

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 57  
(8 August 2003)**

**A. Maurice de Alwis  
v.  
Asian Development Bank**

**Robert A. Gorman, President  
Martti Koskenniemi, Vice-President  
Shinya Murase  
Flerida Ruth P. Romero  
Khaja Samdani**

## **The Applicant's Claim**

1. The Applicant claims that the decision by the Respondent of 25 May 2001 to recover rental subsidies paid to him in 1998-1999 and 1999-2000 as well as to forfeit his right to such subsidy for an additional three years (2000-2001, 2001-2002 and 2002-2003) on the grounds that the Applicant had not been entitled to such subsidies, constituted a breach of the Bank's relevant regulations. The Applicant seeks a reversal of that decision. In addition, he requests the Tribunal to award him "at least 500,000 USD" as damages for mental and other injury, a retroactive salary increase, an apology on the Bank's part plus reimbursement of costs and attorney's fees for this case.

## **Facts**

2. The Applicant joined the Bank as Agricultural Credit Specialist in November 1982. Currently, he works as Senior Financial Analyst (Level 5) in the Agriculture, Environment and Natural Resources Division of the Mekong Department ("MAKE").

3. Sometime in 1995-1996 the Applicant, who until then had lived in the Makati area of Manila, decided to look for a new property to rent for himself and his family. In 1996 he found a rather large condominium at Cleveland Towers in an area overlooking Manila Bay that he deemed suitable for this purpose. In cooperation with his wife and close relatives he set up for this purpose a corporation, YGC Investments ("YGC") to purchase this property. YGC was registered in the Commonwealth of the Bahamas on 7 May 1996. On 21 November, it became the owner of the condominium chosen by the Applicant at Cleveland Towers in Asiaworld City, Tambo, Parañaque at the price of 14,633,769.00 (approx. US\$557,400).

4. On 8 July 1997, the Applicant applied for rental subsidy with the Bank for the lease of the said property for his family. In support of his application, he produced documents showing that he had concluded a contract of lease with YGC for the period of 1 July 1997 to 30 June 2000 with an annual monthly rental of 110,000 (approx. US\$4,169) for the first, 120,000 (approx. US\$2,926) for the second and 140,000 (approx. US\$3,696) for the third year (the latter two sums in US dollars reflecting the intervening devaluation of the Peso).

5. After the expiry of the first year of the lease, however, the Applicant agreed to an increase of his monthly rental to 170,000 (approx. US\$4,397) for the period 1 July 1998 – 30 June 1999 and 1 July 1999 – 30 June 2000. The total amounts of annual rent for those years thus amounted to:

- i. 1997-1998 1,320,000 (=US\$50,030.32),
- ii. 1998-1999 2,040,000 (= US\$49,756.10) plus 255,000 as security deposit (total of 2,295,000), and
- iii. 1999-2000 2,040,000 (= US\$53,857.12) plus 255,000 as security deposit (total of 2,295,000).

During those years the Applicant received rental subsidy from the Bank as follows:

- i. 1997-1998 767,820 (=US\$29,101.73),
- ii. 1998-1999 1,056,180 (= US\$25,760.49), and
- iii. 1999-2000 1,088,400 (=US\$28,734.36).

In addition, as of 30 April 2000 he had received rental advance for the amount of US\$4,186.96. The total rental subsidy paid to the Applicant during the three years 1997-1999 thus amounted to US\$87,783.54. Of this sum, the contested decision by the Bank of 25 May 2001 seeks to recover the amounts paid in 1998 and 1999, that is to say US\$54,494.85 which, adjusted with interest amounts to US\$64,802.86.

6. In 1999, the Compensation and Benefits Division ("BPCB") of the Bank requested the Office of the General Auditor ("OGA") to carry out an investigation of the matter, especially in view of the high levels of rent involved. In November 1999, the General Auditor transmitted the resulting report to the Director, Budget, Personnel and Management Systems Department ("BPMSD") according to which the Applicant had acted on behalf of the YGC in signing, mortgaging and borrowing from the Philippine National Bank ("PNB") the sum of 9,620,000 (US\$370,000) for the purchase of the condominium at Cleveland Towers. The Condominium Certificate of Title identified the Applicant as "Director" of YGC. The mortgage document was signed by the Applicant as debtor and guarantor on behalf of YGC. The Applicant's wife signed the document as guarantor. The mortgage document identified the Applicant as "Managing Director" of YGC.

7. The investigation thus indicated the possibility of a substantial link between the owner of the condominium, YGC, and the Applicant. In particular, it raised the question of whether the rental subsidy paid to the Applicant had been in accordance with the Bank's regulations as provided under Administrative Order ("A.O.") No. 3.07, para. 2.3 (revised 1 July 1998). According to that provision:

Staff members are not eligible for housing assistance if they own residential property suitable for self accommodation within reasonable commuting distance from the Bank's Headquarters, whether such property is owned in their own name, in the name of the staff member's spouse or jointly by the staff members and his/her spouse.

8. Accordingly, on 19 November 1999, the Manager, BPCB, requested the Applicant to comment on the information that the property in which he lived was owned by YGC while the Applicant himself had been a shareholder and Director of the company. In his explanations in December 1999 and January 2000 the Applicant stated that together with his spouse he had "as a family member" only assisted in the purchase of the property but that they both had relinquished their shares in the company in January 1997. Nonetheless, the Company

requested the Applicant and his wife to continue the negotiation and to act as guarantors for the loan from PNB mentioned in paragraph 6 above.

9. In this connection, during the disciplinary procedure as well as in his written pleadings, the Applicant has produced evidence in order to demonstrate that

- i. neither he nor his spouse had been shareholders of YGC during the period of their lease;
- ii. he had made regular rental payments either to the YGC or to persons designated by the company; and that
- iii. his role as the representative of the YGC in purchasing the property, in concluding and guaranteeing the mortgage for the loan for this purpose, as well as in administering the loan had been merely to facilitate the operation of the YGC whose remaining shareholders (the Applicant's sister and nephew) was made difficult on account of their not being residents in the Philippines.

10. The General Auditor did not accept the Applicant's explanations. A Report by the Bank's Anticorruption Unit of 28 February 2000 concluded that the rental payments by the Applicant to the YGC had been "fictitious" and that the relationship between the YGC and the Applicant "had not been at arm's length" as required by the Bank's rental subsidy regulations, in particular Administrative Order No. 3.07. As a result, on 10 April 2000 disciplinary procedures were commenced against the Applicant by the Director, BPMSD, for breach of Administrative Order No. 2.02, para. 4.3 (as applicable in 1996 and 1997) which states that "Any staff member who seeks to engage in outside employment will submit his/her written request with the relevant particulars, through his/her Head of Department or Office and the Director, BPMSD to the President for approval," and Administrative Order No. 2.04, para. 2.1(a) which expressly lists "abuse or misuses of the Bank's benefits and allowances" as samples of unsatisfactory conduct/misconduct. Moreover, Administrative Order No. 2.04, para. 2.1(f) and 6.3 mention false statement, misrepresentation or fraud as specific examples of serious misconduct which may justify a staff member's dismissal.

11. In June 2000, the Applicant submitted a new application for rental subsidy for the period 1 July 2000 – 30 June 2001 for the monthly rental of 120,000 (approx. US\$2,477). The application was not, however, granted. Instead, it was set aside by the Respondent pending the course of the disciplinary process.

### **The Disciplinary Process**

12. During the disciplinary procedure, the Applicant provided more evidence regarding the payments received by him for the transfer of his shares in the company in January 1997 as well as regarding rental payments made by him. The latter payments did not match the amounts of the rent, however, and were made not only to the YGC but to different persons not all of whom were shareholders. During this process, it was also confirmed that the role of the Applicant had been central in receiving the mortgage from PNB for the purchase of the condominium. The loan application had been made by the Applicant and the financial information on the loan related solely to the Applicant himself. He was also identified as having "partially paid about USD 247,000 or 40% on the contract price of the property".

13. In October 2000, a Review Committee was set up to investigate the charges against the Applicant and to present its conclusions to the President. After written exchanges with the OGA and the Applicant, as well as a meeting with the Applicant on 18 April 2001, the Committee presented its Report to the President on 7 May 2001. In the Report, the Committee found there to be "insufficient evidence to conclude that [the Applicant] submitted documents containing fraudulent information to substantiate his claims for rental subsidy." The Committee noted that "renting from a company owned by close relatives was not prohibited under the version of Administrative Order No. 3.07 effective at the time rental subsidies were paid." In particular, it pointed out that "the evidence presented is insufficient to prove that [the Applicant] received any financial benefit from the rental scheme." On the other hand, the Committee also held that by agreeing to the rental increases in 1998 and 1999 while the original three-year lease agreement was still in force, and especially by doing this in a non-arm's-length transaction with a company owned by close relatives, the Applicant had failed to "exercise prudence and economy in the choice of housing, as required by paragraph 2 of A.O. No. 3.07." As a result, the Committee recommended that the Applicant should forfeit his entitlements for 1998/1999 and 1999/2000 and be "required to repay the entire rental subsidy for these years to the [Respondent]."

14. The President did not fully concur with the Committee. In his Decision of 25 May 2001, which is the object of the Application, he drew attention to the fact that YGC seemed to have been:

... specifically incorporated for the purpose of acquiring the property, and that [the Applicant] purchased on behalf of the YGC the property, which was subsequently rented by him. It is not the purpose of the rental subsidy scheme to provide assistance to staff members in cases such as the one of [the Applicant]. Moreover, while A.O. No. 3.07 did not specifically prohibit renting an apartment from close relatives, it was incumbent on [the Applicant] to inform BPMSD of his close involvement in the affairs of his family.

15. In this connection, the President drew attention to Administrative Order No. 2.02, para. 5 which is worded as follows:

It is not possible to set out an all inclusive or exhaustive code of conduct for the guidance of staff members. However, staff members are expected to use their good judgment to conform with the intent and spirit of this AO in all matters not specifically stated herein. Should any staff members have any doubt as regards their proper course of action in any manner related to this AO, it will be in their own interest to seek the advice of their Head of Department or Office of the Director, BPMSD.

16. On this basis the President concluded that the Applicant had:

committed unsatisfactory conduct/serious misconduct under Section 24 of the Staff regulations and the Administrative Order No 2.04 in abusing the rental subsidy scheme provided under Administrative Order No. 3.07.

As a consequence, the President accepted the Review Committee's recommendation to forfeit the rental subsidy for 1998/1999 and 1999/2000. In addition, however, he also decided, pursuant to Administrative Order No. 2.04, para. 4.2, to "remove the entitlement of [the Applicant] to rental subsidy for further three years, i.e. for the period from 2000/2001 to 2002/2003."

## **The Decision by the Appeals Committee**

17. On 2 July 2001, the Applicant filed an appeal against the above-mentioned decision by the President and the recommendation by the Review Committee. In endorsing the President's conclusion, the Appeals Committee drew attention to three aspects of this case:

- i. The Applicant's failure to indicate his relationship with the owner of the condominium when applying for rental subsidy in July 1997;
- ii. The Applicant's failure to supply "any strong evidence" that he had received payment for the transfer of his shares in YGC to his relatives, and that he had in fact made rental payments to the company thereafter; and
- iii. The Applicant's agreement to the amendment of lease so as to substantially increase the rental rate "with no reasonable grounds for doing so."

18. On this basis, the Appeals Committee on 3 May 2002 concluded as follows:

Given the requirement of A.O. No. 3.07 for staff to disclose information and practice prudence and economy, the Committee finds that the President's decision is consistent with ADB's procedures.

## **The Merits**

19. Administrative Order No. 3.07, as it stood at the time, disqualified from rental subsidy staff members who by themselves or through their spouses own residential property within reasonable commuting distance from the Bank. Although the property dealt with by this case was owned by a corporation, YGC, and not by the Applicant or his spouse, the Respondent claims that this arrangement was part of an "elaborate scheme" designed to use the Bank's rental subsidy in order to finance investment in the property in which the Applicant lived, that is to say, in order to "benefit from the policy in a manner not contemplated by it." Although, the Respondent further states, the Applicant may have pro forma divested himself of his shares in YGC, he continued to be decisively involved with it. This was shown in particular in the manner in which he had made all the mortgage payments for the loan the company had received from the PNB for the purchase of the apartment.

## **Piercing the Corporate Veil**

20. There is no doubt about the Applicant's substantial involvement in YGC. The company was set up for the purpose of purchasing the property in which the Applicant lives. The Applicant acted on behalf of the company in purchasing it, and in signing the loan agreement with PNB. He also became guarantor for the loan. Although the Applicant and his wife transferred their shares to the Applicant's sister and nephew who remained the sole shareholders in the company, most of the company's affairs continued to be taken charge of by the Applicant who continued to make mortgage payments in regard to the property. All this suggests that the company was set up as a means for the Applicant to make use of the Bank's rental subsidy policy by circumventing the condition of ownership laid down in Administrative Order No. 3.07.

21. However, Administrative Order No. 3.07 was formulated in an unambiguous manner. It could have covered the present situation by expressly excluding from rental subsidy staff members with some type of substantial involvement or control in an entity owning the property

where the staff member lives. But it did not. It was amended only in 2000 to cover a situation such as that of the Applicant's. The unamended provision cannot through interpretation be extended to cover cases which, on the face of it, it plainly does not cover. The contrary would mean to disregard the corporate form of the YGC and to hold the Applicant as the true owner of the property in its stead. The use of the corporate form to avoid liabilities and complications of personal ownership is part of the very rationale of corporate ownership. "Piercing the corporate veil" would go to the heart of the system of corporate ownership and cannot be lightly undertaken. In effect, on 22 June 2000 the Administrative Order No. 3.07 was revised so as to deal with this problem as follows:

A Staff member requesting rental subsidy for a residential property owned by one or more close relatives as defined in A.O. No 2.01 or owned by a company in which the staff members has a substantial financial interest, has an obligation to disclose such information. As a general rule, in these cases, the staff member will not be eligible for rental subsidy unless otherwise authorized by the Director, BPMSD.

22. The Respondent argues that even if the scheme devised by the Applicant may not have violated the express provisions of the unamended Administrative Order No. 3.07, it still was "at variance with the basic purpose of payment of rental subsidy." This may be so. This "basic purpose of payment of rental subsidy" was referred to in Powell, Decision No. 50, [2000], V ADBAT Reports 65, para. 23 as its "underlying policy" which was laid down in a memorandum of 1975 from the Director of Administration to all professional staff in connection with the first rental subsidy scheme. According to that policy:

The rental subsidy scheme provides assistance, on a selective basis, to professional staff members who are unavoidably paying an excessive portion of their salary in rent for suitable housing. It does not absolve professional staff members from responsibility for exercising normal prudence and care in the choice and cost of their housing, nor does it afford relief from excessive housing costs without some sacrifice from the professional staff. The assistance provided herein is a temporary measure effective for a period of one year.

The Respondent is certainly authorized and perhaps required to take account of that purpose when exercising its discretion to grant or withhold rental subsidy. But the purpose cannot be invoked so as to limit the scope of the express wording of Administrative Order No. 3.07 so that when a staff member has received a rental subsidy, he could nonetheless be subjected to disciplinary procedures for violating that provision. It would have been prudent for the Bank, in case it wanted to exclude cases such as that of the Applicant's from the rental subsidy scheme, to provide for this expressly, as indeed it did by the amendment of 22 June 2000 to Administrative Order No. 3.07.

### **Failure to exercise Prudence and Economy**

23. The Respondent also argues that the Applicant had failed "to exercise prudence and economy in [his] choice of housing" as required by Administrative Order No. 3.07, para. 2.1. Again, excessive rental rate is clearly a basis on which the Respondent is entitled to deny in advance requests for rental subsidy. But it does not by itself constitute a ground for the exercise of retrospective disciplinary action against a staff member. The rental amounts were disclosed to the Respondent as the Applicant sought rental subsidy first in 1997 and then in 1998 and 1999 respectively. While it is hard to see other reason for the Applicant's agreement to the rental increases in 1998 and 1999 than his wish to avoid a loss to the YGC – in which he had a

substantial interest – that would have been caused by the devaluation of the Philippine Peso against the US dollar, this matter should have been dealt with as the subsidy was granted, and not through a retrospective disciplinary process. Moreover, the information provided by the parties regarding the costs of comparable housing in Manila are insufficient to determine that the rent paid by the Applicant would have been out of proportion.

24. There is a second aspect to this, however. The Respondent has argued that there was no reason for the Applicant to agree, after the expiry of the first year of the lease, to a reopening of the lease agreement. This was done in the sole interest of the owner of the property while the original agreement was still in force. The Tribunal considers that by agreeing to this maneuver, and especially by doing this without consulting the Bank, the Applicant had, to some degree, failed to "exercise prudence and economy" and to take account of the Bank's legitimate interest.

### **Failure to inform the Respondent of the substantial interest in the company**

25. Among the grounds for the disciplinary action taken against the Applicant the Respondent states that "it was incumbent on [the Applicant] to inform BPMSD of his close involvement in the affairs of his family." The basis for such duty of information was, according to the Respondent, para. 5 of Administrative Order No. 2.02 which states:

It is not possible to set out an all inclusive or exhaustive code of conduct for the guidance of staff members. However, staff members are expected to use their good judgment to conform with the intent and spirit of this AO in all matters not specifically stated herein. Should any staff members have any doubt as regards their proper course of action in any manner related to this AO, it will be in their own interest to seek the advice of their Head of Department or Office of the Director, BPMSD.

But if it is the case that mere "involvement in the affairs" of one's family members, including a company owned within the family, does not count as a basis for exclusion from the Bank's rental subsidy scheme, as it did not prior to the June 2000 amendment of Administrative Order No. 3.07, then failure to provide such information cannot be regarded as a breach of the Bank's regulations. It may be the case that, as noted by the Respondent at various stages of the process, that had the information been revealed at the time the Applicant applied for the rental subsidy, the Bank might not have deemed him eligible for the subsidy. The point, however, is again that failure to provide this type of information cannot be seen as a breach of the Bank's regulations and thus as grounds for a disciplinary process.

### **Misleading the Respondent in regard to rental payments**

26. The Respondent also maintains that the Applicant has misled the Bank by submitting false information concerning the rental payments that he had allegedly made to the YGC in 1997, 1998 and 1999. Although, the Respondent claims, the Applicant had each year produced receipts that he had paid the appropriate rental advance, he had been unable to provide bank statements, copies of checks or other evidence to the effect that such payments had actually been made. The receipts provided on behalf of the YGC did not, in fact, correspond to any transfers of funds made by him. The explanations and evidence produced by the Applicant throughout the disciplinary process had been unclear and partly contradictory. The evidence did not match the receipts and many of the alleged payments were to relatives, some of whom were not even shareholders.

27. The Tribunal observes, as it has done previously, that it is "a pre-condition to the payment of rental subsidy that a staff member should have actually paid rent for his housing" and that the Bank "has a 'duty of caution' when it examines the evidence put forward by a staff member as the basis for a claim of entitlement" [Powell, Decision No. 50 [2000], V ADBAT Reports, 66, 64, paras. 23 and 19]. In case reasonable doubt emerges as to the correctness of the statements made by a staff member when applying for a benefit, it is incumbent on the staff member to substantiate the basis for his claim. The Applicant's explanations regarding his alleged rental payments have been throughout unclear and contradictory. There is no indication that the transfers of funds to which he refers as rental payments (and which do not match with amounts of rent due) were in fact made for this purpose instead of in relation to some of the other investment schemes in which the Applicant had been involved with his family. It would have been prudent, to say the least, for the Applicant to identify clearly each payment made by him that he then used as a basis for claiming a benefit from the Respondent. Even on the Applicant's own explanations, the payments were made at irregular intervals, to a disparate number of persons, and did not once match the amounts of rent due.

### **Due process**

28. The Applicant also makes a number of claims to the effect that the Respondent violated due process. He contends in particular that the Respondent failed to inform the Applicant of the nature of the charges against him, that it disregarded the evidence produced by the Applicant, that it applied the Bank's regulations retroactively, that it prosecuted him maliciously and failed to respect the confidentiality of the case. Many of these claims have to do with weighing the evidence against the Applicant and do not raise the issue of due process. Most of these claims remain unsubstantiated and may therefore be dismissed. The Tribunal draws, however, attention to two of them.

29. First, since September 2001, the Bank has been deducting the monthly sum of US\$2,000 from the Applicant's salary and has informed the Applicant that it will be doing this until his accountability (US\$64,802.86) has been met. The Applicant claims that this has been in violation of Administrative Order No. 3.07 of 16 March 1999, Appendix 3, para. 9 according to which "staff members' total payroll deductions, including those for the HPL [Housing Purchase Loan] and the multi-purpose loan, must not exceed 70 percent of such staff members' gross salary." It appears from the record that the deductions from his salary based on his loan agreements with the Bank, together with the monthly deduction of US\$2,000, did sometimes exceed seventy percent. At other times, however, the deductions remained within the permitted limit.

30. Second, the Applicant also makes the point that the Bank had failed to deal with his case as speedily as it should have. In particular, it took seven months for the Review Committee and more than 10 months for the Appeals Committee to consider his case. Administrative Order No. 2.04, para. 9.3(c) provides that the Review Committee "shall make every effort to provide its advice to the authorized officer within four weeks after the case has been submitted to it", while Administrative Order No. 2.06, para. 15 provides that the Appeals Committee "shall make every effort" to submit its report to the President "within 90 calendar days from the date upon which formal appeal proceedings commence." The Respondent has acknowledged these facts but has asserted that such lengthy periods followed from the need to give the Applicant time to prepare his responses, to receive information from abroad relevant for clearing the question of the ownership of the property in which the Applicant lives, and from difficulties in scheduling meetings due to travel.



31. The Tribunal notes that both of these contentions have some merit. The Applicant has been inconvenienced by the occasional excesses in the deductions made by the Respondent from the Applicant's salary. The periods of consideration of his case both in the Review Committee and in the Appeals Committee significantly exceeded the projected maximum periods provided for in Administrative Orders Nos. 2.04 and 2.06. The Respondent's explanations as to why they did so are not fully acceptable.

### **Conclusion**

32. It is a precondition of granting rental subsidy that a staff member has actually paid rent. As pointed out in paragraphs 26-27 above, the Applicant has been unable to demonstrate that this has in fact taken place in this case. Therefore, the Tribunal holds that the Respondent acted within its rights when it made the decision to recover the rental subsidies paid to the Applicant in 1998 and 1999. As far as the forfeiture of the right to subsidy in 2000, 2001 and 2002 is concerned, the Tribunal notes that the Respondent's original justification that this was a penalty for the development of a "scheme" to circumvent the Bank's rental policy cannot be upheld. In fact, renting a property from a company owned by certain close relatives did not violate the Bank's rules at the time. However, the Applicant's behavior has manifested a certain neglect of prudence and economy. It did so when the Applicant sought to receive subsidy for payments that he had never made, as well as when he agreed to the increase of his rent during the time of validity of his existing contract. For these reasons, the Tribunal deems it justified that the Applicant was denied the right to subsidy in 2000, 2001 and 2002. However, the Tribunal does not purport to rule on any other claims for subsidy that the Applicant might make for any other period.

33. On the other hand, aspects of the Respondent's behavior, described in paragraphs 29-30 above, constituted a violation of due process and caused some actual inconvenience to the Applicant, for which he should be compensated.

### **Decision**

For these reasons, the Tribunal unanimously decides:

- i. to uphold the decision by the Respondent to recover the amounts of rental subsidy paid to the Applicant in 1998 and 1999;
- ii. to uphold the forfeiture of the Applicant's right to subsidy in the years 2000, 2001, and 2002;
- iii. to award the Applicant compensation in the amount of US\$4,000; and
- iv. to dismiss all of the Applicant's other claims.