UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/656
21 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 656

Cases No. 637: KREMER
No. 642: GOURDON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Samar Sen, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 4 December 1991, Henri Julien Kremer, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

> "... to order the Secretary-General of the United Nations to pay me the repatriation grant to which I am entitled under staff rule 109.5, plus the interest accruing as from the date of my separation from service.
>
> ..."

Whereas the Respondent filed his answer on 11 March 1992;

Whereas the Applicant filed written observations on 10 April 1992;

Whereas at the request of Alain André Marie Gourdon, a former member of the Joint Inspection Unit (JIU), the President of the Tribunal, with the agreement of the Respondent, successively extended until 31 October 1991 and 31 January 1992 the time-limit for the filing of an application with the Tribunal;

Whereas, on 12 December 1991, the Applicant Gourdon filed an application requesting the Tribunal, inter alia:

"...

...to rescind the decision taken by the Chief, Personnel Service at UNOG and upheld by the Secretary-General of the United Nations, which denies me any right to payment of a repatriation grant.

..."

Whereas the Respondent filed his answer on 5 March 1992;

Whereas the Applicant filed written observations on 5 June 1992;

Whereas, on 17 June 1993, the Tribunal decided to adjourn consideration of the cases and to put questions to the Respondent, to which he provided answers on 25 August 1993;

Whereas in November 1993, the Tribunal decided to further adjourn consideration of the cases and on 9 February 1994, put additional questions to the Respondent, to which he provided answers on 9 March, 30 March and 6 April 1994;

Whereas the facts in the cases are as follows:

The Applicant Kremer, a French national, entered the service of the United Nations on 29 April 1971, as a Translator-Trainee at the P-2 level. After serving on fixed-term appointments and on a probationary appointment, he was given a permanent appointment with effect from 1 April 1973. His duty station was New York. The Personnel Action Form issued upon recruitment stated, inter alia, that the Applicant was "entitled to repatriation grant" to France. His place of home leave was Paris, France. After completing a one-year assignment at the Economic Commission for Africa in Addis Ababa, from 1 July 1976 through 30 June 1977, the Applicant returned to Headquarters and was promoted to the P-4 level as a Revisor, with effect from 1 April 1981. The Applicant was then assigned to the Economic and Social Commission for Asia and the Pacific in Bangkok, with effect from 11 January 1983. He was reassigned to the United

Nations Office in Geneva (UNOG) as a Translator, with effect from 13 August 1985. The Applicant separated from the Organization on 7 May 1991.

During his service at UNOG, the Applicant lived in Prévessin-Moens, a town located in the French "Zone franche du Pays de Gex et de la Haute Savoie" adjacent to Geneva. In a memorandum dated 10 August 1987, a Personnel Officer informed the Applicant, in connection with his request for home leave, that:

> "...The Staff Rules of the United Nations (rule 105.3, paragraph (a)) provide a right of home leave for staff members who are internationally recruited and serving outside their country of origin. In your case, as a French national, residing in France since 15 October 1985, you have unfortunately lost the right to home leave, an entitlement which you exercised during your service in other duty stations.
>
> I should also take this opportunity to remind you that while you are residing in France, you no longer have the right to a repatriation grant..." (Translation by the Tribunal)

On his separation from service, the Applicant was not paid a repatriation grant. In the Personnel Payroll Clearance Action Form issued in connection with his separation, it is stated under item 17 that he was not entitled to the repatriation grant because he "lived in France from 15.10.85 until c.o.b. [close of business]". Under item 15 of the same form, it is stated that the Applicant's residence after separation would be Paris.

In a letter dated 14 May 1991, the Applicant asked the Secretary-General to review the administrative decision not to grant him the repatriation grant and, in case his reply were in the negative, to grant him permission to submit his appeal directly to the Administrative Tribunal.

On 6 September 1991, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-General had decided to maintain the decision not to pay

him the repatriation grant and had agreed to the direct submission of an appeal against this decision to the Administrative Tribunal.

On 4 December 1991, the Applicant filed with the Tribunal the application referred to earlier.

The Applicant Gourdon, a French national, was elected by the General Assembly and appointed by the Secretary-General as a member of the Joint Inspection Unit (JIU) to serve on a five-year fixed-term appointment, commencing on 1 January 1986 and ending on 31 December 1990. The JIU and its Secretariat are located in Geneva. During his service with the JIU and, at the time of his separation, the Applicant lived in Veigy-Foncenex in the French "zone Franche du Pays de Gex et de la Haute Savoie" adjacent to Geneva.

On 23 November 1990, the Applicant asked the Chief of Personnel of the United Nations Office at Geneva (UNOG) for payment of the repatriation grant, under staff rule 109.5 and Annex IV to the Staff Rules.

In a reply dated 3 December 1990, the Chief of Personnel informed the Applicant that staff rule 109.5 precluded payment of the repatriation grant to staff members who reside in their home country at the time of their separation from service. He further stated that since the Applicant was a French national residing in France, he was excluded by the terms of the rule from the payment of such a benefit. He added: "the concept of 'zone franche' relates exclusively to certain customs regulations but does not confer any international status nor affects in any way the sovereignty of France over its own territory, ..."

On 26 December 1990, the Applicant asked the Secretary-General to review the administrative decision not to grant him the repatriation grant and, in case his reply were in the negative, to grant him permission to submit his appeal directly to the Administrative Tribunal.

On 18 April 1991, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-

General had decided to maintain the decision not to pay him the repatriation grant and agreed to the direct submission of an appeal against this decision to the Administrative Tribunal.

On 12 December 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. According to the literal and logical interpretation of staff rule 109.5, it should only apply to staff members who are residing in their home country while performing official duties there. For example, French citizens, working in Paris for UNESCO.

2. The Rigoulet decision (Judgement No. 408 (1987)) violates the principle of equality and is not in keeping with the practice of other international organizations in Geneva.

3. French staff members are victims of a dual form of discrimination, based on nationality and place of residence.

Whereas the Respondent's principal contentions are:

1. The Tribunal must maintain its recent interpretation of staff rule 109.5(i) as stated in the Rigoulet decision, denying payment of the repatriation grant to staff members residing in their home country at the time of their separation from service.

2. The Applicant cannot claim to have been unaware of the fact that he would lose his entitlement to the repatriation grant as a result of residing in France.

The Tribunal, having deliberated in Geneva on 10 June 1993, in New York from 20 October to 16 November 1993, and in Geneva from 22 June to 21 July 1994, now pronounces the following judgement:

I. The issues presented by the Applicants are identical, and the Tribunal therefore considers the two applications jointly. The Respondent has not raised any issue concerning the Tribunal's jurisdiction in respect of the Applicant Gourdon, a member of the JIU, and has requested that the Tribunal adjudicate his claim.

II. Having reviewed the documentation filed in both these cases as well as the Rigoulet decision (Judgement No. 408 (1987)), the Tribunal considers that the Applicants are entitled to the repatriation grant by virtue of the considerations set forth below.

III. The Respondent's refusal to pay the Applicants the repatriation grant is based on his interpretation of staff rule 109.5 (i). In fact, the Tribunal believes that the outcome of both these cases hinges upon the proper interpretation of staff rule 109.5 (i). This rule reads as follows:

> "No payments shall be made to ... any staff member who is residing at the time of separation in his or her home country while performing official duties. A staff member who, after service at a duty station outside his or her home country, has served at a duty station within that country may be paid on separation, subject to paragraph (d) above, a full or partial repatriation grant at the discretion of the Secretary-General."

The other relevant provisions on the repatriation grant are staff rule 109.5(d) and Annex IV to the Staff Regulations which provide as follows:

> Staff rule 109.5(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."
>
> Annex IV
>
> "In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to a repatriate... Staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station."

IV. An important principle of interpretation is that construction is to be made of the text as a whole, and not of one section alone. That is, the meaning of a section may be affected by other individual sections in the same text. Therefore, staff rule 109.5(i) should be

construed with reference to the context and with reference to other provisions, namely staff rule 109.5(d) and Annex IV. In other words, these provisions should be read together and not in isolation in order to obtain their proper construction. For example, and to illustrate this principle of interpretation, if one section of an Act requires that "notice" be "given", verbal notice would be sufficient. But if another section provides that notice should be "served" on a person, or "left" with him, one could infer that a written notice was intended. (Maxwell on Interpretation of Statutes, 12th Edition, pp. 59-60).

V. Both section 109.5(d) and Annex IV specifically refer to the duty station which the individual must leave in order to be entitled to the repatriation grant. These texts do not make entitlement to the grant subject to any nationality condition. Leaving the country of the "duty station" is the pivotal and determining condition of eligibility. The UN's interpretation of staff rule 109.5(i) which uses the concept of "residence" as the condition for eligibility leads to illogical and unfair results for it does not take into account the other relevant provisions.

VI. The Tribunal considers that the majority opinion of the Tribunal in the Rigoulet case concerning the interpretation of staff rule 109.5(i) should be regarded as concerning a staff member performing official duties in his/her home country. Otherwise, the expression "performing official duties" would be superfluous. An interpretation of a provision which would leave without effect part of the text should be rejected. In addition, as noted by Mr. Roger Pinto in his dissenting opinion "according to a consistent rule of interpretation, the provision to be interpreted must produce a useful effect" (paragraph XIII). The Tribunal considers that Mr. Roger Pinto's opinion should be applied to the present cases.

VII. In the context of the provisions dealing with eligibility for the repatriation grant, it is helpful to refer to the original purpose of this grant. One of the goals of interpretation is to discover the true intention of the original drafters.

VIII. It appears that the repatriation grant was introduced as a result of the Fleming Commission in 1949. It was recognized that when staff members left the United Nations they incurred extra expenditures. How the grant was to be calculated is important for our purposes. It was to be determined by the Consultative Committee on Administrative Questions (CCAQ) which, inter alia, stipulated that one qualifying year with respect to the repatriation grant should be lost for each 6-month period of duty service in the home country (emphasis added). Hence, if one worked in one's home country, one would not qualify for the grant and in fact would lose qualifying time. Consistent with the above, the location of the duty station is the determining factor in calculating the repatriation grant.

IX. As noted in Rigoulet, already in 1969, the Chief of Personnel of the World Meteorological Organization (WMO), responding to a staff organization memorandum on whether French Nationals residing in the French zone were entitled to the repatriation grant, stated:

> "'In the case of ITU, whose Staff Rules are virtually identical to those of the United Nations on this point, home leave is nevertheless granted to French nationals who were recruited outside the local radius, even when they reside in the area adjacent to Geneva'.
>
> In recommending this solution, the Chief of Personnel added:
>
> 'This solution has the advantage of settling the question of payment of the repatriation grant, which according to WMO staff rule 194.1, is payable to staff members having served for a number of years "away from [their] home country" ...'
>
> The home country is defined as:

> ...the country of home leave entitlement'." (Cf. Rigoulet, dissenting opinion by Mr. Roger Pinto, paragraph VI).

The Chief of Personnel then recommended the adoption of such a position for the WMO, declaring it to be "logical and fair".

X. As further noted in Rigoulet, in 1974, the CCAQ, which was also called upon to make a determination concerning the repatriation grant, discussed this point in a report of 18 December 1974. It stated:

> "'14. ...what must be determining is the place of duty and to get into questions of where a staff member actually resides in the Geneva area can only lead to endless paradoxes. For example, it would be totally unrealistic to make a distinction between those who reside in Ferney (within the radius defined as Geneva) and those who reside in Thonon (from which hundreds of French commute daily to Geneva). A practical consideration is the fact that Geneva has virtually no hinterland and increasingly the surrounding French territory will become the bedroom of this city."'
> (Cf. Rigoulet, dissenting opinion, paragraph VIII)

The CCAQ therefore concluded that, in authorizing the repatriation grant, the simplest rule was to make determinations based on the duty station, provided that the staff member in question was originally recruited from outside the local area adjacent to Geneva. This situation applies to both the Applicants in this case.

XI. The conclusion that the determining factor was the country of the duty station was affirmed once again by the Chairman of CCAQ during the 38th session of the International Civil Service Commission, when he recalled that the conditions of service of the common system were established, inter alia, on the premise that entitlements were based on the staff duty station. This condition applied not only to repatriation but also to other conditions of employment such as hardship and mobility (paragraph 139, 38th session).

XII. Therefore, the true intention of the United Nations in drafting these staff rules was to provide staff members payment for relocation expenditures; the point of departure was the country of the duty station. Upon moving to Paris, both Applicants incurred relocation expenditures. By denying them the repatriation grant based on its interpretation of staff rule 109.5(i), the Organization is thwarting the object of these rules.

XII. The Respondent claims that his position is justified by the "straightforward application" of staff rule 109.5(i). He suggests that this provision concerns staff members who perform official duties in a country other than their home country, while residing in their home country. However, in the Tribunal's view, such a literal application of a rule is possible only if the rule itself is clear and unambiguous. The language that: "No payments shall be made to ... any staff member ... while performing official duties" must be read as referring to staff members who perform official duties in their home country (emphasis added). On that basis, the grant may be refused, as the staff members both perform official duties and reside in their home country.

XIV. Furthermore, the Respondent's interpretation is inconsistent with the reading of Annex IV to the Staff Regulations which stipulates in part that "staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station."

XV. The Tribunal's view is that relocation and the consequent payment of the repatriation grant are contingent upon the location of the duty station and not the location of the staff member's residence. A person remaining in the country of the duty station is not entitled to the repatriation grant. Therefore, it is logical that staff members who relocate to a country outside the duty station are entitled to the repatriation grant. Both Applicants in question have relocated to Paris, France.

XVI. It is clear that the language of staff rule 109.5(i) could be subject to two interpretations. The Tribunal believes that it should reject the interpretation leading to an unreasonable result and adopt the interpretation leading to a reasonable and just result. (The interpretation that was adopted by Mr. Roger Pinto in his dissenting opinion in the Rigoulet judgement). An intention to produce an unreasonable or unjust result is not to be imputed if another construction is available, leading to a just result. (Maxwell, supra pp. 199, 203, 208).

XVII. This premise appears to have been recognized and adopted by almost all the international organizations based in Geneva whose staff rules contain similar provisions. These international organizations who operate within the ambit of the common system of the United Nations, do in fact pay the repatriation grant to all French staff members serving in Geneva and residing in the adjacent French territory upon their relocation to another part of France. The principle of equality of treatment applies here. Only the United Nations and the GATT apply a different policy and refuse entitlement in these cases.

XVIII. The Tribunal agrees with the Applicants' contention that the UN's and the GATT's policy amounts to discrimination, thereby violating a fundamental principle of equality. The denial of the repatriation grant constitutes a dual discrimination on the basis of nationality and of the place of residence, which in the Tribunal's view is not justified.

XIX. Regarding the principle of stare decisis, the Tribunal is not convinced that it cannot reverse one of its own previous findings. Indeed, there are many jurisdictions in which courts can, and do, reverse their previous decisions. Save for UN and GATT, this decision of the Tribunal is consistent with the policy of most international organizations in Geneva.

XX. The Tribunal therefore concludes that both Applicants are entitled to the repatriation grant and orders the payment of the repatriation grant to both Applicants.

XXI. Indeed, in any review of the relevant rules by the Administration, it might be worthwhile if the Administration were to effect a change reflecting the distance involved in the relocation from one place to another. This kind of consideration deserves greater prominence than whether or not the relocation involves the crossing of a national border.

XXII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant Kremer and the Applicant Gourdon the repatriation grant due under staff rule 109.5 and Annex IV to the Staff Regulations.

(Signatures)

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 21 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

* * * * *

DISSENTING OPINION by MR. SAMAR SEN

With much distaste, but with utter conviction, I differ both on the law and on the facts from the majority decision.

I. Background

(a) The problem which the Tribunal has faced in the two applications brought before it by Messrs Kremer and Gourdon has a long history. There are important, complicated and other geographical reasons for it, but the plain fact is that the organizations in the UN family (which includes all the Specialized Agencies) follow different rules in the matter of awarding the repatriation grant to staff members. The International Civil Service Commission (ICSC) has been expected for the last few years to suggest uniform rules on the subject, but has not yet done so.

(b) An extract from the 1993 Report of the ICSC (A/48/30) is reproduced below:

> "The Commission decided to report to the Assembly that it had examined the practices of the organizations in that regard [and] that:
>
> (a) The practices followed were consistent with the provisions of the staff rules and regulations as adopted by the governing bodies of the organizations concerned;
>
> (b) Harmonization of practice would require the revision of either the Staff Rules and Regulations of either the specialized agencies headquartered at Geneva or of the relevant portions of the United Nations Staff Rules and Regulations;
>
> (c) The choice between harmonizing around current United Nations or specialized agency practices would appear to be a policy choice rather than a technical one;
>
> (d) Should the General Assembly wish the Commission to study the matter further, it could do so on the basis of any decision the Assembly might take as regards (c) above."

The General Assembly took note of this report in 1993, and sent it back to the ICSC for further study. The extract given above was preceded by a paragraph summarizing the discussion in the ICSC. The present judgement chooses to ignore all this, although the ICSC is the organ responsible for harmonization of all regulations and rules affecting staff of the common system.

(c) Similarly, on the plea of interpreting some rules - which indeed have been examined with care and in detail in the past - the judgement seeks to solve the problem in a particular way, before the General Assembly, or even the ICSC, have indicated which way the UN System should move. It is still for the General Assembly to decide whether harmonization is desired, and if so, by what methods uniformity is to be achieved. The present judgement preempts the General Assembly from exercising its option and in reality prescribes how uniformity is to come about. This is hardly justified.

II. Interpretation

(a) In coming to its conclusion, the majority view depends heavily on what it considers to be the correct and proper interpretation of staff rules 109.5(i) and (d), together with Annex IV to the Staff Regulations. I agree that, in interpreting and in construing specific provisions of Staff Rules and Regulations, the Tribunal should not only take into account the actual texts, but all other provisions which might affect their meaning and application. Indeed, this method was followed on the last occasion the Tribunal considered this question. (Cf. Judgement No. 408, Rigoulet (1987.) Its analysis then covered a wider and more comprehensive field. It is also to be noted that under the heading "United Nations common system of salaries, allowances and benefits" published in April 1987, by the ICSC, the following sentence occurs: "The amount of the grant varies with family status and with length of service outside the home country up to the maxima shown in annex XI." And in annex XI, the first column reads, "Years of continuous service away from home country".

(b) The majority judgement attaches considerable importance to the words "while performing official duties" in staff rule 109.5(i). It holds that the inclusion of these words indicates that if a staff member works at Geneva and resides in a border region of France, he or she is essentially in a different situation from a staff member who lives in France and works in France.

In my view, such an interpretation is both strained and stilted. The dictionary and common sense meaning of the words "performing official duties" would apply to such official UN duties wherever they happen to be - in the staff members' home country or anywhere else. The interpretation now given in the judgement would mean in fact, that the "superfluous" words were included only to protect and promote the interests of staff members of French nationality who resided in France and worked at Geneva[1]. It is well known that there are no other instances where staff members live in their own country and work in some other country. The interpretation given now credits the framers of this rule with extraordinary prescience to foresee and provide for such (exceptional) eventualities we are dealing with. A view like this is far-fetched and the interpretation runs counter to interpretatio talis in ambiguis semper fienda est ut evitetur inconveniens et absurdum. Besides, it is against the legislative history of these rules and regulations.

(c) In order to support its interpretation, the judgement refers to the Fleming Commission in 1949, but its references are selective. This Commission, as did subsequent discussions on the subject, establish beyond all doubt that the repatriation grant - the only grant we are concerned with at the moment - is given to

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[1] At Geneva there are 5 Specialized Agencies: ITU (established in 1865), IMO (1873 - then named International Meteorological Organization; WMO came formally into existence in 1950), ILO (1919), WHO (1945) and WIPO (1970). UN organizations at Geneva are: UN European Headquarters at Geneva (UNOG), UNHCR (1951), UNCTAD (1964), UN Institute of Disarmament and Research (UNIDIR, 1980) and GATT has a slightly different legal status and it created, together with UN, International Trade Centre (UNCTAD/GATT). They all belong to the "UN" family.

persons living and working in places outside their country. The justification for such a grant has always been that it is disadvantageous to live away from one's own country and so, such a situation deserves recompense. This also explains why provision exists that where a staff member serves from time to time both in his or her own country and also in some other country, the staff member becomes entitled to some grant, at the discretion of the Administration, to cover "moving house" and other expenses involved in a transfer from one country to another. Obviously the amount of the grant will depend on a number of factors.

(d) The issue is befuddled with reference to the Consultative Committee on Administrative and Budgetary Questions (CCAQ), and the practice of some specialized agencies, such as WMO, ITU and some other organizations. The CCAQ is without any legislative authority and whatever actions it may recommend must fit in with the legislative requirements of each constituent organization represented in the CCAQ.

Indeed, the minutes of the CCAQ show that at least one of the participants stated that "Geneva is a foyer of France". If this view were to prevail, the Applicants would indeed be considered as working in France, but the implication and intention behind the statement were very different: those who live in French border areas could be treated as living at Geneva! Similarly, the catchment area for recruitment adopted by some Geneva organizations has no relevance to the question of the repatriation grant.

The introduction of these matters can only divert and confuse.

Nonetheless the judgement cites, from time to time, CCAQ deliberation with approval, but omits to mention that what the Chairman of CCAQ said was identical with what the ICSC reported to the General Assembly (Cf. Section I(a) of this dissent). This is followed by further views of the CCAQ as also of the UN representative. None of the questions raised by these organizations have figured in the judgement. In this context, we have to bear in mind that Specialized Agencies like WMO, ITU and some others, by

definition, follow a different practice from that of the UN and that comparison with them is hardly applicable in interpreting UN Staff Rules and Regulations regarding the repatriation grant. If the UN wished to emulate their example, it could easily have introduced the relevant parts of their staff rules regarding the repatriation grant. It did not do so, although it was fully aware of the Rigoulet decision.

(e) Staff rules 109.5 (d), (i) and Annex IV to the Staff Regulations are unrelated to any consideration of nationality, but the judgement says that the UNOG's interpretation of rule 109.5(i) which uses the concept of "residence" as the condition for eligibility leads to "illogical and unfair conclusion for it does not take into account the other relevant provisions". Such a statement remains unexplained and invalid: it is the judgement's failure to take all the relevant factors into account that has led it to a truncated and predetermined interpretation.

For instance, the concept of relocation has been introduced in the judgement, but not developed. Had it been examined fully, it would have been clear that: (a) where a person lives is decisive for the award of the repatriation grant, (b) the present interpretation taken together with the theory behind relocation (I emphasize the prefix re) would produce many strange anomalies. For instance, the Applicants would be entitled to the repatriation grant without having to move even an inch from the hamlets (Prevessin-Moens and Veigy-Foncenex) in which they were living, while another French staff member working in Paris with UNESCO would be denied such a grant, even if he or she were obliged to move out of Paris after retirement and to settle in some distant place in France, after perhaps incurring much expense in the process. Such examples could be multiplied.

(f) Yet, the judgement says in paragraph IX that upon "moving to Paris both Applicants incurred relocation expenditures". This is both misleading and erroneous: under the interpretation given, the Applicants would have been entitled to the repatriation grant even if they had continued to live where they were. Their

"relocation" and expenditure had nothing to do with this grant. But once again, paragraph XIV concludes that "both the Applicants in question have moved to Paris." This implies that their move to Paris has something to do with their entitlement to the repatriation grant: in fact it is irrelevant.

III. Discrimination

(a) Discrimination could be established if any organization, in applying its Staff Regulations and Rules, treated different staff members in different ways. There is nothing, absolutely nothing, to show that the UN applied its regulations and rules for repatriation in this manner, and to speak of discrimination in this context is therefore irrelevant and misleading.

(b) What has happened is that the Applicants have compared their conditions with what they could have enjoyed if they had worked in some other organizations. Such comparison is not permissible, because each staff member is governed by the Regulations and Rules applicable to him or her and which he or she accepted in full knowledge and consciousness. To compare one set of service conditions with another and then to conclude that for a particular individual, some rules somewhere would have been more beneficial is reductio ad absurdum.

(c) However, since so much has been said about discrimination, it should be pointed out that French citizens, who are entitled to live in French border areas as a matter of right, enjoy many many advantages which are not available to others: they live in their own country, among their own people, friends and family; their children go to national schools; the cost of living in these areas is lower compared to Geneva's and there are many other facilities. So, all the reasons for awarding the repatriation grant - i.e. the disadvantages attendent on someone working away from one's own country - disappear. In fact, the discrimination is in favour of, and not against, the French citizens living in the border areas of France and working in Geneva. There are some non-French staff members who are also allowed by the French authorities to live

in the border areas and work at Geneva. As a rule, these selected few non-French people enjoy more privileges and amenities than their compatriots or colleagues living at Geneva, but they are not as well-favoured as the fortunate French. No one should begrudge the good luck, in varying degrees, of staff members so favourably placed; however, it is entirely a different matter if the repatriation grant were to be extended to a selected few in the United Nations system, while the rest of the UN staff could claim it only if they worked away from their home country.

The UN Office at Geneva reports that out of its 65 professional and higher category staff, 59 live in France! Discrimination "should be made of sterner stuff."

IV. Revision of a previous opinion

It is tautology and needs no stare decisis to assert that the Tribunal can revise its own opinion, but in order to do so, there must be some new facts or new considerations, otherwise such a reversal becomes capricious. The Rigoulet case was decided only a few years ago and now, to revise it only on the ground that persons who decided Rigoulet are different from those deciding the present case, would not, in my view, be proper and can indeed expose the Tribunal to avoidable criticism. For instance, if another set of cases comes with the same or similar pleas before the Tribunal in the near future and a different interpretation is given by a new panel, the result can lead to chaos and confusion, and even ridiculous consequences. The Tribunal should certainly have the courage to change its earlier views, but such a change must be based on new facts or new considerations, or because a long passage of time had made earlier decisions otiose or because some obvious mistakes had been made. None of these justifications exist in this case. The judgement is grounded on ipse dixit.

V. Broad considerations

The Administrative Tribunal's mandate is based on a decision of the General Assembly and the Tribunal's decisions are to be governed entirely by its Statute.

The ICSC has been specifically authorized to study, and is at present seized of the problem of the vexed "policy" question underlying the conflicting practices followed by the organizations in the UN family in awarding the repatriation grant. In view of all that is implied in the consideration of these cases, it would have been legally more defensible, in my view, to hold the line and maintain the status quo until some indication of the wishes of the General Assembly were made known, specifically, whether harmonization was desirable and feasible and if so, in what direction action should be taken by different units of the UN system. The best that can be said of this judgement is that it might prompt and provoke the ICSC and eventually the General Assembly to take speedy actions. But, that is not the job of the Administrative Tribunal.

(Signatures)

Samar SEN
President

Geneva, 21 July 1994

R.Maria VICIEN MILBURN
Executive Secretary