ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2004-1

Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent

Introduction

1. On December 9 and 10, 2004, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "R", now a retired staff member of the Fund.

2. Applicant, the former Director of the Joint Africa Institute (JAI), then located in Abidjan, Côte d'Ivoire, contests a decision of the Department of Human Resources to deny his request for reimbursement of security expenses said to have been incurred by him indirectly when he elected to live in a hotel rather than a private residence at his overseas post. Applicant contends that the Fund's housing allowance for overseas Office staff, while designed to compensate for the difference between housing costs in Washington, D.C. and the duty station, unreasonably fails to take into account differences in security costs at the two locations, except in the circumstance in which the Fund has occasion to pay directly for security enhancements of and protection to the overseas residence. Therefore, asserts Mr. "R", Respondent unfairly penalizes a staff member such as himself who decides to rent quarters in a facility already outfitted with security equipment and guard services, the costs of which he maintains are included in the rental rate. Applicant seeks as relief the amount he estimates that he would have incurred directly for guard services had he elected to live in a private residence at his overseas post.

3. This is the second case brought to the Administrative Tribunal by Mr. "R" challenging the benefits he received during his assignment as Director of the JAI. In his earlier Application, Mr. "R" contested the denial of his request for a) an overseas assignment allowance, and b) a housing allowance commensurate with the housing benefit received by the Resident Representative in Abidjan. In that Application, he challenged as discriminatory the difference in benefits accorded overseas Office Directors vis-à-vis Resident Representatives in the unique circumstance in which such officials are posted in the same foreign city. In Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), this Tribunal rejected Applicant's contentions, holding that the allocation of differing benefits to overseas Office Directors and Resident Representatives was rational, related to objective factors, and untainted by any animus against Applicant, and that it was within the Fund's managerial discretion to decline to make an exception to policy in Applicant's case. (Mr. "R", paras. 64-65.)

4. Respondent urges the Administrative Tribunal to deny Mr. "R"'s present Application on the ground that Article XIII of the Tribunal's Statute (finality of judgments) prevents Applicant from relitigating the same claims as were decided in Mr. "R". Alternatively, Respondent contends that the denial by the Human Resources Department of Mr. "R"'s request to be compensated for security expenses he allegedly incurred by choosing to live in a hotel during his term as JAI Director was not an abuse of discretion but rather was consistent with the application of appropriate Fund policy.

The Procedure

5. On September 26, 2003, Mr. "R" filed his present Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicant that his Application did not fulfill all of the requirements of para. 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiency. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.[1]

6. The Application was transmitted to Respondent on October 16, 2003, and on October 22, 2003, pursuant to Rule XIV, para. 4[2] of the Rules of Procedure, the Registrar issued a Summary of the Application within the Fund. Respondent filed its Answer to Mr. "R"'s Application on December 1, 2003. Applicant submitted his Reply on

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[1] Rule VII provides in pertinent part:

"*Applications*

...

3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.

...

6. If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date. …"

[2] Rule XIV, para. 4 provides:

"4. In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund."

December 24, 2003. The Fund's Rejoinder was filed on February 4, 2004. On August 4, 2004, at the Registrar's request, Applicant filed two additional documents, of which Respondent already had knowledge and which had been referenced in the pleadings, so as to complete the record before the Administrative Tribunal.

7. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.[3]

The Factual Background of the Case

8. The relevant facts may be summarized as follows.[4]

9. Mr. "R", who had been a staff member of the Fund since 1981, was serving as Senior Resident Representative in Dakar, Senegal when in July 1999 he was appointed to serve as the first Director of the Joint Africa Institute, then situated in Abidjan, Côte d'Ivoire.[5] For purposes of the Fund's benefits policies, the JAI is considered as one of the Fund's seven overseas Offices.[6] Also posted at Abidjan was a Fund Resident Representative, who, pursuant to Fund policies, enjoyed more generous benefits.[7]

10. From the time of his appointment as JAI Director, Applicant contended that he should be accorded a hardship allowance, overseas assignment allowance and housing allowance that would make his benefits equivalent to those received by the Fund's Resident Representative. The hardship allowance was, at that time, available only to Resident Representatives; the overseas assignment allowance continues to be so limited. With regard to housing, in the case of Resident Representatives, the Fund provides furnished housing in the city of assignment; for overseas Office Directors it pays an allowance to cover the difference in housing costs between the duty station and Washington, D.C. and for the shipment of household items.

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[3] Article XII of the Tribunal's Statute provides that the Tribunal shall "… decide in each case whether oral proceedings are warranted." Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held "… if the Tribunal decides that such proceedings are necessary for the disposition of the case."

[4] For a detailed presentation of the facts antecedent to Mr. "R"'s earlier case, *see* Mr. "R", paras. 6-15.

[5] The JAI is a joint undertaking of the IMF, World Bank and African Development Bank, with its directorship rotating among these organizations every three years; each organization is responsible for the compensation and benefits of its respective appointee. Mr. "R", para. 6.

[6] *See* Mr. "R", para. 26.

[7] Representative Representatives represent the Fund at numerous locations throughout the developing world, working closely with country authorities, providing policy review and advice, and supporting the Fund's programs. They receive greater benefits than do overseas Office Directors. *See* Mr. "R", para. 27.

11. With respect to his request for an increased housing allowance, Mr. "R" initially found support from the Director of the Fund's Human Resources Department (HRD), who in August 1999 sought approval from the Deputy Managing Director to pay Mr. "R" on an exceptional basis an allowance that would exceed the usual housing allowance for a staff member assigned to an overseas Office. The Director of HRD specifically endorsed Applicant's view that he should be granted a housing allowance equal to the full amount of the estimated cost of his residing at the Hotel Ivoire for the term of his assignment. The HRD Director cited several reasons in support of the request, including the unusual circumstance of Applicant's transferring from a Resident Representative post and the savings to the Fund of not shipping Mr. "R"'s furniture from Washington, as well as of not having to provide security services to Mr. "R" in Abidjan as would be required if he were to live at a private residence:

> "By staying at the Hotel Ivoire, the Fund will save on the cost of security for Mr. ["R"]'s residence. Based on the estimated cost of providing security for the Resident Representative, this cost saving is estimated at $1,500 monthly, or $54,000 over the period of the assignment."

Additionally, the HRD Director recommended a change in policy to make the hardship allowance applicable to staff in overseas Offices; of the locations in which the Fund has overseas Offices, only Abidjan met the qualifications for a hardship location.

12. Applicant soon received an interim response to his requests, advising that an overall review of benefits for overseas staff was being undertaken by HRD.[8] At the same time, he was informed that a hardship allowance would be granted on a provisional basis pending the outcome of that review.

13. In the meantime, Mr. "R" took up his duties as JAI Director on September 20, 1999. Following completion of the overseas benefits review by HRD and its consideration by Fund Management, the Deputy Managing Director took a decision on Applicant's request for parity of benefits with the Resident Representative in Abidjan. This decision, relayed to Mr. "R" by the Chief of the Staff Benefits Division by email of October 2, 2000, 1) made permanent (and retroactive to his appointment as JAI Director) the provisional grant of a hardship allowance to Mr. "R", consistent with a change in policy extending this allowance to staff in overseas Offices, but 2) denied Mr. "R"'s requests for (a) an overseas assignment allowance, and (b) an increased housing allowance. Applicant was informed by the Staff Benefits Chief: "There will be no change in the manner in which your housing allowance is computed and paid and, since you are living in a hotel, no security costs need to be covered."

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[8]This review included comparison of Resident Representative benefits with the benefits applicable to staff employed in overseas Offices and the possible inequity presented by the posting of an overseas Office Director and a Resident Representative in the same location but with differing benefits. *See* Mr. "R", paras. 12-14.

14. It was the October 2, 2000 denial of Mr. "R"'s requests for an overseas assignment allowance and an increased housing allowance that Applicant, following administrative review, challenged in his first case before the Administrative Tribunal. On March 5, 2002, the Tribunal denied Mr. "R"'s Application, concluding that neither the regulatory decision, adopting differing benefits packages for overseas Office Directors and Resident Representatives, nor the individual decision, denying Mr. "R"'s request for exceptional treatment, represented discrimination or abuse of discretion by the Management of the Fund.[9] The matter of reimbursement of security costs allegedly incurred by residing at the hotel was not specifically raised by Applicant nor considered expressly by the Tribunal.

15. Approximately one month following the Administrative Tribunal's decision, Mr. "R", on April 2, 2002, wrote to the Director of Human Resources on the subject of a "Revised Calculation of the Housing Allowance for JAI Office Staff," requesting that the allowance be recalculated to take into account security and utility costs at the duty station. The Director of Human Resources answered on May 3, 2002, noting that utility costs were already comprised in the housing calculation. As for security, she stated the Fund's policy as follows:

> "You are correct that the housing allowance does not cover security costs. However, we have on several occasions advised you that the Fund stands ready to cover the necessary costs of providing security in all locations where staff are placed around the world. In the event that the Fund's security office considers security measures necessary for you or other Fund staff at the JAI, the Fund will pick up the cost. It would be appropriate for you to raise any security concerns with [the Acting Chief of the Fund's Field Security Office]. ..."

16. On June 17, 2002, the Acting Chief of the Field Security Office ("FSO") reported to the Chief of the Staff Benefits Division that Mr. "R" had visited his office to discuss security concerns and allowances, specifically to "... request [ ] the Field Security Office's support in his efforts to obtain a monthly security allowance." According to the Acting Chief of Field Security, "I informed [Mr. "R"] that I am not an authority on compensation and benefits associated with overseas assignments, but that I would be able to comment on the security conditions and the possible impact on allowances." He noted the special security concerns associated with an extended period of civil unrest affecting Côte d'Ivoire, the protections afforded by residing in a hotel, and his view that security costs were passed on as an "invisible part of the room rates":

> "Mr. ["R"] elected to live in a hotel, rather than a private house. This was a very practical and security-conscious decision, and the FSO fully supported it. Major international hotels are normally

[9] Mr. "R", paras. 64-65.

> staffed with security professionals, have comprehensive security programs, and are able to offer better overall protection than individual houses. The cost of the hotel security programs are not insignificant and are passed on to guests as an invisible part of the room rates.
>
> The required security protection measures for private expatriate residences in Abidjan, in view of the security conditions described above, are extensive and include good perimeter fences, metal bars on windows/doors, solid doors with good locking systems, safe havens, security alarm systems, exterior lighting, and full-time security guards.
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> The typical costs to achieve these minimum essential standards are estimated at a one time expense of approximately $10,000 for enhancements to the property and an annual guard service fee of up to approximately $18,000. If Mr. ["R"] had elected to live in a single-family house, the expenses for these measures to ensure adequate security would have had to have been incurred. As in the case of Technical Assistance Advisors, the FSO would have had to cover the majority of these expenses.
>
> Exceptional precautionary measures are required in Abidjan because of the high level of risk faced by expatriates. The exceptional security measures raise the cost of living, whether at a private residence or at a hotel. Mr. ["R"] made a sound security decision by living at the hotel, and this factor should be considered in reviewing the standard allowances and his specific claim."

17. Through an exchange of emails in July 2002, Mr. "R" and the Staff Benefits Chief disputed the import of the memorandum from the FSO Acting Chief. Applicant maintained that the memorandum supported his view that he should be allotted a sum to cover the estimated cost of security provided by the hotel. The Staff Benefits Chief countered that, having considered the opinion of the FSO Acting Chief, HRD's position remained that the "… these costs were not incurred.... The Fund will pay for security costs incurred, but will not pay you for costs that were avoided due to your decision [to live at the hotel]."

The Channels of Administrative Review

18. On November 10, 2002, Applicant sought administrative review by the Director of HRD of the decision of the Staff Benefits Chief, contending: "…I should receive a security allowance because the monthly rental cost of my apartment at the Hotel Ivoire in Abidjan undoubtedly included security costs." Mr. "R" estimated these costs over his three-year appointment as $54,000 (i.e. three times the rate for annual guard service that the FSO Acting Chief had estimated for a private residence in Abidjan).

19. The Human Resources Director responded November 27, 2002 sustaining the decision of the Chief of Staff Benefits, who had in her view "… correctly interpreted and applied the Fund's policies to [Mr. "R"'s] situation." She elaborated these policies as follows:

> "In my memorandum of May 3, I reiterated that the housing allowance is not intended to cover security costs, but that the Fund stood ready to cover the necessary costs of providing security measures. I said, 'In the event that the Fund's security office considers security measures necessary for you or other Fund staff at the JAI, the Fund will pick up the cost.' It was for that reason that I suggested that you contact [the Acting Chief of the Field Security Office].
>
> ….[The FSO Acting Chief] made no recommendations for additional security measures. Based on this, [the Staff Benefits Chief] concluded correctly that no further action was required.
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> ….If you had chosen housing that required guards or additional security equipment, the Fund would have paid for this. However, you chose to live in a hotel, where additional security measures were not needed. The relevant policies simply do not provide for the Fund to pay **to you** a notional amount that it might have had to pay **to other parties** if you had opted to live in a house."

(Emphasis in original.)

20. Mr. "R" submitted his Grievance on January 22, 2003. In a pre-hearing conference, Applicant contended that he was "…not asking for any exception to existing rules; I am only requesting that the Fund apply to my peculiar situation its policy of paying for security measures." The Grievance Committee nonetheless concluded in its Recommendation and Report of August 29, 2003 that it did not have jurisdiction over Mr. "R"'s Grievance because, in the Committee's view, Mr. "R"'s complaint represented a challenge to a Fund policy rather than a challenge to the consistency of its application in an individual case.[10]

21. On September 26, 2003, Mr. "R" filed his Application with the Administrative Tribunal.

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[10]The Committee had dismissed the Grievance filed by Mr. "R" antecedent to his first Tribunal case on the same ground. *See* Mr. "R", para. 17.

Summary of Parties' Principal Contentions

Applicant's principal contentions

22. The principal arguments presented by Applicant in his Application and Reply are summarized below.

1) The data relied on by the Fund for calculation of the housing allowance for overseas Office staff exclude security costs from housing costs. Therefore, the housing allowance seriously underestimates the actual costs of housing at a duty station in which security is a significant concern.

2) Although the Fund offsets the inadequacy in the housing allowance for overseas staff who live in private residences because it pays directly for security costs, for those staff members choosing to lease quarters already having security enhancements, the housing allowance is insufficient because rental expenses include the cost of security. Accordingly, Applicant's housing allowance as JAI Director was improperly calculated.

3) The Administrative Tribunal's decision in Mr. "R" does not bar a claim for recalculation of Applicant's housing allowance. Previously, Applicant sought the same benefits as those granted the Resident Representative in Abidjan; these benefits did not include a housing allowance because the Fund pays directly the full housing expense of the Resident Representative. It is precisely because the first Application was denied that the problem of an ill-determined housing allowance is now raised.

4) Applicant seeks as relief compensation for the exclusion of security costs from the calculation of his housing allowance during his three-year term as JAI Director. As it is not possible to assess these costs precisely, compensation is estimated in the amount of the guard services that would have been required had Mr. "R" chosen to live in a private residence ($1,500 per month multiplied by 36 months, equaling $54,000).

Respondent's principal contentions

23. The principal arguments presented by Respondent in its Answer and Rejoinder are summarized below.

1) Mr. "R"'s Application is barred by the doctrine of *res judicata* because the Tribunal reviewed Applicant's claim for an increased housing allowance in Mr."R". The present Application has the same purpose as the former one, in which Applicant sought a retroactive increase in the housing allowance to cover his actual housing costs in Abidjan, including rent, furniture and security guards, and for the future to allow him to live with the same comfort and security as the Resident Representative.

2) Applicant's current claim was encompassed within his first unsuccessful Application or, at a minimum, his current claim could have been raised in the first case. The foundation of the claim in law, i.e. that the Fund allegedly abused its discretion concerning the benefits payable to the JAI Director, is substantially identical to what Mr. "R" previously argued before the Tribunal.

3) The Tribunal in Mr. "R" reviewed and upheld both the Fund's benefits classification scheme for overseas staff, as well as management's decision to reject an exception to that scheme in Applicant's case. In particular, the Tribunal upheld Fund management's rejection of a recommendation by the Director of HRD that Applicant be paid an exceptional housing allowance, a recommendation based in part upon the security costs avoided by Applicant's selection of housing at the hotel.

4) The memorandum from the FSO Acting Chief does not create previously unknown facts so as to constitute different claims.

5) Even if the present Application is not barred by *res judicata*, it should be denied because Applicant's housing allowance was properly calculated in accordance with Fund policy. Mr. "R" has received all of the benefits to which he was entitled under the housing policy for overseas Office Directors.

6) Applicant's only challenge is to a regulatory decision. The Fund's housing allowance and security polices are reasonably related to their objectives and do not represent an abuse of discretion. The Fund has sound business reasons for its policy of paying for all security costs directly, as opposed to paying an allowance for security costs said to be implicit in the housing expenses of an overseas Office Director.

7) With regard to the Fund's approach to security costs, there is no difference as between Resident Representatives and Office Directors. In each case, the Fund will take, at its expense, all security measures it considers necessary, but it will not pay any staff member for the value of security measures avoided because of his choice of accommodations.

Consideration of the Issues of the Case

Finality of Judgments

24. Respondent's initial contention is that Mr. "R"'s present Application before the Administrative Tribunal is barred under Article XIII of the Statute (finality of judgments) by the Tribunal's Judgment in Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002).

25. Article XIII, Section 2 of the Tribunal's Statute provides:

> "Judgments shall be final, subject to Article XVI and Article XVII, and without appeal."[11]

This statutory provision codifies and applies to the judgments of the IMF Administrative Tribunal a cardinal principle of judicial review, the doctrine of *res judicata*. *Res judicata* prevents the relitigation of claims already adjudicated, promoting judicial economy and certainty among the parties. It is a principle that has been often recognized by international administrative tribunals. The World Bank Administrative Tribunal (WBAT), commenting on the parallel provision of its Statute, observed:

> "Article XI lays down the general principle of the finality of all judgments of the Tribunal. It explicitly stipulates that judgments shall be 'final and without appeal.' No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff."

van Gent (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 13 (1983), para. 21.

26. The IMFAT twice has affirmed the principle of the finality of a judgment in rejecting requests for interpretation of judgments, concluding: "The legality of the Judgment is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to issue an interpretation, because the judgment is final and without appeal." IMFAT Order No. 1997-1, Interpretation of Judgment No. 1997-1 (Ms. "C", Applicant v. International Monetary Fund, Respondent), (December 22, 1997). *See also* Order No. 1999-1, Interpretation of Judgment No. 1998-1 (Ms. "Y", Applicant v. International Monetary Fund, Respondent) (February 26, 1999) ("The adoption of the requested interpretation would constitute an amendment of the Judgment, which is not a matter in respect of which the applicable provisions of the Statute and the Rules of Procedure enable the Tribunal to decide by way of an interpretation, because the Judgment is final and without appeal.") This case is the first, however, in which *res judicata* has been raised as a defense to an Application.

27. The International Labour Organisation Administrative Tribunal (ILOAT) has referred to the "classic three identities---of person, cause and object" that must be met in each case for

[11] Article XVI permits a party to seek revision of judgment in the limited circumstance of discovery of a fact , unknown at the time the judgment was delivered, which might have had a decisive influence on the judgment of the Tribunal. Article XVII allows the Tribunal to interpret or correct a judgment whose terms appear obscure or incomplete or which contains a typographical or arithmetical error.

res judicata to bar a subsequent claim. In re Belser (No. 2), Bossung (No. 2) and Lederer (No. 2), ILOAT Judgment No. 1825 (1998), Consideration 5. In the view of the ILOAT, identity of object or purpose means that "…what the complainant is seeking is what he would have obtained had his earlier suit succeeded. And it is not the actual wording of the decision that matters but the complainant's intent." In re Louis (No. 3), ILOAT Judgment No. 1263 (1993), Consideration 4. Similarly, the ILOAT has explained: "What the cause of action means is the foundation of the claim in law. It is not the same thing as the pleas, which are submissions on issues of law or of fact put forward in support of the claim. …in many instances the question will be whether the complainant's line of argument does not show some direct link with the earlier case." In re Sanoi (No. 6), ILOAT Judgment No. 1216 (1993), Consideration 4.

28. In Louis (No. 3), the ILOAT concluded as to one of the applicant's claims that "…though somewhat differently stated, [it] has much the same purpose as his corresponding claims in the first complaint." (Consideration 6.) By contrast, in Baartz (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 258 (2001), in which in the earlier case "[i]n reciting the facts of the case, the Tribunal …noted that the Applicant 'appear[ed]' to claim compensation for 'significant financial losses' resulting from …changes made to the Bank's benefits policy"(para. 11), such claim survived a *res judicata* defense in the subsequent case because in the first case "[a]lthough the Applicant in his pleadings referred casually to the financial loss he incurred as a result of the Bank's failure to convert his employment, he did not pursue the matter further, and the Tribunal did not address this issue in its judgment." (Para. 32.) More recently, the doctrine of *res judicata* has been articulated as follows:

> "*Res judicata* operates to bar a subsequent proceeding if the issue submitted for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard. It extends to bar proceedings on an issue that must necessarily have been determined in the earlier proceeding even if that precise issue was not then in dispute. In such a case, the question whether *res judicata* applies will ordinarily be answered by ascertaining whether one or other of the parties seeks to challenge or controvert some aspect of the actual decision reached in the earlier case."

In re Enderlyn Laouyane (No. 2), ILOAT Judgment No. 2316 (2004), Consideration 11.

29. Applying these principles to case of Mr. "R", the Tribunal must consider what claims were raised by Applicant in his earlier suit, what was the purpose of that litigation, what legal arguments were put forward by the parties and considered by the Tribunal and what was decided by the Tribunal and on what basis.

Are the parties the same?

30. It is not disputed that the parties to the current dispute before the Administrative Tribunal are identical with those before it in Mr. "R".

Is the outcome Applicant seeks now the same as that which he sought in his first case before the Tribunal?

31. Respondent contends that the Application should be dismissed because, in the Fund's view, Mr. "R"'s present suit has the same purpose as his original case. In particular, Respondent notes that in his first Application Mr. "R" sought as relief an increased housing allowance that "...for the past, would cover at least his actual housing costs in Abidjan and, for the future, would allow him to live in Abidjan with the same comfort and security as the RR."[12] Hence, the Fund contends Applicant's claim was encompassed in his first unsuccessful Application (in which he sought an overseas assignment allowance and an increased housing allowance commensurate with the housing benefit allocated to the Resident Representative) or that, at a minimum, this claim could have been raised in the first case.

32. By contrast, Applicant explains that the purpose of the former litigation was to attain the same benefits as those granted the Resident Representative in Abidjan. These benefits did not include a housing allowance because the Fund pays directly the full housing expense of the Resident Representative. According to Applicant, it is precisely because the first Application was denied that the problem of an ill-determined housing allowance is now raised. Mr. "R" therefore suggests that it would have been inconsistent for him to have argued both that he should be accorded the same benefits as the Resident Representative while at the same time seeking an adjustment in his housing allowance to account for alleged security costs.

33. In his present Application before the Administrative Tribunal, Mr. "R" seeks a) an interpretation of the housing allowance for overseas Office Directors that would take into account security costs in assessing the difference between housing costs in Washington, D.C. and the duty station by recompensing him for the cost of security allegedly included in his rental rate, and/or b) an interpretation of the Fund's security "policy" that would reimburse security costs incurred indirectly.

34. In the Tribunal's view, the purpose of the current claim is not the same as that earlier litigated. In the first case, Mr. "R" challenged the Fund's decision not to accord him as Director of JAI the same perquisites as those granted to the Resident Representative in Abidjan. In this case, he contests the application of a Fund security policy that distinguishes between security costs directly incurred and security costs indirectly incurred, the Fund meeting the former but not the latter.

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[12] *See* Mr. "R", para.19.

> Does Applicant's cause of action have the same foundation in law as that which he raised in his earlier case?

35. Respondent further contends that Mr. "R"'s current Application has the same foundation in law as his first suit, i.e. that the Fund allegedly abused its discretion concerning the benefits payable to the JAI Director. In particular, the Fund notes that the Tribunal in Mr. "R" reviewed and upheld both the Fund's benefits classification scheme for overseas staff and management's decision to reject an exception to that scheme in Applicant's case.

36. In considering the foundation of Applicant's claim in law it is important to observe that in his first Application Mr. "R" challenged management's decision of October 2, 2000 "...because this decision upholds the discriminatory treatment of an Office Director and a RR that are both posted in the same city...." The Tribunal likewise responded to Applicant's claim as one of discrimination and analyzed it on that basis, elucidating the principle of nondiscrimination as a substantive limit on the exercise of discretionary authority.[13]

37. In Mr. "R", the Administrative Tribunal identified the content of the decision then under review as follows:

> "…an 'individual decision' was taken on October 2, 2000, when management declined Applicant's request for exceptions to the benefits policy;[footnote omitted] however, the content of that 'individual decision' was to uphold the validity of the 'regulatory decision' assigning differing benefits packages to different categories of staff."

(Para. 25.) Hence, the Tribunal took no note of the statement in the October 2, 2000 communication to Mr. "R" that "…since you are living in a hotel, no security costs need to be covered," although that document was part of the record before the Tribunal. Nor was the argument raised that, in calculating the housing allowance for overseas Office Directors, the Fund unfairly excludes security costs in assessing the difference in housing costs between Washington D.C. and the duty station.

38. Instead, the Tribunal considered whether "...Respondent abused its discretion by maintaining differing benefits policies applicable to two categories of Fund staff posted abroad...." (p. 20.) Therefore, the central question asked and answered by the Tribunal in Mr. "R" was "…. whether the reasons given by Respondent for the differential treatment of overseas Office Directors and Resident Representatives are supported by evidence and are rationally related to the purposes of the employment benefits at issue." (Para. 53.)

39. The Tribunal reviewed the reasons proffered by Respondent for its differing benefits policies, finding some of the Fund's justifications more persuasive than others. In particular,

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[13] *See* Mr. "R", paras. 30-46.

the Tribunal suggested that Applicant was correct in pointing out, at least as to Fund personnel posted in Abidjan, that security differences did not support the distinction in benefits between Office Directors and Resident Representatives:

> "There are … differences in the standing and representational responsibilities of Resident Representatives and overseas Office Directors that underlie the differences in benefits.[footnote omitted] The Resident Representative occupies a post akin to that of an ambassador accredited to the government of the host state; his or her representational responsibilities, particularly vis-à-vis agencies of the host government, are broad and constant, while those of Office Directors—especially Directors of the IMF Institutes—will be less prominent. *As for security concerns, however, Applicant has rightly emphasized that, because of conditions in Côte d'Ivoire, serious security risks are faced by any staff member posted in that location, not only the Resident Representative.*"

(Para. 56.) (Emphasis supplied.) Nonetheless, the Tribunal did not conclude that the shared factor of security concerns in Abidjan invalidated the distinction in benefits between Mr. "R" and the Fund's Resident Representative. Rejecting Applicant's allegation of impermissible discrimination between two categories of Fund staff, the Tribunal noted that the Fund's policy "…is dependent on generalizations, i.e. generalizations about the living conditions in the locations in which 'many' Resident Representatives, as compared with the conditions in the countries in which 'most' overseas Office staff serves." (Para. 58.) [14]

40. In assessing the preclusive effect of the Tribunal's Judgment in Mr. "R" it may be significant that the decision of the Tribunal did not differentiate in its reasoning between the two allowances, i.e. the overseas assignment allowance and the housing allowance, but rather rested on the permissibility of the difference in the total package of benefits accorded to the two categories of staff. Moreover, the Tribunal did not rely specifically on the factor of security as a justification for the difference in benefits. Rather, it cited other factors in concluding that the allocation of differing benefits to different categories of staff was reasonably related to the purposes of the benefits "...in particular, the incentive to recruitment of Resident Representatives that is provided by the overseas assignment allowance." (Para. 64.)

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[14] This point was amplified by the Administrative Tribunal in Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002), in assessing whether there was a rational nexus between the goals of an expatriate benefits policy and the method for allocating these benefits. "It is noted that the Tribunal's reasoning in Mr. "R" suggests that a 'rational nexus' does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and indeed that the categories employed may rest upon generalizations." (Ms. "G", para. 79.)

41. It may be contended that a stronger argument in favor of *res judicata* may be found in the Tribunal's decision respecting the "individual decision" at issue in Mr. "R". With regard to that decision, it may be said that the Tribunal, in denying the first Application, ratified the decision of Fund Management to reject the recommendation of the Director of HRD to extend a special housing benefit to Applicant to cover the entire cost of his residency at the Hotel Ivoire. That recommendation, it will be recalled, was based in part on the savings to the Fund of not having to provide security equipment or guard services for a private house for Mr. "R"'s occupancy. Management's decision to reject the request for exceptional treatment, concluded the Tribunal, was "..reasonable and one within the ambit of the Fund's managerial discretion."[15]

42. Security-related concerns associated with his posting in Abidjan also figured in Applicant's argument for parity of benefits with the Resident Representative in his first case. Among Mr. "R"'s contentions were that the risks and disadvantages attached to assignment to developing countries are not compensated by the hardship allowance, especially in the location of his posting, in which there are serious dangers resulting from violent unrest.[16] Nonetheless, the foundation in law for Applicant's argument in the present case differs, as he identifies a different inequity than the one complained of in the first case. In the present case, Mr. "R"'s complaint focuses upon the inequality allegedly visited upon overseas Office staff who choose to rent security-enhanced quarters vis-à-vis overseas Office staff who choose to take up residence in a facility that requires security upgrades. It would seem that in one respect this alleged inequality is closely related to the inequality complained of in the first case, as the selection and outfitting of the Resident Representatives' quarters necessarily includes security requirements. Nonetheless, in its pleadings in the present case, Respondent maintains, "As for the Fund's approach to security costs, there is no difference between Resident Representatives and Office Directors; in both cases, the Fund will take, at its expense, all security measures it considers necessary, but the Fund does not pay any staff member for the value of security measures avoided because of the staff member's choice of accommodation."

43. While it may be also contended that Applicant's eliciting a further decision from the Fund should not be permitted to defeat a defense of *res judicata*, it is notable that the Director of HRD, when confronted in April 2002 with Applicant's request for a "Revised Calculation of the Housing Allowance for JAI Office Staff," referred Mr. "R" neither to the Tribunal's recent Judgment nor to the October 2, 2000 decision contested therein which had included the statement that "…because you are living in a hotel, no security costs need to be covered." Rather, the Director replied by asserting that the Fund "…stands ready to cover the necessary costs of providing security in all locations where staff are placed around the world," and suggesting that "[i]t would be appropriate for you to raise any security concerns

[15] Mr. "R", para. 65.

[16] Mr. "R", para. 19.

with [the Acting Chief of the Fund's Field Security Office]." Hence, it may be said that the Fund reacted to Mr. "R"'s April 2002 request as if it were distinct from the request disposed of by the Administrative Tribunal only one month earlier. These actions may have led Mr. "R" to believe that HRD was open to considering his interpretation of the policy and later to pursue his claim through the channels of administrative review culminating in its present consideration by the Tribunal.

44. The Tribunal concludes that Mr. "R"'s current claim is not debarred on the ground of *res judicata*, because, in its essence, it is a challenge not to treating the benefits of a Resident Representative and an Office Director differently but to meeting security costs differently depending on whether the Fund pays those costs directly or leaves it to the staff member concerned to assume them indirectly as by payment of hotel bills that subsume security protection. This latter question was not addressed in the Tribunal's Judgment in the case initially brought by Mr. "R".

> Individual Decision – Was the decision taken in Mr. "R"'s case, i.e. to deny his request for reimbursement of security costs allegedly incurred indirectly by choosing to lease security-enhanced quarters, consistent with applicable Fund policy? Did Respondent properly interpret and apply to Mr. "R" its policy regarding a) calculation of the housing allowance for overseas Office staff, and b) provision of residential security to staff members posted abroad?

45. The gravamen of Applicant's complaint is that his housing allowance was improperly calculated because it did not reflect the difference in the cost of housing between Washington, D.C. and the duty station.[17] The housing allowance has been inconsistently applied in his case, contends Mr. "R", because the Fund has applied to him a policy with regard to security costs for personnel posted abroad that denies reimbursement for security expenses said to be incurred indirectly through the choice of renting a security-enhanced accommodation.

46. Applicant emphasizes that he is complaining of the interpretation, in the particular circumstances of his case, of the HRD Director's statement that the Fund "...stands ready to cover the necessary costs of providing security in all locations where staff are placed around the world. In the event that the Fund's security office considers security measures necessary for you or other Fund staff of the JAI, the Fund will pick up the cost." Applicant's argument is that the Acting Chief of the Field Security Office did consider residential security measures necessary for expatriates in Abidjan, and therefore the Fund should "pick up the cost" of that part of his hotel rent that may be attributable to the provision of security services. Specifically, Mr. "R" contests the July 2002 decision of the Staff Benefits Chief that "...these costs were not incurred....The Fund will pay for security costs incurred, but will

[17] As stated in the information provided on the Fund's internal website as to the housing allowance for overseas Office staff, "The housing allowance paid by the Fund is the difference between the estimated housing cost in the new duty station and Washington D.C."

not pay you for costs that were avoided due to your decision [to live at the hotel].” The Tribunal concurs with Applicant’s view that these costs, far from being avoided, were indeed “incurred,” albeit indirectly. On review, the HRD Director, however, concluded that the Staff Benefits Chief “...correctly interpreted and applied the Fund’s policies to your situation.”

The “regulatory decision”

47. Respondent, maintaining that the Fund’s policy on residential security costs was properly applied to Mr. “R”’s term as Director of the JAI, contends that Applicant’s “only challenge” in the present case is to a “regulatory decision”[18] of the Fund.[19] That policy, as articulated by the Fund, is to provide adequate residential security measures to staff posted overseas but not to reimburse any staff member for such expenses that may be “avoided” by his choice of accommodations.

48. Initially, it should be considered whether the security “policy” was indeed a “regulatory decision” for purposes of the Statute of the Administrative Tribunal, defined by Article II, Section 2.b. as “…any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund.” In Mr. M. D’Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), the Tribunal explained:

> “35. It is clear that for a practice to constitute a regulatory decision there must be a ‘decision’. That decision must have been taken by an organ authorized to take it. However, the evidence in these proceedings shows that the practice of truncating the weight given to the previous experience of non-economists at ten years was never decided upon by the Executive Board, the Managing Director, or the most senior officials of the Fund. The practice is distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund. Rather, at the time that that practice was applied to Mr. D'Aoust, it was an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund. In view of these uncontested facts, the Tribunal is unable to regard the practice in question as flowing from or constituting a regulatory decision.

[18] As the Tribunal has explained in Mr. “R” and elsewhere, the IMFAT is vested by its Statute (Article II) with jurisdiction over challenges to both “individual” and “regulatory” decisions of the Fund. *See* Mr. “R”, paras. 21-22.

[19] This position, it may be observed, is consistent with that taken by the Fund’s Grievance Committee in its Recommendation and Report. *See* The Channels of Administrative Review, supra.

> This being its conclusion, it follows that the Tribunal lacks jurisdiction to pass upon the practice as a regulatory decision, though it has found itself competent to consider the validity of the application of that practice to Mr. D'Aoust as an 'individual' rather than a 'regulatory' decision."

The Tribunal in D'Aoust emphasized the importance of transparency of personnel policies:

> "36. At the same time, the Tribunal finds it appropriate to observe that for the Fund to generate and apply a practice that affects the determination of the salary level of a substantial proportion of its staff, but which was and is largely unknown, may require the consideration of the Managing Director. It is clear that neither the members of the staff of the Fund nor this Tribunal can adequately react to a practice which is at once real in its effects but so elusive in its origins, adoption, recording, articulation and transparency.
>
> 37. It may be added that notice by which rights and obligations are clearly conveyed is a requirement not only of due process. Such notice is an element of the structure of the Statute of the Administrative Tribunal of the Fund, and, as a general proposition, it is held to be required by ample judicial authority."

49. In Ms. "B", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-2 (December 23, 1997), the Tribunal summarized the "…essential conditions for a valid regulatory decision: a decision, taken by an authorized organ of the Fund, laid down in a published official document of the Fund, with a determinable effective date, of which the staff has been given reasonable notice." (Para. 39.)

50. Whether the Fund's "policy" on residential security costs for staff members posted abroad is a "regulatory decision" for purposes of the Statute of the Administrative Tribunal is open to question. This policy has been found in correspondence with Mr. "R"; it is also noted in the benefits review conducted by HRD that, as to Resident Representatives, "Security upgrades should continue to be financed separately by the Fund wherever warranted." ("Resident Representative Program: Review of Benefits and Incentives," February 18, 2000.) But there is no evidence before the Tribunal that the policy has been communicated to the staff of the Fund at large. The Fund accordingly may wish to consider announcing and circulating a clear and comprehensive statement of its policy in respect of meeting costs for the provision of necessary security for Fund personnel posted abroad.

51. In any event, the Tribunal, even if it lacks jurisdiction to pass upon the security policy as a "regulatory decision", is competent to consider the fairness of its application to Applicant as an "individual decision".[20] Implicit in Applicant's challenge to the "regulatory

[20] D'Aoust, para. 35.

decision" is that the policy is inherently inequitable, and, although he does not articulate it as such, that it violates the principle of equal pay for equal work. As the Tribunal observed in Mr. "R", charges of discrimination may arise in different ways, and "…a policy, neutral on its face, may result in some kind of consequential differentiation between groups."[21] The Fund, for its part, maintains that the housing allowance and security policies are reasonably related to their objectives and do not represent an abuse of discretion. Rather, asserts the Fund, it has sound business reasons for paying for all security costs directly, as opposed to paying an allowance for security costs said to be implicit in the housing expenses of an overseas Office Director. The Fund maintains that it does not wish to pay an allowance for security costs lest it be otherwise applied by the staff member.

52. While the Tribunal appreciates the Fund's motivation, it finds it insufficient to justify its application in the case of Mr. "R". Mr. "R", in the security situation then prevailing in Abidjan, made a reasonable decision to live in the Hotel Ivoire. As the Fund's Security Chief recognized, not only was that decision sound; it entailed Mr. "R"'s indirect payment of security costs subsumed in his considerable hotel bills. The Fund "avoided" those costs, but Mr. "R" could not avoid them. The Tribunal sees no cogent consideration, in light of the Fund's policy of meeting security costs, why Respondent should be absolved of those costs in the case of Mr. "R" simply because they were indirectly rather than directly incurred. On the contrary, equal treatment of staff in their fundamental right to enjoy physical security should govern. At the same time, the Tribunal, in passing upon Mr. "R"'s current claim, recognizes that it is dealing with a singular factual circumstance.

Remedies

53. Article XIV, Section 1 of the Statute provides:

> "If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision."

Accordingly, the Tribunal rescinds the decision of the Fund to deny payment of security costs indirectly incurred by Mr. "R".

54. Applicant acknowledges in his pleadings that it is not possible to assess the costs of security that were passed on to individual hotel guests in the rental fee. As a proxy for these costs he requests the amount of the guard services that would have been required had he chosen to live in a private residence ($1,500 per month multiplied by 36 months, equaling $54,000). The source of this figure is found in the August 1999 correspondence from the HRD Director to the Deputy Managing Director seeking an exceptional housing allowance

[21] Mr. "R", para. 36.

for Mr. “R”, in which she notes the cost savings to the Fund of not having to provide security to Mr. “R” at a private residence as $1,500 per month (based upon the security costs for the Resident Representative in Abidjan). This same figure was cited in June 2002 by the Acting Chief of the Field Security Office who estimated the “typical costs to achieve…minimum essential standards” for protection of private expatriate residences in Abidjan at a one time expense of approximately $10,000 for enhancements to property plus an annual guard service fee of approximately $18,000 ($1,500 per month). Accordingly, the Tribunal concludes that $54,000 is the most reasonable approximation that the record affords of the security costs incurred by Mr. “R” and therefore prescribes the Fund’s payment of that sum to Applicant to correct the effects of the rescinded decision.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

1. Mr. "R"'s current claim is not debarred by reason of *res judicata*.

2 The decision of the Fund to deny payment of security costs indirectly incurred by Mr. "R" is rescinded.

3. The Fund shall pay the sum of $54,000 to Mr. "R" as the most reasonable approximation that the record affords of security costs incurred by him in the course of his assignment in Abidjan.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

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Stephen M. Schwebel, President

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Celia Goldman, Registrar

Washington, D.C.
December 10, 2004