

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2009-1

Mr. S. Ding, Applicant v. International Monetary Fund, Respondent

Introduction

1. On March 16 and 17, 2009, 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. Shuang Ding, a staff member of the Fund.

2. Applicant contests elements of the Fund's policy governing eligibility for Education Allowances and their application in his individual case. Applicant contends that the policy impermissibly discriminates in the case of a child, such as his own, whose birthday falls outside of the academic year. In such circumstance, asserts Applicant, the policy provides, in total, one less year of eligibility for Education Allowances than in the case of a child whose birthday falls within the academic year. Applicant seeks as relief the establishment of his child's eligibility for Education Allowances for the 2008-2009 academic year and suggests revision of the Fund's policy to provide eligibility for Education Allowances for a period of twenty academic years, beginning with the academic year following the child's fourth birthday, irrespective of whether the child's birthday falls within or outside of the academic year.

3. Respondent, for its part, maintains that Applicant's claim is inadmissible on the ground that the contested policy was established before, and has not changed since, the entry in force of the Tribunal's Statute and accordingly falls outside of its jurisdiction *ratione temporis* as prescribed by Article XX. If the Tribunal concludes that the Application is admissible, Respondent further maintains that the challenged regulation represents a reasonable exercise of discretion in setting the terms and conditions of staff employment. In the view of the Fund, the age limitations governing Education Allowances are reasonably related to the purposes of the benefits and do not discriminate impermissibly in the case of Applicant's child or others with birthdays falling outside of the academic year.

The Procedure

4. On September 17, 2008, Mr. Ding filed an Application with the Administrative Tribunal, which was transmitted to Respondent on that day. On September 19, 2008,

pursuant to Rule IV, para. (f),¹ the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

5. Respondent filed its Answer to Mr. Ding's Application on November 3, 2008. On December 3, 2008, Applicant submitted his Reply. The Fund's Rejoinder was filed on January 5, 2009.

6. On February 2 and 19, and March 5, 2009, pursuant to Rule XVII, para. 3,² the Tribunal issued to the Fund Requests for Information relating to the history of the age eligibility requirements for Education Allowances and other provisions of the Fund's internal law. The Fund's responses were filed on February 6 and 26, and March 6, 2009 and transmitted to Applicant for his information.

7. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not deemed useful to the disposition of the case.³

Request for Anonymity

8. Mr. Ding has requested anonymity pursuant to Rule XXII of the Tribunal's Rules of Procedure. The Fund has presented its views in accordance with the Rules. Rule XXII provides that the Tribunal may grant a request for anonymity "where good cause has been shown for protecting the privacy of an individual."⁴ The adoption of Rule XXII, with effect

¹ Rule IV, para. (f) provides:

"Under the authority of the President, the Registrar of the Tribunal shall:

...

(f) upon the transmittal of an application to the Fund, unless the President decides otherwise, circulate within the Fund a notice summarizing the issues raised in the application, without disclosing the name of the Applicant, in order to inform the Fund community of proceedings pending before the Tribunal; ..."

² Rule XVII, para. 3 provides:

"3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order."

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 deems such proceedings useful."

⁴ Rule XXII provides in its entirety:

(continued)

in respect of all applications filed after December 31, 2004, effectively revised a policy earlier instituted by the Tribunal of designating the names of applicants by acronyms. The Tribunal has held that Rule XXII operates as an exception to the general practice of making public the names of parties to a judicial proceeding and that a party seeking that a name not be made public carries the burden of showing good cause. *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13.

9. The Tribunal has observed that “[i]nternational administrative tribunals generally have granted anonymity only in cases such as those involving alleged misconduct ... or matters of personal privacy such as health ... or family relations....” *Ms. "AA"*, para. 14. The IMFAT has decided five requests for anonymity pursuant to Rule XXII, in each case granting those requests in circumstances consistent with international administrative jurisprudence. *See Ms. "AA"*, para. 15 (summary dismissal of application alleging harassment and hostile work environment; applicant’s request for anonymity granted to “protect her supervisors from allegations that have not been tested”); *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 20 (allegations of misconduct against applicant, and allegations by applicant of mistreatment by supervisor); *Ms. "CC", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-6 (November 16, 2007), para. 7 (good cause shown where case “involves matters both of health and of alleged misconduct”; challenge to disability retirement decision); *Mr. "N", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2007-7 (November 16, 2007), para. 8 (challenge to giving effect to child support orders under Staff Retirement Plan, pursuant to earlier Judgment); *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 7 (information relating to health of applicant and allegations of mistreatment by supervisor).

“RULE XXII

Anonymity

1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.
2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.
3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.
4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual.”

10. Applicant in this case articulates his request for anonymity as follows: “As a first-timer before the Tribunal, I requested anonymity under Rule XXII of the Tribunal’s Rules of Procedure, because I was not sure what direct or indirect consequences the whole process could bring to me. I believe the natural aversion to uncertainty provides sufficient justification for my request.” The Fund has responded that Applicant has not shown good cause for protecting his privacy in the instant case, “which is simply a challenge to a rule regarding eligibility for a benefit.”

11. In light of the foregoing jurisprudence and the circumstances of the case, the Tribunal holds that Applicant has not shown good cause for the Tribunal to protect his privacy by not making his name public. In respect of Applicant’s reference to “direct or indirect consequences” of making known a staff member’s recourse to the Tribunal, the Tribunal observes that adverse consequences do not arise and cannot be allowed to arise from such recourse.

The Factual Background of the Case

12. The relevant factual background may be summarized as follows.

13. Applicant, an economist, began his employment with the Fund in 1997. In accordance with GAO No. 21, Rev. 7 (June 12, 2000) (Education Allowances), as a national foreign to the United States holding G-4 visa status and serving at the Fund’s Washington, D.C. headquarters, Mr. Ding is eligible for Education Allowances in respect of dependent children.

14. Applicant’s child was born on August 4, 2004. On June 9, 2008, in anticipation of her beginning full-time private school in the coming fall, Applicant brought to the attention of the Human Resources Department (“HRD”) that by the terms of GAO No. 21, Rev. 7, Section 4.02, his child did not appear to meet the age eligibility requirement for the allowance for the 2008-2009 school year. That provision provides in pertinent part:

“4.02.1 *Children With Birthdays Falling Within the Academic Year.* A child whose birthday falls within the academic year shall qualify for education allowances beginning with the academic year during which the child’s fifth birthday occurs until the end of the academic year during which the child’s twenty-fourth birthday occurs.

4.02.2 *Children With Birthdays Falling Outside the Academic Year.* A child whose birthday falls outside the academic year shall qualify for education allowances beginning with the academic year that follows the child’s fifth birthday until the end of the academic year that precedes the child’s twenty-fourth birthday.”

In his communication with HRD, Mr. Ding disputed the fairness of the regulation as follows:

“According to the policy, my child won’t be eligible to receive the allowance for the 2008-09 school year (if the school year ends in the middle of June), whereas a child born in early June 2004 will become eligible. What is more, children with birthdays falling within the academic year will be able to receive one more year of allowance compared with children with birthdays falling outside the academic year during the entire period when they are eligible for the allowance.”

Applicant sought verification that his reading of the rule was correct and questioned why children with birthdays falling outside the academic year were “discriminated” against. (Email from Applicant to HR Center, June 9, 2008.) That Applicant’s child did not qualify for Education Allowances for the 2008-2009 academic year was confirmed to Applicant by HRD via email of June 9, 2008. (Email from HR Center to Applicant, June 9, 2008.)

The Channels of Administrative Review

15. On July 22, 2008, Applicant sought administrative review by the Chief of the Compensation and Benefits Policy Division of HRD, claiming eligibility for Education Allowances for the 2008-2009 school year and maintaining that the Fund’s policy entailed “unequal treatment of children depending on their birth dates.” Applicant asserted:

“In other words, a child with birthday falling outside the academic year would receive one year less of allowance compared with a child with birthday[] falling within the academic year during the entire period when he/she is eligible for the allowance.

For fairness, a child shall ... qualify for education allowance for 20 academic years beginning with the academic year that follows the child’s fourth birthday.”

(Email from Applicant to Chief, Compensation and Benefits Policy Division, July 22, 2008.)⁵ The Division Chief responded on August 5, 2008, denying Applicant’s request for benefits for the 2008-2009 academic year. (Email from Chief, Compensation and Benefits Policy Division to Applicant, August 5, 2008.)

⁵ Applicant explained the alleged inequality by way of the following example:

“For a child born on May 4, 2004, he/she will be eligible to receive education allowance starting from September 2008 until June 2028.

For a child born on August 4, 2004 (my child for instance), he/she will be eligible to receive education allowance starting from September 2009 until June 2028.”

(Email from Applicant to Chief, Compensation and Benefits Policy Division, July 22, 2008.)

16. On August 12, 2008, Applicant sought further administrative review by the Director of Human Resources, requesting “review and revision” of the Education Allowances policy and claiming eligibility for his child starting with the 2008-2009 academic year. (Email from Applicant to HRD Director, August 12, 2008.) The Director of Human Resources responded on August 28, 2008: “. . . as you acknowledge, your child does not qualify for education allowances for the coming school year, based upon the plain language of GAO No. 21, Section 4.02.2 The rules have therefore been properly applied in your case, and I confirm the earlier decisions.” (Memorandum from HRD Director to Applicant, August 28, 2008.)

17. On September 8, 2008, responding to a follow-up communication from Mr. Ding, the Fund advised that he could proceed directly to the Tribunal, as he did not challenge the correctness of the application of the rules in the circumstances of his case but rather sought to contest the regulation itself.⁶ (Email from Applicant to HRD Director, September 3, 2008; Email from Special Assistant to HRD Director to Applicant, September 8, 2008.)

18. On September 17, 2008, Mr. Ding filed his Application with the Administrative Tribunal.

Summary of Parties’ Principal Contentions

Applicant’s principal contentions

Admissibility

19. The principal arguments presented by Applicant in his Application and Reply in respect of the admissibility of the Application may be summarized as follows.

1. The Tribunal has jurisdiction over challenges to GAO No. 21, Rev. 7, which became effective on June 12, 2000.
2. The decision on Education Allowances adopted by the Executive Board on July 30, 1979 did not explicitly address the issue of eligibility of children whose birthdays fall outside the academic year.
3. GAO No. 21, Rev. 7 substantively changed the provision on eligibility criteria for Education Allowances. The legislative history indicates that Revision 7 of GAO No. 21 introduced a new element in the eligibility criteria for Education Allowances that was not part of the 1979 Board decision or the preceding versions of GAO No. 21.

⁶ The jurisdiction of the Fund’s Grievance Committee, in contrast to that of the Administrative Tribunal, is limited to complaints alleging that a staff member has been “adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service,” and specifically excludes “any challenge to (i) a decision of the Executive Board; [or] (ii) staff regulations as approved by the Managing Director. . . .” See GAO No. 31, Rev. 3 (and Rev. 4), Section 4. See also *Mr. “R”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 17.

Merits

20. The principal arguments presented by Applicant in his Application and Reply in respect of the merits of the Application may be summarized as follows.

1. GAO No. 21, Rev. 7, Section 4.02 treats children in a discriminatory manner depending on their dates of birth.
2. Under GAO No. 21, Rev. 7, a child whose birthday falls outside the academic year would receive one less year of Education Allowances, compared with a child whose birthday falls within the academic year, during the entire period for which he is eligible for the allowances.
3. The age eligibility criteria of Section 4.02 of GAO No. 21, Rev. 7, do not reflect a proper exercise of the Fund's discretion in dealing with different categories of Fund staff, but rather represent discrimination among Fund staff only because their children happen to be born at different times of the year.
4. The policy should be designed to ensure that children in the same circumstances will be able to receive the same number of years of allowance.
5. Applicant seeks as relief:
 - a. establishment of his child's eligibility for Education Allowances for the 2008-2009 academic year; and
 - b. legal costs.
6. Applicant additionally suggests revision of the Fund's policy so as to provide eligibility for Education Allowances for a period of twenty academic years, beginning with the academic year that follows the child's fourth birthday, irrespective of whether the child's birthday falls within or outside of the academic year.

Respondent's principal contentions

Admissibility

21. The principal arguments presented by Respondent in its Answer and Rejoinder in respect of the admissibility of the Application may be summarized as follows.

1. The policy challenged by Applicant was introduced in 1979, before the establishment of the Tribunal, and the Tribunal therefore lacks jurisdiction *ratione temporis* under Article XX of the Statute.
2. The current version of GAO No. 21, Rev. 7 (June 12, 2000), which is applicable to Applicant's case, "clarified but did not substantively change" the pre-existing provision. While the earlier provision did not explicitly mention

children with birthdays falling outside the academic year, the meaning of the rule was clear and it was consistently applied so that a child's fifth birthday had to occur before the end of the school year in order for the child to be eligible for Education Allowances for that year.

3. The fact that the Fund's policy on eligibility for Education Allowances adopted in 1979 continues to bar Applicant from receiving benefits before the academic year in which his child reaches her fifth birthday cannot give the Tribunal jurisdiction over Applicant's challenge to the original policy.

Merits

22. The principal arguments presented by Respondent in its Answer and Rejoinder in respect of the merits of the Application may be summarized as follows.

1. The age-based eligibility policy for Education Allowances is not discriminatory and was a proper exercise of the Fund's discretion.
2. The eligibility requirements are intended to limit the provision of the benefit to those circumstances that support the purpose of the policy. It is appropriate that the eligibility requirements relate to the age of the child and the type of schooling, irrespective of the total amount of education benefits that any given staff member may eventually receive.
3. The age criterion adopted by the Executive Board, namely, the school year in which the child turns five, is appropriate and is rationally related to the purpose of the policy, reflecting a widespread practice to begin formal academic instruction for children at age five.
4. Applicant's argument that the Fund should provide staff members with the same total years of entitlement to Education Allowances during their careers is based on a misunderstanding of the nature of the benefit.
5. In the event that Applicant prevails in whole or in part on his Application, his claim for costs should be rejected, as he is not an attorney and did not incur any opportunity cost in preparing his own case.

History of Age Eligibility Requirements for Education Allowances

23. Essential to assessing the contentions of the parties is an understanding of the history of the age eligibility requirements governing the Fund's policy of providing Education Allowances to staff members who serve at duty stations outside of their home countries. This history is reviewed below.

24. Pursuant to its current iteration, GAO No. 21, Rev. 7 (June 12, 2000), Education Allowances are granted with the purpose of assisting expatriate staff "... in educating their children, either in their home countries or elsewhere, in a manner intended to facilitate their children's eventual return to their home countries." (Section 1.01.) In an earlier Judgment, the

Administrative Tribunal identified Education Allowances as one of several types of “expatriate benefits” designed to compensate staff members for the additional costs of maintaining associations with their home countries during their employment and of facilitating their repatriation thereafter. *See Ms. “G”, Applicant and Mr. “H”, Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002) (upholding visa criterion for eligibility for expatriate benefits), paras. 41-42.

25. Education Allowances serve to defray, up to specified limits, the costs of attendance at a qualified educational institution, as well as boarding and travel in the case of attendance at an educational institution outside the duty station country, and certain types of tutoring. (Section 1.01.) At issue in the instant case is Applicant’s request under Section 7.01, which provides: “For each academic year, a staff member whose child is enrolled full-time in a qualified educational institution is entitled to receive three-fourths of the tuition and cost of attendance ... up to the overall maximum allowance (‘ceiling’)” The ceilings for tuition and cost of attendance are annually adjusted for each country in which children of Fund staff are studying. (Section 7.04.)

GAO No. 21 through Revision 4 (1950-1976)

26. The original GAO No. 21 (November 1, 1950) provided staff members whose duty station was outside their home country with an education allowance for each dependent child in full-time attendance at a “school, university, or similar educational institution in the respective home country.”⁷ (Section 2.01.) As to age eligibility, the original GAO No. 21 set only an upper age cut-off for the benefit, requiring that the dependent child “be not more than 18 years of age if in attendance at a school below the university level or not more than 22 years of age if in attendance at a university.” (Section 2.03.)

27. Revision 2 of GAO No. 21 (July 9, 1962) set both a starting point for eligibility, determined by the grade in which the child was enrolled, and an end point for eligibility, governed by chronological age:

⁷ Over time, the coverage of Education Allowances has expanded beyond education in the staff member’s home country. *See* GAO No. 21, Rev. 2 (July 9, 1962), Section 3.01 (“... in the home country or in another country where the Director of Personnel deems the language and system of education to be substantially the same as in the home country”); GAO No. 21, Rev. 3 (November 1, 1969), Section 1.02 (“... to give financial assistance to staff members removed from their home culture who want their children to be educated at home or at the duty station in a manner which, on their eventual return, will facilitate the re-entry of the child into the educational institutions of the home country”); GAO No. 21, Rev. 7 (June 12, 2000), Section 1.01 (“The purpose of education allowances is to assist [staff members serving outside their home countries] in educating their children, either in their home countries or elsewhere, in a manner intended to facilitate their children’s eventual return to their home countries”) and Section 5.02 (“An educational institution will qualify under this Section only if: (i) it is located in the staff member’s home country, or (ii) the staff member certifies that, in his or her opinion, education at the selected school will facilitate the child’s eventual return to the staff member’s home country.”)

“No education allowance shall be paid for a child in attendance at a kindergarten or nursery school, or beyond completion of the scholastic year in which a child attains his twenty-second birthday.”

(Section 2.03.) These eligibility criteria remained identical in Revision 3 of GAO No. 21 (November 1, 1969). Revision 4 similarly provided that “... no education allowance benefits shall be paid beyond completion of the scholastic year during which a child reaches his twenty-second birthday,” and “[a] kindergarten or nursery school, wherever located, shall not be a qualifying educational institution.” GAO No. 21, Rev. 4 (May 1, 1975), Sections 2.02 and 3.013.

1976 Executive Board Decision – Revision of Upper Age Limit

28. In 1976, by decision of the IMF Executive Board, the upper age limit for Education Allowances was revised upward from age 22 to age 24. According to the Board paper recommending this revision, the change was undertaken “... to bring the Fund in line with the Bank.” (EBAP/76/77 – April 9, 1976, considered at Board meeting April 21, 1976.) This decision was communicated to the staff of the Fund via Staff Bulletin No. 76/4 (April 26, 1976) as follows: “Education allowance for future scholastic years will be paid through the scholastic year during which the child reaches age 24, instead of age 22.” The amendment was incorporated in GAO No. 21, Rev. 4 by Supplement 1 (May 1, 1976) and is also reflected in Revisions 5 and 6 of GAO No. 21 (*see below*).

1979 Executive Board Decision – Revision of Lower Age Limit

29. Three years after amending the upper age limit for education allowances, the IMF Executive Board revised the lower limit as well, shifting from a grade-based to an age-based criterion. Accordingly, on July 30, 1979, the Executive Board adopted the following decision:

“Education allowances will be paid from the beginning of the academic year in which the child reaches the fifth birthday.”

(EBM/79/130 – July 30, 1979.)

30. The Executive Board’s 1979 decision followed a study of Education Allowances by the Fund and Bank. (EBAP/79/227 – July 20, 1979, p. 1.) The relevant Executive Board paper and minutes (EBM/79/130 – July 30, 1979) indicate that the Board examined several issues relating to the provision of Education Allowances, among them the question of age eligibility. The rationale for the move from a grade-based to an age-based criterion for determining the starting point for education benefits was elaborated in the Board paper as follows:

“An age qualification would generally be more equitable to administer than one based on the child’s grade. Disagreements sometimes arise over the question whether a certain class in a private school should be considered the equivalent of first grade in

the public school system. The fifth birthday has been proposed since at this age education becomes compulsory in many member countries. Furthermore, the importance of early schooling is receiving growing recognition and academic subjects are being introduced into the curriculum at a younger age.”

(EBAP/79/227 - July 20, 1979, p. 4.) The Board’s 1979 decision was communicated to the staff of the Fund via Staff Bulletin No. 79/13 (August 15, 1979) in the following terms: “In recognition of the growing importance that is now attached to early schooling, the Executive Board has agreed that education allowances be paid for full-time schooling from the beginning of the academic year in which a child reaches the fifth birthday, rather than specifically from the ‘First Grade’ as was previously the rule.”

31. A year later, the Fund issued Staff Bulletin No. 80/11 (August 22, 1980), which *inter alia* drew the attention of the staff to an issue relating to the implementation of the 1979 revision of policy:

“During the last twelve months[, the] Staff Benefits Division has been obliged to turn down a few applications for reimbursement of pre-primary school fees either because the child reached the age of 5 after the last day of classes or because the child was not in full-time schooling (i.e., a minimum of 3 hours per day, 5 days a week). ... Interested staff members may obtain a copy of the guidelines covering pre-primary education, on request from Personnel Records”

The Fund also has included in the record a document dated November 6, 1984, which provided guidance to staff members of the Staff Benefits Division charged with administering the benefit, emphasizing that “[i]n order to qualify for education allowance, a child must reach the age of five on or before the last day of the classes in the child’s school.” (Staff Benefits, “Pre-Primary Education: General Guidelines,” November 6, 1984.)

GAO No. 21, Revisions 5 and 6 (1983, 1985)

32. The Executive Board’s 1976 and 1979 decisions amending the requirements governing age eligibility for Education Allowances were incorporated in GAO No. 21 when it was next revised in 1983. The new text of the GAO provided:

“No education allowance benefits shall be paid before the beginning of the scholastic year in which a child reaches his fifth birthday or beyond the completion of the academic year during which a child reaches his twenty-fourth birthday.”

GAO No. 21, Rev. 5 (June 1, 1983), Section 3.02. At the same time, “qualifying educational

institutions” were defined for the first time to encompass “licensed kindergarten[s].”⁸ (Section 4.01.)

33. Two years thereafter, the age eligibility requirements of GAO No. 21 were revised again, introducing an exception to the upper age cut-off when a child’s education has been interrupted by compulsory military service:

“3.02 *Age Limits*. With the exception stated in subsection 3.02.1 below, no education allowance benefits shall be paid before the beginning of the academic year (first day of child’s classes) in which a child reaches his fifth birthday or beyond the completion of the academic year (last day of child’s classes) during which a child reaches his twenty-fourth birthday.

3.02.1 Upon submission of satisfactory evidence to the Director of Administration, a child whose education was interrupted due to a period of compulsory military service of at least six months shall be eligible for education benefits for the academic year during which he reaches his twenty-fifth birthday.”

GAO No. 21, Rev. 6 (January 28, 1985). It was these age eligibility criteria that prevailed until the issuance in June 2000 of GAO No. 21, Rev. 7.

GAO No. 21, Rev. 7 (2000)

34. The case of Mr. Ding arises under GAO No. 21, Rev. 7 (June 12, 2000), which continues to govern age eligibility requirements for the provision of Education Allowances.⁹ In order for a staff member to receive such allowances, the child must qualify under Section 4 of GAO No. 21, Rev. 7. Section 4 provides in its entirety:

“Section 4. *Qualification of Children*

4.01 *Qualification of Children*. An eligible staff member shall qualify to receive education allowances for each of his or her

⁸ Nursery schools and day care centers, by contrast, were excluded “unless the staff member can present documentation ... that the children are receiving formal academic instruction,” and “... only the cost of instruction during a normal academic year will be considered for reimbursement....” GAO No. 21, Rev. 5, Section 4.02.

⁹ In 2006, as part of a comprehensive revision of the Fund’s system of staff compensation, the Executive Board enacted additional amendments to the rules governing Education Allowances. These revisions did not affect the age eligibility requirements. *See* Staff Bulletin No. 06/11 (June 13, 2006). Elements of the revised compensation system—but not those relating to Education Allowances—were challenged before the Administrative Tribunal, which upheld the revisions as a reasonable exercise of discretion in the setting of terms and conditions of staff employment. *See Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007), Decision and note 5.

children when the child is (i) eligible for child allowances under GAO No. 28; (ii) enrolled full-time in a qualified school or educational institution; and (iii) five years of age or older, but less than twenty-four years of age, except as provided in subsection 4.02.

4.02 Age Limits. An eligible staff member shall receive education allowances for a qualified child subject to the following age limits.

4.02.1 Children With Birthdays Falling Within the Academic Year. A child whose birthday falls within the academic year shall qualify for education allowances beginning with the academic year during which the child's fifth birthday occurs until the end of the academic year during which the child's twenty-fourth birthday occurs.

4.02.2 Children With Birthdays Falling Outside the Academic Year. A child whose birthday falls outside the academic year shall qualify for education allowances beginning with the academic year that follows the child's fifth birthday until the end of the academic year that precedes the child's twenty-fourth birthday.

4.02.3 Extension of Time Due to Military Service. Upon submission to the Director of Human Resources of satisfactory evidence that a child's education was interrupted due to a period of compulsory military service of at least six months, a child's qualification for education allowances shall be extended to include one academic year beyond the age limits in subsections 4.02.1 or 4.02.2.

4.03 Full-time Attendance Requirement. An eligible staff member shall receive education allowances for a child only when he or she is enrolled full-time in a qualified educational institution.¹⁰

¹⁰ Section 5 of GAO No. 21, Rev. 7 defines a "qualified educational institution" in part as follows:

"Section 5. *Qualification of Educational Institutions*

....

5.03 Type of School. The following types of schools shall be considered qualified educational institutions:

- (i) a licensed kindergarten, nursery school or day care center;
- (ii) an accredited grammar or primary school;

(continued)

35. In announcing to the staff of the Fund the adoption of Revision 7 of GAO No. 21, Staff Bulletin No. 00/8 (June 22, 2000) stated: “The revised GAO incorporates a number of changes in administrative policy and procedures ... that have been made since the GAO was last revised. Neither the basic structure of education benefits nor the mechanics of applying for the annual allowances have changed.” Additionally, the Staff Bulletin referred to the age eligibility provision as follows:

“Please note the following provisions:

- *Age limits for children.* The rules with respect to the ages of children for whom education allowances may be paid, generally from age five through the child’s 24th birthday, are now found in Section 4.
-”

Consideration of the Issues of the Case

Admissibility

36. The Administrative Tribunal must consider as a threshold matter whether it has jurisdiction *ratione temporis* over Applicant’s complaint or whether, as Respondent maintains, the Application is barred by Article XX, Section 1 of the Tribunal’s Statute, which provides:

-
- (iii) an accredited high school or secondary school;
 - (iv) an accredited college or university or other post-secondary school, but only if the school is located outside the staff member's duty station country; and
 - (v) an educational institution that offers vocational training, *e.g.*, a secretarial college, nursing school or technical school, or an apprenticeship program, except that schools that offer vocational training or an apprenticeship program beyond the secondary school level will qualify only if they are located outside the duty station country.

5.03.1 *Qualified Kindergarten, Nursery School or Day Care Center.* The Staff Benefits Division shall exclude any fees for child care provided by a qualified kindergarten, nursery school or day care center or costs other than for academic instruction during the normal academic year. A licensed nursery school or day care center shall not be considered a qualified school unless the staff member submits evidence acceptable to the Chief of the Staff Benefits Division that children enrolled are receiving formal academic instruction for at least three hours a day, five days a week.

....”

“The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date.”

37. It is recalled that Article VI, Section 2¹¹ of the Tribunal’s Statute provides that an applicant may challenge a “regulatory” decision of the Fund either directly within three months of its announcement or effective date, or at any time as part of a challenge to an admissible “individual” decision taken pursuant to such “regulatory” decision. It is not disputed that Mr. Ding filed his Application within three months of the exhaustion of administrative review of the “individual” decision¹² denying his request for education benefits for the 2008-2009 academic year on the basis of GAO No. 21, Rev. 7 (June 12, 2000). Article VI, Section 2, is, however, subject to the constraint of Article XX:

“While Article VI, Section 2 of the Statute provides that ‘the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision,’ that general proviso is subject to the *lex specialis* of Article XX. The specific governs the general.”

Ms. “S”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1995-1 (May 5, 1995), para. 22; *Ms. “G”*, para. 68. Accordingly, the question arises whether the “regulatory” decision challenged by Mr. Ding was taken before October 15, 1992.

38. In the view of the Fund, “[t]he legislative history of GAO No. 21 shows that the age limit eligibility criterion which is at issue in this Application was introduced in 1979 and has been applied without change since then.” Applicant, by contrast, maintains that the history of

¹¹ Article VI, Section 2 provides:

“2. An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.”

¹² Article VI, Section 1 provides:

“1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.”

the Fund's internal law governing eligibility for Education Allowances demonstrates that Revision 7 of GAO No. 21, issued in 2000, "substantively changed" the provision on age eligibility. The Fund counters that the Revision "clarified but did not substantively change that provision"; "[r]ather, it simply spelled out the intention and meaning of the existing framework as it had consistently been interpreted and applied, without any change to either the substance or the administration of the rule."

39. In assessing the arguments of the parties, it may be noted at the outset that Respondent's pleadings focus principally on Applicant's contention that he is entitled to education benefits for the current academic year. Accordingly, the Fund's argument, both as to admissibility and on the merits, chiefly engages the element of the challenged "regulatory" decision that governs the starting point for eligibility for Education Allowances. Applicant has made clear, however, beginning with his initial contact with HRD, through the administrative review process, and in his pleadings before this Tribunal, that he seeks principally to impugn the disadvantage that affects staff members such as himself who, by reason of their child's date of birth in relation to the academic year, are entitled to receive one less year of education benefits:

"What I am challenging is the age limits for education allowance set out in Section 4.02 of GAO No. 21, Rev. 7 that provide a child whose birthday falls outside the academic year with one year less of allowance during the entire period when he/she is eligible for the allowance, not simply the regulatory decision that sets the beginning of the eligibility period for education allowance ... or the age cut-off per se"

40. As Applicant challenges two elements of the "regulatory" decision embodied in Section 4 of GAO No. 21, Rev. 7, the Tribunal will consider the following questions: (1) Did the Fund take a "regulatory" decision pre-dating the period of the Tribunal's competence to limit eligibility for Education Allowances to children who have already reached the fifth birthday before the conclusion of the academic year? and (2) Did the Fund take a "regulatory" decision pre-dating the period of the Tribunal's competence to differentiate between children with birthdays falling within the academic year and those with birthdays falling outside the academic year in allocating the total number of years of eligibility for Education Allowances?

41. The Tribunal has held that the fact that past administrative acts may continue to have effect in the period of the Tribunal's competence does not vest the Tribunal with jurisdiction and the denial of requests for exceptional application or amendment of a pre-existing provision cannot confer jurisdiction which the Tribunal otherwise lacks:

"That a current complaint about a rule which came into force before October 15, 1992 is not sufficient to give rise to jurisdiction which otherwise is absent follows from the principle that formed the basis of the Tribunal's judgment in the case of *Mr. "X" v. International Monetary Fund*, [IMFAT Judgment No. 1994-1 (August 31, 1994)]. That principle governs in respect of assertions

of the illegality of pre-existing rules. It also governs requests for changes in pre-existing rules and requests for exception to their application.”

Ms. “S”, para. 21; *Ms. “G”*, para. 68.

42. At the same time, the Tribunal also has held that reconsideration, reaffirmation, and refinement by the Fund’s Executive Board of a decision pre-dating the Tribunal’s competence may give the Tribunal jurisdiction, even where the applicant remains disadvantaged by the rule in the same manner as before the regulation’s reaffirmation. Accordingly, in *Ms. “G”*, the Tribunal concluded that it had jurisdiction *ratione temporis* over an application contesting as discriminatory the rule excluding staff members holding Lawful Permanent Resident (LPR) rather than G-4 visa status from eligibility for expatriate benefits. The Fund had maintained that “in essence” *Ms. “G”*’s complaint challenged a policy of the Fund, the “visa test” for expatriate benefits, which had been in effect since 1985, and that the fact that the policy continued to bar *Ms. “G”* from receiving such benefits while she retained her LPR visa status could not give the Tribunal jurisdiction over her challenge to the underlying policy.

43. In concluding that its jurisdiction *ratione temporis* encompassed *Ms. “G”*’s complaint, the IMFAT took account of the following considerations:

“70. It is not disputed that the Fund’s Executive Board first adopted the visa test for eligibility for expatriate benefits in 1985, before the entry into force of the Tribunal’s Statute. That test denies access to expatriate benefits to individuals (such as Applicant and Intervenor) who hold LPR visa status and who joined the Fund’s staff after 1985....

71. A review of the Executive Board’s actions within the period of the Tribunal’s jurisdiction, as surveyed above, shows that these actions included the reaffirmation of the visa test in 1994 and the refinement of that test by the 2002 amendment. In 1994, the Executive Board considered three options: (I) reverting to the nationality criterion; (II) adopting the ‘modified INTELSAT option’ or (III) retaining the 1985 policy. It chose the latter. In 2001, the Fund’s Human Resources Department presented the Executive Board with a broad re-examination of the eligibility criteria, including a review of the merits of the visa test. It recommended an amendment refining the eligibility requirements in some respects but retaining as the Fund’s fundamental policy that staff members holding G-4 visas are entitled to expatriate benefits and those holding LPR visa status are not. The Executive Board adopted the proposed amendment, to take effect in 2002.”

Accordingly, the Tribunal in *Ms. “G”* concluded:

“72. ... the Executive Board’s reaffirmation of the eligibility requirements in 1994 and its adoption of the 2002 amendment represented the re-consideration of the contested policy and its adaptation at the highest levels of the Fund’s decision-making. As such, they represent an ‘administrative act’ falling within the Tribunal’s jurisdiction *ratione temporis*.”

In so concluding, the Tribunal distinguished the facts of *Ms. “S”* in which there was no evidence that the contested rule had been reconsidered and reaffirmed in the period of the Tribunal’s jurisdiction apart from the “individual decision” resulting from *Ms. “S”*’s request for an exception to the generally applicable policy. *Ms. “G”*, para. 72.

44. In order to decide upon the admissibility of Applicant’s claims, it is necessary to compare the text of the pre-existing rule, which pre-dated the entry in force of the Tribunal’s Statute, with the text of the rule that is currently administered by the Fund and gives rise to Applicant’s complaint. The pre-existing rule, Revision 6 (January 28, 1985) of GAO No. 21, provided in pertinent part:

“3.02 *Age Limits*. . . . no education allowance benefits shall be paid before the beginning of the academic year (first day of child’s classes) in which a child reaches his fifth birthday or beyond the completion of the academic year (last day of child’s classes) during which a child reaches his twenty-fourth birthday.”

This text may be contrasted with Revision 7 (June 12, 2000) of GAO No. 21, which reads in relevant part as follows:

“4.02.1 *Children With Birthdays Falling Within the Academic Year*. A child whose birthday falls within the academic year shall qualify for education allowances beginning with the academic year during which the child’s fifth birthday occurs until the end of the academic year during which the child’s twenty-fourth birthday occurs.

4.02.2 *Children With Birthdays Falling Outside the Academic Year*. A child whose birthday falls outside the academic year shall qualify for education allowances beginning with the academic year that follows the child’s fifth birthday until the end of the academic year that precedes the child’s twenty-fourth birthday.”

45. It is apparent that the texts of the two rules differ in form. While Revision 7 differentiates explicitly between children whose birthdays fall within the academic year and those with birthdays outside of the academic year, Revision 6 made no such differentiation on the face of the regulation.

46. In the view of the Fund, the 2000 Revision "... clarified but did not substantively change that provision. Rather, it simply broke down the provision on age limits into two subsections to expressly address the issue of children whose birthdays fall outside the academic year." In characterizing the language of Revision 7 as a "clarification" of the earlier rule, the position of the Fund suggests that the new rule represented a necessary interpretation of the earlier one; "... it simply spelled out the intention and meaning of the existing framework as it had consistently been interpreted and applied, without any change to either the substance or the administration of the rule." At the same time, the Fund maintains that the new wording "... removed any ambiguity and reflects in the GAO the application of the age limit rule that had been adopted by the Board in 1979 and consistently applied since that time."

47. Applicant, by contrast, observes: "The Board decision on education allowance adopted on July 30, 1979 did not explicitly address the eligibility issue of children whose birthdays fall outside the academic year"; "Rev. 7 of GAO No. 21 (2000) was the first GAO-related action that expressly addressed the issue of children whose birthdays fall outside the academic year, but unfortunately interpreted the Board decision of 1979 in a way that gave rise to discriminatory treatment." In Applicant's view,

"[t]he legislative history indicates that Rev. 7 of GAO No. 21 introduced [a] new element in the eligibility criteria for education allowance that did not exist in the 1979 Board decision and the preceding versions of GAO No. 21. ... Rev. 7 of 2000 entailed new regulations addressing the issue of children whose birthdays fall outside the academic year."

48. Having considered and evaluated the respective arguments of Applicant and Respondent, the Tribunal finds that, in substance and in effect, Section 3.02 of Revision 6 (January 28, 1985) and Section 4.02 of Revision 7 (June 12, 2000) are the same. Both only permit payment of Education Allowance benefits to a child who reaches his or her 5th birthday during the academic year. Both cut off payment of the Education Allowance at the end of the academic year in which the 24th birthday is reached. Since, in substance, the provisions are the same, Mr. Ding's Application is tantamount to a challenge to a rule of the Fund that pre-dates the entry into force of the Tribunal's Statute. Hence, by reason of the terms of Article XX, paragraph 1, of the Tribunal's Statute, the Tribunal is without jurisdiction to pass upon the merits of the Application.

49. Nevertheless, the Tribunal is constrained to observe that the effect of the wording of the provisions in question is not clear on their face insofar as they bear on the number of years that a child of a staff member is entitled to the Education Allowance. They do not expressly state that children born outside the academic year will be entitled to the benefit of 19 years of the Education Allowance while those born within will be entitled to 20. Rather, staff are left to draw this implausible conclusion by their own calculation. As the Fund's pleadings confirm, these provisions result, or can result, in a child of a long-serving staff member receiving either 19 or 20 years of Education Allowance benefits, depending on whether the child is born during or outside of the academic year. The resultant inequality—whether intended or not—invites the reconsideration of the Fund.

Decision

FOR THESE REASONS

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

The Application of Mr. Ding is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
March 17, 2009