

6. The Applicant also claims that the Tribunal should have awarded costs in his favour. The Applicant did not claim it in his original application to the Tribunal nor during the oral presentation of the case. The Tribunal, for whatever reason, has not awarded costs to the Applicant in its Judgement No. 68 and should therefore be deemed to have refused the claim. Since an application for revision under article 12 of the Statute is not in the nature of an appeal, the Tribunal decides that the claim for costs cannot be reopened at this stage.

7. In the result, the application for revision is hereby dismissed.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

R. VENKATARAMAN
Member

Mani SANASEN
Executive Secretary

New York, 5 December 1958.

Judgement No. 74

(Original: English)

Case No. 80:
Bang-Jensen

Against: The Secretary-General
of the United Nations

Dismissal of a staff member on the recommendation of the Joint Disciplinary Committee.—Request for setting aside the proceedings on the Committee.

Complaints regarding alleged violations of the rights of the defence.—Complaint regarding the transmission to the Joint Disciplinary Committee of the report of a special committee appointed by the Secretary-General to investigate the Applicant's conduct.—Right of the Secretary-General to appoint a committee to advise him on a particular question.—Absence of any proof that the transmission of the report vitiated the proceedings of the Joint Disciplinary Committee.

Complaint regarding the composition of the Joint Disciplinary Committee.—Failure to raise the matter before the Committee.—Complaint not receivable by the Tribunal.

Complaint regarding failure to allow Applicant to engage outside legal counsel to represent him before the Joint Disciplinary Committee.—Opportunity of Applicant to be represented before the Committee by another staff member, in accordance with Staff Rule 110.5 (b).—The fact that the Administration had granted to Applicant the right to consult outside legal counsel in the preparation of his brief.—Absence of any violation of the rights of the defence.

Complaint regarding the Joint Disciplinary Committee's refusal to stay its inquiry into the case pending an appeal by the Applicant to the Joint Appeals Board.—Validity of Committee's refusal in view of the fact that the filing of an appeal does not operate as a stay of proceedings.

Complaint regarding Respondent's denial to Applicant of access to documents during proceedings of Joint Disciplinary Committee.—Refusal to allow access to relevant documents constitutes a violation of the rights of the defence.—Absence of such a violation, as Applicant had access to the documents on which the charges were based.—Need to prove to the Joint Disciplinary Committee the relevance of documents requested in disciplinary proceedings.—

Irrelevance of some of the documents requested.—Nature of other documents justifying conditions imposed by Respondent with regard to their production.—Absence of any violation of the rights of the defence.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; the Honourable Mr. R. Venkataraman ; Mr. Omar Loutfi, alternate member ;

Whereas Povl Bang-Jensen, former staff member of the Department of Political and Security Council Affairs, filed an application to the Tribunal on 29 August 1958 against the Secretary-General's failure to offer him due process prior to the proceedings of the Disciplinary Committee which led to his dismissal ;

Whereas the Applicant requests the Tribunal :

(1) to find that the proceedings of the Joint Disciplinary Committee in the Applicant's case were "illegal and invalid" ;

(2) to order the Secretary-General to make available to Applicant all documents he "might request" as necessary for the proper preparation of his defence ;

(3) to order the Secretary-General to allow to Applicant reasonable time to prepare his written answer to the charges made against him ;

(4) to order the Secretary-General to ensure that the Applicant's case is not dealt with by the Joint Disciplinary Committee until it is properly presented to the Committee by the Administration ;

Whereas the Respondent filed his answer to the application on 29 September 1958 ;

Whereas the Applicant requested on 27 October, under article 9 of the Tribunal's Rules, that the Respondent produce certain documents and give certain information for which the Applicant had originally applied to the Administration on 9 April 1958 ;

Whereas, on 31 October 1958, the Respondent replied that "it would seem most convenient and orderly for consideration of any need for additional documents or information to await the oral proceedings" ;

Whereas the President of the Tribunal, on 11 November 1958, requested the Respondent to submit to the Tribunal, if he should so desire, any additional written observations or documents in good time before the oral proceedings ;

Whereas the Tribunal heard the parties in oral session on 20 November 1958 ;

Whereas the Applicant, in oral session, requested the calling of two witnesses ;

Whereas the Tribunal rejected the Applicant's request for witnesses but allowed him to put written questions relating to selected documents from Annex 11 for scrutiny by the Tribunal and for decision whether, and if so, what questions should be answered by the Respondent in writing ;

Whereas the Applicant submitted the questions in writing on 21 November ;

Whereas, on the basis of the Applicant's request, the Tribunal asked the Respondent on 21 November to furnish certain information ;

Whereas the Respondent submitted a written reply to the Tribunal on 24 November and indicated that "if the Tribunal should desire factual information concerning matters to which any items which interest it relate, the Executive Assistant to the Secretary-General or any other official holds himself ready to appear before the Tribunal for this purpose" ;

Whereas the Tribunal heard the evidence of the Executive Assistant to the Secretary-General in oral session on 26 November ;

Whereas on 28 November the Applicant requested a further hearing which was refused by the Tribunal on the ground that further proceedings would serve no useful purpose ;

Whereas, in reply to statements made at the hearing on 26 November, the Applicant submitted a further written statement dated 30 November and at the same time requested that his case be remanded "so that it can be presented anew to a Disciplinary Committee, with another membership, in a complete and unprejudiced manner and in a manageable form" ;

Whereas the facts as to the case are as follows :

The Applicant entered the service of the United Nations on 1 July 1949 as a political affairs officer in the Department of Security Council Affairs. On 10 January 1957, the General Assembly set up a special committee consisting of representatives of five Member States to inquire into the situation in Hungary. The General Assembly invited "the Secretary-General to render the Committee all appropriate assistance and facilities". Pursuant to the General Assembly's resolution, the Secretary-General set up a secretariat with a Principal Secretary, Deputy-Secretary and staff to assist the Special Committee on Hungary and assigned the Applicant to the post of Deputy-Secretary. When the Committee began to draft its report to the General Assembly, the Applicant objected to several portions of the draft text, asserting that it contained "grave errors" and involved criticism of representatives of States acting as Chairman and Rapporteur of the Committee. In a memorandum dated 30 May 1957 to the Secretary of the Committee, the Rapporteur complained of the Applicant's conduct and stated, *inter alia* :

- "(1) I regard Mr. Bang-Jensen's behaviour, to say the least, as unbecoming to a member of the Secretariat,
- "(2) I do not believe that Mr. Bang-Jensen is quite himself,
- "(3) I am of the opinion that he has already done considerable harm and that his allegations are largely childish and without foundation,
- "(4) Should this situation continue I have no alternative but to raise it at a higher level so that proper disciplinary action may be taken to see that it stops."

On 31 May 1957, the Applicant was formally instructed in writing by the Secretary of the Committee to "abstain from attendance at the Committee". On 4 June 1957, the Applicant made a number of allegations in writing to the Secretary-General that serious irregularities had been committed in the conduct of the Special Committee on Hungary. On subsequent dates he charged that sabotage of the Special Committee had been committed since the beginning

and that the Chairman and the Rapporteur of the Special Committee had been deceived. On 26 August 1957, he was relieved of his functions as Deputy-Secretary of the Committee.

At the instance of the Secretary-General, one of the Under-Secretaries conducted an inquiry into the allegations made by the Applicant that "the Chairman and Rapporteur of the Special Committee on Hungary have been and continue to be, 'deceived' by a member of the Secretariat about the factual accuracy of the report".

On 9 October, the Applicant's superior officer verbally requested him to return the files including correspondence with the witnesses and the list of witnesses who had appeared before the Special Committee on Hungary.

On 29 November 1957, the Applicant was formally instructed in writing to deliver the list of witnesses who appeared before the Special Committee together with all records or correspondence pertaining to the work of the Committee in accordance with the established practice for safekeeping of important documents in the Secretariat. On 2 December 1957, the Applicant replied that he had not at any time refused to hand over the list of witnesses but that he was unable to do so as he had explained in a memorandum of 22 November 1957. In the meantime, on 18 October 1957, the Secretary-General asked the Chairman and Rapporteur of the Special Committee on Hungary to give their views on the attitude of the Applicant with respect to the custody of the documents in question. The Chairman replied, on 1 November, that "not only Bang-Jensen, but also I myself on behalf of the *members of the Committee and of the Secretariat and the Staff as a whole* have given 'firm commitments' that the names of those (anonymous) witnesses should remain secret." In his opinion, "all documents concerning the Hungary Committee ought to be placed in the custody of the United Nations" and he suggested that the list of witnesses should be burnt. The Rapporteur of the Special Committee replied, on 29 October, that the order given to the Applicant "to restore official documents to their proper place is a lawful one and must be complied with" and "the attempt of one of your officers to set himself up as what he calls 'an irrevocable trustee', would be disastrous for the proper conduct of business in the United Nations . . .".

On 4 December 1957, the Applicant was formally notified by the Director of Personnel of his suspension with full pay. On the same day, the Secretary-General established a committee consisting of three members to investigate the Applicant's conduct relating to his association with the Special Committee on Hungary. The Committee was composed of Mr. Ernest Gross, Chairman, Mr. Philippe de Seynes and Mr. Constantin Stavropoulos. The Applicant appeared before the Gross Committee on 13 and 16 December 1957 and then informed the Committee that "he had been advised not to meet again with them without legal counsel".

On 21 December 1957, the Gross Committee issued an interim report, which was released to the Press, stating *inter alia* that the United Nations had consistently maintained safe custody of all highly confidential documents relating to various missions. On 15 January 1958, the Gross Committee issued a report, released to the Press, recommending *inter alia* that the records of the anonymous witnesses before the Committee on Hungary should be destroyed. On 24 January 1958, a sealed envelope was burned by the Applicant at United Nations Head-

quarters, in the presence of witnesses. On 8 February 1958, the Gross Committee issued its final report (which was also the subject of a press conference) in which it advised the Secretary-General that the "continued employment of Mr. Bang-Jensen would be incompatible with the best interests of the United Nations". The Committee also considered that the Applicant's conduct "departed markedly from normal and rational standards of behaviour" and recommended that he should undergo medical examination under Staff Rule 106.2 (a). On 19 February 1958, the Applicant was notified by the Office of Personnel that charges of grave misconduct would be presented against him before the Joint Disciplinary Committee and that he would have 14 days to present his answer. The charges were, briefly:

(i) that he had repeatedly made unfounded charges and allegations, orally and in writing, to the Chairman and Rapporteur of the Special Committee on Hungary and to officials of the Secretariat, imputing to members of the Secretariat "sabotage" and "dishonest motives";

(ii) that he had acted contrary to his obligations as an international civil servant and in defiance of instructions from his superior officer in pressing in an improper manner with the Chairman and Rapporteur of the Special Committee his personal views on the drafting of the report and that he had also refused to comply with an instruction not to attend a meeting of the Special Committee;

(iii) that he had given assurances to prospective witnesses which were in excess of his authority or that he had subsequently made a wrong and unjustified interpretation of such assurances, or both;

(iv) that he had failed to comply with oral and written instructions to deliver for safekeeping in the Secretariat papers in his possession relating to witnesses before the Special Committee on Hungary.

By the same letter, the Applicant was informed "you will, of course, have free access to your files and papers in your office at Headquarters . . ." and "in accordance with Staff Rule 110.5 (b), you may arrange, if you wish, to have your case presented before the Joint Disciplinary Committee by any other staff member . . .".

On 4 March 1958, the Applicant sought the right to be represented by independent legal counsel and "the right to be made available to me or my counsel such documents as may be necessary to the proper presentation of my defence". On 7 March, the Office of Personnel replied to the Applicant as follows:

"All documents presented to the Joint Disciplinary Committee will be made available to you. Should the Committee consider that other documents are relevant to the charges submitted, the Chairman may request their production. The Committee may consider suggestions by you or your counsel as to material which should be requested.

With respect to papers required for your preparation prior to the proceedings, you will of course, as said in my memorandum of 19 February 1958, have access to your files and papers in your office at Headquarters. Should any other particular document, relevant to the charges, be necessary to the preparation of your case, you should address a specific request to Mr. Cordier. He will, subject to necessary protection of secret material, make any such paper available to you or your counsel."

The period fixed for submission of the answer was also extended by 30 days, up to 7 April. On 2 March 1958, the Applicant was informed that he could obtain assistance from outside legal counsel for the preparation of his answer alone but that, otherwise, no exception would be made to Staff Rule 110.5 (b). On 9 April 1958, the Disciplinary Committee informed the Applicant that he was granted an additional 14 days' extension, up to 21 April, for his written answer and that the Committee would begin consideration of the charges on 24 April. On 9 April 1958, the Applicant addressed a memorandum to Mr. Cordier, Executive Assistant to the Secretary-General, enumerating 87 items on which he requested documents and information. Mr. Cordier replied, on 15 April 1958, that he was referring the Applicant's request to the Joint Disciplinary Committee "for advice as to which documents if any, should be made available . . .". During this period (memoranda of 11, 19 and 28 April 1958), the Applicant appealed to the Secretary-General for his "personal protection" against violations of due process and fundamental human rights; at the same time, he repeated his requests for the production of documents, for more time to find legal counsel and asked the Secretary-General to ensure that his case would not be dealt with by the Disciplinary Committee until all the documents had been clearly presented. On 19 April, the Applicant gave notice of his intention of appealing on these procedural matters to the Joint Appeals Board and expressed his assumption that the Joint Disciplinary Committee would not proceed with his case while his appeal was before the Board. On 24 April 1958, the Secretary of the Joint Disciplinary Committee advised the Applicant that the Committee would proceed with its examination of the case. On 25 April 1958, the Applicant was invited to appear in person before the Committee on 2 May and to submit his written answer to the charges as well as to two questions which were put to him. On 30 April 1958, the Applicant protested against the proceedings of the Disciplinary Committee. On 2 May 1958, the Secretary of the Disciplinary Committee again requested the Applicant to reply in writing to the questions put to him and informed him that the Committee was ready to hear him. The Applicant did not reply to the questions nor did he make an appearance before the Disciplinary Committee. On 10 May 1958, the Applicant submitted an application to the Joint Appeals Board contesting the following "administrative decisions":

- (i) failure to produce documents requested by him on 9 April 1958 ;
- (ii) failure to allow time to Applicant to find and instruct counsel for the preparation of his answer ;
- (iii) failure to "make certain" that his case should not be dealt with in the Disciplinary Committee until the facts had been completed and, in particular, while his appeal was pending before the Joint Appeals Board.

On 17 and 26 May 1958, the Applicant protested to the Joint Disciplinary Committee against irregularities in the handling of his case and said that he "must assume that the Committee . . . has agreed to rest the case . . ." pending consideration by the Joint Appeals Board. The Joint Appeals Board decided to consider first the question of its competence before taking up the appeal and gave a hearing to the Applicant on 27 May 1958. On 29 May 1958, the Board reported to the Secretary-General that it was not competent to consider the appeal at that stage of the proceedings. On 3 June 1958, the Applicant notified the joint Disciplinary Committee that he would appeal to the Administrative

Tribunal. On 5 June 1958, the Joint Disciplinary Committee reached the unanimous conclusion that the Applicant should be dismissed for misconduct. On 6 June 1958, the Secretary-General forwarded the report of the Disciplinary Committee to the Applicant and gave him one week to give an answer to the charges in the Committee's report. On 7 June 1958, the Applicant replied, saying that he was unable to answer the charges without the production of documents. On the same day, he sent a protest to the Joint Disciplinary Committee against its "secret and illegal proceedings". On 14 June 1958, the Applicant submitted to the Secretary-General a detailed memorandum outlining his previous allegations respecting the conduct of the Special Committee on Hungary and his protest against violations of due process. He specified that his memorandum did not constitute a reply to the charges against him. On 13 June 1958, the Secretary-General granted the Applicant additional time, up to 23 June 1958, to answer the charges. The Applicant made no reply to the charges and the Secretary-General, by letter of 3 July, notified the Applicant of his dismissal for misconduct. He also informed the Applicant that he would receive compensation in lieu of three months' notice and also, by virtue of the Secretary-General's discretionary power under Annex III, paragraph D, of the Staff Regulations, the termination indemnity in accordance with paragraph (a) of the same Annex. On 29 August 1958, the Applicant filed his application with the Administrative Tribunal.

Whereas the Applicant's principal contentions are:

(a) The application is directed "against the Secretary-General's failure to offer the Applicant due process *prior* to the proceedings of the Joint Disciplinary Committee" and "against administrative decisions which were made—and appealed against". While it is contended that the proceedings of that Committee, leading to the Applicant's dismissal, were illegal and void, the Applicant's "case itself and the 'dismissal' are not under appeal at present".

(b) The Applicant appeals against the following actions of the Administration:

(i) The Secretary-General's failure to make available the documents needed by the Applicant for the preparation of his answer to charges of grave misconduct laid before the Joint Disciplinary Committee.

(ii) The Secretary-General's failure to allow the Applicant to engage outside legal counsel to represent him in oral hearings before the Joint Disciplinary Committee.

(iii) The Secretary-General's failure to use his powers to ensure that the Joint Disciplinary Committee should not proceed with the case until the facts had been clearly presented, until all essential documents had been produced and, in particular, until the Joint Appeals Board had dealt with Applicant's appeal on procedural questions.

(c) The proceedings of the Joint Disciplinary Committee leading up to the Applicant's dismissal were "illegal and invalid".

(i) The charges against the Applicant were improperly formulated. They were based upon those contained in the Report of the Gross Committee which were much wider in scope.

(ii) The Applicant's case before the Joint Disciplinary Committee was

"irreparably prejudiced" by the Secretary-General's action in transmitting to it the "defamatory" report of the Gross Committee.

(iii) The Joint Disciplinary Committee itself was composed of staff members who should have been disqualified from sitting on the Applicant's case by reason either of their propinquity to persons involved in the Gross Committee or, in one case, of certain statements uttered by the member prior to the Committee's proceedings.

(iv) The Gross Committee superseded the bodies set up by the Staff Regulations and Rules. "The Gross Committee itself decided the case and passed sentence—in effect instructing the Disciplinary Committee and the Appeals Board to recommend Mr. Bang-Jensen's dismissal".

(v) The Joint Disciplinary Committee, by not answering the Applicant's earlier protests, gave him the "impression" that it had "agreed to rest the case" pending a decision by the Joint Appeals Board on the question of production of documents.

(vi) The Committee consequently made its report on the case without having heard the Applicant or receiving from him any answer to the charges.

Whereas the Respondent's principal contentions are:

(a) The application is not receivable by the Tribunal.

(i) It bears only upon certain interlocutory points which are not appealable.

(ii) The Applicant sought to stop all proceedings against him by refusing to appear before the Committee completed consideration of his case.

(iii) The Applicant's allegation of lack of due process can be examined only in relation to the legality of the termination and on the basis that the procedure leading to the termination was unfair.

(iv) The Applicant failed to appeal to the Joint Appeals Board, under Staff Regulation 11.1, against the only substantive decision taken against him, viz. his termination, and has allowed the time-limit for appeal to lapse.

(v) Disciplinary proceedings in progress are not subject to the appeals machinery. An appeal cannot be taken from a decision of the Joint Disciplinary Committee to the Joint Appeals Board until the Secretary-General has taken his decision on the advice of the Committee.

(vi) An administrative decision must first be effective before it is appealable under Staff Regulation 11.1; none of the "failures" to act during the procedure, as alleged by the Applicant, constituted administrative decisions.

(b) Applicant's termination was in accordance with principles of fair proceedings.

(i) The Applicant received all evidence submitted in support of the charges against him and at no time did the Administration refuse the Applicant relevant documents. The Applicant was not entitled to the production of all the documents and information which he considered necessary for his defence nor, as a matter of due process, to the production of documents which were not used against him.

(ii) Applicant failed to avail himself of the Administration's exceptional offer to give him access to the documents requested by him.

(iii) Rules of "pre-trial discovery" of documents do not support the

Applicant's contentions in respect to his request of 9 April 1958, for production of 87 categories of documents without submitting a showing of relevance.

(c) The convening of the Gross Committee was a proper exercise of the Secretary-General's discretionary powers to appoint advisory groups. It was not violative of the Applicant's rights and the Committee did not, by its investigation, supersede the internal bodies set up by the Staff Rules. Due process does not require the Applicant's participation in such "preliminary investigation".

(d) The Applicant had adequate notice of the charges of misconduct which were properly referred to the Joint Disciplinary Committee under Staff Regulations and Rules.

(e) The Secretary-General's decision of termination was taken in accordance with the Staff Rules and was fully supported by evidence that the Applicant had violated the standards of conduct required of United Nations officials.

The Tribunal, having deliberated until 5 December 1958, now pronounces the following judgement:

1. This application differs from the usual applications before the Tribunal and therefore the Tribunal finds it necessary to set out clearly the scope of the application. The Applicant was dismissed by an order of the Secretary-General dated 3 July 1958. The Applicant has not filed an appeal against the said order either to the Joint Appeals Board or to the Tribunal. The Applicant has, on the other hand, chosen to attack the entire disciplinary proceedings against him on the ground that they lacked due process. The Applicant has further insisted that the Tribunal should not go into the merits of the case at its present hearing, having stated in his application that "the case itself and the 'dismissal' are not under appeal at present". During the oral presentation, the Applicant protested against the Secretary-General, or the Administration, bringing in the substantive case at this stage (AT/PV.75). In the circumstances, the Tribunal has no alternative but to address itself to the limited question of procedures raised before it.

2. The Applicant attacked the proceedings before the Joint Disciplinary Committee stating that it lacked due process on several grounds. The Applicant contends that the Gross Committee "prejudiced the issue and prejudged the issue" and that the publication of the interim reports and the circulation of the final report have prejudged the case before the Joint Disciplinary Committee and vitiated its proceedings. That the Secretary-General is entitled to appoint a committee, such as the Gross Committee, to advise him on a specified matter, is not questioned. This right has been endorsed by the Tribunal itself in its Judgement No. 38 where "the Tribunal recognizes that the Secretary-General may, if he deems fit, set up a special committee to clarify or advise him on a specific situation". The Tribunal is not convinced about the need for the publicity given to the case from time to time through press conferences, especially when the Gross Committee was set up only to advise the Secretary-General. Nevertheless, the Tribunal is unable to find that the subsequent proceedings of the Joint Disciplinary Committee were in any way vitiated by the report of the Gross Committee. The Joint Disciplinary Committee, in its letter dated 25 April 1958, informed the Applicant that "it does not consider itself bound by the findings of that Report (Gross Report) and does not intend to rely upon it for the purpose of its own examination of the charges, except in so far as documents included in the annexes may furnish it primary evidence".

3. The Applicant further contends that the Joint Disciplinary Committee included members who should have been disqualified from sitting thereon by virtue of the official position they held as subordinates to some of the members of the Gross Committee. The Tribunal does not pronounce itself on the validity of the objection. But this objection was not raised before the Joint Disciplinary Committee itself and, as pointed out by the Respondent, was raised for the first time after the report of the Joint Disciplinary Committee had been submitted to the Secretary-General. Having failed to make the objection in proper time, the Applicant cannot be allowed to raise it in subsequent proceedings.

4. The Applicant also contends that the denial of permission to be represented by counsel before the Joint Disciplinary Committee amounts to a denial of due process. Sub-paragraph (b) of Staff Rule 110.5 specifically authorizes representation of one staff member by another staff member in such proceedings. Unless it is contended that Staff Rule 110.5 is itself invalid as being contrary to due process, the Applicant must be bound by such rule. Limitation of the right of representation in what are known as domestic Tribunals is a well established procedure, familiar to jurisprudence. The Respondent, in his letter dated 7 March 1958, conceded to the Applicant the right to consult with his legal representative in the preparation of the brief to the Joint Disciplinary Committee. The Tribunal therefore holds that there was no lack of due process as contended by the Applicant.

5. The Applicant also states that the Joint Disciplinary Committee acted illegally in proceeding with an enquiry into the charges against him when an appeal by him to the Joint Appeals Board was pending. The Applicant himself concedes that the filing of an appeal does not operate as a stay of proceedings. Moreover, the Applicant was informed by the Joint Disciplinary Committee, in their communications dated 24 April 1958 and 2 May 1958, that they would proceed with the examination of the case in accordance with the Staff Regulations and Rules. The Tribunal finds nothing illegal in the Joint Disciplinary Committee proceeding with the enquiry.

6. Though the Applicant argues the several points set out above, the Applicant rests his case squarely on the denial of access to documents requested by him in his memorandum dated 9 April 1958. The Administration by its letter dated 19 February 1958 stated as follows: "You will of course have free access to your files and papers in your office at Headquarters in connexion with the preparation of your answer and your appearance before the Joint Disciplinary Committee".

7. The Applicant also relies on a letter dated 7 March 1958 by the Administration to the Applicant which states as follows: "Should any other particular document, relevant to the charges, be necessary in the preparation of your case, you should address a specific request to Mr. Cordier. He will, subject to necessary protection of secret material, make any such paper available to you or your counsel". The Applicant contends that the Administration changed its position and did not afford him access to the documents referred to in his memorandum dated 9 April 1958 and thereby denied due process to the Applicant before the Joint Disciplinary Committee.

8. The Statute of the Administrative Tribunal prescribes that the Tribunal shall be competent to hear and pass judgement upon application alleging non-observance of contracts of employment of the staff members of the Secretariat

of the United Nations or of the terms of appointment of such staff members. The words "contracts" and "terms of appointment" include all pertinent regulations and rules in force. The question naturally arises whether there has been a non-observance of the regulations and rules in force on the part of the Administration by the failure to give access to the documents requested.

9. Staff Regulations 10.1 and 10.2 and Staff Rules 110.1 through 110.5 do not specifically provide for any access to documents or for procedures for inspection and discovery of documents. The Respondent argues that "there is no such rule in the Staff Regulations or Staff Rules. There is no such requirement of due process". Nevertheless, the Tribunal considers that rules of equity and justice do require access to documents and information within the exclusive possession of the Administration in so far as it relates to the staff member concerned and is relevant to the proceedings under consideration. Unless access is given to "relevant" documents to the Applicant, it would amount to lack of due process in the preparation and presentation of his case.

10. The Applicant's access to his own personal files has never been in dispute. It is only in relation to other documents and information, which the Applicant requested, that the Respondent raised questions of relevancy.

The Respondent contends that in none of the courts of civil procedure is there a right for a party to a proceeding to ask for access to documents without

- (a) an order of court, and
- (b) proving their relevance.

The Respondent therefore argues that the Administration has done nothing more than what was expected of it under normal rules of civil practice when it referred the request of the Applicant for documents to the Joint Disciplinary Committee. The Tribunal notes that the documents requested should have some relevance to the subject matter at issue and that a party has no right to a roving examination of all papers in the hope of finding information in his favour. The Respondent has properly appreciated his duties in this behalf. In its letter dated 19 February 1958, the Administration offered access to the Applicant's files and papers in connexion with the preparation of the answer and the appearance before the Joint Disciplinary Committee. In the memorandum of 9 April 1958, the Administration was faced with the request for 87 items of documents and information covering a very wide field. The Administration naturally wanted to be assured of the relevance of these documents to the proceedings before the Joint Disciplinary Committee, and in this connexion pointed out "the unexpected scope and nature of your request for documentation as indicated in your memorandum to Mr. Cordier of 9 April 1958 gave rise to new questions of relevance". The Respondent went on to say: "In the light of the new situation arising from the scope and nature of your requests, you will, I am sure, agree that the Joint Disciplinary Committee is the proper body to provide guidance as to the relevance of documentation to the charges".

11. In the light of the foregoing observations, it falls to the Tribunal to decide whether the Respondent's failure to make available to the Applicant all the documents mentioned in his memorandum of 9 April 1958 constitutes a lack of due process or whether the Respondent's contention that in view of the unexpected scope and nature of the request for documents, the Respondent was justified in seeking the guidance from the Joint Disciplinary Committee. If the Tribunal comes to the conclusion as a question of fact that the Applicant

was unable to make his primary plea without the documents mentioned in his memorandum of 9 April 1958, the Tribunal will have no alternative but to come to the conclusion that the Applicant has been denied due process. If, on the other hand, the Tribunal finds, as a question of fact, that the documents requested are not of such character as to hamper the presentation of the Applicant's case before the Joint Disciplinary Committee, the application fails.

12. In an effort to appraise the real situation, the Tribunal gave an opportunity to the Applicant to specify the documents in respect of which he desired information. On 21 November 1958, the Tribunal went over carefully the list furnished by the Applicant and called on the Respondent to furnish information on some items which the Tribunal considered relevant to the issue. On 24 November 1958, the Administration furnished its comments on the documents referred to it by the Tribunal and offered to present the testimony of Mr. Cordier, Executive Assistant to the Secretary-General.

13. Though the substance of the charges are not directly before the Tribunal, yet, in order to appraise the validity of the request for the documents made by the Applicant, it becomes necessary to refer to the substance in brief. The memorandum dated 19 February 1958 contains among other things two main charges, one relating to the Applicant's conduct and dealings with the Chairman and Rapporteur of the Special Committee on Hungary and to his charges of sabotage and dishonesty levelled against Secretariat officials, and the other relating to his failure to obey instructions on several occasions, more particularly with regard to the delivery of documents to the Administration. The evidence in support of the charges has been detailed in the said memorandum and it is common ground now that all the documents relied on by the Administration in support of the charges were made available to the Applicant. At the meeting on 26 November 1958, the Tribunal was assured that the Applicant was given the documents and annexes to the Gross Committee Report on which the charges were based. The Tribunal is of the opinion that the normal requirements of due process are met when the Applicant is given the material on which the charges are framed. If the Applicant wanted further material, he should satisfy the authorities before whom proceedings are pending, with regard to its relevance to the proceedings.

14. The Applicant wanted some of these documents in order to deal with the allegations against the staff members of the Secretariat regarding the work of the Special Committee on Hungary. The Tribunal has its doubts with regard to the duty of junior secretariat officials to try and press their point of view against that of their superiors and to carry on a campaign for the acceptance of the same. Moreover, the Special Committee on Hungary was appointed by the General Assembly and the Chairman and Rapporteur were responsible for the report and the conclusions contained in the report. It appears to the Tribunal that the duties of the Secretariat staff would stop with bringing various facts to the notice of the Committee. In attempting repeatedly and persistently to press the Applicant's editorial point of view before the Chairman and Rapporteur even after they had indicated that they had personally satisfied themselves on this subject, the Applicant strayed beyond the scope of his ordinary duties as a secretariat assistant to the Committee. However, the Tribunal does not express itself on this question on merits as it is not directly before it. Suffice it for the purpose of this case, to state that the documents bearing on the question would

have to be carefully scrutinized and selected on the basis of their relevance to the charge. The Joint Disciplinary Committee is the appropriate organ to do it under these circumstances.

15. In reply to the charge that the Applicant refused to surrender papers relating to the Committee on Hungary, more particularly the list of anonymous witnesses, the Applicant contends that according to some arrangements, he alone in the Secretariat would know the names of such witnesses and that he had given a pledge of secrecy to the anonymous witnesses. Whatever the merits of the contention, it is obvious that the Applicant came into possession of a certain list of witnesses as an official of the Committee on Hungary. As soon as the assignment was terminated, he should have handed over the papers to the appropriate authority. Mr. Cordier, in his evidence before the Tribunal on 26 November 1958, stated that the normal Secretariat practice was that when an assignment was over, the papers relating to that assignment were handed over to the United Nations. The Applicant was asked during the oral proceedings what he would have done with the list of witnesses if he had been requested to resign from the United Nations. The Applicant stated in answer that he would have handed over the papers to the Chairman of the Committee on Hungary. This clearly acknowledges that the papers in question were not his personal property. In view of the fact that the Secretary-General is, under the Charter, the Chief Administrative Officer of the Organization, the Applicant could have no valid excuse whatever for declining to deliver the documents to the Secretary-General.

16. The Applicant's further contention that there are not enough security arrangements within the United Nations for safeguarding the confidential list of anonymous witnesses betrays his ignorance of the measures and procedures for safeguarding and preserving confidential documents observed in the United Nations Organization. There are over 100 officers in the Organization of higher rank to the Applicant. He is not expected to know all the security arrangements and procedures prevalent in the United Nations in respect of the several grades of secret and classified documents. Nor can he claim to be educated on this matter since that itself would violate security arrangements. It is for the Secretary-General to provide such security arrangements and procedures for the preservation of secret and confidential papers as are necessary and if the Secretary-General is satisfied that such arrangements do exist, it is not open to any member of the staff to go into the adequacy of such arrangements. It has been definitely stated by Mr. Cordier in his evidence before the Tribunal that such security arrangements do exist in the United Nations for safeguarding secret and confidential information and it must be taken as conclusive of the matter.

17. In the light of the foregoing observations, the Tribunal finds that documents 10 to 24 requested by the Applicant dealing with the lack of internal security measures and procedures of the United Nations generally and in particular as applied to the work of the Committee on Hungary, are irrelevant for the purpose of the presentation of the Applicant's case. The Tribunal also finds that the documents Nos. 35 to 46 required by the Applicant dealing with "the charge that Mr. Bang-Jensen has persisted in bringing irregularities to the attention of his superiors after, allegedly, 'inquiries' or 'investigations' repeatedly had proved that his allegations were 'entirely baseless' and 'totally unfounded'" are such that the Joint Disciplinary Committee should have gone into the relevance and pronounced upon the production of the same.

18. It should be observed that the Administration had at no stage refused or declined to give access to the documents mentioned by the Applicant in his letter dated 9 April 1958. The Respondent only insisted on the Joint Disciplinary Committee looking into the relevance, of the documents requested, to the charges framed against the Applicant. The Tribunal is not aware of a *due process* which gives an applicant the right to call for any document from the opposite party regardless of its relevance to the issue under consideration.

19. It is regrettable that the Applicant has put himself in a difficult position by his own conduct. The Applicant remained *ex parte* in the proceedings before the Joint Disciplinary Committee on the ground that the documents requested were not made available to him. The Applicant has thereby denied himself an opportunity for his defence being considered on its merits by the Joint Disciplinary Committee and also by appropriate appeal authorities in due course.

20. In conclusion, the Tribunal finds that the plea of lack of due process at various stages of the disciplinary proceedings against him is not substantiated.

21. The application is hereby dismissed.

(Signatures)

Suzanne BASTID

President

CROOK

Vice-President

R. VENKATARAMAN

Member

Omar LOUTFI

Alternate Member

Mani SANASEN

Executive Secretary

New York, 5 December 1958.

Judgement No. 75

(Original: English)

Case No. 79:
Davidian

Against: The Secretary-General
of the United Nations

Termination of the temporary-indefinite contract of a staff member of the United Nations Children's Fund.

Application received after expiration of time-limit prescribed in article 7, paragraph 4, of the Statute of the Tribunal.—Decision to regard application as receivable by application of article 7, paragraph 5, of the Statute, proof having been provided that the application had been posted before the expiration of the time-limit.

Request for rescission of the UNICEF Personnel Contracts Review Board's recommendation that the Applicant should not be granted a permanent appointment.—Request for rescission of the Joint Appeals Board's conclusion that termination of the Applicant's employment was not contrary to Staff Regulations.—Neither of Applicant's requests receivable in view of advisory nature of the bodies in question.

Request for damages for faulty dismissal considered as an appeal against the termination decision.—Absence of any proof that the decision was based on prejudice.