

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 130**

Athukorala

v.

13 October 2023

Asian Development Bank

**Chris de Cooker, *President***  
**Raul C. Pangalangan, *Vice President***  
**Catherine F. Meier**  
**John Raymond Murphy**  
**Teresa Maria Da Silva Bravo**

1. The Applicant has filed an Application (“the Application”) in terms of Article II of the Statute of the Asian Development Bank Administrative Tribunal (“the Tribunal”) read with Rule 6 of the ADB Administrative Tribunal's Rules of Procedure challenging the decision of the Administration Committee of the Staff Retirement Plan (“the SRP Administration Committee”) of 16 December 2020 rejecting his request to change the payment currencies of his pension benefit from 20% USD and 80% LKR (Sri Lankan Rupees) to 100% USD.
2. The Applicant requests the Tribunal to make orders directing: i) the annulment of the provision in the Guidelines for Change in Currency of Pension Payments adopted by the SRP Administration Committee in 1998 (“the Guidelines”) requiring physical presence in a new country for at least one year as a precondition to changing a currency election; ii) the SRP Administration Committee to convert 80% of his pension paid in LKR to USD; iii) the SRP Administration Committee and the Retirement Benefits and Investment Unit (“the BPOD-RIU”) of the Asian Development Bank (“the ADB”, “the Bank”, or “the Respondent”) to pay him USD 500,000 as compensation for unfairly imposing a restriction preventing him from moving to Manila and not taking timely decisions.
3. The Respondent contends that the decision to deny the Applicant’s request to change his currency election was taken on a reasonable and observable basis and was in accordance

with the Rules of the Staff Retirement Plan (“the SRP Rules”). It accordingly requests the Tribunal to dismiss the Application and to deny the relief sought by the Applicant.

## **I. THE FACTS**

4. The Applicant commenced employment with the Bank on 6 April 2001 and was a participant in the Staff Retirement Plan in accordance with Article 2 of the SRP Rules. The Applicant retired from the Bank on 17 December 2014, shortly after he reached the normal retirement age of 60. In accordance with Section 3.3 of the SRP Rules he was entitled to receive a late retirement pension.

5. On 3 September 2014, the Applicant specified in Payment Instructions relating to his pension benefits that he elected to: i) commute 40% of this pension benefit into a lump sum benefit; ii) receive the commuted lump sum portion of his pension in USD; and iii) receive 80% of the non-commuted portion of his pension in LKR and the remaining 20% in USD. The Applicant’s election was in accordance with Section 3.8 and Section 5.3(a) of the SRP Rules. His request was approved by the SRP Administration Committee on 21 November 2014. The Applicant received USD 301,477.50 as a commuted lump sum and a remaining pension for life in an amount then equivalent to USD 37,637.64 per annum.

6. The Payment Instructions signed by the Applicant on 3 September 2014 stipulates that the election as indicated “shall become irrevocable 90 days after commencement of the monthly pension payment”. The Applicant’s monthly pension commenced on 18 December 2014 and from that point forward he received 20% of his pension in USD and 80% of his pension in LKR in accordance with his Payment Instructions.

7. On 10 July 2020, the Applicant addressed the following e-mail to the BPOD-RIU:

“You may have already heard about the situation in Sri Lanka. Sri Lanka is undergoing a severe economic hardship and we are unable to get basic things needed for the day-to-day life... Given the situation, we have decided to move to Manila as our base. Both I and my wife are holders of retiree visas issued by the Philippines and hence we will not face any visa issues.

We already have tickets to visit Australia in a couple of weeks. We will first go to Australia and spend little time with our daughter and come to Manila by mid-September.

In my case, I have opted that a major part of my pension be given to me in Sri Lankan rupees. When we move out of Sri Lanka and change our base to Manila, I will not be able to get my pension from a Sri Lankan bank. Hence, I am requesting the pension division to change my pension option. Please credit all my pension from now onwards to my U.S. dollar account...in... Manila. I do not know what other information or documents need to process this change. If you need any further information please let me know.”

8. On 18 July 2022, the BPOD-RIU replied to the Applicant as follows:

“Please be advised that under the Staff Retirement Plan, the currency election becomes irrevocable 90 days after the pension commencement date. You may only request for change in currency election if you had a change in permanent place of residence. We are aware of your situation, and we will refer this to our approving authorities. As this may take a while, please plan accordingly.

Meantime, we are awaiting confirmation from [the Applicant’s bank] that they will accept LKR remittance with auto conversion to USD. If this is confirmed, let me know if we will proceed in remitting your LKR pension to your USD account. As it is already payroll’s cut-off, please advise on how you wish us to proceed. Otherwise, we will not change anything on your current pension payment instructions.”

9. The Applicant replied on the same day advising the BPOD-RIU that it was unlikely that his bank in Manila would accept LKR deposits and accordingly instructed the RIU to continue remitting his pension payment to his bank account in Sri Lanka.

10. On 26 July 2022, the BPOD-RIU addressed a further e-mail to the Applicant in which it stated:

“We have discussed this internally with approving authorities within BPOD-RIU. We regret to inform you that the SRP provisions and corresponding guidelines do not allow the change in the currency option unless there has been residence of at least one year in the new place of permanent residence.”

11. The provisions referred to by the BPOD-RIU are Sections 5.2 and 5.3 of the SRP Rules as well as Paragraph 1 of the Guidelines. They provide that all payments from the SRP to a former participant shall be made in the “Normal Payment Currency” being the currency in

which the salary was paid but that a participant may elect to receive all or a portion of the pension in his or her currency of permanent residence. The provisions also allow the SRP Administration Committee to consent to a change of the currency of payment when the former participant changes his or her country of permanent residence and provides proof of an intention to live permanently or indefinitely in the new country and to abandon his or her previous place of residence.

12. The Applicant immediately replied to the e-mail of the BPOD-RIU of 26 July 2022 as follows:

“Thanks for the e-mail. To whom I should appeal on this (*sic*). You indicate that we should have one year before changing currencies. Where is it written? Even if it is written how do someone expect a pensioner to survive one year without a pension at the new location. I would like to take this up when i get to Manila. Please let me know with whom I should take this up. Same time can you please let me know whether there was any precedent on this rule or is this the first time they intend to implement it.”

13. On 4 August 2022, the Applicant again wrote to the BPOD-RIU appealing against the decision to deny his request to change his currency election to 100% USD. In relevant part his letter reads as follows:

“In response to my request, the Pension Unit informed me that I need to live one year at the new location before you change the pension currency. I was also told that I should find a bank which will accept Sri Lanka rupees in Manila. As you may know this is an impossible task. Banks in Manila will not accept Sri Lanka rupees. The condition that the pension unit communicated to me is not practical. How am I going to live one year without a pension? I do not have substantial savings to live one year without my pension.

At the time of retirement, I was told that we can change the pension currency unit only once provided that we change the residence country. There was no instruction to live one year before the currency change request was made.

I am appealing against the Pension Unit’s decision on the following grounds:

1. At the time of the retirement, we were not told that we should live one year in the country of residence to qualify for the currency change.
2. Pension Unit’s decision to not pay my pension by using the new currency unit, till I live one year at the new location is unfair and unjust. If I continue to get my pension in Sri Lanka rupees, I will not be able to move

out of Sri Lanka at all. This means ADB is forcing me to live in a place where I have to undergo a lot of economic hardships.

Therefore, I am requesting you to reconsider your decision and allow me to convert my pension to USD so that I can move to Manila. I intend to be in Manila by the second week of September.”

14. On 9 September 2022, the Respondent provided the Applicant with an update on the status of his appeal. He was told that his appeal was being prepared for submission to the SRP Administration Committee. He was informed that the process could take from one to two months or even several months to process but that efforts would be made to get back to him sooner.

15. After ongoing correspondence, the Secretary of the SRP Administration Committee, on 16 December 2022, issued a memorandum containing the decision of the SRP Administration Committee, which was transmitted to the Applicant on 22 December 2022. In relevant part the memorandum reads:

“The SRP is administered strictly in accordance with the SRP legal document. The irrevocability of pension election is intended to maintain the actuarial soundness of the Plan and protect the solvency of the Fund. Hence, a change in currency election is only accommodated within the relevant SRP provisions. Specifically:

- (i) The Staff Retirement Plan (SRP) provides that a Retired Participant may, not later than 90 days after the date of entitlement to the Pension, elect to receive all or a portion of the Pension in the currency of the country of permanent residence, as recognised by ADB (Section 5.3(a)). In your case, the date of entitlement to the Pension was 18 December 2014 when your pension commenced.
- (ii) The SRP also provides that a Retired Participant may, subject to the consent of the AC, elect to receive all or a portion of the Pension in the currency of such person’s country of permanence residence other than the country of permanent residence as recognised by ADB (Section 5.3(b)).

Per rules established to implement the above provision, the criteria for payment of benefits in the currency of the country in which a staff member takes up new residence are: (i) presentation of proof of physical presence in the new country for at least one year; and (ii) submission of proof of intention to live permanently or indefinitely in the new country and to abandon the previous place of residence. These guidelines have been consistently applied.

The AC noted that you had neither taken up residence in the Philippines for at least one year, nor have you communicated your intention to live permanently or indefinitely in the Philippines and abandon Sri Lanka as your place of permanent residence. Moreover, your request was a change in pension currency to U.S. Dollar and not to Philippine Peso. As such, this request for a change in currency election cannot be supported under Section 5.3(b).

- (iii) On your claim that you were not informed of the requirement of physical presence in the new country for at least one year: Section 5.3(b) of the SRP provides that a request for payment in another currency is subject to the approval of the AC and requires submission of required documents. In the Frequently Asked Questions in the BPMSD intranet, staff are advised to contact the pension unit for the required documentation.

Accordingly, after careful review of available information, the AC has decided to deny your request to change your currency election from 20% USD-80% LKR to 100% USD.”

16. During the course of January 2023, the Respondent sent additional correspondence to the Applicant reiterating its decision of 16 December 2022 and providing additional documentation in support of it.

17. On 9 March 2023, the Applicant filed the Application in terms of Article II of the Statute requesting the Tribunal to: i) annul the requirement of one year's residence as required by the Guidelines; ii) direct the SRP Administration Committee to convert his currency election to 100% USD and iii) order the payment of damages of USD 500,000 for the alleged unfair restriction on his physical movements.

## **II. SUMMARY OF THE PARTIES' CONTENTIONS**

### **The Applicant's Contentions**

18. The Applicant submits that the requirement of Section 5.3(b), read with the Guidelines, for a retired participant to prove physical presence in a new country for one year as proof of a change in permanent residence, is an unreasonable restriction on his fundamental right to freedom of movement and that the requirement should be annulled for that reason.

19. The Applicant further submits that the failure by the SRP Administration Committee to grant a change in currency election was unreasonable in that he was not properly informed of his entitlements and that as a consequence had suffered significant prejudice.

20. The Applicant maintains that he is entitled to compensation for the harm suffered on account of the evident hardship.

### **The Respondent's Contentions**

21. The Respondent submits that since the Applicant did not request a change in his currency election to PHP (Philippine Pesos), the currency of his alleged new country of permanent residence, the Philippines, the SRP Administration Committee lacked authority to grant his request for a change in currency election. The discretion of the SRP Administration Committee under Section 5.3(b) is limited to granting a change in currency election to the currency of the new country of permanent residence. The SRP Administration Committee accordingly had no legal authority to change the Applicant's currency election to USD.

22. The Respondent further contends that the Applicant failed to meet the evidentiary requirement of showing that he had changed his permanent residence to the Philippines. In this regard, he failed to submit proof of intention to live permanently or indefinitely in the Philippines and to demonstrate a clear intention to abandon his residence in Sri Lanka. Therefore, the material conditions precedent to the SRP Administration Committee exercising its discretion to consent to the change in currency election were not met.

23. The Respondent argues that the Guidelines do not in any way impede or affect the Applicant's right to travel freely or to re-establish his permanent residence elsewhere.

24. The Respondent also submits that the Applicant has failed to prove any wrongful conduct on the part of the SRP Administration Committee that caused him harm entitling him to compensation in any amount.

25. The Respondent accordingly requests the Tribunal to dismiss the application and to deny the Applicant the relief he seeks.

### III. FINDINGS

#### Preliminary Matters

##### *a. Oral Hearings*

26. Rule 11, paragraph 1, of the Tribunal's Rules of Procedure provides:

“Oral proceedings, including the presentation and examination of witnesses or experts, may be held only if the Tribunal so decides, on its own motion or at the request of a party filed up to the date fixed for filing the rejoinder.”

27. The Tribunal notes that neither party has requested an oral hearing. As the submissions by the parties provide a sufficient basis for consideration of the issue, the Tribunal considers that oral proceedings are not warranted.

##### *b. En banc*

28. In light of the fact that the Tribunal met *en banc* to consider another case in the same session dealing with related issues, and in the interests of consistency it decides, in accordance with Article V (5) of the Statute, to consider this Application *en banc*.

#### *Legal Framework*

29. Section 5.2 of the SRP Rules provides that:

“Except as otherwise expressly provided, all payments from the Fund to a former Participant shall be made in the Normal Payment Currency.”

30. The Normal Payment Currency is defined in Section 1.1(m) of the SRP Rules to mean:

“... the currency in which payments from the Fund to a former Participant, or to a person entitled to such payments through a former Participant, shall be made, which shall be the currency in which the salary of such former Participant was paid, as provided in section 5.2.”



31. Section 5.3(a) of the SRP Rules provides that:

“A Participant or Retired Participant may, by written and witnessed notice to the Administration Committee not later than 90 days after the date of entitlement to the Pension or lump sum, elect to receive all or a portion of the Pension or lump sum in the currency of the country of permanent residence, as recognized by ADB.”

### **The Merits**

32. Section 5.2 of the SRP Rules provides that “[e]xcept as otherwise expressly provided, all payments from the Fund to a former participant shall be made in the Normal Payment Currency.” The Normal Payment Currency is defined in Section 1.1(m) to mean “the currency in which the salary of such former participant was paid ....” Section 5.3(a) grants participants an election, to be exercised at the time of retirement, to receive all or a portion of their pension in the currency of permanent residence as recognized by the Bank, provided they do so not later than 90 days after the date of the entitlement to the pension. The Applicant’s Normal Payment Currency was USD. However, as discussed, he exercised the election afforded to him in terms of Section 5.2 to receive payment in 20% USD and 80% LKR.

33. Once a participant elects at retirement to receive all or a portion of the pension in the currency of permanent residence, rather than in the Normal Payment Currency, that election will ordinarily be irrevocable. However, the SRP provides for one instance in which that election may be changed. Section 5.3(b) provides:

“A Participant, Retired Participant or surviving Spouse may, (i) by written and witnessed notice, and submission of the required documents to the Administration Committee; and (ii) with the subsequent consent of the Administration Committee, elect to receive all or a portion of the Pension or lump sum in the currency of such person’s country of permanent residence other than the country referred to in subsection (a)... of this Section.”

### **The Tribunal’s Assessment and Findings**

34. The purpose of Section 5.3(b) is to grant a measure of latitude to Retired Participants who change their permanent residence subsequent to retirement. Section 5.3(b) thus contemplates the possibility of a Retired Participant, such as the Applicant, changing his or her

country of permanent residence, and, with the consent of the SRP Administration Committee, to change the currency election which the Retired Participant exercised at the time of retirement and to authorize payment in the currency of the new place of permanent residence.

35. It is important to note that under Section 5.3(b) the authority of the SRP Administration Committee can only be to consent to a change to “the currency of such person’s country of permanent residence other than the country referred to in subsection (a)”; in other words, the currency of the new place of permanent residence.

36. The Applicant freely exercised his election on retirement to receive 80% of his pension payments in LKR rather than in the Normal Payment Currency, which was USD. Moreover, the Payment Instructions clearly indicated that the election would become irrevocable 90 days after the commencement of his monthly pension payment. Thus, the only provision permitting a change in currency election was that in Section 5.3(b) which allows a post-retirement change of the currency election but only to the currency of the country of the newly acquired permanent residence.

37. In the relevant communications with the BPOD-RIU, the Applicant consistently indicated that he intended to relocate to the Philippines and requested 80 percent of his pension paid in LKR be converted to USD. He did not request a change in his currency election to PHP. Accordingly, the SRP Administration Committee had no legal authority to accede to his request to change his currency election to 100% USD. The principle of legality requires that the exercise of power must be authorized by law. The SRP Administration Committee may exercise no power and perform no function beyond that conferred upon it by law. It accordingly could not have consented to the Applicant’s request to “convert [his] 80 percent of the pension paid in Sri Lanka rupees to USD” because the applicable internal law, Section 5.3(b), would permit that change only to a currency of the new country of residence. In the premises, the Applicant has not made an election in terms of Section 5.3(b)(ii).

38. In light of the above finding the other issues raised by the Applicant have become moot and therefore need not be decided upon.

**DECISION**

For these reasons, the Tribunal unanimously decides to dismiss the Application and all claims for relief.

Chris de Cooker

/s/

President

Raul C. Pangalangan

John Raymond Murphy

/s/

Vice-President

/s/

Member

Catherine F. Meier

Teresa Maria Da Silva Bravo

/s/

Member

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

In Manila, 13 October 2023