Decision No. 350

Yaw Kwakwa (No. 2),
Applicant

v.

International Finance Corporation,
Respondent

1. The present judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Jan Paulsson, President, Robert A. Gorman and Francisco Orrego Vicuña, Judges. The Applicant's claim was denied in *Kwakwa*, Decision No. 300 [2003]. By an application dated 28 December 2005, he requests that that judgment be reopened on the basis of "new evidence of a nature to have decisively affected the decision in his case had it been available at the time the decision was taken." He seeks to justify his request under the criteria of Article XIII of the Statute of the Tribunal, which permits revision of judgments because of a potentially decisive fact "which at the time the judgment was delivered was unknown both to the Tribunal and to that Party."

2. The Applicant's grievance arises out of the termination of his employment in 2001 for misconduct, namely receipt of funds from an IFC loan applicant during the processing of the loan. The explicit reason for the Applicant's dismissal was that he had, in contravention of Staff Rule 3.01, accepted remuneration from a third party "in connection with service with the Bank Group."

3. The Tribunal's judgment in *Kwakwa* summarized the essential facts as follows (para. 4):

> It is uncontroverted that on June 28, 1994, the Applicant's bank account in the United Kingdom was credited with a payment of a value equivalent to US$50,000 from a Mr. Armen Kassardjian, a businessman resident in Accra who had applied to the IFC for two loans, one for US$1,000,000, the other for US$300,000. These loans were being processed at the time. The Applicant, who since March 1993 was a full-time IFC Consultant, was the IFC's Investment Officer on both loans, and, as such – according to the IFC's then Chief Credit Officer in the Sub-Saharan African Department, who testified before the Appeals Committee after having reviewed the relevant records – "appraised those projects and structured the deal and negotiated the terms and conditions of our investment in those projects." In response to a direct question from the Appeals Committee Panel, the Applicant conceded that he was responsible for the "final decision memorandum as the lead IO [Investment Officer]."

4. The Applicant had explained that the payment of the US$50,000 was an innocent exchange, legal under Ghanaian law, whereby "Mr. Kassardjian would remit US$50,000 to one of the Applicant's London bank accounts, and the Applicant would immediately cause an equivalent amount in Cedis to be remitted to Mr. Kassardjian in Ghana." He asserted that Mr. Kassardjian subsequently "'actively avoided' him and 'frustrated [his] good faith and earnest attempts to return the funds in Cedis to him.'" The Tribunal observed, however, that "the Applicant does not explain persuasively why Mr. Kassardjian, after having so quickly paid out US$50,000 in order to have access to Ghanaian currency, suddenly lost all interest in receiving it." The Tribunal continued: "Nor does the Applicant convincingly explain how he proposed to fund his Cedi remittance to Mr. Kassardjian."

5. The Tribunal determined that "the IFC loans were disbursed to Mr. Kassardjian in 1994 and 1995" and that "[o]n May 10, 1996, by which time Mr. Kassardjian had become a delinquent borrower, the Applicant issued a check in the amount of US$49,750 to Mr. Kassardjian. The latter did not seek to present the check for payment until October 2000, by which time the Applicant was under investigation."

6. The Tribunal ultimately upheld the Respondent's findings that the Applicant abused his position in violation of fundamental principles of the Staff Rules on the grounds of facts admitted by the Applicant himself, observing at paragraph 31 that:

> In this case, there is no issue of proof since facts sufficient to justify the sanctions have been admitted by the Applicant. As for the investigation, it was conducted under the responsibility of Mr. Alan Sharp, a consultant to the Department of Institutional Integrity (and its predecessor, the Corruption and Fraud Investigation Unit) who had 22 years experience as a U.S. federal agent conducting mail fraud investigations. The Applicant suggests that Mr. Sharp and his colleagues were motivated by a desire to obtain a conviction irrespective of the true facts. He adduces no evidence for this serious charge, which therefore remains speculative. In a system where the investigator's work is subject to checks and balances, including recourse to this Tribunal, it would be more plausible to speculate that an investigator is motivated by the desire to be seen as doing his job properly.

7. In response to the Applicant's complaint that "Mr. Kassardjian refused to speak directly with the investigator," the Tribunal responded, at paragraph 32, that it was

> true that the record shows that Mr. Kassardjian was not forthcoming. But then again, unlike the Applicant he was not fighting for his job, was not a staff member required to cooperate with an internal investigation, and understandably may have preferred not to accuse himself of having participated in financial improprieties. Through his associate, a Mr. Quist, he indicated to the investigator that the US$50,000 payment had been on account of the Applicant's assistance in explaining IFC procedure and in completing his loan applications. This version of the events is contrasted with the Applicant's story, namely that the transaction involved a currency exchange having no relation to the IFC. If the justification for the Respondent's disciplinary measure depended on adopting Mr. Kassardjian's version, one might very well be disturbed at the investigator's giving credence to such an informant. But there is no indication whatsoever that the investigator or anyone else involved on behalf of the Respondent believed Mr. Kassardjian's story that the Applicant had been remunerated for his advice. It is the Applicant's own story which justifies his dismissal; whether or not he mistakenly believed that it was acceptable to enter into the transaction he describes with an IFC client is irrelevant.

8. The Tribunal also stated at paragraph 39:

> [H]aving had access to a substantial number of documents produced for its *in camera* review by the Respondent … [the Tribunal] has found no evidence which contradicts the findings of the investigator, suggests any prejudice against the Applicant or favoritism toward his accusers, or indicates that relevant information was withheld from him. The Applicant has expressed particular concern about the Respondent's alleged failure to provide the Applicant's employment records. In this respect, the Tribunal is satisfied that such aspects of the Applicant's terms of employment at the relevant times as are pertinent to this application have been fully disclosed.

9. In support of his attempt to reopen the case, the Applicant has submitted alleged new evidence which falls into categories that may be described as follows.

Lower Court Decision: Decision of the Superior Court of Judicature, The Fast Track High Court Sitting at Accra on Tuesday 21 October 2003

10. In 2002, the Applicant had brought suit against the Barclay's Bank of Ghana Limited (Barclay's). At issue was the US$50,000 which the Applicant sought from Barclay's. As described by the Court, the Applicant had instructed Barclay's to transfer US$50,000 to the account of Armen Kassardjian on 10 May 1996. Barclay's issued a banker's draft. In 2000, Mr. Kassardjian contacted Barclay's by letter requesting a copy of the draft, which he claimed he had misplaced. Barclay's then contacted the Applicant asking for permission to issue a new draft. The Applicant in response asked that the transaction be reversed and his account credited with the amount. Barclay's ultimately refused, and the Applicant filed suit.

11. The Court denied the Applicant's requests and dismissed the suit. The decision was in part based on the judge's determination that the draft was not a bill of exchange or a bank check. Among other things, in order to

have the transaction reversed, the Court asked the Applicant to provide Barclay's with indemnity, including the value of the draft and legal costs incurred as a result of the suit. The Court also ruled that the Applicant was estopped from claiming that Barclay's acted wrongfully in not ensuring that the draft was issued properly in 1996.

Decision on Appeal: Court of Appeal, Accra, 27 May 2005

12. The Court of Appeal reversed this judgment, finding, among other things, that the banks had "bungled" the transaction and therefore should bear the consequences of not having completed the transaction in 1996. The Court found that the banks did not follow the Applicant's instructions properly and accordingly, that the US$50,000 "should revert to the account of" the Applicant, including interest.

Documents obtained from Visa Hotels and Resorts Management Inc. related to the Palm Royale project of Armen Kassardjian

13. The Applicant submits a number of documents which, so he alleges, prove that he did not appraise Mr. Kassardjian's hotel project, as had been asserted by the Respondent, but that instead Mr. Walchli, a "hotel expert" and consultant, had done so. The Applicant asserts that he testified under oath before the Appeals Committee that he did not appraise the project and that he was told to sign a decision memorandum that he did not write. He says that he was not a "tourism expert" and that Mr. Walchli, the "hotel expert," evaluated the project.

Statement of claim by the IFC against Armen Kassardjian Shangri-La Ltd. and Palm Royale Apartment Co. Ltd. seeking execution in the amount of US$1,114,004.44, and motion to stay execution pending appeal by Hotel Shangri-La Ltd. and Armen Kassardjian, dated 26 October 2005

14. With these papers, the Applicant seeks to expose certain discrepancies in the dates referred to in *Kwakwa*:

a) The first loan of US$1 million to the Palm Royale Apartment Co., 26 April 1994 (the Applicant alleges that he made the acquaintance of Mr. Kassardjian on 23 June 1994);

b) The second loan agreement of US$300,000 for Shangri-La refurbishment, 3 August 1994;

c) Palm Royale Ltd. defaults on its loan from the IFC, 28 October 1997;

d) The IFC agreement to merge the two loans with payments to commence on 15 September 1998;

e) All payments on the merged loans rescheduled, 10 June 1999;

f) Action commenced against defendants following demand in May 2001.

Article in the Daily Graphic of Tuesday, 13 August 2002

15. The Applicant invokes this article as evidence that the investigator, Mr. Sharp, was biased against him, contending that Mr. Sharp solicited false testimony from Mr. Bruks, a witness for the Applicant during the investigation, in return for Mr. Bruks' obtaining work as a consultant for the IFC. The article, so the Applicant asserts, shows that Mr. Bruks had in fact obtained consulting work from the IFC about the time of the investigation.

Legal documents regarding court proceedings in Ghana involving Mr. Kassardjian and the IFC

16. These court papers allegedly "show the lengths to which Mr. Kassardjian will go in his effort to escape liability."

Discussion

17. The relevant standards applicable to this Tribunal include first and foremost not Article XIII, but Article XI of its Statute. As the Tribunal observed in *van Gent (No. 2)*, Decision No. 13 [1983], para. 21:

> 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 of 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.

18. In this light, the character of Article XIII as a very limited exception should be obvious. Its requirements are not fulfilled unless the Tribunal is satisfied that newly discovered facts are potentially decisive.

19. It is difficult to define in a phrase the nature of factual revelations which might justify the disruption of a *res judicata*; it is a matter to be determined in the particular circumstances of each case. If it were left to any disappointed litigant to assess the relevance and decisiveness of subsequently discovered facts, the ingenuity of pleaders would ensure that few, if any, judgments would ever be final. Unless some restrictive principle fulfills a rigorous screening function, the availability of revision would subvert a fundamental rule of tribunals such as this one: namely that its judgments are definitive. To ensure that Article XIII does not wreak havoc with the rule of finality, enshrined in Article XI, the former must be recognized as available only in exceptional circumstances. The "new fact" must shake the very foundations of the tribunal's persuasion; "if we had known that," the judges must say, "we might have reached the opposite result."

20. As if to emphasize the narrowness of the opening, the International Law Commission's comment on Article 29 of its 1955 Draft Convention on Arbitral Procedure was to the effect that the category of so-called "new facts" invoked in support of a request for revision could not "embrace facts occurring subsequently to the award." The quintessential example of an admissible "fact" would be the discovery that evidence upon which the decision-makers relied in forming their judgment turned out to have been falsified. More recently, in the Oxford University Press *Commentary on The Statute of the International Court of Justice* (published in 2006), the chapter on revision of judgments states: "It seems now to be settled that the fact which might give rise to a request for revision must have existed prior to the rendering of the judgment to be eventually revised," Andreas Zimmermann and Robert Geiss, "Article 61," at p. 1317 (2006). It follows that although the revelation may be new, the fact thus revealed must have been extant at the time of the impugned judgment. Thus, in *Land, Island and Maritime Frontier (Application For Revision)*, El Salvador v. Honduras, *International Court of Justice* (*ICJ) Reports (2003)*, pp. 392, 402 (para. 29), El Salvador sought to establish a preexisting geological phenomenon which could only be demonstrated by subsequently discovered scientific methods. Similarly, in *Ferrandi v. Commission*, Case No. C-403/85 Rev., [1991] ECR-1215, 1220, the European Court was in principle willing to consider subsequently produced reports that purported to establish a preexisting medical condition. (In both cases, revision was nevertheless declared inadmissible.)

21. The discovery of such a new fact does not *entitle* the discovering party to a reopening of the case. The matter is subject to evaluation by the relevant court or tribunal. The most crucial factor is the importance of the new alleged fact, i.e. the likelihood that it might have been decisive. Another factor of possible relevance is whether the failure of *prior* revelation of the fact in question appears attributable to a lack of diligence on the part of the discovering party; Article 61 of the Statute of the ICJ, consistently with the International Law Commission's Draft Convention on Arbitral Procedure referred to in paragraph 20, explicitly so provides.

22. An arbitral tribunal acting under the UNCITRAL Rules and chaired by a former President of the ICJ reasoned as follows, in *Antoine Biloune et al v. Ghana Investments Centre et al*, 30 June 1990, XIX *ICCA Yearbook Commercial Arbitration* 11, 23 (1994), para. 34 (after making an explicit reference to Article 61 of the ICJ Statute):

> The present Tribunal would not hesitate to reconsider and modify its earlier award were it shown by credible evidence that it had been the victim of fraud and that its determinations in the previous award

were the product of false testimony. However, no such evidence has been adduced. As in many complex cases, this Tribunal has been required to weigh and resolve occasional inconsistencies in the evidence of both sides in this arbitration, and to come to its best determination of the relevant facts. Nevertheless, the Tribunal is satisfied that the material facts on which it based its previous award on jurisdiction and liability, as well as the present award on damages and costs, are sufficiently explained and proved by credible evidence.

23. Although there are many international decisions which acknowledge the theoretical possibility of reopening on the grounds of new facts, it is a striking fact that the Tribunal is unaware of any instance – before such varied authorities, to make a merely illustrative listing, as the Permanent Court of International Justice, the ICJ, the European and Latin American Courts of Human Rights, the Iran-US Claims Tribunal, the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, the Court of Arbitration for Sport, and indeed this Tribunal itself – when the attempt to reopen has succeeded. Nor has the Applicant in the present case been able to point to any such precedent.

24. Successful petitions for reopening have however arisen before national courts, and one day surely such a case will be presented before an international jurisdiction as well. Each case deserves a proper consideration on the merits. In this case, the Tribunal unhesitatingly concludes that the Applicant has invoked no new facts which relate in any material way to the prior judgment and the findings on which it was based. For example, there may be a great deal of information about Mr. Kassardjian and his way of doing business which was never introduced in the prior case. Whether or not that information suggests that Mr. Kassardjian lacks scruples in a general sense is however immaterial to the Tribunal's conclusion, which was that the Respondent did not violate the Applicant's terms of employment when he was terminated on the grounds of facts demonstrated to the Tribunal's satisfaction – and moreover by reference to the Applicant's own admissions. (Indeed, this accumulation of materials intended to disparage Mr. Kassardjian would, if anything, give credence to the proposition that kickbacks were part of Mr. Kassardjian's armamentarium.) The judgment makes it explicitly clear that the Tribunal did not in the least rely on Mr. Kassardjian's trustworthiness. Similarly, the apparent fact – if credence is to be given to a newspaper article – that Bruks and Associates acted as "local consultants to a survey of investment in Ghana" may be *new* in a literal sense, but in the absence of any connection to the investigator it is wholly implausible to use that fact as a foundation for the gratuitously calumnious assertion that the Bruks consultancy was a payoff for false testimony.

25. Apart from pointing out these irrelevancies – namely, Mr. Kassardjian's general business ethics and Mr. Bruks' consultancy assignment with the IFC – it suffices to say that whether the Applicant sought to repay Mr. Kassardjian with a check or a "direct deposit to Kassardjian's account," and whether the Applicant's role in appraising the project for which IFC financing had been obtained was limited due to his lack of expertise in "tourism," cannot possibly justify a reopening. The former simply would not matter, one way or the other. As to the latter, the Tribunal did indeed consider the Applicant's responsibilities in 1993-94. His contentions that the project was in fact not appraised by him, and that he had signed a decision memorandum written by another consultant, are certainly not new; he testified to that effect before the first judgment. In any event, the Applicant's submission of a subsequent e-mail and related documents from a Swiss hotel consultant explaining that the latter was hired to give advice as to Mr. Kassardjian's operations simply does not begin to justify the assertion that IFC officers had somehow sought to "shift blame to Applicant." In sum, nothing in the materials presented by the Applicant in support of his request, even if all of it were accurate, would cast him in a better – or even different – light.

26. In his Reply in the present proceedings, the Applicant submits yet another set of documents totaling 107 pages. The admissibility of these documents raises an issue of principle, because at this stage there is some difficulty with the proposition that they could qualify as the new facts which allegedly justify the request for reopening. It is however more practical to disregard this somewhat scholastic issue because an examination of these additional documents readily reveal them to add nothing to the Applicant's request. On the one hand, they confirm that the Applicant has won his case against Barclay's in the Court of Appeal (see paragraph 12 above). This is immaterial to the issue of the Applicant's misconduct in his employment at the IFC. On the other hand, they contain much additional paperwork generated in the course of the IFC's attempts to secure

repayment from Mr. Kassardjian and his company (see paragraph 16 above). But the Tribunal was quite aware of the IFC's problems with Mr. Kassardjian at the time of its judgment in *Kwakwa*; the Ghanaian legal proceedings may as the Applicant says "show the lengths to which Mr. Kassardjian will go in his effort to escape liability," but this changes nothing with respect to the Applicant's own established misconduct.

27. Finally, the Applicant argues that the IFC wrongfully withheld documents in the course of the first proceedings before the Tribunal. This contention was not part of his application, but introduced for the first time in the Reply, which concludes in boldface with the sentence: "Withholding of relevant evidence is sufficient in the Law to annul a decision and grant a rehearing." Without examining the validity or limitations of this proposition, it suffices to note that in any event it would not avail the Applicant. The allegedly withheld documents related to what the Applicant describes as IFC's "raging dispute with the person who was accusing its own loyal staff member." Once again the Applicant fails to understand that the gravamen of the well-founded complaint against him was proved by his own admissions, and in no way depended on the details of the IFC's difficulties with Mr. Kassardjian. It is at any rate quite implausible to think that Mr. Kassardjian could have imagined that the IFC would somehow forget about the unpaid loan if he revealed that he had paid a secret and improper commission to obtain it in the first place.

28. With respect to remedies, the Applicant's Reply suggests that in the event the Tribunal does not accede to the request for reopening the original case, it should annul its first judgment and grant him anonymity in order to avoid damage to his reputation. It appears that this curious proposal is meant as a type of an alternative plea. Its first branch is to be dismissed out of hand. A judgment is *res judicata*, and if anything is reinforced by a positive and conscious refusal not to grant a request for reopening. The second branch merits two observations. First, under Tribunal Rule 28, applicants may request anonymity *at the outset* of the proceedings; there is no statutory basis for petitioning for anonymity only after the outcome is known. Secondly, it would be unfortunate if applicants were tempted to engage in tactical calculations to the effect that their identity will be public knowledge only if they prevail, but shrouded in anonymity if they lose; such gamesmanship has no place in judicial proceedings.

Decision

The Tribunal hereby dismisses the application.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington, DC, 26 May 2006