

2. That the Applicant be paid as compensation a sum equivalent to three months' net base salary for loss caused by the procedural delay.

(Signatures)

R. VENKATARAMAN  
President

Suzanne BASTID  
Vice President

Francis T. P. PLIMPTON  
Vice-President

Jean HARDY  
Executive Secretary

Geneva, 26 April 1972

---

## Judgement No. 158

(Original: French)

Case No. 144:  
Fasla

Against: The Secretary-General  
of the United Nations

---

*Non-renewal of a fixed-term appointment.—Request for the payment of subsistence allowances and for compensation for damages arising from the Applicant's placement on special leave.*

*Submission to the Tribunal of an application and a supplement thereto.—Decision of the Tribunal to issue one judgement, in view of the relationship between the two briefs.*

*Request for the production of three documents.—The first is annexed to the Respondent's answer.—The second is not relevant, with the exception of a few lines of which the text was given to the Applicant.—The Respondent's statement that the third is not in his files.*

*The Applicant's request for reinstatement through the extension of his last appointment.—Staff Rule 112.6 and Administrative Instruction ST/AI/115.—Commitment by the Respondent to try to find another assignment for the Applicant and implicit obligation to act in a correct manner and in good faith.—Gaps in the Applicant's file at the time the search for a new assignment was undertaken.—Consequently, the commitment undertaken by the Respondent was not correctly fulfilled.—Following the report of the Joint Appeals Board, the Respondent refused to undertake a search for an assignment in a more correct manner.—Conclusion that the obligation assumed by the Respondent has not been performed.—Action taken to complete the Applicant's file.—The Applicant's complaint that one of the periodic reports was prejudiced.—Consideration of that report.—Prejudice on the part of the first reporting officer against the Applicant.—The prejudice was in no way corrected by the second reporting officer.—The report is invalid and must be treated as such.—It is not possible to remedy the situation by rescinding the contested decision or by ordering performance of the obligation contracted.—Award to the Applicant of compensation, equal to six months' net base salary.*

*Request for compensation for damages arising from the Applicant's placement on special leave.—The Applicant raised no objection to the granting of special leave.—Wide discretion granted to the Respondent under regulation 5.2 of the Staff Regulations.—The request is rejected.*

*Request for the payment of subsistence allowances.—Staff Rule 103.22 (c).—The request is rejected, as the Applicant received an assignment allowance.—The Respondent's offer to make the Applicant an ex gratia payment in the amount of any losses that he can show he suffered as a result of his precipitate recall.—The Applicant is entitled to take advantage of his possibility within two months.*

*Request for compensation for the delays in considering the case.—The request is rejected, as no abnormal delay attributable to the Respondent can be found.*

*Request for payment of exceptional costs.—The request is rejected.*

187 case 2 is referred to the  
committee to review HT judgements

#### THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. R. Venkataraman, President; Mr. Mutuale-Tshikantshe Vincent;

Whereas on 2 October 1970, at the request of Mohamed Fasla, a former staff member of the United Nations Development Programme, hereinafter called UNDP, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 1970 the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 December 1970, the Applicant filed an application requesting the Tribunal "to order the following measures:

"(a) As a preliminary measure, production by the Respondent of the report by Mr. Satrap, Chief, Middle East Area Division, UNDP on his investigation of the UNDP office in Yemen in February 1969.

"(b) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, Consultant to the UNDP Administrator, on his investigation of the UNDP office in Yemen in March 1969.

"(c) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, UNDP Special Representative in Yemen, concerning the Applicant's performance, prepared at the request of the UNDP in the summer of 1969.

"(d) Restoration of the Applicant to the *status quo ante* prevailing in May 1969, by extending the Applicant's last fixed-term appointment for a further two years beyond 31 December 1969, with retroactive pay of salary and related allowances; alternatively, payment by the Respondent to the Applicant of three years' net base salary.

"(e) Correction and completion of the Applicant's Fact Sheet which is intended for circulation both within and outside the UNDP, with all the required Periodic Reports and evaluations of work; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

"(f) Invalidation of the Applicant's Periodic Report covering his service in Yemen, prepared in September 1970; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

"(g) Further serious efforts by the Respondent to place the Applicant in a suitable post either within the UNDP or within the United Nations Secretariat or within a UN Specialized Agency; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

"(h) As compensation for injury sustained by the Applicant as the result of the repeated violation by the Respondent of Administrative Instruction ST/AI/115, payment by the Respondent to the Applicant of two years' net base salary.

"(i) As compensation for injury sustained by the Applicant as the result of the continuous violation by the Respondent of his obligation to make serious efforts to find an assignment for the Applicant, payment by the Respondent to the Applicant of two years' net base salary.

"(j) As compensation for injury sustained by the Applicant as the result of prejudice displayed against him, payment by the Respondent to the Applicant of five years' net base salary.

"(k) As compensation for the emotional and moral suffering inflicted by the Respondent upon the Applicant, payment by the Respondent to the Applicant of one Yemen rial.

"(l) As compensation for delays in the consideration of the Applicant's case, especially in view of the fact that no Joint Appeals Board was in existence during the first four months of 1969 since the Respondent had failed to appoint a Panel of Chairmen, payment by the Respondent to the Applicant of one year's net base salary.

"(m) Payment to the Applicant of the sum of \$1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case necessitated the Applicant's travel from California to New York in May 1970 as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date.

"(n) As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary."

Whereas the Respondent filed his answer on 1 June 1971;

Whereas, on 11 June 1971, the Applicant filed a supplement to his application containing pleas, set forth under article 7, paragraph 3 of the Rules, in which he requested the Tribunal to order the following additional measures:

"(a) As compensation for the further delay in the consideration of the Applicant's case early in 1971, payment by the Respondent to the Applicant of one year's net base salary.

"(b) Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.

"(c) As compensation for the illegal suspension of the Applicant from duty, payment by the Respondent to the Applicant of five years' net base salary."

Whereas the Respondent filed a supplement to his answer on 12 August 1971;

Whereas the Applicant filed written observations on 15 November 1971;

Whereas, on 17 March 1972, the Respondent provided information concerning the requests for production of documents;

Whereas on 15 April 1972, at the request of the Tribunal, the Respondent filed comments on a document in the file;

Whereas on 18 April 1972, following a request from the Tribunal, the Respondent filed a document the production of which had been requested, as well as a written statement;

Whereas, on 24 April 1972, the Tribunal informed the parties that, except for a quoted paragraph, the above-mentioned document was irrelevant to the case;

Whereas, on 26 April 1972, the Applicant submitted observations on the said document, on the above-mentioned written statement and on the comments filed on 15 April 1972 by the Respondent;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 30 June 1964 under a fixed-term appointment of two years at the P-3 level as Assistant Resident Representative of the Technical Assistance Board in Damascus (Syrian Arab Republic). On 1 January 1966 he was reassigned to the UNDP Office at Beirut (Lebanon) as Assistant Resident Representative. On 1 June 1966 the Applicant was reassigned to Headquarters in New York as Programme Officer in the Bureau of Evaluation and Reports of UNDP; on 30 June 1966 his appointment was extended to 31 December 1966. On 1 January 1967 the Applicant was granted an extension of appointment for one year as Area Officer in the Bureau of Operations and Programming of UNDP. On 1 June 1968 the Applicant, whose appointment had been successively extended to 1 April 1968 and to 31 December 1969, was reassigned to the UNDP Office at Freetown (Sierra Leone) as Assistant Resident Representative. On 15 September 1968 he was reassigned in the same capacity to the UNDP Office at Taiz (Yemen). Upon this reassignment he received an installation allowance and assignment allowance and, as his family did not join him at his duty station, his post adjustment was calculated at the New York rate. On 1 December 1968, however, the Applicant's family having joined him in Taiz, his post adjustment at the New York rate was discontinued and replaced by post adjustment at the—lower—Taiz rate. During the Applicant's assignment in Yemen, strained relations developed between him and the Resident Representative, with each making charges of misconduct against the other. In a cable of 19 December 1968 and a letter of 30 December 1968 addressed to the Chief of the Personnel Branch of UNDP, and in subsequent correspondence, the Applicant requested that his family be repatriated and that he be granted home leave and the opportunity of a briefing at Headquarters. On 20 February 1969, as the Resident Representative had fallen ill, the Chief of the Europe, Mediterranean and Middle East Area Division of UNDP, who was on a mission to the United Arab Republic, was instructed to proceed to Taiz and advise Headquarters regarding the supervision of the UNDP Office. In the conclusions of his report, dated 7 March 1969, he recommended that during the immediate short term period of the Resident Representative's absence the Applicant might remain in charge of the Office, but that for the long term a new team of both Resident Representative and Assistant or Deputy should be appointed as soon as possible. In March 1969 the UNDP Operations in Yemen were investigated by a high official of UNDP who subsequently became its Special Representative in Yemen. On 10 May 1969, the Director of the Bureau of Administrative Management and Budget of UNDP cabled to the Applicant that a Special Representative has been appointed in temporary replacement of the Resident Representative, who was unable to resume

his duties for health reasons, that the Applicant's request for repatriation of his family was approved, and that he should report back in New York on 20 May 1969 for consultations with the assumption that he was not to return to Yemen. The Applicant having asked to know his next assignment, the Director informed him that his future would be discussed in New York. On 20 and 21 May 1969, the Applicant met in New York with the Director and with the Chief of the Personnel Division of UNDP. On 22 May 1969, the Chief of the Personnel Division informed him of the outcome of these discussions in the following letter:

“... .

“Firstly, and in response to your own request made earlier in the year, you are authorized to proceed on home leave forthwith. As you know, your place of home leave is established as Algeria . . .

“As to the matter of your further association with our Programme, Mr. Vaidyanathan [Director of the Bureau of Administrative Management and Budget of UNDP] has explained to you that every effort will be made to secure another assignment for you. Additionally, and in accordance with your own expressed wish we will seek possibilities in the UN Secretariat, as well as within UNDP or elsewhere in the UN family. Mr. Vaidyanathan has also pointed out that this task will not be an easy one . . .

“If at the conclusion of your home leave no possibilities have presented themselves then it is our intention that you remain on special leave with full pay and be so maintained until you are assigned, or until the expiry of your contract on 31 December 1969, whichever is earlier.

“Reflecting that there have been previous occasions on which your continued service with the Programme has been in serious doubt, you must understand that it may well be that no extension of your existing contract will be made. It is our intention to reach a conclusion on this point as soon as possible and if that conclusion is that no extension can be offered we would be prepared to authorize your repatriation to your place of recruitment (if this were your wish) prior to the expiry of your contract so as to enable you to make appropriate arrangements for the settlement of your family and your future plans.”

The Applicant left for Algeria on home leave on 23 May 1969. On 17 June 1969, in a cable addressed to the Chief of the Personnel Division, he requested that in view of the difficulty of staying in hotels with young children and without personal effects on “unplanned home leave”, he be authorized to return to New York with his family in early July pending reassignment. The Chief of the Personnel Division answered on the following day that the letters to the United Nations and the specialized agencies proposing the Applicant's candidacy had been dispatched on 9 June 1969 and that at least four weeks from that date should be allowed before replies were expected. On 12 September 1969 the Chief of the Personnel Division informed the Applicant—who had returned with his family to his place of recruitment in California—that it had not been possible to date to find an assignment for him, that it might not be possible to extend his contract and that after the exhaustion of his normal leave entitlements he would be maintained on special leave with full pay during the balance of his contract. The Applicant having requested the Secretary-General to review that decision, the Director of the Bureau of Administrative Management and Budget advised him on 21 October 1969 that, since no administrative decision had in effect been

taken by UNDP, there was no ground for appeal and no review required by the Secretary-General. On 20 November 1969, the Director notified the Applicant that it had not been possible to find a new assignment for him and that no extension of his contract could therefore be envisaged. On 22 November 1969 the Applicant again requested a review of that decision. On 12 December 1969 he was informed that there was no basis for the Secretary-General to alter the position taken by UNDP in not extending his fixed-term appointment beyond its date of expiration and, on 28 December 1969, he lodged an appeal with the Joint Appeals Board.

During the Applicant's employment with the United Nations, his services were evaluated in three periodic reports. In the first report, which covered the period from 30 June 1964 to 30 June 1965, the Applicant received from the first reporting officer an average rating on nine items, an above-average rating on one and a below-average rating on three, and he was rated as "a staff member who maintains only a minimum standard" by the second reporting officer. The Applicant appended a statement of rebuttal to that report. In the second report, which related to the period from June to October 1966, the first reporting officer rated the Applicant average on 11 items and above average on two, and described him as "an efficient staff member giving complete satisfaction". In the third report, covering the period from November 1966 to November 1967, the Applicant was rated average on 8 items, above average on three and below average on three by the first reporting officer, and the second reporting officer described him as "a staff member who maintains only a minimum standard". Other periodic reports concerning the work of the Applicant were prepared upon the recommendation of the Joint Appeals Board after the Applicant had left the service of the United Nations.

The Joint Appeals Board submitted its report on 3 June 1970. The concluding sections of the report read as follows:

*"Considerations and Conclusions"*

"41. As this was a case of non-renewal of a fixed-term appointment, the Board did not attempt to evaluate the appellant's performance but decided to determine whether the administrative decision had been motivated by prejudice or by some other extraneous factor.

"42. The Board is conscious that it was not within its responsibilities to comment upon the conditions prevailing in the UNDP offices in Syria and Yemen and is of the view that the appellant's references to the Resident Representative in Yemen were relevant only if it were shown that the Resident Representative's actions had in any way reflected prejudice against the appellant.

"43. The Board finds no evidence to indicate prejudice on the part of officials at UNDP Headquarters. While the Board recognizes that there may have been prejudice against the appellant on the part of the Resident Representative in Yemen, no clear-cut evidence has been submitted to substantiate this assumption.

"44. The Board therefore concludes that the UNDP has not violated any Staff Regulations or Staff Rules nor the terms and conditions of appointment of the appellant in not renewing his fixed-term appointment after 31 December 1969.

"45. The Board nevertheless feels constrained to take account of certain other aspects of this case:

"(a) It is evident that very difficult conditions prevailed in the UNDP Offices both in Syria and in Yemen. By assigning the appellant to these duty stations, UNDP put him in difficult situations. Adverse assessments of his work under these circumstances placed him in a disadvantageous position with respect to his future assignments with UNDP or other International Organizations. He thus became a victim of circumstances not entirely through his own fault.

"(b) UNDP did not follow the established administrative procedures with respect to the periodic reports in this case, since there were substantial gaps in his service not covered by reports and particularly there was no report assessing his work for the period November 1967 until his separation on 31 December 1969.

"(c) Similarly the UNDP did not follow the required practice with regard to rebuttals of periodic reports by staff members.

"(d) Complimentary assessments of the appellant's work in Lebanon were neither included in his Official Status file nor mentioned on the fact sheet [attached to the letters to the United Nations and the specialized agencies proposing the Applicant's candidacy]. The handling by UNDP of the periodic reports and rebuttals and the decisions as to what should or should not be placed on the file or the fact sheet was less than competent.

"(e) UNDP's efforts to assign the appellant elsewhere were inadequate especially since the fact sheet was incomplete. It is the view of the Board that, as a result of these facts, the performance record of the appellant is incomplete and misleading and that this seriously affected his candidacy for a further extension of his contract or for employment by other agencies.

*"Recommendations*

"46. The Board makes the following unanimous recommendations for the consideration of the Secretary-General:

- "(i) UNDP should re-examine the appellant's files with the view to filling the gaps in the records in accordance with established procedures, and bringing them up-to-date with all required periodic reports and evaluations of work, which should then be reflected adequately in the appellant's fact sheet.
- "(ii) UNDP should make further serious efforts to place the appellant in a suitable post either within UNDP or with one of the other International Organizations.
- "(iii) If UNDP fails in these efforts, the Board recommends that an *ex gratia* payment equivalent to six months' salary be made to the appellant."

On 10 July 1970, the Director for Policy Co-ordination in charge of the Office of Personnel of the United Nations informed the Applicant that the Secretary-General had reached the following decisions concerning the appeal:

"...

"The Secretary-General has re-examined your complaint in the light of the Board's report and has decided to take note of the Board's conclusion that the UNDP had not violated any Staff Regulations or Staff Rules nor the

terms and conditions of your appointment in not renewing your fixed-term appointment after 31 December 1969.

"The Secretary-General has also noted the recommendations contained in paragraph 46 of the report and has decided to refer the recommendations in sub-paragraphs (i) and (ii) to the UNDP administration for such action as it may deem appropriate. The Secretary-General has also decided that there was no basis for the granting of an *ex gratia* payment and that no action be taken in regard of the recommendation in sub-paragraph (iii) of paragraph 46 of the report."

On 31 August 1970, the Officer-in-Charge of the Bureau of Administrative Management and Budget of UNDP informed the Applicant that the Board's first recommendation was being implemented and that, with regard to the second recommendation, UNDP did not intend to offer him another appointment in the future as all possible efforts had been made to find a suitable post for him within UNDP or with other agencies when he was under contractual status with UNDP. On 31 December 1970 the Applicant filed with the Tribunal the application referred to earlier.

While his appeal was pending before the Joint Appeals Board the Applicant had contended, in a letter of 14 May 1970 addressed to the Director of the Bureau of Administrative Management and Budget of UNDP, that he was entitled to subsistence allowance for the duration of his stay in Yemen from 15 September 1968 to 17 May 1969 and to the difference between the Yemen post adjustment and the New York post adjustment for the period from 22 May to 31 December 1969. On 15 June 1970, the Chief of the Personnel Division of UNDP advised him of the rejection of those claims on the following grounds:

"... When you were re-assigned from Sierra Leone to Yemen on 15 September 1968 your re-assignment was not intended to be for less than one year, hence your entitlement and effective payment of assignment allowance and post adjustment from 15 September 1968. This action was taken in application of Staff Rules 103.22 (a) and 103.7 (a). Payment of subsistence allowance instead of assignment allowance and post adjustment could therefore not be considered in view of the intended duration of your assignment in Yemen. Furthermore, our records show that your duty station remained unchanged until your last day of appointment on 31 December 1969, and that your full salary and allowances, including assignment allowance and post adjustment, were charged against your post in Yemen until that date, or for a total period of fifteen months. For that reason as well, the Yemen rate of post classification was applicable for the period from 15 September 1968 through 31 December 1969. There would have been no justification under the Staff Rules to pay you the New York rate of post adjustment as requested."

On 15 July 1970 the Applicant requested the Secretary-General to review that administrative decision and, after receiving a negative reply, he lodged a second appeal with the Joint Appeals Board on 17 September 1970. The Board submitted its report on 18 January 1971. The Board's conclusions and recommendations read as follows:

*"Conclusions and Recommendations"*

"40. The Board finds that the appellant's assignment as Assistant Resident Representative in Yemen was intended to continue for more than



one year and that his salary and allowances were correctly determined on that basis. The Board finds further that when it was decided in May 1969 that the appellant would go on leave while a search was made for a new assignment for him, the appellant was transferred to Headquarters and his duty station was changed to New York. Consequently, the Board considers that the appellant should have been paid the New York post adjustment for the period from 23 May 1969 to 31 December 1969, and recommends that the Secretary-General authorize payment to him of the difference between the New York post adjustment for that period and the Taiz post adjustment which he received.

"41. In the absence of any guidance in the Staff Regulations or Rules or in administrative instructions as to whether salary and allowances should be recalculated when an assignment for one year or more is cut short, the Board does not make any recommendation for the readjustment of the appellant's salary and allowances for the period during which he served in Yemen. The Board recommends, however, that the Secretary-General consider making an *ex gratia* payment to the appellant in the amount of any losses that he can show that he has suffered as a consequence of his precipitate recall from Yemen.

"42. Lastly, the Board finds that the Secretary-General was authorized under Staff Regulation 1.2 to recall the appellant from Yemen and under Staff Regulation 5.2 to place him on special leave with pay from 10 September 1969 to 31 December 1969. In the Board's view the special leave in question was authorized in the interests of the appellant in order to permit a search to be made for a further assignment for him. The Board finds, moreover, that the appellant accepted the benefits of this arrangement and suffered no loss in salary or allowances because of it. Accordingly, the Board makes no recommendation in support of the appellant's contentions concerning special leave.

"..."

The Member elected by the Staff appended to the report a dissenting opinion reading as follows:

"1. I concur completely with the Board's finding, in paragraph 40 of its report, that in May 1969 the appellant was transferred to Headquarters and his duty station was changed to New York. Accordingly, I support the Board's recommendation, made in the same paragraph, that the appellant should receive the difference between the New York and Taiz post adjustments for the period from May to December 1969.

"2. However, I cannot agree with the majority view of the Board, recorded in paragraph 41 of its report, that no recommendation should be made in favour of retroactive adjustment of the appellant's salary in Yemen. In my opinion, a clear case for such an adjustment has been established by the statement of the representative of the Secretary-General which affirms that the UNDP would have recalculated the appellant's salary and allowances if he had been assigned to another post within one year of his assignment to the Yemen post (paragraph 34 of the report). I am supported in this opinion by the fact that the UNDP has not attributed to the appellant the responsibility for his abrupt recall. Under the circumstances, I must regard the Board's recommendation of a conditional *ex gratia* payment as neither adequate nor equitable to the appellant.

"3. Finally, I am unable to subscribe to the majority view of the Board, stated in paragraph 42 of its report, that the placement of the appellant on leave represented a valid exercise of administrative authority under the Staff Rules and Regulations of the United Nations. In my opinion, the right to perform one's functions is a fundamental right under any contract of employment. That right must not be abridged by the imposition of special leave under Staff Rule 105.2 which applies to an altogether different situation. In the present case, the arbitrary nature of this action was aggravated by the failure of the UNDP to substantiate to the Board the alleged urgency of this exceptional measure, as well as by the failure of the UNDP (noted in paragraph 38 of the report) to employ the appellant at Headquarters while a new assignment was being sought for him. It is also obvious to me that the barring of the appellant from the functions for which he had been recruited diminished his prospects of obtaining an extension of his fixed-term contract."

On 8 March 1971 the Applicant was advised, with regard to his second appeal, that the Secretary-General had decided:

- "(i) that sympathetic consideration be given to such claims as you may be able to substantiate for financial losses to which you refer and which occurred as a result of your recall to Headquarters on short notice in May 1969; (ii) that you be paid an amount equivalent to the difference between the post adjustments for New York and Taiz for the period from 23 May to 31 December 1969; and (iii) that the decision to place you on special leave with pay from 10 September to 31 December 1969 be maintained."

On 11 June 1971 the Applicant filed with the Tribunal the above-mentioned supplement to his application.

Whereas the Applicant's principal contentions are:

1. With regard to the first appeal:

(a) Staff Rule 112.6 as authoritatively interpreted by Administrative Instruction ST/AI/115 concerning periodic reports was repeatedly violated;

(b) The Respondent violated his obligation to make serious efforts to place the Applicant in a suitable post following his recall from Yemen in May 1969;

(c) The Respondent displayed prejudice against the Applicant.

2. With regard to the second appeal:

(a) On the question of the Applicant's allowances during his service in Yemen:

(i) The Applicant, while in Yemen, received assignment allowance but not subsistence payments on the assumption that he would have an assignment lasting one year or longer; however, his abrupt recall from Yemen by UNDP, at its own initiative, rendered the original assumption inoperative and transformed the Applicant's assignment in Yemen to one of only eight months' duration;

(ii) The argument that would endow the Secretary-General with complete discretion to pay either a lower or higher salary for a short-term assignment fails because such complete discretion would open the door to arbitrariness and because it has been the consistent practice of

UNDP—a practice which, in UNDP's own view, has created a legal entitlement for the staff members concerned—to pay the higher subsistence allowance for assignments under one year and the lower assignment allowance for assignments over one year; furthermore, the argument of discretion is refuted by Staff Rule 103.22 (c);

- (iii) The conclusion of the Joint Appeals Board in the first sentence of paragraph 41 of its report disregarded the principle of equity as well as the Respondent's statement to the effect that UNDP would have recalculated the Applicant's salary and allowances if he had been assigned to another post within one year of his assignment to the Yemen post; the Board's recommendation for an *ex gratia* payment to the Applicant is neither adequate nor equitable;
- (b) On the question of special leave:
  - (i) The argument that special leave can be imposed on a staff member is in conflict with the ordinary meaning of the terms of Staff Rule 105.2 and with the entire tenor and purpose of that Rule; it further disregards the fact that special leave carries with it certain negative consequences for the staff member;
  - (ii) The rule to be applied to impose leave, with or without pay, is Staff Rule 110.4 on suspension pending investigation; any other interpretation carries with it the most serious implications since it would enable the Secretary-General to suspend staff members from duty, with or without pay, under the guise of granting them special leave;
  - (iii) The removal of the Applicant from Yemen and his placement on special leave without his agreement bears all the earmarks of a suspension from duty; that suspension was illegal since no charges of misconduct were made against the Applicant and it affected his interests in a prejudicial manner since, as a result of that illegal action, he found himself without a work assignment at the time of the expiration of his appointment.

Whereas the Respondent's principal contentions are:

1. With regard to the first appeal:

(a) The administrative decision on the extension of the Applicant's fixed-term appointment beyond its scheduled expiration date was entirely within the Respondent's authority on selection and appointment of staff;

(b) The evidence adduced by the Applicant is insufficient to sustain the charge that he was prejudiced as a result of any delays in the preparation of periodic reports on his performance;

(c) The evidence adduced by the Applicant is insufficient to prove that any of the acts of which he complains was motivated by prejudice; the periodic report on his service in Sierra Leone and Yemen, in particular, was not dictated by prejudice and does not misrepresent the facts on which it is based.

2. With regard to the second appeal:

(a) On the question of the Applicant's allowances during his service in Yemen:

- (i) In view of the provisions of paragraph (e) (ii) of Staff Rule 103.7 and the administrative practices of the Secretary-General, it cannot be validly maintained that an assignment for less than one year in and

- of itself entitled the staff members concerned to receive subsistence payments during that assignment. *A fortiori*, a staff member whose assignment for one year or more is reduced to less than one year, also has no entitlement to receive subsistence payments during his assignment;
- (ii) If the allowances paid under Staff Rules 103.7 and 103.22 to a staff member during an assignment had to be re-adjusted on the basis of the actual duration of his services under that assignment, the Secretary-General would be required to make a second determination as to the staff member's entitlements; such a requirement cannot be read into those provisions;
  - (iii) The Respondent's statement to the effect that UNDP would have recalculated the Applicant's salary and allowances if he had been assigned to another post within one year of his assignment to the Yemen post must be understood to mean that the Secretary-General has the authority to re-adjust on an *ex gratia* basis the allowances paid to a staff member where an assignment has been reduced from one year or more to less than one year;
- (b) On the question of special leave:
- (i) The discretionary authority of the Secretary-General to assign, re-assign or refrain from assigning a staff member to any post derives from the Charter and from the Staff Regulations and Rules; it is not consensual and the Secretary-General may exercise it on his own initiative;
  - (ii) The decision to place the Applicant on special leave with full pay was not improperly motivated; on the contrary, it was designed to and did in fact serve the best interests of the Applicant and UNDP; nor did that decision violate any of the Applicant's contractual rights;
  - (iii) The decision to place the Applicant on special leave was not a disciplinary measure; no charge of misconduct within the meaning of Staff Rule 110.4 was brought against the Applicant and his conduct was not investigated.

The Tribunal, having deliberated from 10 to 28 April 1972, now pronounces the following judgement:

I. The Tribunal had before it an application filed on 31 December 1970 and a supplement thereto filed on 11 June 1971. In view of the obvious relationship between the two, the Tribunal decides to issue one judgement covering all the requests.

II. As a preliminary measure, the Applicant requested the Tribunal to order the production of three documents.

(a) The Tribunal notes that the report by Mr. Satrap, Chief, Middle East Area Division, UNDP, on his investigation of the UNDP Office in Yemen in February 1969 is annexed to the Respondent's answer.

(b) The report by Mr. Hagen, Consultant to the UNDP Administrator, on his investigation of the UNDP Office in Yemen in March 1969 is in the Applicant's official status file. The counsel of the parties and the Tribunal have therefore been able to consult it. This document does not directly relate to the Applicant's situation: it concerns the living conditions of UNDP staff in Yemen.

The Applicant explained in his written observations that, in requesting the production of Mr. Hagen's report, he had in mind a letter which he claims Mr. Hagen wrote before leaving Yemen to Mr. Cohen, Assistant Administrator of UNDP, Director of the Bureau of Operations and Programming. In that letter, Mr. Hagen informed Mr. Cohen of the results of his investigation and apparently stated that the Applicant was managing the UNDP office with excellence. The Applicant claims that Mr. Hagen showed him the letter and that he himself placed it in the pouch.

In his written observations, the Applicant requested the Tribunal to order the production of the letter in question.

The Respondent announced on 17 March 1972 that a diligent search had been made by the competent officials of UNDP but that no such letter was contained in the files of UNDP and that no reference to such a letter was contained in any documentation in the possession of UNDP.

On 18 April 1972, however, in a reply addressed to the Tribunal on the subject of the document mentioned below under (c), the Respondent announced that the letter had been found and that he was sending a copy of it to the Tribunal with his observations; he stated that the letter was confidential and that it would be transmitted to the Applicant's counsel only on orders of the Tribunal. The Tribunal decided that this letter, dated 9 March 1969, was not relevant to the case, with the exception of a few lines of which the text was given to the Applicant.

(c) Lastly, the Applicant requested the production of a letter sent in the summer of 1969 to the Director of the Bureau of Administrative Management and Budget by Mr. Hagen, in which Mr. Hagen apparently provided a "very good assessment" of the Applicant's performance in Yemen.

Since the Respondent's communication dated 17 March 1972 did not mention this request, the Tribunal requested the Respondent, on 14 April 1972, to produce the letter in question. On 18 April 1972, the Respondent replied that UNDP did not have such a letter in its files.

The Tribunal can only take note of this statement.

III. The Applicant requested the Tribunal to order the Respondent to restore him to the *status quo ante* prevailing in May 1969, by extending his last fixed-term appointment for a further two years beyond 31 December 1969.

The Applicant does not, however, claim that, merely by virtue of being the holder of a fixed-term appointment, he had the right to have his contract extended beyond 31 December 1969. He first requests the Tribunal to order the Respondent to correct and complete his fact sheet and the required periodic reports and evaluations of his work; he also requests the Tribunal to order the Respondent to make further serious efforts to place the Applicant in a suitable post.

IV. The Tribunal notes that Staff Rule 112.6 requires supervisors to make reports "from time to time" on the service and conduct of their subordinates. Administrative Instruction ST/AI/115 of 11 April 1956 specified that for staff serving under temporary appointments the report would be made each year. The Instruction established the manner in which the staff member concerned would be shown the reports and be able to comment on them and specified what should be done with such comments. The periodic reports are the basis for the fact sheet which the Respondent uses when he is required to find a suitable post for a staff member whose contract expires.

In the case under consideration, the Applicant received a letter on 22 May 1969 from the Chief of the UNDP Personnel Division, which stated:

"As to the matter of your further association with our Programme, Mr. Vaidyanathan [Director of the Bureau of Administrative Management and Budget of UNDP] has explained to you that every effort will be made to secure another assignment for you. Additionally, and in accordance with your own expressed wish we will seek possibilities in the UN Secretariat, as well as within UNDP or elsewhere in the UN family. Mr. Vaidyanathan has also pointed out that this task will not be an easy one . . .".

The same letter also stated: "... it is our intention that you remain on special leave with full pay and be so maintained until you are assigned, or until the expiry of your contract on 31 December 1969, whichever is earlier". Lastly, details were given about the possible repatriation of the Applicant "if [our] conclusion is that no extension can be offered".

In the opinion of the Tribunal, the above-mentioned letter constitutes a formal commitment by the Respondent to try to find another assignment for the Applicant. Such a commitment to make "every effort" obviously implies an obligation to act in a correct manner and in good faith.

It appears from the file that, in the weeks which followed the letter of 22 May 1969, a fact sheet for the Applicant was circulated to the competent departments of UNDP, the United Nations and specialized agencies. The contents of this fact sheet were mentioned by several prospective employers to justify negative replies.

On 20 November 1969, the Director of the Bureau of Administrative Management and Budget informed the Applicant that it had not been possible to find a new assignment for him and that no extension of his contract could therefore be envisaged.

V. The Tribunal notes that, at the time when the search for a new assignment was undertaken, no periodic report had been made on the Applicant's service from 1 July 1965 to 31 May 1966 and from November 1967 to 31 December 1969. The established procedure for the rebuttal of periodic reports had not been observed. Lastly, certain complimentary assessments of the Applicant's service did not appear in the file. The fact sheet drawn up solely on the basis of the existing reports was therefore incomplete. After examining that situation, the Joint Appeals Board stated "that, as a result of these facts, the performance record of the appellant" was "incomplete and misleading" and that that fact had "seriously affected his candidacy for a further extension of his contract or for employment by other agencies".

The Tribunal considers that the commitment undertaken by the Respondent was not correctly fulfilled since the information concerning the Applicant's service, as it appeared in his file and his fact sheet, had serious gaps. The search for a new assignment could have been made correctly only on the basis of complete and impartial information.

VI. Following the report of the Joint Appeals Board, the Respondent decided to "refer" certain of the Board's recommendations "to the UNDP administration for such action as it may deem appropriate".

One of those recommendations concerned the re-examination of the Applicant's files "with the view to filling the gaps in the records in accordance with established procedures, and bringing them up-to-date with all required periodic

reports and evaluations of work, which should then be reflected adequately in the appellant's fact sheet".

The other recommendation states: "UNDP should make further serious efforts to place the appellant in a suitable post either within UNDP or with one of the other International Organizations".

VII. On 31 August 1970, UNDP informed the Applicant that it did not intend to offer him another appointment in the future, as all possible efforts had been made to find a suitable post for him within UNDP or with other agencies when he was under contractual status with UNDP.

In addition, UNDP stated its readiness to implement the first recommendation.

Thus the Respondent does not dispute that the Applicant's file did not conform to the established rules at the time when the search for an assignment was being made and that the fact sheet transmitted to prospective employers was incomplete, if not inaccurate. The Respondent refuses, however, to acknowledge that, because of this, the efforts made in 1969 were vitiated by a fundamental defect and specifically states that he will do nothing to undertake a search for an assignment in a more correct manner. The Tribunal therefore considers that the obligation assumed in the letter of 22 May 1969 has not been performed.

VIII. In the circumstances mentioned above, the decision of UNDP to comply with the recommendation concerning the gaps in the file no longer had any real point. The preparation of a corrected fact sheet becomes meaningless once UNDP decided not to take the necessary further steps to find the Applicant a new assignment. Even assuming, therefore, that action to complete the file had been taken in a correct manner, it could not *per se* have any effect on the Respondent's obligation to find a post to which the Applicant could have been appointed.

The Tribunal must, however, consider the manner in which UNDP acted to fill the gaps in the file. The Tribunal notes that additional reports were prepared in order to cover all the Applicant's service. A new fact sheet was prepared. It has been produced by the Respondent. The Tribunal notes that it has gaps. No report is mentioned for the period June 1965-June 1966. In addition, the report for the period June 1968-March 1969 is summarized as follows:

"Top ratings none. Second ratings none. Third ratings 2, 3, 11, 12, 13. Fourth rating item 1. Fifth ratings 4, 5, 6, 7, 8, 9, 10. On the whole, an unsatisfactory S/M [staff member] (Vaidyanathan)."

The Tribunal is certain that, if this new fact sheet had been circulated, it would not have elicited a more favourable response from prospective employers than the fact sheet prepared in 1969. The Applicant has strongly contested the actual circumstances in which additions had been made to his file and, in particular, has contended that the report for the period June 1968-March 1969 was prejudiced. The Tribunal will now examine this complaint.

IX. The report in question was made in September 1970, after his retirement, by the staff member who had discharged the functions of Resident Representative in Sierra Leone and then in Yemen. It is not disputed that his personal relations with the Applicant were extremely difficult. The ratings in section I of the report are the lowest possible in all but one case and are accompanied by handwritten comments couched in unusually strong terms. These comments cast doubt on the professional skill, capabilities and loyalty of the Applicant. A report of this kind, written more than one year after the supervisor had relinquished his

duties, testifies to uncontrolled personal feelings. The Respondent himself has spoken of "intemperate" language.

X. The Tribunal notes, in particular, the discrepancies in the assessments of the Applicant's linguistic ability in this report and in the reports covering earlier periods. In the report covering the period 30 June 1964-30 June 1965, for item 5 ("Written expression in working language") the statement "Adequately clear and concise" is checked and for item 6 ("Oral expression in working language") the statement "Expresses himself adequately" is checked. In section I C ("Languages"), the reporting officer writes: "Staff member prefers to work in French in which he is most proficient. He does not write Arabic and his English not fully adequate". In subsequent reports, the same ratings as in 1964-1965 are given for items 5 and 6. The report for the period June-October 1966 indicates that the Applicant works in English and French. The report for November 1966-November 1967 also indicates "is effective in both languages". A personal letter dated 23 July 1968 from the acting Resident Representative in Sierra Leone, which was produced by the Respondent, contains the following information on this subject:

"A further complicating factor arises from the embarrassment and frustration experienced by Mr. Fasla because of his lack of proficiency in written or spoken English. . . . This is aggravated by the absence of secretarial assistance from staff fully competent in the language. I am sure Mr. Fasla would be much more at home in a French-speaking country, a point upon which he is most articulate."

If one refers to the report for the period June 1968-March 1969, one finds the rating "Ineffective" for items 5 and 6. In section I C ("Languages"), it is stated: "Staff member's mother tongue is Arabic. He works in English. His English is poor and incorrect, both written and oral. He gets secretaries and clerks to draft for him, as he is incapable of writing a couple of lines in English correctly and clearly. I have taken this into consideration partly in (5) and (6).".

As it is scarcely conceivable that knowledge of a language should deteriorate with practice, it must be concluded that the assessments given in this last report cannot constitute a reasonable and well-considered opinion.

XI. After considering the whole of the report, the Tribunal concludes that the ratings and the handwritten comments, made after an interval of more than one year, can be due only to a violence of feeling and lack of self-control which, in this case, reveal prejudice on the part of the first reporting officer against the staff member who was the subject of the report.

XII. The Applicant's second reporting officer noted that the former Resident Representative had completed section II A with the rating "On the whole, an unsatisfactory staff member". The second reporting officer, for his part, simply wrote "Based on ratings under section I I would have to agree".

In signing this report as second reporting officer, the Director of the Bureau of Administrative Management and Budget of UNDP thus endorsed its contents without considering it necessary to make any further comments, either on the particularly difficult circumstances in which the Applicant had been placed in Yemen or on the unwonted language used by the former Resident Representative to describe him.

The Tribunal notes that the second reporting officer had seen the letter written from Yemen by Mr. Hagen to Mr. Cohen on 9 March 1969. This letter contained a passage concerning the Applicant and his service. It stated, *inter alia*: "As far as



I can see, Mr. Fasla is running the office well". In addition, certain complimentary assessments were specifically given. It is true that the Respondent has contended that Mr. Hagen's assessment was "mere first impressions, entirely devoid of probative value". Yet the Respondent has adduced no evidence indicating that Mr. Hagen subsequently changed his views.

The second reporting officer did not deem it necessary, however, to take into consideration those comments from an authorized person who had been requested to make an investigation of the mission in Yemen. He simply acknowledged that the ratings in section I led to the conclusion that the Applicant was "On the whole, an unsatisfactory staff member".

The Tribunal must conclude from this that the prejudice shown by the first reporting officer towards the Applicant was in no way corrected by the superior officer required to participate in the drafting of the report which the Respondent had agreed to prepare, as he was obliged to do under the Staff Rules.

The Respondent thus allowed a report manifestly motivated by prejudice, containing no reservation or personal comment on the part of the second reporting officer, to be placed in the Applicant's file and used in the fact sheet, as revised in response to the recommendation of the Joint Appeals Board which had been accepted by the Respondent.

The Tribunal decides that the periodic report in question is invalid and must be treated as such for all appropriate purposes.

XIII. The Tribunal, having reached the conclusion that the Respondent did not perform in a reasonable manner the obligation which he had undertaken to seek an assignment for the Applicant, notes that it is not possible to remedy this situation by rescinding the contested decision or by ordering performance of the obligation contracted in 1969. In similar cases (Judgements Nos. 68: *Bulsara* and 92: *Higgins*), the Tribunal held that compensation, in lieu of specific performance, may constitute sufficient and adequate relief.

Having regard to the findings of the Joint Appeals Board in its report of 3 June 1970 (paragraph 45) and to the fact that UNDP refused to make further efforts to find an assignment for the Applicant after agreeing to correct the fact sheet by taking into consideration the periodic reports which were previously missing, the Tribunal considers that in the circumstances of the case the award to the Applicant of a sum equal to six months' net base salary constitutes "the true measure of compensation and the reasonable figure of such compensation" (Advisory Opinion of 23 October 1956, International Court of Justice Reports, 1956, p. 100).

XIV. The Applicant maintains that his placement on special leave with pay from 10 September 1969, of which he was informed by the Respondent on 22 May 1969 and which the Respondent confirmed on 12 September 1969, was not in conformity with the conditions laid down in Staff Rule 105.2. Since it took place without the Applicant's consent, it actually constituted, in his view, a suspension from duty as contemplated in Rule 110.4. That action was illegal because no charge of misconduct was made against the Applicant and Staff Rule 110.4 was not therefore applicable to his case.

The Tribunal notes that the Applicant raised no objection to the granting of special leave with full pay when he was informed on 22 May 1969 that he would be placed in that situation after the end of his home leave, if there was no possibility of employing him. In view of the wide discretion granted to the Respondent

under regulation 5.2 of the Staff Regulations, the Tribunal considers that the Applicant has no grounds for contesting the correctness of that decision.

XV. The Applicant maintains that the allowances he received in Yemen should be recalculated on the basis of the subsistence allowances which he contends are payable because, owing to the Respondent's action, his stay in that country was less than one year, contrary to the original intention.

According to Staff Rule 103.22 (c), "When a staff member is assigned to a duty station for less than one year, the allowance will normally not be paid. However, appropriate subsistence payments will be made where no assignment allowance is payable". The Tribunal observes that this text leaves the Respondent a margin of discretion with respect to the payment of an assignment allowance: it is possible for the allowance to be paid for a stay of less than one year. In addition, the text lays down a very strict rule: the subsistence allowance is payable only where an assignment allowance has not been paid. In the present case, however, the Applicant received an assignment allowance and is therefore not entitled, under the Staff Rules, to a subsistence allowance.

Following the second report of the Joint Appeals Board, the Respondent agreed to make the Applicant an *ex gratia* payment in the amount of any losses that he could show he had suffered as a result of his precipitate recall from Yemen. Since the Applicant maintained his claim to a subsistence allowance, he did not avail himself of that opportunity. The Tribunal considers that, in view of the above decision concerning the subsistence allowance, the Applicant is entitled to take advantage of the possibility offered by the Respondent within a reasonable period of time from this judgement, and that this period must be fixed at two months.

XVI. The Applicant requests compensation for the damage he claims to have sustained as a result of the delays in considering his case. The Tribunal notes that the first appeal to the Joint Appeals Board was filed on 28 December 1969, that the Respondent's answer is dated 9 February 1970, that the hearings took place on 11 and 13 May 1970, and that the report was drawn up on 3 June 1970. The decision of UNDP was notified on 31 August 1970. The second appeal was filed on 17 September 1970, a number of documents were submitted by the parties, the hearings took place on 10 December 1970 and the report was drawn up on 18 January 1971. The Respondent's final decision was notified to the Applicant on 8 March 1971.

The applications to the Tribunal were filed on 31 December 1970 and 11 June 1971. The Applicant himself requested extensions of the time-limits on several occasions.

In these circumstances, the Tribunal decides that no abnormal delay attributable to the Respondent can be found in the conduct of this case, and that the request must be rejected.

XVII. The Applicant requests payment of one thousand dollars for exceptional costs in preparing the case. Since the Applicant had the assistance of a member of the panel of counsel, the Tribunal finds this request unfounded and rejects it.

XVIII. The Tribunal accordingly decides that:

1. The Respondent shall pay the Applicant a sum equal to six months' net base salary;
2. The periodic report prepared for the period June 1968-March 1969 is invalid and shall be treated as such;

3. Any requests for payment made in accordance with paragraph XV above shall be submitted, together with the necessary supporting evidence, by the Applicant to the Respondent within a period of two months from the date of this judgement;

4. The other requests are rejected.

(Signatures)

Suzanne BASTID  
*Vice-President, presiding*

R. VENKATARAMAN  
*President*

MUTUALE-TSHIKANTSHE Vincent  
*Member*

Jean HARDY  
*Executive Secretary*

Geneva, 28 April 1972

STATEMENT BY MR. R. VENKATARAMAN

I have participated in the discussions and read the draft English translation of the Judgement and I concur with the decision.

(Signature)  
R. VENKATARAMAN

Geneva, 28 April 1972

---

Judgement No. 159

(Original: French)

Case No. 157:  
Grangeon

Against: The Secretary-General  
of the United Nations

---

*Request by a former technical assistance expert for miscellaneous compensation.*

*Report of the Joint Appeals Board declaring that the appeal was not receivable for non-observation of time limits, adding obiter that, except possibly for one claim, the Applicant's claims were unfounded and indeed frivolous.*

*Question of the receivability of the appeal by the Board.—Consideration of the correspondence exchanged between the Applicant and the Administration.—In respect of certain claims the Administration offered the Applicant the option of appealing to the Board within a time-limit which was an exception to the Staff Rules.—Finding that the Board was bound to receive those claims.*

*Question of the receivability of the application by the Tribunal.—Considering the unanimous declaration by the Board that most of the Applicant's claims were frivolous, the Tribunal can only receive the claim concerning the installation grant.—Since a review of the decision in question was not requested within the statutory time-limit, that claim is unreceivable.*

*The application is not receivable.*

---