.e. whether, under the law of domicile of Maryland and under federal law, a G-4 alien was unable to establish domicile. It came to the conclusion that there was nothing in Maryland law, possibly aside from the principle that a person intending a change in domicile must be legally capable of doing so, to prevent a G-4 visa holder from obtaining a Maryland domicile. It then examined federal law in order to determine whether such law relating to G-4 aliens in any respect rendered such aliens incapable of changing their domiciles.

The relevant passage of the decision reads as follows:

> "The Immigration and Nationality Act of 1952 (8 U.S.C. § 1101 *et seq.*) defines 12 classes of nonimmigrant aliens which, including subclasses, describe 17 types of nonimmigrants. Class C aliens are aliens who are in the United States as resident representatives of foreign governments and members of their immediate families and staffs, as well as aliens who are foreign representatives to or employees of international organizations covered by the International Organizations Im-

[6] Article III, paragraph 2, of the Constitution of the United States limits the judicial power of federal courts to "cases" or "controversies".

munities (22 U.S.C. § 288[7]) and members of their immediate families and personal staffs. Specifically, G-4 aliens are:

" '(iv) officers, or employees of such international organizations and the members of their immediate families.'

"In contrast to those classes of aliens who are defined as aliens 'having a residence in a foreign country which [they have] no intention of abandoning,' (8 U.S.C. § 1101 (*a*) (15) (B), (F), (H), (J)) or as aliens who intend to enter the United States 'temporarily' or who are 'in transit' (§1101 (*a*)(15) (C), (D), (L)), a G-4 alien is simply defined as an employee of an international organization. The statute, therefore, does not define a G-4 alien in terms of an express intent on the part of such alien relative to his domicile.

"The visa itself held by a G-4 alien is not determinative of the domicile issue. A visa is essentially a document of entry . . . Its period of validity has no relation to the period of time an alien may be authorized by the immigration authorities to stay in the United States (22 C.F.R. §41.122(*a*)). The stay of a G-4 alien is governed by regulations of the Immigration and Naturalization Service (8 U.S.C. §1184(*a*)). As provided in 8 C.F.R. §214.1(*a*):

" '(*a*) *General.* Every non immigrant alien applicant for admission or extension of stay in the United States shall . . . agree that he will abide by all terms and conditions of his admission or extension, and that he will depart at the expiration of the period of his admission or extension or an abandonment of his authorized nonimmigrant status.'

"The period of admission of a G-4 alien is for so long as the alien continues to be recognized by the Secretary of State as a member of that class of aliens. In terms of the present case, the period of admission of the plaintiffs' fathers is for so long as they are respectively employed by international organizations governed by the International Organizations Immunities Act, cited supra (8 C.F.R. § § 214.1(*a*), 214.2 (*g*)).

"The mere fact that a G-4 alien is subject to being deported if he changes his employment does not make him legally incapable of establishing a Maryland domicile or of intending to remain or remaining here indefinitely. In *Alves* v. *Alves* . . . the District of Columbia Court of Appeals held specifically that a G-4 alien was domiciled in the District of Columbia. In that divorce case the appellant wife challenged the finding of the lower court that her husband was a D.C. domiciliary on the ground here argued that 'the appellee did not have the legal capacity to form an intention to become a domiciliary of the District of Columbia since he was living here at the grace of Great Britain and the United States.' (at 114). The wife also argued that the husband had to adjust his status to permanent resident before he could become domiciled in the District of Columbia. The *Alves* court rejected the last contention holding that under the immigration laws it is legally possible 'for an alien to remain in the United States for many years without applying for permanent residence' and that such a contention wrongfully ignores 'the period of time [the alien had] resided in the District of Columbia, his intention in moving into the District of Columbia and other relevant factors.' (At 115). As to the first contention the court held:

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[7] See United Nations Legislative Series, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (ST/LEG/SER.B/10, United Nations publication, Sales No. 60.V.2), p. 128.

" 'The fact that the appellee entered the United States on a nonimmigrant visa . . . does not preclude a finding that appellee could become domiciled in the District of Columbia.

" '. . . At best it might be argued appellee had a floating intent to return to Great Britain conditioned upon an uncertain event—his dismissal from the I.M.F. But such a floating intention to return to Great Britain is not sufficient to require a holding that appellee was still domiciled in Great Britain.' (footnotes omitted). (At 115-116).

" . . .

"The rule expressed in *Alves* . . . as applied to a G-4 alien, who presently intends to remain in Maryland indefinitely but who may have to return to his native country at the conclusion of his employment, makes it clear that such a G-4 alien is not legally incapable of establishing a Maryland domicile. Furthermore, as noted *supra,* there is nothing in the statutory definition in 8 U.S.C. §1101 of a G-4 alien, as opposed to certain other types of nonimmigrant aliens, which indicates that Congress sought to negate a domiciliary intent on the part of a G-4 alien.

"In summary, under Maryland law the plaintiffs' fathers must be able to demonstrate physical presence in Maryland, an intent to remain here indefinitely and the legal capability to do so. The federal immigration laws do not render the plaintiffs' fathers legally incapable of demonstrating and being able to carry out a present intention to remain in Maryland indefinitely. Plaintiffs' fathers' G-4 status, in fact, gives them that precise status, residents of Maryland for an indefinite period of time. This legal capacity coupled with physical presence and sufficient evidence of the requisite intent is all that the law of Maryland requires to establish domicile."

Having thus determined that the irrebutable presumption utilized by the University of Maryland in enforcing its challenged policy—namely that no class of non-immigrant alien could establish a Maryland domicile—was not universally true since G-4 aliens were not legally incapable of establishing Maryland domicile, the Court concluded that the policy of the University of Maryland created a constitutionally impermissible irrebutable presumption.

The Court granted declaratory relief to the members of the class defined as follows:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but who would be interested in attending if given an opportunity to establish in-state status or who are currently students in senior high schools in Maryland, and who hold or are named within a visa under 8 U.S.C. § 1101(*a*) (15)(G)(iv) or are financially dependent upon a person holding or named within such a visa."

and enjoined the defendant from denying the members of this class in-state status solely because they or their parents were holders of a G-4 visa.
