



Before: Judge President Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

GEHR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

PRESIDENT'S ORDER
ON MOTION FOR RECUSAL OF
A JUDGE

Counsel for Applicant:
Self-represented

Counsel for Respondent:
UNOV/UNODC

Introduction

1. This order deals with a request made by Mr. Walter Gehr (“Applicant”), pursuant to arts. 27 and 28 of the Rules of Procedure of the Dispute Tribunal, for the recusal of Judge Thomas Laker from consideration of the Applicant’s application for interpretation of a judgment previously rendered by his Honour.

2. The Applicant, a former staff member of the United Nations Office of Drugs and Crime (“UNODC”), makes the request on the alleged existence of a conflict of interest, in that Judge Laker has been, *inter alia*, assigned the application for interpretation with respect to an issue on which he has already ruled, which ruling is the subject of an appeal filed by the Applicant.

Background

3. Although the Applicant has a number of closed and pending cases with the Dispute Tribunal, the present Order deals only with the Applicant’s request for recusal in the instant matter and refers only to relevant rulings and documents pertaining hereto.

4. On 12 August 2011, Judge Laker rendered judgment *Gehr* UNDT/2011/142 (hereinafter “*Gehr I*”) (Case No. UNDT/GVA/2010/082). In *Gehr I*, the Applicant contested the decisions of 12 February 2010 to abolish his post and reassign him to the new position of Senior Legal Adviser. The Applicant claimed, *inter alia*, that the terms of reference, the title, and the functions of the new position were unclear (see paras. 27(c), 51 of *Gehr I*). Judge Laker found, *inter alia*, that the reassignment was lawful and that “the description of the duties of the position of Senior Legal Adviser as contained in the ... draft terms of reference [was] sufficiently precise” (paras. 58–60 of *Gehr I*). The Applicant subsequently filed an appeal against *Gehr I* with the Appeals Tribunal, in which, according to the Applicant, he contests Judge Laker’s

opinion expressed in *Gehr 1* concerning the terms of reference for the position of Senior Legal Adviser on the ground that Judge Laker exceeded his jurisdiction.

5. On 18 October 2011, Judge Laker rendered *Gehr* UNDT/2011/178 (“*Gehr 2*”) (Case No. UNDT/GVA/2011/024). In *Gehr 2*, the Applicant challenged, *inter alia*, the classification decision of the Administration of the United Nations Office in Vienna (“UNOV”) in relation to the post of Senior Legal Adviser, occupied by the Applicant. The classification decision was issued with retroactive effect from 1 April 2010. Judge Laker found, *inter alia*, that the classification decision in relation to the post of Senior Legal Adviser was unlawful and ordered its rescission.

6. No appeal has been filed against *Gehr 2*, but, on 5 November 2011, the Applicant filed an application for interpretation of *Gehr 2*, requesting clarification regarding its effects on the title, duties, and responsibilities of his post. This application was registered under Case No. UNDT/GVA/2011/074.

7. On 18 April 2012, Judge Laker held a case management hearing in relation to several of the Applicant’s cases.

8. By motion dated 20 April 2012, the Applicant requested the recusal of Judge Laker from the consideration of his application for interpretation of *Gehr 2*.

9. The motion was sent for French-to-English translation and the translation was received on 2 May 2012. On 2 May 2012, the motion and the translation were transmitted to Judge Laker for his comments in accordance with art. 28.2 of the Rules of Procedure. Judge Laker’s comments were provided on 4 May 2012.

Applicant’s motion

10. The Applicant submits that Judge Laker has a conflict of interest with respect to the application for interpretation. The Applicant submits, in effect, that Judge Laker has been assigned an application for interpretation with regard to an issue on

which he has already ruled but which is the subject of an appeal. The Applicant also submits that Judge Laker's consideration of *Gehr 1* is a factor that may undermine, or might reasonably be seen as undermining, Judge Laker's ability to make a fully independent and impartial decision with respect to the application for interpretation. The Applicant submits that Judge Laker's consideration of the application for interpretation would appear inappropriate to a reasonable and impartial observer.

11. In his motion, the Applicant submits, *inter alia*, that at the case management hearing of 18 April 2012, Judge Laker "admitted ... that he had involved himself in Case No. UNDT/GVA/2011/074 'in error', believing that the judgment that was the subject of the [application] for interpretation [i.e., *Gehr 2*] had been contested before the United Nations Appeals Tribunal". The Applicant alleges that Judge Laker has also concluded that the interpretation of *Gehr 1*, and therefore the terms of reference for the Applicant's position, had become hypothetical since he is no longer employed by the United Nations. The Applicant submits that "rather than alleging an implausible 'error' that is to the advantage of one of the parties, the Respondent, it would have been far more honest for [Judge Laker] to recuse himself on the grounds of a conflict of interest well before the end of [the Applicant's] contract [on 31 December 2011]".

Judge Laker's comments

12. In his written comments provided pursuant to art. 28.2 of the Rules of Procedure, Judge Laker explains that the purpose of the case management hearing of 18 April 2012 was to discuss seven cases filed by the Applicant. The case concerning the application for interpretation of *Gehr 2* was not included in the list of cases to be discussed at that hearing because Judge Laker had erroneously believed at the time that *Gehr 2* was under appeal. Judge Laker considered that, if *Gehr 2* was under appeal, it would have been inappropriate for him to discuss the application for interpretation relating to that judgment. However, having realized that no appeal had

been filed against *Gehr 2*, Judge Laker decided, at or around the time of the case management hearing of 18 April 2012, to include the Applicant's application for interpretation in the list of cases to be discussed at the hearing, even though initially that case had not been included in the scheduling order for that day. Judge Laker explains that the "error" to which he referred to at the case management hearing simply referred to the non-inclusion of the case regarding the application for interpretation in the scheduling order for the day on his initial mistaken understanding that *Gehr 2* was under appeal. Judge Laker explains that, given the circumstances as described above, he does not consider that there is any conflict of interest or any factor giving rise to the appearance of a conflict of interest as defined in art. 27 of the Rules of Procedure of the Tribunal.

Consideration

The law on recusal

13. The present section summarises the applicable rules on recusal in the United Nations context and states some general principles that apply in recusal matters.

14. Article 4.9 of the Statute of the Dispute Tribunal provides that, where a party requests recusal of a Judge from the case, the decision shall be taken by the President of the Dispute Tribunal.

15. Article 28.2 of the Rules of Procedure of the Dispute Tribunal states:

A party may make a reasoned request for the recusal of a judge on the grounds of a conflict of interest to the President of the Dispute Tribunal, who, after seeking comments from the judge, shall decide on the request and shall inform the party of the decision in writing. A request for recusal of the President shall be referred to a three-judge panel for decision.

16. Article 27 of the Rules of Procedure defines a “conflict of interest” as follows:

1. The term “conflict of interest” means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her.

2. A conflict of interest arises where a case assigned to a judge involves any of the following:

(a) A person with whom the judge has a personal, familiar or professional relationship;

(b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;

(c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge’s participation in the adjudication of the matter would be inappropriate.

17. On 9 December 2011, the General Assembly adopted the Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal (see resolution 66/106). Section 2 of the Code of Conduct states:

2. Impartiality

(a) Judges must act without fear, favour, or prejudice in all matters that they adjudicate;

(b) Judges must ensure that their conduct at all times maintains the confidence of all in the impartiality of the Tribunals;

(c) Judges must recuse themselves from a case if:

(i) They have a conflict of interest;

(ii) It may reasonably appear to a properly informed person that they have a conflict of interest;

(iii) They have personal knowledge of disputed evidentiary facts concerning the proceedings;

(d) Judges must not recuse themselves on insubstantial grounds. Judges must provide reasons when they decide an application for recusal;

(e) Judges must disclose to the parties in good time any matter that could reasonably be perceived to give rise to an application for recusal in a particular matter;

18. Rules on recusal and impartiality form a significant part of the rules on judicial conduct, as failure to comply with them may undermine the public's trust in any system of justice. As was stated by Lord Hewart CJ in a well-known case regarding impartiality and recusal of judges, *R v. Sussex Justices, ex parte McCarthy* (1924) 1 KB 256, (1923) All ER 233, "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

19. The precise test for determining whether a Judge should be recused from consideration of a case has been expressed in different ways in different jurisdictions, sometimes in terms of a reasonable suspicion or apprehension of a conflict of interest or bias, sometimes in terms of a reasonable risk of a conflict of interest or bias.

20. In the United Nations context, the term "conflict of interest" is defined in art. 27.1 of the Rules of Procedure as "any factor that may impair or reasonably give the appearance of impairing the ability of the judge to independently and impartially adjudicate the case assigned to him or her". The test to be applied in determining conflict of interest or bias is an objective one and is to be applied from the view point of a reasonable person. The existence of a reasonable appearance or suspicion of bias satisfies the test.

21. However, Judges should not be recused from matters on insubstantial grounds (see Code of Conduct, sec. 2(d)). The person seeking the recusal must prove facts from which bias or conflict of interest may reasonably be inferred. Mere unsubstantiated expressions of fear of bias cannot suffice. The applicant in such a case must show by facts and circumstances that there is a reasonable fear that the proceedings would not be conducted in an impartial manner.

22. The mere fact that cases of the same applicant were previously considered by the same Judge does not *per se* mean there is bias or a conflict of interest. Further, an alleged or actual mistake of fact or law made by a Judge in another matter involving the applicant is not in itself evidence of bias.

23. Furthermore, an application for the recusal of a Judge should be brought without delay. The delay in lodging such an application may be a factor taken into consideration in determining whether the application has been made in good faith.

Findings

24. The Applicant requests the recusal of Judge Laker from the application for interpretation of *Gehr 2* whereby he seeks clarification on the effect of that judgment on his title and the duties and responsibilities of the post occupied by the Applicant as at November 2011. The Applicant does so on the grounds, *inter alia*, that Judge Laker has considered the issue of the Applicant's terms of reference in *Gehr 1* and would have to retract his position expressed in that ruling and, in effect, decide on a matter that is currently under appeal.

Adjudication and interpretation

25. I find that the present motion may be misguided for the following reasons. The Applicant does not allege a predisposition of the issues by the Judge on the grounds of bias, prejudice or other reasons related to partiality or lack of independence. He simply says that Judge Laker has already rendered a considered view on the issue of his duties and terms of reference in *Gehr 1* and that therefore the Applicant will not get a new interpretation on this issue. This is, of course, not the purpose of interpretation of a judgment. Adjudication of a case and interpretation of a judgment are two discrete judicial processes. In this instance, Judge Laker has already adjudicated the case that was assigned to him (*Gehr 2*). An interpretation of Judge Laker's judgment does not constitute a re-adjudication of the matter nor a re-visitation of the facts. Furthermore, an application for interpretation is best decided by the Judge who adjudicated the matter. Should an applicant be dissatisfied with either a judgment or its interpretation, he or she may file an appeal with the Appeals Tribunal. It is therefore doubtful whether a recusal motion can be

sustained in an application for interpretation of a matter which has already been adjudicated.

Application of the rules on recusal

26. In the event that a motion for recusal is sustainable in an application for interpretation, I find that none of the conditions of art. 27 of the Rules of Procedure have been satisfied. In terms of art. 27.2 of the Rules of Procedure, a conflict of interest may arise under three scenarios:

- (a) A person with whom the judge has a personal, familiar or professional relationship;
- (b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;
- (c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.

27. It is quite clear that the first scenario described in art. 27.2(a) is not applicable; nor does the second scenario under art. 27.2(b) apply as Judge Laker has not previously served in the concerned matter in any capacity other than as a Judge. With respect to the third scenario described in art. 27.2(c), the mere fact that a Judge has previously presided over matters involving the applicant does not give rise to any conflict of interest in itself. Further, even an alleged or actual mistake of law or fact cannot be simply characterized as showing bias and is not enough to warrant recusal of a Judge. Furthermore, Judges should not be recused from matters on insubstantial grounds (Code of Conduct, sec. 2(d)). In my considered view, *Gehr 1* being under appeal does not create a conflict of interest with respect to Judge Laker's consideration of the Applicant's application for interpretation of *Gehr 2*.

28. Further, it might well be arguable that the present motion was unduly delayed. The Applicant filed the present motion on 20 April 2012, approximately six months after *Gehr 2* was rendered and more than five months after the filing of the

application for interpretation. However, it is not necessary to decide this point in view of the other findings in the present Order.

29. It appears that the present motion for recusal was prompted, at least in part, by the Applicant's interpretation of what was stated by Judge Laker at the case management hearing of 18 April 2012. Indeed, had either party appealed *Gehr 2*, it would have been inappropriate for the Dispute Tribunal to consider an application for interpretation of *Gehr 2*, as the Appeals Tribunal would be regarded as being seized of the case (*di Giacomo* UNDT/2011/200). Judge Laker explained in his response to the present motion that, having clarified at the time of the case management hearing that *Gehr 2* was, in fact, not appealed by either party, he decided to include it in the case management discussion. Considering that *Gehr 2* is not under appeal, as was clarified by Judge Laker, it was well within his discretion to raise the application for interpretation of *Gehr 2* at the case management hearing. In any event, it is always open to the Applicant to withdraw the application for interpretation if he considers that the issue with respect to which he seeks interpretation is on appeal as part of *Gehr 1*.

Conclusion

30. For the reasons stated above, the present motion for recusal stands to be rejected.

31. The present Order is without prejudice to any consideration or findings on issues of receivability and substance in any other matters concerning the Applicant and pending before the Tribunal.

IT IS ORDERED THAT:

32. The Applicant's motion for recusal of Judge Laker from consideration of the Applicant's application for interpretation of *Gehr* UNDT/2011/178 is rejected.

(Signed)

Judge President Ebrahim-Carstens

Dated this 22nd day of June 2012