

## SEPARATE OPINION OF JUDGE NAGENDRA SINGH

As I have voted in favour of the Court's Advisory Opinion in this case and fully agree with its reasoning no less than its findings, my opinion has no other object than to emphasize certain aspects of the case about which I feel the Court could have been more forthright. It could, in my view, have proceeded a little further in order to arrive at the full logical conclusion which I feel could have been drawn with profit all round – i.e., in relation to the General Assembly, which always seeks enlightenment from the Court ; the staff of the United Nations, whose vital interests are involved ; and, lastly, the international community whom the Court has ever to serve.

## I

The Court has rightly relied on its own jurisprudence in holding that it is essential first to determine the entire scope of the question put to it in a request for an advisory opinion. This would appear to be particularly the case when dealing with Article 11 of the Statute of the United Nations Administrative Tribunal (*I.C.J. Reports 1973*, p. 183, para. 40). Accordingly, in paragraph 48 of the present Advisory Opinion, the Court has taken due notice of the two basic aspects which go to determining the whole gravamen of the question posed to the Court, i.e., *first*, meeting the requirements of Article 11 of the Statute of the Tribunal, which specifies the grounds on which a judgement of the Tribunal may be challenged through the medium of the advisory jurisdiction, and, *second* answering in terms of the specific request made to the Court, which aspect cannot be ignored.

The Court has dealt with the first aspect a great length, and it is true that in this case that does suffice to a large extent. It would have been inconceivable not to examine the two particular grounds on which the Tribunal's judgement has been challenged in this case, as attested by the voting in the Committee on Applications for Review, namely : that the Tribunal had exceeded its jurisdiction and its competence, as well as erred on a question of law relating to the provisions of the United Nations Charter. There can be no doubt that the Court has come to the right conclusion on both those aspects by holding that the Administrative Tribunal neither erred on a question of law relating to the provisions of the Charter nor committed excess of the jurisdiction or competence vested in it.

However, so far as the second aspect is concerned, which to my mind is vital because it relates to the specific question asked of the Court, it is

necessary to provide a full and adequate answer. The precise terms of the question run as follows :

“Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished v. The Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be *given immediate effect* in requiring, *for the payment* of repatriation grants, evidence of relocation to a country other than the country of the staff member’s last duty station ?” (Emphasis added).

Some pertinent observations have been made by the Court on this question, and General Assembly resolution 34/165 has been distinctly touched upon by the Opinion at several places. I nevertheless feel that this aspect could justifiably have been dealt with more fully and at greater length. The question put to the Court appears to disclose an anxiety lest the Tribunal may have flouted resolution 34/165 by declining to allow immediate effect to the requirement of evidence of relocation where payment of repatriation grant to Mr. Mortished was concerned. It is, of course, true, as the Court has pointed out, that “the Tribunal saw itself not as in any way challenging resolution 34/165 by means of a general notion of acquired rights but simply as applying the existing Staff Regulations and Rules” (para 75). In support of this observation, the Court has also rightly stated that the Tribunal

“was faced not only with resolution 34/165 and the 1980 Staff Rules made thereunder, but also with Staff Regulation 12.1 also made no less by and with the authority of the General Assembly. On the basis of its finding that Mr. Mortished had an acquired right, it had therefore to interpret and apply these two sets of rules, both of which were applicable to Mr. Mortished’s situation. The question is not whether the Tribunal was right or wrong in the way it performed this task in the case before it ; the question – indeed, the only matter on which the Court can pass – is whether the Tribunal erred on a question of law relating to the provisions of the Charter of the United Nations. This it clearly did not do when it attempted only to apply to Mr. Mortished’s case what it found to be the relevant Staff Regulations and Rules made under the authority of the General Assembly.” (Para. 76.)

The aforesaid is certainly sufficient to deal with the grounds particularized in Article 11 of the Statute of the Administrative Tribunal. It also helps to answer the actual question put to the Court but it does not provide a complete answer. One could therefore have wished that the Court, having agreed to entertain the case, had proceeded further in the direction of answering the specific request made to it in the exact terms of the reference

to the Court. It is true that the Court in this case was sitting not in appeal but in review, and it had to be careful not to allow itself to drift into "exercising" a non-existent appellate jurisdiction and retrying the case. However, the Court could not have been said to incur that odium if it had merely interpreted and applied resolution 34/165 to the facts of the case in order to throw more light on the specific question in which the Committee couched the objections to the Tribunal's judgement.

The crux of the problem lies in the sense of the "immediate effect" to be given to General Assembly resolution 34/165, which makes entitlement to repatriation grant subject to evidence of relocation after 1 January 1980. As the question of interpretation and application of General Assembly resolution 34/165 is inevitably involved, the wording of the resolution has to be closely examined, and is reproduced below :

*"The General Assembly . . .*

*Decides that effective 1st January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided."*

It would be clearly unwarranted to interpret the unambiguous words of that resolution in order to give it retroactive effect, because of potent considerations based on the well-known principles which govern the interpretation and application of rules. These clearly require a prospective thrust to be ascribed to the resolution. For example, the first principle of interpretation is that normally an enactment of law, whether an act of the legislature or a rule-making resolution of a body like the General Assembly, must be construed prospectively and not retroactively. Again, if the text of that rule is clear and unambiguous, there is no need to go behind that text to ascertain the intention of the legislature, or the General Assembly as in this case. Furthermore, another principle is that, if a legislature intends to give retroactive effect to any rule, it must necessarily spell this out unequivocally and specifically which has not been done in this case. In the absence of any such express stipulation, the construction favouring prospective effect would be justified. What is more, resolution 34/165, though passed on 17 December 1979, indicates in terms a future date for its becoming effective, namely 1 January 1980, and this in itself clearly indicates a prospective intention ; hence to interpret the resolution as having retroactive effect would *a fortiori* be unjustified. The conclusion that resolution 34/165 is not retroactive would therefore seem to be well-founded.

If, therefore, a staff member had completed the requirement of qualifying service of 12 years to earn the repatriation grant in its entirety before 1 January 1980, it would not be possible to stretch resolution 34/165 in order to make it applicable retroactively to such a case. Hence, as Mor-tished had earned the entitlement by his qualifying service of 12 years and thereby fully completed his entitlement well before 1979, General Assem-

bly resolution 34/165, effective as from 1 January 1980, could not be applied in order to compel him to meet the requirement of furnishing evidence of relocation for the payment of repatriation grant.

The position might be different in the case of a staff member whose entitlement to repatriation grant continues to accrue beyond 1 January 1980. In such an eventuality, the said resolution 34/165 would appear to require evidence of relocation to be furnished in order for him to obtain the grant for any period of entitlement, whether before or after 1 January 1980. However, the same cannot be said in the case of one who earned the entire grant before 1 January 1980 and is only waiting to receive payment on retirement. In sum, therefore, without entering into the complex field of acquired rights, it could have been said that, given the non-retroactivity of resolution 34/165, when the staff member had fully completed his side of the requirement for the entitlement to repatriation grant under circumstances prevailing before 1 January 1980, the employer, in all fairness, could not ignore that position. The Tribunal came to the right conclusion, in its Judgement, but on a different ground, basing its reasoning on acquired rights, whereas the question put to the Court now, it is submitted, is one primarily involving considerations relating to the interpretation and application of the text of the resolution 34/165. The examination of the latter aspect would have served to demonstrate yet another method of confirming the conclusion reached by the Administrative Tribunal.

This may have meant going a little beyond the two grounds of Article 11 of the Statute of the Tribunal on the strength of which reference has been made to the Court but, as already stated, the Court, according to its own jurisprudence, "is, in principle, bound to attend to the terms of the question formulated in the request" (*I.C.J. Reports 1973*, p. 184, para. 41). Hence it could have done more to draw attention to the divergence in viewpoint between resolution 34/165, which is prospective as from 1 January 1980 and refers to "entitlement", not "payment", and the question put to the Court, which implies that the resolution had concerned "payment" and had decreed its stoppage with immediate effect. For what the question masks is the fact that the giving of immediate effect to a resolution in that sense would have involved retroactivity of effect upon perfected entitlements. It is significant, therefore, that the representative of France in the Committee on Applications for Review of Administrative Tribunal Judgements, proposed, in fact, that, instead of the words "be given immediate effect", the words "take effect retroactively" should be used, which would have very clearly brought out the correct thrust of the question. However, that amendment was not entertained by the Committee and the words "immediate effect" were allowed to stand. In actual fact, then, what the question implicitly asks is whether the resolution could have been given retroactive effect by the Tribunal. The answer is that the resolution was worded to be unequivocally prospective so that all retroactivity was precluded.

Mentioning of this aspect would not have interfered with the proper

functioning of the Court and could not have hindered the judicial process, but would surely have helped readers of the Opinion to appreciate the problem posed to the Court by a question which was certainly “infelicitously expressed and vague”.

## II

The second aspect which I wish to emphasize relates to the powers of the General Assembly to pass resolutions, whether prospectively or retroactively, and the legal limitations on that power.

There can be no doubt that the General Assembly is virtually omnipotent in this particular field since it has sovereign powers to prescribe terms of appointment for staff members and to regulate their employment (*vide* Art. 101, para. 1, of the United Nations Charter). However, it could not be said that such powers of the Assembly were above the law. The limitation is that the United Nations could not be seen to commit a breach of contract in relation to its staff member. Consent is the basis of international obligations binding even sovereign States ; and once the Secretary-General on behalf of the United Nations and the staff member mutually agree to certain terms of appointment, no tribunal could acquiesce in the breach of such an agreement, based upon the free and mutual consent of both parties. It is submitted that the Court could have brought out this aspect more pointedly than it has actually done.

In paragraph 76 of the Advisory Opinion, the Court rightly points out that neither the Administrative Tribunal nor even the Court has the power of judicial review in respect of decisions taken by the General Assembly, particularly when dealing with Staff Regulations. However, equally basic is the fact that the General Assembly has no legal powers to disregard contractual obligations. It is submitted that the Court should also have brought out this latter side of the picture after having rightly stated the limits to the competence of the Administrative Tribunal.

(Signed) NAGENDRA SINGH.

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