

Judgement No. 192

(Original: English)

Case No. 185:
LevcikAgainst: The Secretary-General
of the United Nations*Non-renewal of a fixed-term appointment.*

Refusal of the Czechoslovak Government to extend the "secondment" of the Applicant.—Respondent's argument that he is bound to terminate the employment of a staff member seconded by the Government of a Member State when that Government refuses to authorize the extension of the secondment.—In order to decide on the legality of the contested decision, the Tribunal must recall the legal principles applicable to the secondment of an official and consider whether the status of the Applicant was actually one of "secondment".

Legal principles applicable to secondment.—Staff Rule 104.12(b).—Administrative practice followed in establishing the personnel action form of a seconded candidate.—Basic principles governing secondment set out in Judgement No. 92.—Agreement of the three parties involved required.—Article 100, paragraph 1, of the Charter.—In the absence of a secondment carried out in accordance with the aforementioned principles, the Respondent cannot legally invoke a decision of a Government to justify his own action.

Consideration of the question whether the Applicant's status was one of secondment.—Period of the initial appointment.—Status and conduct of the Applicant.—Contacts between the Executive Secretary of the Economic Commission for Europe and the Permanent Representative of Czechoslovakia in Geneva.—Distinction between "clearance" and "secondment".—The Tribunal notes that there was no reference to secondment and much less an agreement on secondment, nor was there any request for information about the candidate.—Conclusion of the Tribunal that the procedure followed at that time was designed merely to ensure that the prolonged absence of the Applicant from his national territory was in order from the point of view of the Czechoslovak Government.—Period of the two-year fixed-term appointment.—Appearance of the concept of secondment in correspondence between the Respondent and the Government.—Adoption by the Respondent of the Government's position that the Applicant had been on secondment since he took up his duties.—Consideration of the question whether, on the basis of the legal principles applicable to secondment, the Respondent's position is well founded.—The agreement reached between the Government and the Respondent on the matter of secondment did not specify the starting-point of the secondment, did not specify the Applicant's post in his country or the conditions relating to his return to that post, did not take into account two statements made by the Czechoslovak authorities and above all was not brought to the knowledge of the Applicant and his consent was not obtained.—The Tribunal therefore holds that there was no valid secondment of the Applicant during the period in question.—Periods of the last three appointments.—Special system of consultation between the Respondent and the Czechoslovak Government.—Conclusion of the Tribunal that the Applicant's status during the period in question was not one of secondment.

Consideration of the question whether the Applicant had a legal expectancy of continued employment.—Circumstances which gave the Applicant a legal expectancy that his appointment would be extended.—Entitlement of the Applicant to compensation for the injury resulting from the decision not to extend his appointment.

Request for monetary compensation.—Award to the Applicant of compensation in the amount of one year's net base salary, less such amount as may already have been paid.—Request relating to pension benefits.—Request rejected, since damages should not be remote or indirect.—Award to the Applicant of \$800 as costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Sir Roger Stevens;

Whereas, on 19 February 1974, Friedrich Levcik, a former staff member of the United Nations, filed an application the pleas of which read as follows:

“In conformity with this Tribunal’s case-law,

“ ‘Where the parties cannot be restored to *status quo ante*, compensation in lieu of specific performance may prove to be adequate and proper relief.’ (Judg. 92 of U.N.A.T.—Vol. III of UNAT Judgements, p. 54, para. XIX).

“Moreover, as Respondent’s decision of 6 December 1973 (annex 34) is not adequate to ensure Applicant’s *restitutio in integrum*, Applicant respectfully requests the Tribunal to rescind the decisions of 1970, 1971 and 1973 (annexes 19, 26 and 34) by which Respondent refused to implement the promised extension of Applicant’s contract up to 31-3-1974 and to order Respondent

“1. to pay Applicant a compensation equivalent to the amount of his base salary, after deduction of his contributions to the UN Pension Fund, for the two years’ period during which he would have been employed, had Respondent implemented the promised renewal which would have covered the period 1-4-72 to 31-3-74.

“2. to pay Applicant a compensation equivalent to the lump sum Pension Benefit which he would have been entitled to receive on 31-3-74, after having completed 5 years of service with the United Nations.

“3. award Applicant an amount of \$1500 in reimbursement of his judicial costs.”;

Whereas the Respondent filed his answer on 8 May 1974;

Whereas, on 22 May 1974, the Applicant requested that oral proceedings be held in the case;

Whereas the Applicant filed written observations on 3 July 1974;

Whereas the President of the Tribunal granted the Applicant’s request for oral proceedings on 29 July 1974;

Whereas, on 24 September 1974, the Applicant amended his pleas as follows:

“1. After Applicant was separated from the UN Service on 31.3.72, he remained without employment for 10 months (1.4.72 until 1.2.1973). On 1.2.1973, Applicant was appointed Deputy Director of the Vienna Institute for comparative economic studies.

“The damage suffered by Applicant as a result of Respondent’s decision not to renew his contract may be determined as follows if one takes into account that his monthly UN salary at the P.5, step 8 level was 6.500 SF in March 1972 and that his monthly salary in his present employment from 1.2.1973 up to 30 June 1973 was 16.500 Austrian Shillings (i.e. $5 \times 16.500 = 82.500$) and from 1 July 1973 up to 31 March 1974, 17.500 Austrian Shillings (i.e. $9 \times 17.500 = 157.500$), the net total of these two sums representing 240.000 Austrian Shillings or 40.000 SF at the rate of exchange of 1 SF = 6 Austrian shillings.

“2. Had the renewal of Applicant’s contract be allowed to follow its agreed duration, Applicant would have drawn his UN salary for two more years from 31.3.1972 up to 31.3.1974 i.e. 24 months at 6.500 SF a month i.e. a total of 156.000 SF.

“Since Applicant’s total money income from 31.3.1972 up to 31.3.1974 amounted to 40.000 SF, Applicant’s total money losses amount to 156.000 SF

minus 40.000 SF i.e. a net total of 116.000 SF. As Respondent paid to Applicant a sum of 13.834.50 SF on 20.6.74, this amount has to be brought down to 102.165.50 SF. It should be observed that in the above calculation, no account has been taken of the rise in UN salaries after 31.3.1972 nor of any advance in step.

"3. As far as the loss suffered by Applicant on his Pension benefits, his damage should be calculated as follows: once the actuarial value of the pension benefit to which Applicant would have been entitled as of 31.3.1974, has been determined, it should be decreased by the amount received by Applicant as reimbursement of his own contribution to the Pension Fund.";

Whereas the Tribunal heard the parties at a public session held on 24 September 1974;

Whereas the Respondent submitted an additional statement at the request of the Tribunal on 27 September 1974;

Whereas the facts in the case are as follows:

The Applicant served in the Ministry of Health of the Czechoslovak Socialist Republic until 30 June 1956 and was thereafter employed by the Institute for Technological and Economic Information in Prague until November 1963 and then by the Institute of Economics of the Czechoslovak Academy of Sciences. On 4 August 1968 the Applicant, who was in Geneva on leave of absence without pay from the Academy of Sciences, took up employment on a short-term basis with the International Labour Organisation. On 2 September 1968 he submitted a Personal History form to the United Nations Economic Commission for Europe (ECE) with a view to securing a post with the Commission; in that form he listed as his "present post" his post at the Academy of Sciences, adding, under "Reason for leaving", "I have not left so far", and he stated that he had been "a permanent civil servant in [his] government's employ" from 1949 to 1957. On 3 September 1968 the Executive Secretary of ECE addressed to the Permanent Representative of Czechoslovakia in Geneva the following letter:

"At our meeting last Monday I indicated to you that we would be very much interested in recruiting Mr. B. Levčík to the staff of the Secretariat of the Economic Commission for Europe. I interviewed him personally, examined his curriculum vitae and consider that his qualifications are perfectly suitable for the vacant post in the Centrally Planned Economies Section of our Research and Planning Division. I appreciate highly Mr. Levčík's experience and personal qualifications, but regret that, in the present circumstances, I would not be able to recruit him at a level higher than P.5.

"I would be obliged to you for informing me about your Government's agreement with this recruitment so as to enable me to take further administrative steps at Headquarters."

On the following day the Executive Officer of ECE informed the Recruitment Services that the Executive Secretary had "not yet got government clearance on the availability of Mr. Levčík". On 11 October 1968 the Permanent Representative replied as follows to the Executive Secretary's letter of 3 September 1968:

"I have the honour to refer to your letter of September 3, 1968 concerning the recruitment of Mr. B. Levčík to the staff of the Secretariat of the Economic Commission for Europe. I have contacted directly the appropriate authorities of my Government and consulted their opinion.

"... I am pleased to inform you that the Government of the Czechoslovak Socialist Republic is in agreement with the recruitment on the temporary basis, you have proposed."

On 22 October 1968 the Applicant was offered by the United Nations Office at Geneva a short-term appointment for 11 months from 4 November 1968 as Economic Affairs

Officer. On the same day he submitted his resignation, as from 31 October 1968, to the International Labour Organisation, which accepted it on 24 October 1968. On 23 October 1968 the Applicant accepted the 11-month appointment offered him by the United Nations Office at Geneva. He then returned to Prague and came back to Geneva at United Nations expense on 3 November 1968 to assume his duties. On 14 March 1969 the Permanent Representative of Czechoslovakia in Geneva informed the Executive Secretary of ECE of "my Government's agreement with [the Applicant's] recruitment to the staff of the Secretariat of the Economic Commission for Europe on a long-term basis". On 18 March 1969 the Deputy Permanent Representative of Czechoslovakia in New York advised the Chief of the Secretariat Recruitment Service of the Office of Personnel in New York that "the Government of the Czechoslovak Socialist Republic agrees with the extension of Mr. B. Levčík's secondment by two years as requested by the Executive Secretary of the Economic Commission for Europe". On 20 March 1969 the Chief of the Secretariat Recruitment Service advised the Chairman of the Appointment and Promotion Board that the Executive Secretary of ECE recommended a two-year fixed-term appointment for the Applicant, "who would join on secondment from his Government". On 21 March 1969 the Appointment and Promotion Board recommended, and subsequently the Secretary-General approved, the appointment of the Applicant "on a fixed-term secondment basis for a period of two years". On 24 March 1969 this action was notified to the Secretariat Recruitment Service by a memorandum from the Secretary of the Appointment and Promotion Board in which reference is made to a "two years secondment from the Government of Czechoslovakia" and to a "fixed-term secondment". On 2 April 1969 the Chief of the Personnel Services in Geneva offered to the Applicant a fixed-term appointment for two years. This offer, which made no mention of secondment, was accepted by the Applicant on 17 April 1969. The letter of appointment, which appointed the Applicant Senior Economic Affairs Officer in ECE for a fixed-term of two years as from 1 April 1969, was signed on 22 April 1969 by the Chief of Staff Services and on 24 April 1969 by the Applicant; this letter makes no reference to any secondment and mentions "none" under the item "Special Conditions"; nor is there any mention of secondment in the corresponding Personnel Action form, dated 2 May 1969. On 14 August 1969 the Director of the Institute of Economics of the Czechoslovak Academy of Sciences informed the Applicant that, as his "appointment abroad [had] been found to be well justified", his "leave of absence [would end] at the originally approved term, i.e. on 31 December 1971", adding: "This information is being given to you to enable you eventually to settle more easily questions of appointment with your present employer". On 26 November 1970 the Chief of Staff Services in Geneva addressed to the Chief of Staff Services in New York a memorandum on "Review of professional staff members serving under fixed-term appointments due to expire in March 1971"; the memorandum read in part:

"The Executive Secretary of the ECE strongly recommends that Mr. Bedrich Levčík's fixed-term appointment should be extended for a further period of not less than three years.

"We concur with this recommendation."

That memorandum was transmitted on 4 December 1970 to the Chief of Staff Services in New York by an Administrative Officer in the Office of Personnel under the following memorandum:

"1. The Executive Secretary of the Economic Commission for Europe has recommended that the fixed-term appointment presently held by Mr. Bedrich Levčík, a P-5 Senior Economic Affairs Officer, which is due to expire on 31 March 1971, be extended for a further period of three years. The Department of Economic and Social Affairs supports ECE's recommendation.

"2. Mr. Levcik was appointed on 1 April 1969 on a fixed-term basis for a period of two years. His service as Chief of the Centrally Planned Economies Section in ECE has proved to be very successful and as evidenced in his periodic report he has been rated as an exceptionally competent staff member of unusual merit.

"3. In view of Mr. Levcik's highly competent performance and ECE's need for his services, *I support ECE's recommendation and recommend your approval.* In addition to Mrs. Cerna-Raton [Chief of Staff Services in Geneva]'s memorandum of 26 November 1970 and the up-to-date periodic report, I attach a *letter to the Permanent Mission of the Czechoslovak Socialist Republic to the United Nations from the Director of Personnel* requesting an extension of Mr. Levcik's secondment to the United Nations which will be required should the extension of appointment be approved.

"..."

On 4 December 1970 the Chief of Staff Services in New York recommended that the Director of Personnel approve the proposed extension. The Director of Personnel gave his approval on 7 December 1970 and, on 8 December 1970, he wrote to the Permanent Representative of Czechoslovakia in New York, requesting his "assistance in securing the consent of [his] Government to the extension of Mr. Levcik's secondment" until 31 March 1974. On 29 December 1970 the Permanent Representative replied that his Government did not agree with the proposed extension. On the same day the Administrative Officer in the Office of Personnel sent the following cable to the Chief of Staff Services in Geneva:

"Today Czechoslovak Mission informed us that Czechoslovak Government has not repeat not approved our request for extension Bedrich Levcik secondment. Therefore, staff member is to return to his Government service after expiration of present contract on 31 March 1971."

On 22 January 1971 the Director of the Applicant's Division submitted to the Executive Secretary of ECE, in preparation for a mission which the latter was about to undertake in New York, a brief in which he came to the conclusion that the agreement of the Czechoslovak Government to the Applicant's employment with ECE had the character of a political clearance and not of a government secondment from the national Civil Service, that the Organization was consequently under no legal obligation to comply with the wishes of the Government under the rules about secondment, and that there were grave legal reservations against soliciting from the Government a renewal of clearance and, even more so, against accepting a reversal of the previous positive clearance given in October 1968 and March 1969 without any reasons and evidence being furnished. On 17 March 1971, at the instance of the Executive Secretary of ECE, the Director of Personnel again wrote to the Czechoslovak Mission in New York, stressing the need for the Applicant's services and appealing to its co-operation "with a view to securing an extension of Mr. Levcik's secondment until the end of 1971". On 1 April 1971 the Applicant's appointment was extended for one month, pending the response of the Czechoslovak Mission. On 12 April 1971 the Czechoslovak Mission advised the Director of Personnel that the Czechoslovak Government did not agree with the proposed extension. On 1 May 1971, at the urgent request of the Executive Secretary of ECE and of the Director-General of the United Nations Office at Geneva, the Applicant's appointment was extended until 31 December 1971. The reasons for this decision were explained by the Director of Personnel in a letter to the Permanent Representative of Czechoslovakia in New York dated 30 April 1971. On 20 October 1971 the Applicant addressed to the Secretary-General a memorandum in which he stated *inter alia* that he had not been seconded from the national Civil Service and was therefore under no obligation to return to his Government's service, in the

employ of which he had not been prior to his appointment with ECE, and that the attempts of the Czechoslovak authorities to prevent his employment with the United Nations had nothing to do with the application of the rule of "secondment" but were simply an act of persecution to which the United Nations could not be a party; the memorandum concluded as follows:

"15. The United Nations has the legal and moral obligation to resist the illegal pressures put on it by a Member State which is trying to invoke the rule of 'secondment' for the purpose of persecution of its national. I appeal to you, Sir, to reconsider my case and to accept the original recommendation of the Executive Secretary of the ECE for a three-year extension of my appointment."

In a reply dated 4 November 1971, the Director of Personnel summarized the circumstances surrounding the Applicant's recruitment for ECE and reached the following conclusion:

"The facts stated above clearly indicate that you had been in the service of the Institute at Prague until you joined the Commission and that your employment with the UN took effect not through a 'political clearance' but through a request to and agreement by your Government of your secondment to the UN. You will no doubt understand that 'the Secretary-General is not in a position to contest the Government's claim that the Institute was part of the Government system or that your Government's consent to the secondment was not in order.'

"In any event, may I call your attention to the fact that your appointment with the UN was a fixed-term appointment which according to the conditions as governed by Staff Rule 104.12 (b) created no expectancy of renewal or of conversion to any other type of appointment. Under the terms of your appointment, you have no claim for continued service with the United Nations."

On 1 January 1972 the Applicant's appointment was extended for a final period of three months at the request of the Executive Secretary of ECE "in order not to interrupt work on current survey of economic situation in Europe which must be completed in time for twenty-seventh session of Commission in April and also to enable [the Executive Secretary of ECE] to recruit" a successor to the Applicant. On 25 January 1972 the Applicant appealed to the new Secretary-General to accept the original recommendation of the Executive Secretary of ECE for a three-year extension of his appointment, stressing that his name had not been on any list of candidates of the Czechoslovak Government, that his services had not been offered by it, that nobody could loan his services to somebody else without his knowledge and consent, that the Organization could not accept such a loan without his knowledge and consent, and that the repeated formal offers for an extension of his contract and the hope and desire frequently expressed by his superiors that he continue his work with the Organization had established a legitimate expectancy of a continuation of service with the United Nations, an expectancy which would have been fulfilled had it not been for the illegal pressure exercised by the Czechoslovak authorities and the inappropriate invokement of the secondment rule by the Office of Personnel. On 7 April 1972 Headquarters requested confirmation by Geneva that the Applicant had been "separated from service after expiration" of his contract on 31 March 1972. On the same day the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 29 March 1973. The Board's conclusions and recommendation read as follows:

"VIII. Conclusions of the Board

"58. The Board recognizes that the Secretary-General was within his rights in not accepting to renew the Appellant's fixed-term appointment.

"59. The Board is also of the opinion that the conditions prevailing at the end of the Appellant's fixed-term period of employment have created a legitimate

expectancy of renewal of the Appellant's contract, which would justify an appropriate financial compensation.

"IX. Recommendation

"60. Taking into consideration the above findings and conclusions, the Board recommends to the Secretary-General that the Appellant be granted an appropriate indemnity. With reference to the maximum termination indemnity allowed by the Staff Rules in the case of staff members having completed three years of service in the Secretariat, the Board further recommends that the said indemnity should be the equivalent of three months' salary at the grade and step of the Appellant's fixed-term appointment."

On 6 December 1973 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report and had decided, without adopting the reasoning of the Joint Appeals Board on the matter of secondment and expectancy, to accept the Board's recommendation for granting him an indemnity in an amount equivalent to three month's base salary. On 29 January 1974 the Applicant rejected the compensation offered him as being "totally inadequate and proffered under unacceptable legal conditions". On 19 February 1974, he filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. In the circumstances peculiar to his case, the Applicant had an expectancy of renewal of his fixed-term appointment for a further period of three years from 1 April 1971. Had the Respondent not interpreted the Czechoslovak Government's position as he did, he would have renewed the appointment for that period. The only question which remains to be solved is whether the Respondent made a legitimate use of his discretionary power not to renew the appointment.

2. The Respondent would have exercised legitimately his power not to renew the Applicant's contract if the latter had been under a status of secondment and the releasing Government had refused to extend the term of the secondment beyond the one to which it had agreed previously. The Applicant, however, was not seconded by the Czechoslovak Government to the United Nations. Indeed, he was not a national civil servant when the Respondent appointed him, as is clear from the uncontested statement made in this respect by the Applicant in the Personal History form.

3. The transaction of secondment requires the concurrence of the three parties to the arrangement, namely the releasing Government, the receiving Organization and the staff member concerned, and the staff member must have the right to revert to employment in his establishment of origin. The Respondent has not brought any evidence of the Applicant's consent to such an arrangement. At the time of the Applicant's appointment, the preoccupation of the United Nations was to obtain government clearance for the Applicant to receive a valid exit permit, which could not be taken to mean that a secondment was involved. Nor could the Respondent contend that the Applicant was seconded to the United Nations by the Czechoslovak Academy of Sciences.

4. The Respondent has put political expediency ahead of his obligation of independence under Article 100 of the Charter, ahead of the Applicant's right of expectancy of renewal of his contract until 31 March 1974, and ahead of the Applicant's basic human rights.

Whereas the Respondent's principal contentions are:

1. There exists no general framework within which secondments from national employers take place. There is no trilateral instrument nor even a trilateral arrangement; instead one can identify three bilateral agreements: an agreement between the individual and his permanent employer, an understanding between the Organization and the permanent employer, and a letter of appointment from the Organization to the

staff member and accepted by the latter. This set of arrangements is designed to be mutually advantageous to each of the three parties. Each party benefits from certain rights and must assume certain duties, including the right of the permanent employer to the return of its employee at the end of the specified period and the corresponding duty of the Organization not to attempt, at the end of such period, any permanent or long-term recruitment without the consent of the permanent employer.

2. When the Applicant initially joined the staff of ECE and even thereafter (until the Czechoslovak Government communicated the refusal to extend the secondment), he did his best to maintain his existing relationships with his permanent employer—the Czechoslovak Academy of Sciences, a “national institution” within the meaning of Staff Rule 104.12 (b)—and with his Government. His efforts to maintain his permanent employment relationship must be considered as at least an implicit consent to the secondment that was actually agreed to by the Organization, even if he was not explicitly informed of the relevant communications.

3. Since it is up to the Secretary-General to make all decisions about appointments and renewal of appointments, it is only he who might, through some action, create an expectation of renewal. In the present case, however, the Secretary-General was, even if he minded to do otherwise, not in a position to create such an expectation, because the Applicant had been seconded from his permanent employer, and the very circumstances under which the last short-term extensions of appointment were granted precluded the Applicant from basing any long-term expectations on them.

The Tribunal, having deliberated from 24 September to 11 October 1974, now pronounces the following judgement:

I. The Tribunal is requested to rule on the Applicant's claim for compensation for injury sustained as a result of the decision of the Respondent to separate the Applicant from the service on 31 March 1972 despite urgent requests from his superiors to extend his appointment to 31 March 1974.

The decision of the Respondent was taken following the refusal of the Czechoslovak Government to extend the “secondment” of the Applicant to the United Nations. Thus the decision of the Respondent was the direct consequence of action by the authorities of a Member State. The Respondent argued before the Tribunal that he was bound to terminate the employment of a staff member seconded by the Government of a Member State when that Government refused to authorize the extension of secondment and that, since such was the situation of the Applicant, he could not receive further employment after the expiry of his last appointment on 31 March 1972.

II. In order to decide on the legality of the Respondent's action, the Tribunal must recall (a) the legal principles applicable to the secondment of an official to the United Nations Secretariat and then (b) consider whether the status of the Applicant was actually one of “secondment” during the period of his service in the United Nations.

III. (a) With regard to the legal principles applicable to secondment to the United Nations Secretariat, the Tribunal observes that Staff Rule 104.12 (b) provides that a fixed-term appointment may be granted for a period not exceeding five years to persons “temporarily seconded by national governments or institutions for service with the United Nations”. The possibility of “temporary secondment” is therefore formally recognized in the Staff Rules. Moreover, the Training and Reference Manual of Procedure for Personnel Clerks and Secretaries gives practical indications as to how the Personnel Action Form of a candidate seconded to the United Nations is to be established and states: “Under ‘Remarks’ include the government or agency from which the staff member is being seconded”. Thus the Manual, designed to provide guidance in administrative practice, calls for a formal mention of the situation of secondment in the document which must be prepared at the time of appointment.

IV. The substantive law governing the secondment of a staff member of the United Nations to the Secretariat of the Inter-Governmental Maritime Consultative Organization has been applied by the Tribunal in the *Higgins Case* (Judgement No. 92). In that case, after taking cognizance of the rules contained in various documents from the Consultative Committee on Administrative Questions concerning the transfer, secondment or loan of officials between organizations applying the common system of conditions of employment in the United Nations, the Tribunal, having held that those rules were not binding on the parties, had to seek some other legal basis for its decision. The basic principles set out by the Tribunal in Judgement No. 92 are generally applicable to secondment, and particularly to cases envisaged in Staff Rule 104.12 (b).

According to that judgement,

"IV. There is no legal definition of the term 'secondment' in the Staff Regulations and Rules of either IMCO or the United Nations. Nevertheless, the term 'secondment' is well known in administrative law. It implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits. . . .

"VI. . . . there are really three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned"

V. The principles stated in Judgement No. 92 imply that in a case of secondment the situation of the official in question must be defined in writing by the competent authorities in documents specifying the conditions and particularly the duration of the secondment. These documents must be brought to the knowledge of the official concerned and his consent must be obtained. Any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously requires the agreement of the three parties involved. When a Government which has seconded an official to the Secretariat of the United Nations refuses to extend the secondment, the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the Government.

Bearing in mind the provision in Article 100 of the Charter that "in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization", the Tribunal considers that in the absence of a secondment agreed to by all parties concerned in conformity with the above-mentioned principles, the Respondent cannot legally invoke a decision of a Government to justify his own action with regard to the employment of a staff member.

VI. As to (b) in paragraph II above, the Tribunal must now consider whether the Applicant's status was one of secondment while serving with the United Nations. The Tribunal notes that the Applicant received five successive appointments from 4 November 1968 to 31 March 1972. During that period the attitude of both the Respondent and the Czechoslovak Government varied. In order to determine whether there was a secondment which could entail the legal consequences claimed by the Respondent, three periods must be distinguished: that of the initial appointment, that of the fixed-term appointment for two years which took effect on 1 April 1969, and finally the period from 1 April 1971 to 31 March 1972 during which the Applicant received three successive appointments.

VII. With regard to the first period, the Tribunal notes that at the time of his recruitment at Geneva to the Economic Commission for Europe (ECE), the Applicant was on unpaid leave from the Institute of Economics of the Czechoslovak Academy of Sciences. At that time he was working at the International Labour Organisation on

a short-term contract. The offer of employment for 11 months at ECE, the letter of appointment and the Personnel Action Form, all dated October 1968, make no mention of "secondment" from a national Government or institution.

VIII. Although the Applicant entered into direct contact with the Executive Secretary of ECE and personally chose to leave the International Labour Organisation for the prospect of longer-term employment, the Tribunal observes that the Executive Secretary immediately communicated with the Permanent Representative of Czechoslovakia in Geneva.

On 3 September 1968 the Executive Secretary, referring to a previous conversation, asked the Permanent Representative to inform him "about your Government's agreement with this recruitment". Before a reply from the Permanent Representative had been received, the Executive Officer of ECE informed the Recruitment Services that the Executive Secretary "has not yet got government clearance on the availability of Mr. Levčík" and asked to be advised "as soon as the basic clearances have been obtained".

The reply from the Permanent Representative dated 11 October 1968 indicated that he had "contacted directly the appropriate authorities of [his] Government and consulted their opinion", and informed the Executive Secretary that the Government was "in agreement with the recruitment on the temporary basis you have proposed".

The Tribunal notes that the term "secondment" does not appear in the reply, that no indication is given as to the appropriate authorities consulted, and that no information is requested or provided concerning the Applicant's situation in his country of origin. The Tribunal also notes that the Administration uses the term "clearance" to describe the procedure which was followed.

IX. During the oral proceedings counsel for the Respondent explained to the Tribunal the meaning of "clearance on the appointment of a prospective staff member" in United Nations practice and the distinction between "clearance" and "secondment".

He stated *inter alia* that the term "clearance" is "not only not defined by any rule or administrative instruction, but is indeed not an officially used and sanctioned term at all, nor is it a correct one to describe the procedure that is followed".

However, he recognized that some Governments "have informed the Secretary-General that they expect to be routinely consulted about the employment of any staff members or certain categories of staff members, so that they might supply to the Secretary-General whatever information they may have on such candidates". He also stated: "With respect to the nationals of some States, the applications are almost always received from the national Missions of their Governments. This is the case with respect to most Eastern European countries. Almost never is an application from an Eastern European received directly, and Applicant is one of the very few exceptions." Finally, he added that the distinction between "clearance" and "secondment" was very simple: "The former procedure, the so-called clearance, is merely one for obtaining information from a government about a candidate for appointment. The latter, that is secondment, is an arrangement made with the employer of a candidate—whether the employer is another international organization, a governmental institution, a private society or even a corporation. It is an arrangement whereby a candidate is appointed to the staff of the Organization without being required to sever his existing relationship with such an employer. In this situation it is of course necessary that the approval of the employer be secured, because this is an arrangement involving an agreement with such an employer."

The Tribunal notes that during the period of the Applicant's first appointment there was no reference to a secondment, much less an agreement on secondment; nor was there any request for information about the candidate, whose career and abilities

were known to the Executive Secretary of ECE. The Tribunal arrives at the conclusion that the procedure followed in October 1968 was merely designed to ensure that the prolonged absence of the Applicant from his national territory was in order from the point of view of the Czechoslovak Government.

X. It was in relation to the period of the appointment running from 1 April 1969 to 31 March 1971 that the concept of secondment first appeared in correspondence between the Respondent and the Government, with the result that the Respondent thereafter considered that the appointment of the Applicant could only be further extended with the consent of the Government.

The Tribunal must examine the circumstances to determine whether there was a "secondment" and whether the Respondent's position has any legal basis.

XI. At the time when the proposal to grant a two-year appointment to the Applicant was to be submitted to the Appointment and Promotion Board, the Chief of the Secretariat Recruitment Service discussed the situation with the Deputy Permanent Representative of Czechoslovakia in New York. On 18 March 1969, the latter conveyed the agreement of his Government "with the extension of Mr. B. Levčík's secondment by two years as requested by the Executive Secretary of the Economic Commission for Europe". For the first time the term "secondment" was employed and a specific duration named by the Government. This communication described the existing situation of the Applicant as "on short-term basis" and, by using the words "extension" of his "secondment", seemed to imply that, from the point of view of the Government, there had been a "secondment" from the commencement of the Applicant's service. The first document emanating from the Administration which uses the term "secondment" is a memorandum dated 20 March 1969 from the Chief of the Secretariat Recruitment Service to the Chairman of the Appointment and Promotion Board. This memorandum conveyed the recommendation from the Executive Secretary of ECE, with which the Department of Economic and Social Affairs and the Office of Personnel concurred, to grant a two-year appointment to the Applicant. The memorandum used the formula "who would join on secondment from his Government", which would imply that the Applicant's entry to the Secretariat was subject to the granting of a two-year appointment had it not been mentioned in the same memorandum that the Applicant was serving in his post since 4 November 1968.

The terms "two years' secondment from the Government of Czechoslovakia" and "fixed-term secondment" appear in a memorandum of 24 March 1969 announcing the Secretary-General's approval of the recommendation of the Appointment and Promotion Board. But at that time the Applicant was not informed of the position taken by the Office of Personnel in New York or of the communication from the Deputy Permanent Representative. No mention is made of either of these in the detailed letter which was sent to the Applicant on 2 April 1969 to offer him a two-year appointment effective from 1 April 1969, or in the letter of appointment itself or in the Personnel Action Form established on that occasion.

XII. When the proposal to extend the Applicant's appointment for three years was made by the Executive Secretary of ECE in November 1970, an Administrative Officer in the Office of Personnel, while recommending a favourable decision to his superiors, drew the legal consequences of the "secondment" status referred to in the above-mentioned documents. In a memorandum dated 4 December 1970, he stated:

"In addition to Mrs. Cerna-Raton [Chief of the Staff Services in Geneva]'s memorandum of 26 November 1970 and the up-to-date periodic report, I attach a letter to the Permanent Mission of the Czechoslovak Socialist Republic to the United Nations from the Director of Personnel requesting an extension of Mr.

Levcik's secondment to the United Nations which will be required should the extension of appointment be approved."

The letter of 8 December 1970 which the Director of Personnel addressed to the Permanent Representative of Czechoslovakia in New York along the lines suggested in that memorandum requested an extension of the Applicant's secondment until 31 March 1974. This letter stated that the Applicant "has been serving since 1 April 1969 on secondment from your Government", thus using the terms of the memorandum of 20 March 1969. On 29 December 1970, the Permanent Representative of Czechoslovakia in New York stated that his Government was opposed to an extension. The Administrative Officer in the Office of Personnel informed Geneva that the "Staff member is to return to his Government service after expiration of present contract on 31 March 1971." It was then that the Geneva Office and the Applicant himself were notified for the first time of the situation which had been accepted at Headquarters and according to which, in the view of Headquarters, the Applicant's retention in service was conditional upon the consent of the Government.

The position of the Respondent was reaffirmed in the communication sent to the Applicant on 4 November 1971 by the Director of Personnel, who wrote:

"The facts stated above clearly indicate that you had been in the service of the Institute at Prague until you joined the Commission and that your employment with the UN took effect not through a 'political clearance' but through a request to and agreement by your Government of your secondment to the UN. You will no doubt understand that 'the Secretary-General is not in a position to contest the Government's claim that the Institute was part of the Government system or that your Government's consent to the secondment was not in order'."

The Tribunal notes that, in this communication, the Respondent modifies his earlier view and adopts the Government's position that the Applicant has been on secondment since he took up his duties in November 1968.

XIII. The Tribunal must now consider whether, on the basis of the legal principles applicable to secondment, the Respondent's position is well founded.

The Tribunal observes that the agreement reached in New York between the Government and the Respondent on the matter of secondment did not specify the starting-point of the secondment and that, in this respect, the positions of the parties were at variance. Nor did it specify the Applicant's post in his country or the conditions relating to his return to that post. Furthermore, the agreement did not take into account two statements made by the Czechoslovak authorities concerning the Applicant.

On 14 March 1969, that is, four days prior to the communication mentioned in the beginning of paragraph XI above, the Permanent Representative of Czechoslovakia in Geneva wrote to the Executive Secretary of ECE informing him of "my Government's agreement with his [the Applicant's] recruitment to the staff of the Secretariat of the Economic Commission for Europe on a long-term basis". The terms used are identical to those employed in October 1968 by the same Permanent Representative, except that the phrase "on a long-term basis" is used instead of "on a temporary basis", and there is no reason to consider that this indicated a change in the legal scope of the "agreement". The Tribunal also notes that the Permanent Representative ended by saying: "I would be very much obliged to you for informing me about your further decisions in the respect of contract of Mr. Levcik", indicating thereby that it was up to the United Nations to settle the question of the contract which was to be concluded and that the Government only wished to be kept informed. Finally, it is clear from the terms of the letter that it was written after conversations had taken place between the Executive Secretary and the Czechoslovak authorities in Prague in February 1969. This letter does not appear to have been transmitted immediately to New York, but it was

referred to in the document drawn up in Geneva for the Executive Secretary in preparation for the discussions he was to have in January 1971 at Headquarters on the future of the Applicant.

The other document was a letter sent on 14 August 1969 to the Applicant by the Director of the Institute of Economics of the Czechoslovak Academy of Sciences in which he referred to discussions held in the governing bodies of the Institute and stated:

"At these proceedings your appointment abroad has been found to be well justified. I confirm, therefore, that your leave of absence ends at the originally approved term, i.e. on 31 December 1971.

"This information is being given to you to enable you eventually to settle more easily questions of appointment with your present employer."

The Tribunal notes that the Institute which employed the Applicant in his country did not speak of secondment but merely of leave of absence which was granted until 31 December 1971, while the Deputy Permanent Representative of Czechoslovakia in New York had mentioned a secondment ending on 31 March 1971. These communications show that the position of the national authorities with regard to the presence of the Applicant in the United Nations was not without contradictions.

XIV. Above all, the agreement reached in New York on the secondment was not brought to the knowledge of the Applicant and his consent was not obtained. Thus an essential requirement for the validity of a secondment was lacking. The Tribunal therefore holds that there was no valid secondment of the Applicant during the period of his two-year fixed-term appointment.

XV. Prior to the expiry of the Applicant's two-year fixed-term appointment the Director of Personnel had requested the agreement of the Government to the extension of the secondment for three years. On 29 December 1970 the Permanent Representative of Czechoslovakia in New York informed the Director of Personnel that his Government did not agree with the proposed extension—a position that was reaffirmed by the Government on 12 April 1971 following a new approach made by the Director of Personnel on 17 March 1971 concerning the possibility of extending the appointment until the end of 1971. It was thus clear that the Government was opposed to any extension of the Applicant's appointment. Nevertheless, in the period from 1 April 1971 to 31 March 1972 the Applicant was granted three successive appointments.

The Tribunal observes that, at the suggestion and urgent request of Geneva, the Respondent found it possible to disregard the Government's refusal by relying *inter alia* on the communications, referred to in paragraph XIII above, from the Permanent Representative of Czechoslovakia in Geneva and from the Director of the Institute of Economics of the Czechoslovak Academy of Sciences.

The Tribunal also notes that the letter of 17 March 1971 from the Director of Personnel to the Deputy Permanent Representative of Czechoslovakia in New York uses a new formula and requests the "prolongation de la mise en disponibilité" of the Applicant, mentioning November 1968 as the date of his entry on duty with the United Nations and his position at the Academy of Sciences.

Finally, the Tribunal notes that, while informing on 30 April 1971 the Permanent Representative of Czechoslovakia in New York of the decision to extend the Applicant's appointment until 31 December 1971, the Director of Personnel stated that the "action" was of an "exceptional nature" and assured the Permanent Representative "that it did not in any sense reflect a desire . . . to change the policy of close consultation with the Czechoslovak authorities, which, as in the past, continues to be our rule".

This communication refers to a system of consultation between the Respondent

and the Czechoslovak Government which differs both from what counsel for the Respondent described as "clearance" and from the procedure of secondment.

In view of the foregoing, the Tribunal concludes that the Applicant's status during the period from 1 April 1971 to 31 March 1972 was not one of secondment. The Tribunal also finds that the decision not to extend the Applicant's appointment beyond 31 March 1972 resulted from the position taken by the Government and from the Respondent's belief that he was bound to respect that position. In the Tribunal's view, only if the Applicant's appointment had satisfied the requirements of a secondment set out by the Tribunal earlier in this Judgement could the Respondent's reliance on the Government's refusal to approve an extension of the appointment have had any legal validity. 1-4
a further
secondment

XVI. Having reached the conclusion that the Applicant was at no time on regular secondment, even during his two-year appointment, the Tribunal does not have to consider the arguments presented by the Applicant regarding either the nature of the legal relationship between a seconded official and his national authorities or the situation arising when that legal relationship ceases to exist during the period of secondment.

XVII. The Tribunal has further to consider whether the Applicant had a legal expectancy of continued employment until 31 March 1974.

It is true that the Applicant's successive appointments all contained a clause similar to the provision in Staff Rule 104.12 (b) that "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

The Tribunal notes, however, that the Applicant's outstanding qualifications, his special competence in the work to which he was assigned and the manner in which he performed his duties had won him exceptional commendation. His continued employment by the United Nations was regarded by his superiors in ECE, by the Department of Economic and Social Affairs and by the Office of Personnel as highly desirable in the interests of the Organization, and every effort was made to retain his services at least until 31 March 1974. The Applicant was kept completely informed of this situation. The Tribunal therefore finds that the Applicant had a legal expectancy that his fixed-term appointment would be extended until that date and that he is therefore entitled to compensation for the injury resulting from the decision not to extend his appointment, a decision based on the premise of secondment which the Tribunal has shown to be an error of law.

XVIII. In his amended pleas the Applicant only requests monetary compensation. The Tribunal is called upon to consider whether the Respondent's action has rendered him liable for payment of compensation in respect of the Applicant's separation from the service.

The Applicant requests payment of the difference between the salary which he would have received if he had remained in the employment of the United Nations and the sums which he actually received both from the United Nations and from the Vienna Institute for Comparative Economic Studies, where he was appointed Deputy Director with effect from 1 February 1973.

Taking into account that the Applicant was without any post between 1 April 1972 and 1 February 1973, that is for a period of 10 months, and that the post which he obtained in Vienna carried emoluments lower than those received by him in Geneva, the Tribunal awards compensation to the Applicant in the amount of one year's net base salary, less such amount as the Respondent may have paid to the Applicant as a result of the decision taken on 6 December 1973 by the Secretary-General after receiving the recommendation of the Joint Appeals Board, and orders accordingly.

XIX. With regard to the Applicant's plea relating to pension benefits, the Tribunal

notes that if his appointment had been extended until 31 March 1974 and if he had completed five years of service he would have been entitled to the retirement benefits provided for under the pension scheme. The Tribunal notes that the Applicant has obtained refund of his own contributions under article 32 of the Pension Fund Regulations. The Tribunal observes, however, that the Applicant's entitlement to a retirement benefit might have been affected by changed personal circumstances and, on the basis of the principle that damages should not be remote or indirect, the Tribunal rejects the request.

XX. The Applicant requests \$1,500 as reimbursement of his judicial costs.

The Tribunal notes that the Applicant could have availed himself of the assistance of a member of the panel of counsel.

Having regard to its resolution of 14 December 1950 and considering the special nature and circumstances of the case, the Tribunal orders the Respondent to pay the Applicant \$800 as costs.

(Signatures)

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

New York, 11 October 1974

Roger STEVENS
Member

Jean HARDY
Executive Secretary

Judgement No. 193

(Original: English)

Case No. 186:
Addo

**Against: The Secretary-General
of the United Nations**

Request that the Tribunal declare receivable an appeal submitted to the Joint Appeals Board after the expiration of the required time-limit.

Date of notification of the contested decision and of the appeal submitted to the Joint Appeals Board.—Staff Rule 111.3 (c) and (d).—Question whether the Board acted correctly in deciding that none of the reasons offered by the Applicant for not meeting the required time-limit amounted to exceptional circumstances.

The Applicant cannot plead ignorance of the Staff Rules requirements for appeals.—Examination of the correspondence exchanged between the Applicant's solicitors and the Respondent.—Conclusion of the Tribunal that the decision of the Board not to waive the time-limits is supported by the record.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton,
Vice-President; Mr. Zenon Rossides;