Judgement No. 273

(Original: French)

Case No. 257: Mortished *Against:* **The Secretary-General of the United Nations**

Request of a former staff member for recognition of his entitlement to a repatriation grant without the need to produce evidence of relocation.

Refusal to pay the repatriation grant to the Applicant pursuant to General Assembly resolution 34/165 and Administrative Instruction ST/AI/269.

Basis of the legal obligations of the United Nations towards the Applicant.—Contract.—Possibility that the United Nations may assume supplementary obligations towards a staff member.—Incorporation of documents of general application into the contract.—Authorities competent to draft the Staff Regulations and Staff Rules.—Power of the Secretary-General to establish and amend the Staff Rules within the limits laid down by the Staff Regulations.—Staff Regulation 12.1 and Staff Rule 112.2 (a).—Duty of the Secretary-General and of the General Assembly to respect the acquired rights of staff members.—Question whether the Applicant has rights on which he may rely as regards the repatriation grant.—Special obligations assumed by the United Nations at the time of appointment of the Applicant.—Origin and evolution of the repatriation grant.—Staff Regulation 9.4 and annex IV to the Staff Regulations.—Rule-making authority of the Secretary-General.—Consideration of the question by the General Assembly and by ICSC.—Terms of entitlement to the repatriation grant established by ICSC at the request of the General Assembly.—Their inclusion in Administrative Instruction ST/AI/262 with effect from 1 July 1979 and consequential amendments made in Staff Rule 109.5.—Entitlement of the Applicant to the amount of the repatriation grant without the need, as regards his period of service prior to 1 July 1979, to produce evidence of relocation.—Question whether the entitlement can have been effaced retroactively by the Secretary-General's deletion of subparagraph (f) of Staff Rule 109.5 in pursuance of General Assembly resolution 34/165.—Purport of that resolution.—Judicial precedents established by the Tribunal with regard to acquired rights.—Failure of the Respondent to recognize an acquired right of the Applicant.—Assessment of the injury sustained by the Applicant at the amount of the repatriation grant of which payment was refused.—Award to the Applicant of a sum equal to the amount of the grant.—Since there has been no untoward delay in settling the dispute, request for payment of interest is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Endre Ustor, Vice-President; Mr. Francisco A. Forteza, Vice-President; Mr. Herbert Reis, alternate member;

Whereas at the request of Ivor Peter Mortished, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended successively to 30 September 1980 and 10 October 1980 the time-limit for the submission of an application to the Tribunal;

Whereas, on 10 October 1980, the Applicant filed an application in which he requested the Tribunal:

> "A. To *adjudge and declare* that the scheme and detailed conditions and definitions established by the Secretary-General pursuant to Staff Regulation 9.4 and Annex IV to the Staff Regulations for the payment of repatriation grants entitled the Applicant to the payment of such a grant without the necessity for the production of evidence of relocation;

"B. To *adjudge and declare* that the Applicant's entitlement to the payment of a repatriation grant amounted to an acquired right;

"C. To *adjudge and declare* that this entitlement could not be retroactively effaced by subsequent amendments to the Staff Regulations and Rules; and

"D. In consequence of the foregoing to *order* the Secretary-General to pay to him his entitlement to a repatriation grant in accordance with Annex IV to the Staff Regulations."

Whereas the Applicant requested oral proceedings on 25 February 1981;

Whereas the Respondent filed his answer on 5 March 1981;

Whereas the Applicant filed written observations on 10 April 1981;

Whereas the Tribunal heard the parties at a public session held on 28 April 1981;

Whereas additional documents were filed by the Applicant and the Respondent on 28 April 1981;

Whereas additional information was submitted by the Respondent on 28 and 29 April 1981 and by the Applicant on 29 April 1981;

Whereas the additional information submitted by the Applicant contained a request for payment of $1,206.45 as interest for one year on the repatriation grant evaluated at $24,129;

Whereas additional information and documents were submitted by the Respondent on 1 May 1981;

Whereas the facts in the case are as follows:

The Applicant, an Irish national, entered the service of the International Civil Aviation Organization (ICAO) on 14 February 1949. In 1958 he was transferred to the United Nations and received a permanent appointment as a Translator/Précis-writer. On 1 April 1967 he was transferred from Headquarters to the United Nations Office at Geneva.

By a memorandum dated 6 December 1979 the Applicant, who had become Deputy Chief of the English Translation Section and was due to retire on 30 April 1980, informed the Chief of the Personnel Division of the Geneva Office that he envisaged a very serious problem in connexion with his retirement in the light of recent reports that action was being recommended to the General Assembly with a view to amending the terms of entitlement to the repatriation grant set out in Administrative Instruction ST/AI/262 of 23 April 1979 and particularly in its paragraph 2 (*d*). This Administrative Instruction read as follows:

"1. As announced in information circular ST/IC/79/5 of 22 January 1979, the General Assembly decided, in its resolution 33/119 of 19 December 1978, that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the International Civil Service Commission.

"2. Pursuant to that decision, the Commission has established the following modifications to the terms of entitlement to the repatriation grant:

" '(*a*) With effect from 1 July 1979 payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station;

" '(*b*) Evidence of relocation shall be constituted by documentary evidence

that the former staff member has established residence in a country other than that of the last duty station, such as a declaration by the immigration, police, tax or other authorities of the country, by the senior United Nations official in the country or by the former staff member's new employer;

" '(*c*) Payment of the grant may be claimed by the former staff member within two years of the effective date of separation;

" '(*d*) Notwithstanding paragraph (*a*) above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation; the exercise of any additional entitlement accrued after that date shall, however, be subject to the conditions set out in paragraphs (*a*) to (*c*) above.'

"3. Effective 1 July 1979, the above-cited provisions shall govern the conditions for payment of repatriation grant to United Nations staff members under annex IV to the Staff Regulations. Suitable amendments to the Staff Rules will be made in due course."

In a further memorandum to the Chief of the Personnel Division, dated 19 December 1979, the Applicant stated more specifically:

" . . .

"3. Paragraph 2 (*d*) of the Administrative Instruction informed the staff of the intention progressively to phase out a retirement benefit entitlement which has been in existence for many decades and on which a great number of staff members have long counted, throughout their career, to ease the difficulty of retirement, especially in view of the inadequacy and eroding value of United Nations pensions. No justification or reason for the termination of this entitlement was given to staff, but, if the action was to be taken, this phasing out, at least, appeared to be a normal and reasonable measure.

"4. As a staff member whose appointment is scheduled to terminate within the next few months, I have within the last few days received, orally and in writing, from the Personnel Division, UNOG, a number of prognostications, intimations and suggestions relating to possible action by the General Assembly which might have the effect of abruptly terminating, with effect from 1 January 1980, the entitlement referred to in paragraph 3 above. However, as of this date (five working days before 1 January 1980), I have not been informed of any official decision affecting the above-mentioned entitlement or of the cancellation or amendment of Administrative Instruction ST/AI/262. Consequently, in the matter of my entitlements at the end of my appointment, I consider, and shall continue to consider, the United Nations, as my employer, to be bound by the terms of my letter of appointment signed on behalf of the Secretary-General of the United Nations on 5 August 1958."

On 21 December 1979 Administrative Instruction ST/AI/269, amending Administrative Instruction ST/AI/262 with effect from 1 January 1980, was issued; it read:

"1. By information circular ST/IC/79/84 of 14 December 1979, members of the staff were informed of the decision that the General Assembly was expected to take on the question of the repatriation grant. At its 106th plenary meeting held on

17 December 1979, the Assembly took that decision by the adoption of its resolution 34/165.

"2. Accordingly, the terms of entitlement to the repatriation grant set out in administrative instruction ST/AI/262 of 23 April 1979 are amended by the substitution of a new subparagraph (*d*) and, as so amended with effect from 1 January 1980, are as follows:

"(*a*) Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station;

"(*b*) Evidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station, such as a declaration by the immigration, police, tax or other authorities of the country, by the senior United Nations official in the country or by the former staff member's new employer;

"(*c*) Payment of the grant may be claimed by the former staff member within two years of the effective date of separation;

"(*d*) No staff member shall be entitled to any part of the repatriation grant unless evidence of relocation of residence away from the country of the last duty station is provided.

"3. Suitable amendments to the Staff Rules will be made in due course."

On the same day the Applicant was advised accordingly and was informed that the Personnel Division was authorized to waive the three months' notice requirement and to accept resignations with immediate effect until 31 December 1979. On 18 February 1980 he sent a letter of appeal to the Joint Appeals Board and requested the Secretary-General's agreement for direct submission of the case to the Tribunal. On 11 April 1980 the Applicant received, as part of the formalities of retirement, a Personnel Payroll Clearance Action form indicating that he was entitled to a repatriation grant for the period from 14 February 1949 through 30 April 1980 "subject to evidence of relocation". Following an exchange of memorandums between the Applicant and the Personnel Division from which it appears that the Respondent has refused to pay the repatriation grant without evidence of relocation and that the Applicant has refused to supply such evidence, the Applicant was notified on 1 May 1980 of the Secretary-General's agreement for direct submission of his case to the Tribunal. On 10 October 1980 he filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Under both Staff Regulation 9.4 and Annex IV to the Staff Regulations as well as his contract of appointment, the Applicant was in principle entitled to the payment of a repatriation grant although the entitlement was expressly made subject to a scheme to be established by the Secretary-General and to detailed conditions and definitions. Under the scheme established by the Secretary-General and in force as of 1 July 1979, the Applicant was entitled to the payment of a repatriation grant without the need to produce evidence of relocation. Under the scheme established by the Secretary-General with effect from 1 July 1979, the Applicant's entitlement to the payment of a repatriation grant without the necessity for evidence of relocation with respect to his years and months of qualifying service prior to 1 July 1979 was reaffirmed.

2. The Applicant's entitlement to a repatriation grant was an "acquired right":

(*a*) The repatriation grant is of a personal nature. The size of the payment depends

upon each individual staff member's marital status, category of service and most importantly length of service with the Organization. Its graduated nature in proportion to number of years of service makes it analogous with pension benefits;

(*b*) The repatriation grant is an "earned" service benefit. At any one point in a staff member's service, the progressive nature of the grant enables a precise determination of the amount of the entitlement, and the size of the payment is related to length of service. Thus, the fact that it is actually paid to the staff member upon separation from service is as irrelevant as it is with respect to the pension fund entitlement.

3. The Applicant's entitlement could not be retroactively effaced by subsequent amendments to Staff Regulations and Rules. The amendment to the Staff Regulations and Rules which took effect on 1 January 1980 is inapplicable to him in respect of his acquired rights.

Whereas the Respondent's principal contentions are:

1. General Assembly resolution 34/165, which changed with effect from 1 January 1980 the prior practice of paying repatriation grant benefits to staff members on their separation without requiring evidence of relocation, is a valid exercise of the General Assembly's authority under Article 101.1 of the Charter. Resolution 34/165 binds both the staff and the Secretary-General from 1 January 1980:

(*a*) General Assembly resolutions affecting conditions of employment are part of the staff member's contract;

(*b*) The prior administrative practice of paying the repatriation grant without requiring evidence of relocation created rights for staff on separation only while the rules permitting this practice were in force, i.e. until 31 December 1979.

2. The General Assembly's amendment to the conditions of entitlement to the repatriation grant and its application to the Applicant do not prejudice any of his rights and are consistent with Staff Regulation 12.1:

(*a*) Rights to the eligibility conditions for payment of the repatriation grant are not "acquired" upon entry on duty;

(*b*) Rights to the repatriation grant are not "earned" during service;

(*c*) Conditions of eligibility for payment of allowances are not subject to the exception contained in Staff Regulation 12.1 concerning the effect on staff members of amendments to the regulations.

The Tribunal, having deliberated from 28 April to 15 May 1981, now pronounces the following judgement:

I. The Applicant maintains that at the time of his retirement on 30 April 1980, he was entitled to receive the repatriation grant without the need to produce evidence of his intention to establish residence in a country other than that of his last duty station, since the acquired right to the grant rendered Administrative Instruction ST/AI/269 inapplicable in his case.

The Respondent recognizes that if the Applicant had submitted his resignation before 1 January 1980, he would have been entitled to receive the repatriation grant without needing to establish his intention of relocating. However, the General Assembly, by its resolution 34/165 of 17 December 1979, decided that "effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided".

The refusal to pay the repatriation grant to the Applicant was thus grounded in Administrative Instruction ST/AI/269, established in pursuance of resolution 34/165.

Before considering the legal scope of the application, the Tribunal must recall the basis of the legal obligations of the United Nations towards the Applicant as a staff member of the Organization since 1958.

II. The legal status of staff members of the United Nations is defined by a contract entered into by the person concerned and the authority empowered to act on behalf of the Organization. The provisions of that contract are binding on the parties and can be amended only by mutual agreement. The contract, entitled "letter of appointment", is signed by both parties. The Tribunal has recognized that supplementary obligations towards a staff member may be assumed by the United Nations by virtue of commitments entered into at the time of the signing of the contract or subsequently (Judgements Nos. 95, *Sikand,* and 142, *Bhattacharyya*).

The summary provisions contained in the letter of appointment are supplemented by documents of general application which are much more detailed. The letter of appointment refers to these in stipulating that the appointment is offered "subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules". Thus, by virtue of that provision, documents of general application are made an integral part of the contract and the staff member accepts in advance any amendments which may be made to them. At the time of appointment, copies of the Staff Regulations and Staff Rules are transmitted to the person concerned and that fact is noted in the letter of appointment. Further, every staff member is notified of subsequent amendments to those documents through the publication of administrative circulars, which give the text of the relevant new provisions and their date of entry into force (Judgement No. 249, *Smith*). On that date, the new provisions become an integral part of the contract.

III. The authorities competent to draft the Staff Regulations and Staff Rules were specified in the Charter. Article 101.1 of the Charter provides that:

> "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

Article 7 states that the Secretariat is a "principal organ" of the United Nations and Article 97 describes the Secretary-General as "the chief administrative officer of the Organization".

Under the heading "Scope and purpose", the Staff Regulations adopted by the General Assembly lay down the following:

> "The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary-General, as the Chief Administrative Officer, shall provide and enforce such staff rules consistent with these principles as he considers necessary."

In the chapter headed "General provisions", Staff Regulation 12.2 reads as follows:

> "The Secretary-General shall report annually to the General Assembly such Staff Rules and amendments thereto as he may make to implement these Regulations."

These texts empower the Secretary-General to establish and amend the Staff Rules within

the limits laid down by the Staff Regulations. The Secretary-General has the duty to report to the General Assembly on the exercise of his rule-making authority, which is derived from the Charter and from the Staff Regulations, but the bringing into force of the provisions established by the Secretary-General, on a date fixed by him, is not subject to the approval of the General Assembly.

In other words, the legal status of a staff member is governed by the provisions of the Staff Rules immediately on their entry into force.

IV. The General Assembly, with reference to the exercise of its own rule-making authority, affirmed in the following terms, in Staff Regulation 12.1, the fundamental principle of respect for acquired rights:

> "These Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."

In accordance with Staff Rule 112.2 (*a*), "these rules may be amended by the Secretary-General in a manner consistent with the Staff Regulations".

Thus, the Secretary-General is bound to respect the acquired rights of staff members in the same way as the General Assembly.

V. The Tribunal must lastly record the fact that according to article 1 of its Statute, the International Civil Service Commission (ICSC) was established "for the regulation and co-ordination of the conditions of service of the United Nations common system". Under article 10, ICSC makes recommendations to the General Assembly on allowances and benefits of staff which are determined by the General Assembly; a note to article 10 mentions the repatriation grant among these allowances. Under the terms of article 9, ICSC is guided in the exercise of its functions by the principle "which aims at the development of a single unified international civil service through the application of common personnel standards, methods and arrangements".

The Tribunal has recognized that these provisions concerning ICSC form part of the régime governing the staff of the United Nations (Judgement No. 236, *Belchamber*). However, other than in exceptional cases, ICSC is not competent to take decisions directly affecting staff members.

VI. The Tribunal must now consider whether the Applicant has rights on which he may rely as regards the repatriation grant.

The Tribunal notes that, at the time of his appointment to the United Nations on 30 July 1958, the Applicant, who had started to work with ICAO on 14 February 1949, received from the Office of Personnel a personnel action form which expressly stated: "Service recognized as continuous from 14 February 1949" and "Credit towards repatriation grant commences on 14 February 1949".

Although these statements do not appear in the letter of appointment itself, they nevertheless unquestionably constitute the explicit recognition by the United Nations of entitlement to the repatriation grant, and validation for that purpose of more than nine years' service already completed with ICAO.

In the Applicant's case, a formal reference was thus made at the time of appointment to the repatriation grant and to the principle of the relationship between the amount of that grant and length of service. As a result, the Applicant is in the position noted by the Tribunal in Judgements Nos. 95 and 142 cited above, namely, that special obligations towards him were assumed by the United Nations.

VII. By the time the Applicant joined the United Nations, the repatriation grant had been in existence for several years. It had been established by the General Assembly, by resolution 470 (V) of 15 December 1950, following the abolition of an expatriation allowance which was paid annually. The repatriation grant was originally conceived as compensation for the expenses involved for the staff member in relocation to his home country. The revised text of the Staff Regulations, adopted in resolution 590 (VI) and brought into effect on 1 March 1952, incorporated the provisions adopted by the General Assembly in 1950 (Regulation 9.4 and Annex IV, para. 4). In rule 109.5 (*a*) of the Staff Rules which became effective on 1 January 1953, the expression "obligation to repatriate" was defined as meaning the obligation to return a staff member to a place outside the country of his duty station. Further, it was stipulated that loss of entitlement to payment of return travel expenses, which ensued if the journey was not made within six months, did not affect eligibility for payment of the repatriation grant (rule 109.5 (*i*)). Thus, the link between the repatriation grant and return "to the home country" was broken in the Staff Rules as early as 1953. Eligibility for the grant was recognized in the event of residence being established outside the home country. The literal meaning of the term "repatriation" was abandoned. These provisions, which were brought to the attention of the General Assembly, were not contested at the time.

VIII. The Consultative Committee on Administrative Questions (CCAQ), a body which reports to the Administrative Committee on Co-ordination and which constitutes the forum for the consultations between the United Nations and the specialized agencies provided for in the agreements concluded between them in accordance with Articles 57 and 63 of the Charter, submitted a report on 14 May 1952 in which it made recommendations concerning repatriation grants (CO-ORDINATION/R.124, p. 6). Among these recommendations, it indicated that the grant should be paid regardless of whether the staff member is actually repatriated; however, the Organization is not considered obligated where the staff member voluntarily assumes the nationality of the country of duty station.

Twenty-two years later, the Consultative Committee requested its secretariat to carry out a study of the repatriation grant for the purposes of a survey of the organizations, with a view to examining whether there were any grounds for modifying the existing system. The resulting document (CCAQ/SEC/325(PER)), dated 6 May 1974, raises the question whether the grant should be paid only if repatriation actually occurs. It points out that the purpose of the grant is to assist the staff member and his family returning to their home country and that there is no logical justification for paying the grant to a staff member who remains in the country of his last duty station. However, it adds that applying this logic raises great difficulties. It notes that the Organization has no way of knowing where a staff member resides after he leaves service, and that in fact there are a number of cases in which staff have two or more residences. Even if his repatriation travel has been paid for, he can pay his own fare back to the country of the last duty station in which he wishes to reside. Furthermore, the staff member may be undecided as to his definitive place of residence and may ask for the question of payment to be kept pending. The report concluded: "For all these reasons, CCAQ secretariat doubts the feasibility of attempting to make payment of the grant dependent on evidence of repatriation".

The Respondent observed that the rules of certain specialized agencies had expressly reflected the practice of not requiring evidence of relocation to qualify for the repatriation grant, but that those of the United Nations had not—they were silent on evidence of relocation.

However, the Tribunal observes that the document produced in 1974 proves that the system proposed by the Consultative Committee on Administrative Questions as early as 1952 was in effect followed to the benefit of staff members, even though it was not explicitly embodied in any United Nations regulation. The parties considered the question whether a practice followed consistently for nearly 30 years could generate an acquired right within the meaning of Staff Regulation 12.1. In view of the particular situation of the Applicant, the Tribunal finds that it is not required to adjudicate that question *in abstracto*.

IX. The existence of the repatriation grant and the respective roles of the General Assembly and the Secretary-General in defining its juridical rules of application have their foundation in the Staff Regulations.

Under Staff Regulation 9.4, "the Secretary-General shall establish a scheme for the payment of repatriation grants within the maximum rates and under the conditions specified in Annex IV to the present Regulations". Annex IV states that "detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General".

The Tribunal observes that in Annex IV to the Staff Regulations, certain elements were stipulated in precise terms by the General Assembly: the amount of the grant is "proportional to the length of service with the United Nations"; it is calculated on the basis of a scale given in the annex, taking account, *inter alia,* of the number of years of continuous service away from the home country, up to an upper limit of 12 years; and a staff member who is summarily dismissed is explicitly excluded from receiving the grant. Further, eligibility for the grant is defined in terms which leave a margin of discretion: "*In principle,* the repatriation grant shall be payable to staff members whom the Organization *is obligated to repatriate.*" [Emphasis added.] The Tribunal notes that the provision does not refer to staff members *actually* repatriated but to those for whom that obligation on the part of the Organization exists. In addition, the expression "in principle" leaves the Secretary-General the discretionary power to decide what action is appropriate in practice.

These two provisions of the Staff Regulations, which expressly acknowledge that the repatriation grant scheme falls within the scope of the rule-making authority of the Secretary-General, are still in force. No new provision relating to that grant was added to the Staff Regulations by the General Assembly at either its thirty-third or thirty-fourth sessions.

Thus the question whether the Applicant is entitled to rely on acquired rights does not arise in respect of provisions of the Staff Regulations which fall within the competence of the General Assembly, even though the subject of the application is closely related to the decisions on the repatriation grant taken by the General Assembly.

X. The decisions of the General Assembly at its thirty-third and thirty-fourth sessions were taken as a result of studies carried out by the International Civil Service Commission (ICSC). The 1971-1972 Special Committee for the Review of the United Nations Salary System, in its report to the twenty-seventh session of the General Assembly (A/8728, vol. I, para. 376), had already recorded the fact that it was divided on the subject of the repatriation grant and had suggested that the scheme should be considered by ICSC, the establishment of which was then being planned.

In the course of the debate on the ICSC report which took place in the Fifth Committee at the thirty-first session of the General Assembly, some representatives, in the light of the financial situation, made suggestions relating to the payment of the repatriation grant,

in particular in cases where the staff member remains at the duty station following retirement (Austria, A/C.5/31/SR.32, para. 46; Canada, SR.34, para. 14; Belgium, SR.34, para. 41). The General Assembly, in its resolution 31/141 B, requested ICSC to re-examine, in the light of the views expressed in the Fifth Committee at the thirty-first session:

> "(*a*) The conditions for the provision of terminal payments (for example, repatriation grant . . .) . . . and the possibility of establishing a ceiling for the maximum aggregate of entitlements to these payments."

In 1978, ICSC focused its attention on two issues and, in particular, on "the appropriateness of paying the grant to a staff member who, upon separation, does not return to his home country". In its report (A/33/30, paras. 182 *et seq.*), ICSC acknowledged the practical difficulties involved in keeping track of the movements of a former staff member, but accepted that the grant should not be paid to a staff member who, on separation, remained permanently in the country of his last duty station. It recommended that payment of the grant should be made conditional upon a declaration of intent from the staff member and added the following:

> "That requirement should come into effect from 1 January 1979 for new staff members. If the organizations consider that some period of grace should be allowed to serving staff members who may already have planned the place where they will reside after their separation on the assumption that they will receive the grant, CCAQ should agree on a common transitional measure." (para. 186.)

XI. During the debate in the Fifth Committee in 1978, discussion centred on the method suggested by ICSC for monitoring changes of residence, but no consideration was given to the problem of a transitional measure, which had been raised by ICSC. A draft resolution (A/C.5/33/L.33/Rev.1), presented by the representative of Japan, stated *inter alia:*

> "[*The General Assembly*] *Decides* that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the [International Civil Service] Commission."

The representative of Japan declared: "It will be the Commission's task to establish the exact terms" of application of this provision (A/C.5/33/SR.56, para. 29). In saying this, he appears to have had in mind the provision of evidence by the persons concerned. At that stage in the debate, the Under-Secretary-General for Administration and Management spoke of the "concern" of the Secretary-General and the Executive Heads of the various organizations and specialized agencies at a number of the provisions of the draft resolution:

> "Where payment of the repatriation grant was concerned, he took it that the Commission would show some flexibility in implementing the practice proposed. . . . Since acquired rights were involved, it might prove necessary to refer the matter to the Administrative Tribunal, and that could create problems unless the Commission could find some means of resolving the difficulty". (A/C.5/33/SR.56, para. 32.)

The Tribunal notes that these arguments were not challenged and that at no point in the discussion was the nature of the terms to be established by ICSC specified.

The relevant part of the draft resolution was adopted by the General Assembly in its resolution 33/119 of 19 December 1978.

XII. Thus the General Assembly set a fundamental objective which accorded with the views expressed in the report of ICSC, and requested ICSC to establish the terms of implementation. ICSC was clearly required to take action in accordance with the powers vested in it to ensure co-ordination within the common system.

In its report to the thirty-fourth session of the General Assembly (A/34/30), ICSC considered all aspects of the problem, among them the question of an acquired right, and reached the following conclusions:

> "24. Some members questioned whether any acquired right could be said to exist to payment of the repatriation grant to a staff member who did not repatriate or relocate himself. In their view, such acquired rights as might be deemed to exist could only be in respect of persons who had retired and could not accrue to the benefit of existing employees whose rights must rest on a true interpretation of the existing staff regulations rather than an administrative practice contrary to the regulation which expressly related repatriation grant to those employees whom the organizations had an obligation to repatriate. The Commission sought an opinion from the Office of Legal Affairs of the United Nations Secretariat, which indicated that, in so far as the United Nations Organization itself was concerned, there was no express or implied provision that only those who actually made use of the travel entitlement should receive the grant; the relevant Staff Rules had been reported to and noted by the General Assembly, which must accordingly have deemed the rule to be consistent with the intent and purpose of the Regulations which it had itself approved. On the basis of the advice received the Commission decided that the requirement of relocation should apply only to that part of a staff member's entitlement which was earned after the date on which the rule was changed."

Accordingly, ICSC adopted the following text, which was duly promulgated on 6 April 1979 under the symbol CIRC/GEN/39:

> "The following modifications to the terms of entitlement to the repatriation grant are established by the International Civil Service Commission in pursuance of paragraph 4 of section IV of General Assembly resolution 33/119:
>
> "(*a*) With effect from 1 July 1979 payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station;
>
> "(*b*) Evidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station, such as a declaration by the immigration, police, tax or other authorities of the country, by the senior United Nations official in the country or by the former staff member's new employer;
>
> "(*c*) Payment of the grant may be claimed by the former staff member within two years of the effective date of separation;
>
> "(*d*) Notwithstanding paragraph (*a*) above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation; the exercise of any additional entitlement accrued after that date shall, however, be subject to the conditions set out in paragraphs (*a*) to (*c*) above."

It was on the basis of this report that Administrative Instruction ST/AI/262 of 23 April 1979 announced that, with effect from 1 July 1979, the provisions noted above would regulate the terms of payment to staff members of the Organization of the repatriation grant as set out in Annex IV to the Staff Regulations. The Secretary-General added that suitable amendments to the Staff Rules would be made in due course. In circular ST/SGB/Staff Rules/1/Rev.5 of 22 August 1979, the Secretary-General announced that "Rule 109.5, Repatriation grant, is amended to make the payment of the grant conditional upon presentation of actual evidence of relocation *with respect to periods of eligibility arising after 1 July 1979.*" [Emphasis added.]

Accordingly, exercising the authority vested in him by Staff Regulation 9.4 and Annex IV to the Staff Regulations, the Secretary-General inserted into Staff Rule 109.5 subparagraphs (*d*) and (*f*), reading as follows:

> "(*d*) Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station. Evidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station."
>
> "(*f*) Notwithstanding paragraph (*d*) above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation with respect to such qualifying service."

In taking this measure, the Secretary-General adopted the same position as the Executive Heads of the specialized agencies.

XIII. The Tribunal observes that this was the first time that a provision of the Staff Rules acknowledged that entitlement to the repatriation grant might exist without evidence of relocation being provided.

The Tribunal further observes that the Applicant, having entered on duty before 1 July 1979, falls into the category defined in subparagraph (*f*) quoted above. It notes that the period of service completed by the Applicant before that date, in ICAO and in the United Nations, far exceeds the upper limit, 12 years, of the scale of years of service rendering a staff member eligible for the grant contained in Annex IV to the Staff Regulations. Consequently, under the terms of Staff Rule 109.5 (*f*) quoted above, the Applicant retains his entitlement to the amount of the grant without the need, as regards that period of service, to produce evidence of relocation.

The Tribunal notes that according to this provision, if the length of service completed before 1 July 1979 were less than 12 years, failure to produce evidence of relocation would reduce the amount of the grant to which the person concerned would be entitled.

XIV. The question therefore arises whether the entitlement as described in the provision quoted above, which came into force on 1 July 1979, having been adopted by the Secretary-General in accordance with a procedure laid down by the General Assembly in its resolution 33/119, can have been effaced retroactively by the Secretary-General's deletion of subparagraph (*f*) in pursuance of resolution 34/165. The relevant part of that resolution reads as follows:

"[*The General Assembly*] *Decides* that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided".

In the course of the debate which preceded the adoption of that resolution, the Fifth Committee sought an opinion from the Office of Legal Affairs. The opinion supplied had already been given to ICSC, and stated that the Secretary-General had established the conditions for payment of the repatriation grant "by promulgating Staff Rule 109.5 and also by establishing a practice in an agreement within the Consultative Committee on Administrative Questions". The Office of Legal Affairs pointed out that in the Staff Regulations there was no express or implied provision to the effect that only those who actually made use of the travel entitlement should receive the grant (A/C.5/34/CRP.8, p. 1).

A number of delegations expressed the view that that opinion was wrong and that "the fact that in the past [the provision regarding the repatriation grant] had been incorrectly applied did not confer an unchangeable entitlement". (Australia, A/C.5/34/SR.47, para. 6).

The Chairman of ICSC, while observing that the matter had been included in the Commission's report only for information and that it called for no action by the General Assembly, stated that ICSC had taken "a pragmatic decision in the interests of economy, judging that it would be unreasonable to impose upon organizations a measure which would certainly be appealed by staff members". He pointed out that the governing bodies of the majority of the other organizations in the common system had, since July 1979, approved the incorporation of the transitional measures announced by the Commission into their organization's staff rules (A/C.5/34/SR.55, para. 41).

The Under-Secretary-General for Administration, Finance and Management said that the proposed provisions would have the effect of revoking a decision which was in process of implementation by the agencies of the common system. He observed that if the General Assembly were to rescind the ICSC decision in respect of staff members of the Organization, such a decision would also inevitably be viewed by the staff as discriminatory. He noted that it had been the long-standing practice in the Organization to implement policy changes in the least disruptive manner, either in order to respect acquired rights or simply to ensure a smooth transition from one set of arrangements to another. It was in the same spirit that the Secretary-General and his colleagues in the Administrative Committee on Co-ordination believed that the Fifth Committee should accept the transitional arrangements (A/C.5/34/SR.60, paras. 59–61).

The delegation of the United States of America proposed a text which was ultimately adopted and which became a General Assembly decision.

The Tribunal notes that at no time did the General Assembly contemplate supplementing or amending the provisions relating to the repatriation grant contained in the Staff Regulations. Nor did the Assembly examine the text of the Staff Rules in force since 1 July 1979, and it never claimed that there was any defect in the provisions introduced on that date which diminished their validity. The Assembly simply stated a principle of action which the Secretary-General acted upon in establishing a new version of Staff Rule 109.5 which, from 1 January 1980, replaced the version previously in force on the basis of which the Applicant could have obtained the repatriation grant.

XV. The question therefore arises whether the Applicant can rely on an acquired

right, failure to recognize which would give rise to the obligation to compensate for the injury sustained.

The Tribunal has been required to consider on a number of occasions whether a modification in the pertinent rules could affect an acquired right. It has held that respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract. The Tribunal pointed out, in paragraph VI above, that entitlement to the repatriation grant had been explicitly recognized at the time of the Applicant's appointment, together with the relationship between the amount of the grant and the length of service. The Tribunal also pointed out in paragraph VII above that at the time of the Applicant's entry on duty, payment of the grant did not require evidence of relocation to a country other than that of the last duty station. Further, the Tribunal held that respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected. The repatriation grant is calculated according to length of service. The amount of the grant is "proportional to the length of service with the United Nations", as stated in Annex IV to the Staff Regulations. This link was explicitly reaffirmed in Staff Rule 109.5 (*f*), which refers to "the years and months of service qualifying for the grant which [staff members] already had accrued" as of 1 July 1979. Consequently, the link established by the General Assembly and the Secretary-General between the amount of the grant and length of service entitles the Applicant to invoke an acquired right, notwithstanding the terms of Staff Rule 109.5 which came into force on 1 January 1980 with the deletion of subparagraph (*f*) concerning the transitional system. As in the case of Judgement No. 266 (*Capio*), it is incumbent upon the Tribunal to assess the consequences of any failure to recognize an acquired right.

XVI. By making payment of the Applicant's repatriation grant conditional on the production of evidence of relocation, the Respondent failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 (*f*).

The stand taken by the Respondent has had the effect of depriving the Applicant of payment of the repatriation grant. Recognizing that the Applicant was entitled to receive that grant on the terms defined in Staff Rule 109.5 (*f*), despite the fact that that rule was no longer in force on the date of the Applicant's separation from the United Nations, the Tribunal finds that the Applicant sustained injury as the result of a disregard of Staff Regulation 12.1 and Staff Rule 112.2 (*a*). The Applicant is thus entitled to compensation for that injury. The injury should be assessed at the amount of the repatriation grant of which payment was refused. Accordingly, the Tribunal rules that the Respondent shall pay to the Applicant, as compensation, a sum equal to the amount of the repatriation grant calculated in accordance with Annex IV to the Staff Regulations.

XVII. Since there has been no untoward delay in settling this dispute, which involved complex legal issues, the Tribunal decides to reject the request for payment of interest in addition to the sum owing.

XVIII. For the foregoing reasons, the Respondent shall pay to the Applicant the sum stipulated in paragraph XVI above.

(Signatures)

Suzanne BASTID
President

Francisco A. FORTEZA
Vice-President

Endre USTOR
Vice-President

Not being in agreement with the judgement, I set forth my dissenting opinion below.

Herbert REIS
Alternate Member

Jean HARDY
Executive Secretary

Geneva, 15 May 1981

DISSENTING OPINION OF MR. HERBERT REIS

[*Original: English*]

1. Since, on 17 December 1979, the General Assembly adopted resolution 34/165, deciding that "effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided", the Applicant has been afforded two opportunities to receive the repatriation grant to which his otherwise creditable service of 12 years would apply. First, on 21 December 1979, he was informed in an interview by the Chief of the Personnel Administrative Section, Personnel Division, United Nations Office at Geneva, that, in view of the adoption of General Assembly resolution 34/165 and his approaching retirement, he could secure payment of the repatriation grant without evidence of relocation provided that he retired effective 31 December 1979, that is, within the cutoff date set by the General Assembly. Second, since under current regulations payment of the repatriation grant, assuming its conditions are met, can be sought in a timely manner by a former staff member within two years of the date of his retirement, the Applicant has the right—confirmed by Counsel for Respondent during the oral hearing on 28 April 1981—to apply for and receive payment of the grant upon presentation of documentary evidence that he has in fact relocated his residence outside Switzerland, the place of his last duty station. In this second context, when the Tribunal heard this case, the Applicant still had approximately one year in which to relocate in order to qualify for the grant. Notwithstanding these options, the Tribunal has decided that the Applicant is entitled to receive the repatriation grant without presenting evidence of relocation. This case presents difficult issues for decision and it is with regret that I dissent from the judgement of the Tribunal.

2. The repatriation grant payable to staff members of the United Nations went through different stages prior to the adoption of General Assembly resolution 34/165. In the earliest days of the Organization this benefit was payable as a continuing expatriation allowance; then as a one-time grant payable upon repatriation or expatriation to any country other than that of the last duty station; and, subsequently, as a grant payable without evidence of relocation from the last duty station. The grant was never payable to nationals of the country in which the last duty station is located, and there were others to whom it was not payable such as those summarily dismissed, etc. That the United Nations quickly moved from an initial requirement formulated in terms of return to the country of nationality to allowing removal to any country in which the retiring employee might wish to take up residence attests to the humanitarian character of the United Nations administration which recognized that, after long years of service for the Organization, a

retiring employee should be allowed, as a matter of personal liberty, to seek residence in a third country if that were his wish without losing a grant that would help defray the costs of his relocation.

3. Throughout the various stages of the evolution of this grant, its purpose was, and it remains unchanged by the adoption of General Assembly resolution 34/165, to provide an end of service payment that will assist the retiring staff member, after many years of service for the Organization, in meeting the costs of moving to another country, whether the country of his nationality or a third country. Indeed, the Tribunal so recognizes in paragraph VII of its judgement. The repatriation grant was never conceived of as an end of service salary supplement—nationals of the country of last duty station never receiving it, notwithstanding the fact that in a large country like the United States their relocation costs away from Headquarters in New York City could be large—and competent bodies of the United Nations variously recognized this fact. For example, in reviewing in 1974 the history of the repatriation grant (CCAQ/SEC.325, 6 May 1976), the Secretariat of the Consultative Committee on Administrative Questions noted that:

> "The whole purpose of the grant is to assist the staff member and his family to re-establish in the *home* country and clearly there is no logical justification for paying the grant to a staff member who remains in the country of his last duty station." (para. 14, emphasis in the original)

Now, it must be noted that the CCAQ analysis continued immediately by asserting that "Applying the logic is, however, fraught with practical difficulties" (*Id.*), which, according to the authors, arose from the uncertainty of documentation that might be presented to prove relocation, the possibility that the relocated staff member might subsequently return to reside in the country of last duty station or that he might have a residence in more than one country, and so forth. Here we see an exemplification of a curious phenomenon within the Secretariat during the long period from the early 1950s until 1980, namely, the raising in an operationally destructive manner of assertedly "practical difficulties" of a documentary and durational character that, so it was asserted, would attend the imposition of any requirement, as a prerequisite to payment of the grant, that the retiring staff member show he had in fact relocated his residence in a place outside the country of last duty station. In this connexion, a question may be raised as to the objectivity of those in the Organization who, through the years, advanced these self-styled "practical difficulties" as reason for insisting on the payment of the repatriation grant without evidence of relocation. This matter is the more serious in light of the fact that, following the adoption of General Assembly resolution 34/165, the Secretary-General apparently experienced no difficulty whatever in adopting entirely straightforward rules for the implementation of the documentary requirement. Thus, Administrative Instruction ST/AI/269 of 21 December 1979, currently in force, states that:

> "Evidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station, such as a declaration by the immigration, police, tax or other authorities of the country, by the senior United Nations official in the country or by the former staff member's new employer;". (para. 2 (*b*).)

It seems clear that since the repatriation grant may be large in amount if the staff member has had 12 years of service, the maximum period creditable in respect of the grant, the retiring staff member would not experience an inappropriate burden in gathering and presenting the required documentation of relocation outside the country of last duty station.

4. At this juncture it is relevant to consider the reasons why the General Assembly adopted resolution 34/165. In 1976 Austria sharply asked the question in the Fifth Committee of the General Assembly why the United Nations was paying the relocation grant even when a staff member retired in the country of his last duty station and consequently incurred no post-retirement relocation expenses (A/C.5/31/SR.32, para. 46). A lengthier discussion ensued in the Fifth Committee in 1978, during which, it must be admitted, the Under-Secretary-General for Administration, Finance and Management asserted that entitlement to the grant even in the absence of evidence of relocation must be considered to be an acquired right and that, accordingly, there should be developed some provision in the nature of a transitional measure assuring payment to staff members who had already completed their period of creditable service in the context of the grant (A/C.5/33/SR.56, para. 32, 9 December 1978). Members of the Fifth Committee do not seem at that time to have addressed this suggestion of a transitional arrangement, agreeing, in what became resolution 33/119 of 19 December 1978, that, in addressing the various work tasks of the International Civil Service Commission for the next year, the General Assembly:

> "4. *Decides* that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of *evidence of actual relocation,* subject to the terms to be established by the Commission;" (Emphasis added.)

5. The International Civil Service Commission considered the issue of the repatriation grant at length at its 1978 session (A/33/30, paras. 178-186). Some members of the Commission noted, as in the 1974 CCAQ Secretariat observation, *supra,* paragraph 3, that they could not justify payment of the grant if relocation did not take place. Indeed, at this time, the Commission as a whole recorded its conclusion that "Strictly speaking, it was clear that to do so [to allow payment] would be inconsistent with the stated purpose of the grant". (*Id.*, para. 183.) It concluded by recommending to the General Assembly that payment of the repatriation grant "should be made conditional upon signature by the staff member of a declaration that he does not intend to remain permanently in the country of his last duty station" and that this requirement should come into effect 1 January 1979 for new staff members (*Id.*, para. 186). At its 1979 session, the Commission was informed by the Secretariat that the legal advisers of several specialized agencies (not identified) believed that, by reason of the jurisprudence of the United Nations Administrative Tribunal, a transitional provision protective of existing "entitlements" would be necessary (A/34/30, para. 23). At that session the Commission also had before it an opinion of the Office of Legal Affairs of the United Nations Secretariat which, seemingly summarily, set forth as its central observation the fact that there had not been incorporated in the Staff Rules any "express or implied provision that only those who actually made use of the travel entitlement should receive the [repatriation] grant" (*Id.*, para. 24). (At the request of the Australian representative in the Fifth Committee of the General Assembly, this opinion was subsequently reproduced as A/C.5/34/CRP.8, dated 9 November 1979.) The International Civil Service Commission accordingly decided to recommend the following transitional measure with regard to existing staff members:

> "(*d*) Notwithstanding paragraph (*a*) above, staff members already in service before 1 July shall retain the *entitlement* to repatriation grant proportionate to the years and months of service qualifying for the grant which they had already accrued at that date without the necessity of production of evidence of relocation; the exercise of any *additional entitlement* accrued after that date shall, however, be subject to

the conditions [concerning documentary evidence of relocation abroad] set out in paragraphs (*a*) to (*c*) above." (*Id.*, para. 25, emphasis added.)

This recommendation was incorporated by the Secretary-General in his Administrative Instruction ST/AI/262 dated 23 April 1979. It is not surprising, given the bias of the Secretariat, that the Commission and the Secretary-General decided upon a transitional provision, the drafting of which, a task performed by the Secretariat, was drawn in terms of and consistent with the concept of acquired rights.

6. When these developments came before the Fifth Committee of the General Assembly some months later in the fall of 1979, there evidently developed a storm of protest against the notion of a transitional measure. The provisional summary records of the Fifth Committee reveal strongly held views concerning the International Civil Service Commission's recommendation for a continuation, as to existing staff members, of the practice of paying the repatriation grant in the absence of any removal from the country of last duty station. On 14 November 1979 the question of a possible acquired right that could have justified the transitional period provision was addressed on the legal plane in detail by Australia (A/C.5/34/SR.47). Noting that the ICSC had received a Secretariat legal opinion appearing to assert the existence of an acquired right, the representative of Australia said:

> "The legal opinion, in fact, appeared to assume that the repatriation grant was equivalent to something like the payment of travel costs on retirement. The term 'repatriation', however, clearly signified a return to one's homeland. It was impossible to interpret the rule as meaning that the repatriation grant would be paid to any staff member who was entitled to be repatriated, irrespective of whether or not he was repatriated. For reasons of language, common sense, and even law, the opinion given by the Office of Legal Affairs was wrong.
>
> "His delegation understood that ICSC must act on the basis of the legal advice given to it. However, the General Assembly could make its own law. It was important to follow common sense and restore the repatriation grant to its original function. The fact that in the past it had been incorrectly applied did not confer an unchangeable entitlement." (paras. 5, 6.)

Earlier, the Australian representative had asked the Secretariat to produce a paper setting out in full the reasons underlying its earlier assertion of the existence of an acquired right (A/C.5/34/SR.38, 6 November 1979, para. 80), but no such opinion appears to have been forthcoming.

7. The debates in the Fifth Committee concerning the repatriation grant were extensive (see A/C.5/34/SR.38, 46, 47, 55, 60 and 62). In addition to Australia, representatives of Algeria, Canada, the Federal Republic of Germany, India, Italy, Japan, Morocco, New Zealand, Nigeria, Peru, Sierra Leone, Spain, Syria, Tunisia, Uruguay, the USSR, the United Kingdom, the USA and Yugoslavia took part. While a significant number of these delegations expressly agreed with the Australian view that acquired rights were not involved, only Tunisia, the Under-Secretary-General for Administration, Finance and Management and the Chairman of the International Civil Service Commission supported a transitional measure; these latter stated, variously, the view that were the General Assembly to cancel it, there would arise a violation of an acquired right, difficulties with the specialized agencies in the context of the common system or a possible appeal to the Administrative Tribunal. The Fifth Committee did not agree and, in the end, adopted a proposal by the United States to allow no payment after 1 January 1980 in the absence

of documentary evidence of relocation, by a vote of 59 in favour, 5 against, with 24 abstentions, on 28 November 1979 (A/C.5/34/SR.62, para. 33). The same text was adopted without change by the General Assembly a few weeks later on 17 December 1979, in Section II, paragraph 3, of resolution 34/165.

8. Even the Administrative Tribunal of the International Labour Organisation, with its considerably more extensive acquired rights jurisprudence, has stated that not every right or benefit contained in the contract of employment between the new staff member and the hiring international organization, and the record of associated personnel action, is necessarily, by its inclusion in documentation of this fundamental contractual character, to be considered to be an acquired right. Thus, in *de los Cobos and Wenger* (No. 391), the ILO Administrative Tribunal in 1980 stated that in order to constitute an acquired right, an express contractual provision must have been "of decisive importance to a candidate for appointment" and both the candidate and the employing organization must have intended "that it should be inviolate" (para. 6). At the last term, the United Nations Administrative Tribunal held, in connexion with an earlier United Nations system of promotion opportunities based upon work performance, that an entitlement arising at the time of initial employment is subsequently to be treated as an acquired right if it relates to a material part of the complex of benefits in compensation for services already performed by the staff member (*Capio*, No. 266). In the current case, the Tribunal observes that the Personnel Action of 4 August 1958, assimilated to the Letter of Appointment dated 5 August 1958, expressly states "Credit towards repatriation grant commences on 14 February 1949", Applicant having had nine years of service with ICAO. Acknowledging the subjectivity of questions of intent, can it reasonably be asserted that the Applicant considered as "of decisive importance" this notation as to the creditworthy character of his ICAO service in the context of a United Nations repatriation grant that might be paid to him some 20 years in the future? Even if the answer were affirmative, was the Applicant likely to have known of the then 5-year-old practice of the United Nations of paying the repatriation grant without evidence of relocation, and, if so, would he have been justified in assuming that the continuation of this payment practice would be guaranteed to him as a matter of legal right over the period of 20 years that was to ensue before he would retire? To the extent that the Applicant and the Secretariat considered this aspect of the contract of employment, they might have asked themselves serious questions concerning the survivability of the payment of a "repatriation grant" in the absence of actual expenses. The Applicant might reasonably have had a contingent hope, but nothing more.

9. In my view, the doctrine of acquired rights must serve, in the particular case, to prevent injustice by way of retroactive denial of benefits to an individual who in good faith has performed meritorious service and long entertained just expectations based upon legal undertakings, while, in the general context, it should protect the competence and independence of the civil service of an international organization and thus promote the integrity of the organization itself. It is for these reasons that the General Assembly has guaranteed respect for acquired rights of staff members by adopting the Staff Regulations of the United Nations, Article 12.1. One learned commentator has pointed out that "Acquired rights of international public servants should be protected to the extent there is a *public* interest in the stability of those rights." (Hans W. Baade, "The Acquired Rights of International Public Servants", 15 *American Journal of Comparative Law* (1967), 251, 299 [emphasis in the original]). I believe there is a necessary element of good faith that must exist in order to justify a finding of acquired right. There is not, in

this case, any "public" purpose in relation to the Applicant or to the United Nations that may be served by requiring the payment of a substantial sum to a retiring staff member who has not incurred any relocation expenses, who has moved his residence not at all in the last 22 years and who intends to maintain his residence in the country of his last duty station where it has been for those 22 years, namely, Switzerland. As observed at the outset of this opinion, the Organization has been generous to the Applicant in the context of the payment of a repatriation grant.

10. For these reasons, I cannot agree that the Applicant had an acquired right to the payment of the repatriation grant which right must in law be recognized without regard to any requirement of relocation to another country and documentary evidence thereof.

(Signature)

Herbert REIS

Geneva, 15 May 1981

Judgement No. 274

(Original: English)

Case No. 263: Sletten *Against:* **The Secretary-General of the United Nations**

***Request by a former Field Service Officer for** payment of compensation for the loss of personal effects.*

Staff Rule 106.5.—Requirement that the** value of a lost item should be assessed on the basis of its **replacement cost at the time and place of the** loss and in its condition at that time.—**Applicant's failure to establish that the amount of compensation he** was finally offered fell short of the amount calculated **according to those principles.—The Secretary-General** may not impose on the payment of the sum awarded **by the Claims Board the condition that the staff** member waive his statutory right of appeal.—Award to **the Applicant of the interest awarded to him in consideration** of the foregoing by the Joint Appeals Board.— **The other claims of the Applicant are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, Vice-President, presiding; Mr. Arnold Kean; Mr. Herbert Reis;

Whereas at the request of Erling J. Sletten, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 29 June 1981 the time-limit for the filing of an application to the Tribunal;

Whereas, on 3 June 1981, the Applicant filed an application the pleas of which read as follows: