ADMINISTRATIVE TRIBUNAL

Judgement No. 509

Cases No. 525: HAMADEH-BANERJEE
No. 526: HAMADEH-BANERJEE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice- President; Mr. Arnold Kean;

Whereas at the request of Lina Hamadeh-Banerjee, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 June and 15 August 1989, the time-limit for the filing of two applications to the Tribunal;

Whereas, on 31 July 1989, the Applicant filed two applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 November 1989, the Applicant, after making the necessary corrections, again filed two applications, the first one in case No. 525, concerning "medical evacuation" (hereinafter referred to as the "first case"), the second one in case No. 526, concerning "change of country of home leave" (hereinafter referred to as the "second case").

Whereas the pleas in the application in the "first case" read as follows:

"II. PLEAS

7. With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;

(b) To consider the present application receivable under article 7 of its Statute;
(c) To decide to hold the oral proceedings of the Tribunal on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules.

8. On the merits, the Applicant requests the Tribunal:

(a) To rescind the Secretary-General's decision of 8 December 1988 in which he maintained his earlier decision concerning the Applicant's medical evacuation from Afghanistan in August 1986:

(i) That the Applicant was entitled to a daily subsistence allowance [DSA] equivalent to 50% of the Riyadh rate, during her stay in New York to give birth to her second child Ishan;
(ii) That her son Kiran, who accompanied his mother, (and whose return air fare from Kabul to Riyadh had been, subsequently, authorized), was not entitled to a daily subsistence allowance during his stay with his mother in New York;
(iii) That the travel of her newly born child, Ishan, to Kabul, should be limited to Riyadh-Kabul costs and not New York (his birth place) to Kabul;

(b) To find that the Respondent, having already rejected the Applicant's request for change of country of home leave, was fully aware that the Applicant's country of home leave was physically inaccessible to her; therefore it was accepted that New York would be the actual place of medical evacuation, but that the travel costs will be payable as if the destination would be Riyadh and the related subsistence allowance would be paid at the New York or Riyadh rate whichever was lower;
(c) To find that the applicable rules and instructions and, in particular, circular UNDP/ADM/PER/130/Add.1/Rev.2 entitled her to daily subsistence allowance at 100% level of the Riyadh rate;
(d) To find that the discretion vested in the Secretary-General under rule 107.15(h) was exercised arbitrarily, and that it should be exercised in a fair and consistent manner, and therefore payment of a DSA should be made for the Applicant's son Kiran for the duration of his stay in New York with his mother as well as for official stopover travel time as authorized accompanying family member on medical

evacuation;

(e) To find that under rule 107.2(b) Ishan's travel to Kabul should have been authorized from New York to Kabul, and not from Riyadh, since the place of his father's recruitment by the UNDP [United Nations Development Programme] in 1968 was Washington D.C.;

(f) To find that the United Nations contribution towards daily subsistence allowance on medical evacuation should apply consistently to Ishan during his stay in New York;

(g) To order that the Applicant is entitled to 100% DSA of the Riyadh rate during her stay in New York and therefore to order payment of the difference between what she received and what she is due;

(h) To order DSA payment for Ishan for the duration of his stay in New York following his mother's confinement as an eligible accompanying family member;

(i) To order payment of Ishan's ticket from New York to Kabul and to refund the Applicant for the difference in cost between the New York/Kabul and Riyadh/Kabul fares;

(j) To order payment of Kiran's DSA for the duration of his stay in New York with his mother and for official stopover travel time Kabul/Riyadh/Kabul, as an authorized accompanying family member."

Whereas the pleas in the application in the "second case" read as follows:

"II. PLEAS

7. With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;

(b) To consider the present application receivable under article 7 of its Statute;

(c) To decide to hold the oral proceedings of the Tribunal on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules.

8. On the merits, the Applicant requests the Tribunal:

(a) To rescind the three conditions to which the decision of the Secretary-General, contained in

the letter of 3 November 1988, to authorize a change in the country of home leave from Saudi Arabia to Bahrain, is subjected;

(b) To find that the first condition that the change is to be effective from 19 January 1988, the date of the issuance of circular UNDP/ADM/88/2, would effectively deprive her, under staff rule 105.3, of the entitlement to accelerated home leave in 1987;

(c) To find that the circular UNDP/ADM/88/2 is irrelevant to the request of the Applicant since this circular in no way alters or otherwise modifies the basic requirements for change of country of home leave set out in staff rule 105.3 (d)(iii) and that its provisions essentially refer to a change of country of home leave on alternate home leaves;

(d) To find that the restriction to the date of the circular effectively denies the Applicant her right to avail herself of her entitlement to home leave, during a two year period, during which she was entitled alternately to home leave or accelerated home leave every twelve months;

(e) To find that the Respondent, having authorized the Applicant's accelerated home leave to Geneva at United Nations expense on the understanding that the Applicant 'would reimburse costs should the appeal be successful or if there is no decision by 31 December 1987', has to honour its commitment since the Respondent procrastinated in submitting the reply on 29 July 1988, and the outcome of the appeal was met;

(f) To find that the second condition, that any additional costs above the entitlement to home leave to Saudi Arabia be borne by the Applicant, is null and void;

(g) To find as a matter of equity that staff rule 105.3 (a) is unequivocal in describing the entitlement to home leave 'at United Nations expense' and draws no distinction in the way 'UN expense' can be interpreted and therefore applies to all those who are entitled in the same manner;

(h) To find that the third condition that the change of country of home leave is to Bahrain and not to Geneva was made by the Joint Appeals Board invoking the grounds of close family relative in Bahrain was prejudiced since Geneva satisfies both requirements of 'family or personal ties' as per staff rule 105.3 (d)(iii);

(i) To order the Respondent to cover the Applicant's home leave costs for 1987 which she is being

effectively denied due to no fault of her own and solely to the unnecessary delay attributable to the Respondent;

(j) To order [the Respondent] to rescind the second condition and to order that the cost of travel to the new country of home leave be at UN expense in the same manner as any other staff member who is entitled to home leave;

(k) To fix pursuant to article 9, paragraph 1 of the Statute, that the change of country of home leave travel should be:

(i) effective retroactively to the date of Applicant's original request in 1986;

(ii) to Geneva, Switzerland, where family and personal ties for her and her children are stronger than Bahrain;

(iii) at the full cost of the United Nations."

Whereas the Respondent filed his answer in the "first case" on 3 April 1990;

Whereas the Respondent filed his answer in the "second case" on 20 July 1990;

Whereas the Applicant filed written observations in the "first case" on 30 July 1990;

Whereas the Applicant filed written observations in the "second case" on 28 September 1990;

Whereas, on 1 February 1991, the President of the Tribunal ruled that no oral proceedings would be held in the cases;

Whereas the facts in the cases are as follows:

The Applicant entered the service of the United Nations on 1 December 1972, as a Professional Trainee at the United Nations Economic and Social Office in Beirut. She was initially offered a two-year fixed-term appointment at the P-1 level. The Applicant resigned from the Organization effective 1 July 1974, and re-entered the service on 17 February 1975, as an Associate Social Affairs Officer at the P-2, step I level. The Applicant's appointment became permanent on 1 February 1977. She was transferred to the United Nations Development Programme (UNDP) on 8 May 1978.

On 17 March 1983, the Applicant married a staff member of UNDP, Mr. Somendu Kumar Banerjee. The Applicant is a national of Saudi Arabia. Her husband is a national of India.

On 1 May 1985, the Applicant's husband was assigned to Kabul, Afghanistan, as UNDP Resident Representative. The Applicant was also assigned to Kabul, as Programme Development Adviser for the United Nations Fund for Population Activities. The Applicant remained in Kabul until 19 July 1988. Kabul is a hardship duty station with a home leave cycle of 12 months.

In a memorandum dated 24 April 1985, the Applicant requested the Deputy Director, Division of Personnel (DOP), to change the designation of her country of home leave from Saudi Arabia to Switzerland. According to the Applicant, she would "be legally denied departure from [Saudi Arabia] without [her] father's permission". She explained that under Saudi law, marriage to a foreigner cannot be recognized without prior permission from the Ministry of the Interior. Since her father had failed to secure the proper authorization, he remained the Applicant's legal guardian and, consequently, could prevent her effectively from fulfilling her professional obligations and from returning to her husband and her immediate family once she had entered Saudi Arabia. The Applicant chose Geneva as an alternate place of home leave since her sister resided there.

In a reply dated 22 May 1985, the Deputy Director, DOP, rejected her request on the grounds that the applicable rules did not allow for an exception. In a letter dated 30 May 1985, the Applicant reiterated her request. She questioned whether section 30604(4) of the UNDP Personnel Manual was applicable to her case and gave additional reasons in support of her request.

An exchange of correspondence ensued between the Applicant and the UNDP Administration. The Applicant argued essentially that her difficulties in returning to Saudi Arabia were not purely of a personal nature but were rather "administrative and legal in character". She suggested that Bahrain, as "a neighbouring

country", was a further option since another sister resided there. The UNDP Administration maintained its position, but considering that the Applicant had last exercised her right to home leave travel in 1981, authorized her to travel to Geneva, against her entitlement Kabul/Riyadh/Kabul, on the understanding that she would spend her next home leave in Saudi Arabia. The Applicant took her home leave in Geneva, in July 1985.

In a letter dated 11 December 1985, the Applicant asked the then Administrator of UNDP to review the decision by UNDP to deny her a change in the designation of place of home leave from Riyadh, Saudi Arabia, to Geneva, Switzerland. In a reply dated 28 January 1986, the Director, DOP, informed the Applicant that, after carefully reviewing her case, in light of the provisions of staff rule 105.3(d)(iii), the Administration had found no evidence that she had maintained normal residence in Switzerland for a prolonged period prior to her appointment to the Organization. In fact, there was no record of any period of residence in Switzerland. Since the rule's first condition for an exception had not been met, the fact that her sister resided in Switzerland became irrelevant.

On 12 March 1986, the Applicant asked the Director, DOP, to "reconsider [her] request for a change in the designation of home leave country from Riyadh, Saudi Arabia to a neighbouring country, namely, Bahrain" where she could maintain her "cultural and social links" and where she also had family. This request was also denied on 26 March 1986, by the Director, DOP.

On 8 April 1986, the Applicant wrote to the Joints Appeals Board (JAB) and her communication was treated by the Respondent as a request for review of the administrative decision rejecting her request for a change in the designation of place of home leave.

On 16 April 1986, the Applicant wrote to a Personnel Officer at Headquarters, requesting medical evacuation to give birth to her second child, in light of her age and due to the lack of adequate facilities in Kabul. She asserted that it would not be possible to return to her home country and requested authorization to be

evacuated to New York City under the medical care of the same

physician who had delivered her first child. The Applicant also requested authorization to be accompanied by her husband and her son Kiran.

On 2 May 1986, the UN Medical Director authorized the Applicant's medical evacuation to Riyadh or to an equivalent destination. However, he did not recommend that the Applicant's husband or child be authorized to accompany her. In a cable dated 8 July 1986, the Personnel Officer informed the Applicant of the UN Medical Director's decision and stated that daily subsistence allowance (DSA) would be payable to her in accordance with the circular UNDP/ADM/PER/130/Add.1/Rev.2 and at the New York rate, unless it was higher than the Riyadh rate.

The Travel Section authorized the Resident Representative to make arrangements for the Applicant's travel within the entitlement Kabul/Riyadh/ Kabul. An advance of DSA for 30 days at Riyadh rates and two days stopover in Delhi was authorized in Kabul by the Resident Representative. An additional advance of US$2,000 was authorized upon the Applicant's arrival in New York by the Division of Personnel.

The Applicant travelled to New York, paying the additional costs of the journey from Riyadh to New York herself. She gave birth to her son Ishan on 9 September 1986. The UNDP Administration agreed to cover the cost of his travel up to an amount equivalent to the fare from Riyadh to Kabul.

On 3 October 1986, the Applicant lodged an appeal with the JAB in the "second case" concerning her request to change her country of home leave.

In a letter dated 8 October 1986, the Applicant requested the Personnel Officer to make the necessary arrangements to pay her the balance of her entitlements during the period of her confinement.

On 11 March 1987, the Applicant wrote to the Personnel Officer, asking him to act on her accelerated home leave travel to Geneva, scheduled for 23 June to 23 July 1987. In a reply dated

24 April 1987, he informed the Applicant that the Administration could not approve travel on home leave to Geneva again. Since she had not spent her last home leave in Saudi Arabia, under section 30703 of the UNDP Personnel Manual, she was obliged to exercise her 1987 entitlement as regular home leave, which required spending at least two weeks in her recognized country of home leave (Saudi Arabia).

In a cable dated 1 May 1987, the Travel Section informed the Applicant that, in connection with her pending claim for DSA during the period of her confinement, UNDP would proceed to recover an amount of US$2,396.88 from her, on the grounds that the Kabul Office had paid her an "excess DSA advance" using the full New York rate of DSA instead of 50 per cent of the Riyadh rate.

In a letter dated 3 May 1987, the Applicant requested the Secretary of the JAB for compensation for the loss of home leave and accelerated home leave entitlements during the appeal period. In a cable dated 13 May 1987, the Personnel Officer explained that although no exception could be granted, as a temporary solution, UNDP was willing to authorize travel to Geneva as requested by the Applicant, provided she would agree to reimburse the costs involved if her appeal should be unsuccessful or at the latest, by 31 December 1987. The Applicant accepted the offer and travelled on accelerated home leave to Geneva between 23 June and 23 July 1987.

In a letter dated 19 May 1987, the Applicant asked the Deputy Director, DOP, to review the administrative decisions regarding her medical evacuation.

In a cable dated 21 May 1987, the Applicant was informed that the Administration had exceptionally approved payment of her oldest son Kiran's return ticket to Riyadh, but no approval had been given for payment of DSA for either of her children. She was further advised that, in accordance with paragraph 2 of UNDP/ADM/PER/130/Add.1/Rev.2, the Organization's responsibility with respect to her DSA was limited to payment of DSA at the 50 per cent rate, since the authorized place of her medical evacuation was her

place of home leave (Riyadh).

On 16 December 1987, after an exchange of correspondence with UNDP, the Applicant lodged an appeal with the JAB in the "first case" concerning medical evacuation.

On 31 October 1988, the JAB adopted its report in the "second case". Its conclusions and recommendation read as follows:

"Conclusions and recommendation

The Majority of the Panel:

24. Concludes that with the issuance of circular UNDP/ADM/88/2, UNDP, without departing from the basic principle governing the home leave entitlement set out in staff rule 105.3, intended to introduce a reasonable degree of flexibility in the application of the said principle, thereby departing from the narrow interpretation favoured by the Administration for more than 40 years.

25. Also concludes that the social and religious conditionsprevailing in the appellant's home country, whereby a woman must obtain the permission of the Ministry of the Interior in order to legally marry a foreigner, such permission being withheld when the foreigner is not from one of the three recognized faiths (Islam, Christianity and Judaism), resulting in a situation where the woman remains the legal ward of her father, restricting her freedom of movement in and out of the country, apply not only to the appellant, but to all Saudi women in a similar position, and that, therefore her difficulties are not of a 'purely personal nature'.

25[sic]. Further concludes that these conditions which make it unsafe for the appellant to return to her home country are sufficiently abnormal to justify an exception to the rules.

26. In addition concludes that, should an authorization of a change in the designation of the country of home leave be granted, such designation should be Bahrain as a neighbouring country, since the appellant does not have any close relatives in Geneva as specified in paragraph 4 of UNDP/ADM/88/2, and since this would be in keeping with the spirit of staff regulation 5.3.

27. In light of the foregoing recommends that the appellant's request for a future change in her country of home leave from Saudi Arabia to Bahrain be favourably reviewed, on the

understanding that, if granted, this authorization would constitute a temporary and exceptional designation of an alternate home leave country, and provided that the appellant's travel to the alternate country will be subject to a cost limitation based on what the travel would cost to her regular country of home leave and that any additional cost above that which would be applicable to the designated home leave country is to be paid by the staff member herself."

On 3 November 1988, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary- General, having re-examined her case (the "second case") in light of the Board's report, had decided:

"to authorize [her] requested change of country of home leave from Saudi Arabia to Bahrain in accordance with circular UNDP/ADM/88/2 of 19 January 1988, on a temporary and exceptional basis, with effect from the date of issuance of the circular, provided that any additional costs above [her] entitlement to home leave travel to [her] country of nationality under staff rule 105.3 be borne by [herself]".

On 28 November 1988, the Board adopted its report in the "first case". Its conclusions and recommendation read as follows:

"Conclusions and recommendation

40. The Panel concludes that the appellant's authorized place of medical evacuation was her place of home leave, Riyadh or equivalent destination, and that, therefore, she was entitled to DSA at 50% of the lower Riyadh rate, as stipulated in paragraphs 2 and 4 of circular UNDP/ADM/PER/Add.1/Rev.2.

41. The Panel also concludes that, although the appellant's older son was never given the status 'authorized accompanying family member' by the Medical Director, which is necessary for the application of paragraph 2 of the same UNDP circular, it is clear from UNDP correspondence with the appellant that payment for the boy's travel was authorized by Personnel on an exceptional and generous basis, with no entitlement for DSA.

42. The Panel further concludes with regard to the appellant's younger son, the following:

(a) Since the appellant was officially on medical evacuation to her home country, Saudi Arabia, as can be seen from her travel authorization, Kabul/Riyadh/Kabul, the baby's entitlement could only be calculated as if he had been born in Riyadh;

(b) Since no provisions are made in the relevant UNDP documents regarding DSA for newborn babies and in view of the inter-office memorandum of 26 February 1986 reflecting UNDP's policy that no medical evacuation DSA should be paid for infants after birth, the appellant was not entitled to DSA for him for the period following his birth until their return to Kabul.

43. In light of the foregoing, the Panel makes no recommendation in favour of the appeal."

On 8 December 1988, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined her case (the "first case") in light of the Board's report, had decided:

"to maintain the contested decisions concerning [her] medical evacuation from Afghanistan in August 1986 to [her] place of home leave or to an equivalent destination, in accordance with the relevant provisions of circular UNDP/ADM/PER/130/Add.1/Rev.2, and to take no further action in this matter".

At the Applicant's request, on 9 December 1988, the Under-Secretary- General for Administration and Management informed the Applicant that circular UNDP/ADM/88/2 could not be applied retroactively and that for future home leave to Bahrain, granted pursuant to circular UNDP/ADM/88/2, the reimbursement would be limited to the costs of travel to Saudi Arabia.

On 30 November 1990, the Applicant filed with the Tribunal the applications referred to earlier.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Applicant should be paid DSA at 100 per cent of the Riyadh rate, rather than at 50 per cent of the Riyadh rate.

2. DSA for the Applicant's son Kiran should be paid during his stay with his mother in New York.

3. The newly born son Ishan's full air fare should be paid from his place of birth, New York, to Kabul, not from Riyadh, along with DSA during his stay in New York following his mother's confinement.

Whereas the Respondent's principal contention in the "first case" is:

The discretionary decisions made in the context of the Applicant's medical evacuation for delivery of her child were in compliance with the relevant staff rules and UNDP circulars.

Whereas the Applicant's principal contentions in the "second case" are:

1. The decision by the Respondent authorizing a change in the country of home leave from Saudi Arabia to Bahrain, effective 19 January 1988, should be amended to cover retroactively the Applicant's 1987 accelerated home leave to Geneva.

2. The Respondent's decision should be revised to allow designation of Switzerland as the Applicant's country of home leave.

3. The Respondent should bear the full cost of home leave to the newly designated country, revising the condition in the 3 November 1988 decision that costs above travel to the Applicant's originally designated home country, Saudi Arabia, should be borne by the Applicant.

Whereas the Respondent's principal contentions in the "second case" are:

1. The denial by the Respondent of the Applicant's request for a change in the designation of the country of home leave effective 1986, complied with the applicable staff rules and sections of the UNDP Personnel Manual pertaining to home leave entitlement.

2. The Respondent's later decision pursuant to new circular UNDP/ADM/88/2 of 19 January 1988, to change the country of home leave from Saudi Arabia to Bahrain, but to limit the cost of travel of the Applicant to the new country of home leave, Bahrain, to the cost of travel to her original country of home leave, Saudi Arabia, complies with the applicable rules.

3. The denial by the Respondent of the Applicant's request to cover the costs of her accelerated home leave travel on alternate home leave to Geneva in 1987, is a consequence of a written agreement.

The Tribunal, having deliberated from 19 February to 28 February 1991,now pronounces the following judgement:

I. Since the appeals in cases Nos. 525 and 526 involve the same Applicant and are related, the Tribunal considers them together.

II. In case No. 525, the Applicant appeals from a decision of the Secretary-General dated 8 December 1988, maintaining contested disallowances of amounts claimed by the Applicant arising out of the Applicant's medical evacuation from Afghanistan in August 1986. A Joint Appeals Board (JAB) report dated 28 November 1988, made no recommendation in favour of the Applicant's appeal. The Applicant asks the Tribunal to rescind the Respondent's decision of 8 December 1988 and to determine that, since her country of home leave, Saudi Arabia, was physically inaccessible to her, New York should be considered as its equivalent and regarded as the authorized place of medical evacuation and that her daily subsistence allowance (DSA) should be paid at 100 per cent of the New York or Riyadh rate, whichever is lower. The Applicant also asks that DSA should be paid for the Applicant's son Kiran for the duration of his stay in New York with her, as well as his stopover travel time as an authorized accompanying family member on medical emergency; that her newborn

son Ishan's travel to Kabul should have been authorized from New York to Kabul, and that DSA should have been applicable to Ishan during his stay in New York.

III. By way of background, the Tribunal notes that the Applicant is a national of Saudi Arabia with family residing there at the time of the events which gave rise to this appeal. Following her marriage in March 1983, to an Indian national of the Hindu faith, who is also a United Nations staff member, in April 1985, the Applicant requested a change in the designation of her home leave place to Geneva, Switzerland, and later to Bahrain. Issues relating to the requested change are the subject of case No. 526.

IV. The Applicant's allegations that her marriage was contrary to her father's wishes and was entered into without the permission of her government to marry a non-Saudi, prompted her requested change. There is evidence that under Saudi law, government permission is required for marriage to a non-Saudi national. A marriage entered into without the government's permission is allegedly not considered valid in Saudi Arabia. The Tribunal is informed by the Applicant that non-Saudi spouses and children resulting from such marriages can be denied entry visas to Saudi Arabia, and that children from such marriages are not entitled to Saudi citizenship.

V. In addition, the Applicant alleges that Saudi females whose marriages are not recognized remain wards of their male legal guardians who normally are fathers or brothers. According to the Applicant, a female ward does not have the freedom to leave Saudi Arabia without her guardian's permission.

VI. At the time of the Applicant's medical evacuation to give birth to her second child, her application for change in the designation of home leave country had not been approved. She

therefore requested authorization for medical evacuation to New York City, both for medical reasons and because she was fearful that if she went to Saudi Arabia to give birth, she might not be permitted to leave that country. Although the Applicant was not barred from traveling to New York to give birth, her medical evacuation travel costs were approved for Kabul/Riyadh/Kabul, or equivalent destination.In other words, medical evacuation was authorized to her place of home leave, Saudi Arabia. This approval did not include her spouse who was then also stationed in Kabul or her son, who was two years and nine months old.

VII. With respect to the Applicant's claim of entitlement to DSA at 100 per cent of the Riyadh rate, the Tribunal finds, as did the JAB, that the Applicant was aware before her departure that the authorized place of her medical evacuation was Riyadh or "equivalent" (emphasis added). Contraryto the Applicant's suggestion, the Tribunal understands "equivalent" to mean a place in Saudi Arabia other than Riyadh. For it is clear beyond any doubt that the Applicant's place of home leave, then Saudi Arabia, was the place being authorized for medical evacuation. In view of this, it follows that the Applicant's arguments concerning her DSA are lacking in merit for they are based entirely on the notion that her medical evacuation was authorized to a place other than her place of home leave. The language of the applicable UNDP instruction could not be clearer in providing that, under the circumstances here, the Applicant was entitled to 50 per cent of the Riyadh DSA, as the JAB found.

VIII. With respect to the Applicant's contention that since her son Kiran was authorized to accompany her on her medical evacuation, he should also be allowed DSA, there is likewise no merit in the Applicant's claim. Her contention is premised on the erroneous notion that the Applicant's son was authorized to accompany her. That is not what occurred. In fact, authorization for her son was

denied, but he was nevertheless taken along by his mother on her trip to New York. As an exceptional act of generosity, the Administration, despite the lack of any obligation to do so, reimbursed the Applicant for the cost of a return ticket to Riyadh for her son. The Applicant's notion that staff rule 107.15 requires the conclusion argued by the Applicant is without any valid basis. The Tribunal finds, as did the JAB, that the Applicant's claim for DSA with respect to her son must fail.

IX. With respect to the Applicant's contention that the travel costs for her newborn infant son should cover air fare from New York to Kabul, the Tribunal concludes, as did the JAB, that the Respondent acted properly and in accordance with the Staff Rules in authorizing payment for the Applicant's newborn son from Riyadh to Kabul. The Applicant argues that staff rule 107.2 requires that the newborn's travel be paid from New York since the child's father was recruited in Washington, D.C. This is not what staff rules 107.2(a)(i) and 107.2(b), on which she relies, provide. The Tribunal finds that, since the authorized place of medical evacuation was the Applicant's place of home leave and since New York was not the place of home leave, but was the place she chose for the birth of her child, it was entirely reasonable and proper for the Respondent under staff rule 107.2(b) to pay the newborn's travel expenses on the same basis as hers - from Riyadh to Kabul. With regard to the Applicant's claim for DSA for the newborn child, the Tribunal finds, as did the JAB, that there is no provision for such a payment. The Respondent was therefore not required to make it. The Tribunal notes that once again, as an exceptional act of generosity, the Administration gave the Applicant a lump sum installation grant for her newborn son to which she would otherwise not have been entitled.

X. The Tribunal finds that the Applicant's arguments, rather than resting on a plausible reading of any of the applicable rules,

appear to be premised on the notion that her personal situation somehow entitled her to an exception from the applicable rules at the time of the events in question. The granting of exceptions is within the discretion of the Respondent, not the Tribunal. Only where there is evidence - not present here - that the Respondent's discretion was improperly exercised on the basis of unlawful or extraneous factors or was based on some material mistake of fact or law will the Tribunal review the matter. That incorrect estimates were initially used as the basis for advancing funds to the Applicant, or that a mistake or an exception in a unique situation may have been made, or a more than two-year-old child may have been involved in the case of another staff member, are totally irrelevant to the issue, as are the reasons which prompted the Applicant's choice of New York as the place for her medical evacuation. Indeed, if there were any relevance to the authorization of the advance payment received by the Applicant, the Tribunal would express the same grave concerns as the JAB with regard to the role of the Applicant's husband in authorizing the advance notwithstanding staff rule 104.10(c)(ii).

XI. In case No. 526, the Applicant appeals from a decision of the Secretary-General dated 3 November 1988 and clarified on 9 December 1988, in response to a letter from the Applicant dated 28 November 1988. The effect of the Secretary-General's decision and clarifying letter was to authorize, on a temporary and exceptional basis, a change in the Applicant's country of home leave from Saudi Arabia to Bahrain. This authorization was in accordance with circular UNDP/ADM/88/2 dated 19 January 1988, with effect from that date. As a result, any additional costs above the Applicant's entitlement to home leave travel to Saudi Arabia (her country of nationality) would have to be borne by her. Prior to 19 January 1988, the Applicant had taken accelerated home leave to Geneva, Switzerland, on the understanding that she would reimburse the Organization with respect to costs if her then pending appeal on the

issue of her place of home leave was not resolved in her favour. Accordingly, the Respondent has taken the position that the Applicant must reimburse the Organization for the 1987 home leave.

XII. Although the Applicant had initially sought a change in her place of home leave from Saudi Arabia to Geneva, Switzerland, essentially for the reasons outlined in paragraphs III-V above, she later substituted Bahrain for Switzerland. Her request was considered under staff rule 105.3(d)(iii), which at the time provided:

> "The Secretary-General, in exceptional and compelling circumstances, may authorize as the home country, for the purposes of this rule, a country other than the country of nationality. A staff member requesting such authorization will be required to satisfy the Secretary-General that the staff member maintained normal residence in such other country for a prolonged period preceding his or her appointment, that the staff member continues to have close family or personal ties in that country and that the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3."

XIII. The Applicant's pleas before the Tribunal are somewhat broader than merely seeking to establish her position as to the effective date of the Secretary-General's decision with regard to the Applicant's request for a change in the place of her home leave. She now asks that: (a) the effective date of the authorized change in her place of home leave be rescinded; (b) her 1987 home leave costs be borne by the Organization; (c) future costs of home leave travel to a new country be paid in full without any limitation related to the costs of home leave travel to Saudi Arabia; and (d) her place of home leave be established by the Tribunal as Geneva, Switzerland, and that this be done retroactively to the date of the Applicant's original 1986 request, with full costs associated with such a change being borne by the UN.

XIV. The Tribunal finds no merit in any of the Applicant's

contentions. Most of them are fundamentally flawed by the Applicant's failure to recognize, as in case No. 525, that the Tribunal's function is to determine whether the Staff Rules and related Instructions have been applied in accordance with their terms and whether the reasonable discretion which the Secretary-General has in applying or allowing exceptions to the Rules has been exercised in a lawful manner or was tainted by some impropriety or error of fact. The Tribunal's consistent

jurisprudence that it is not empowered to ignore the Staff Rules or to create exceptions to them is plainly applicable here.

XV. Even assuming, for the sake of discussion, that the Applicant's situation in Saudi Arabia would be precisely as she described it, and, in addition, that there is a valid reason for her apparent disinterest in taking home leave at her husband's place of home leave, the fact remains that staff rule 105.3 did not compel the Respondent to come to any conclusion other than that reached when the Respondent denied the Applicant's initial request for a change in her place of home leave to Switzerland and her later request for a change to Bahrain. The Respondent's interpretation of the staff rule was entirely permissible and did no violence either to its language or to its purpose. The Applicant simply did not meet the requirements of the staff rule and it is irrelevant whether her situation is to be regarded as one involving personal circumstances or a reflection of a broader issue, or whether the denial of an exception might cause the loss of an entitlement to accelerated home leave. It was properly within the discretion of the Secretary-General to evaluate and balance the interests involved in deciding whether to make an exception for the Applicant and, if so, when and to what extent.

XVI. The Applicant is wrong in her belief that she prevailed in her appeal before the JAB. Her JAB appeal was predicated on her claim that she was entitled to the grant of her requested change in her place of home leave even before the issuance, in January 1988, of circular UNDP/ADM/88/2, which provided an increase in the flexibility allowed the Administration in permitting temporary exceptions to the rules previously applied with regard to changes in the place of home leave.

XVII. The JAB report makes it clear that, in view of the JAB, but for the issuance of the UNDP circular, there would have been no

basis either in the language of the staff rule or the practice under it for granting the exception sought by the Applicant. Consequently, the Applicant's assertion that she should not be required to reimburse the Organization for her 1987 home leave is mistaken. The regime established in January 1988 by the circular was prospective in nature and there is nothing that required the Respondent to apply it retroactively.

XVIII. Nor is there anything that required the Respondent to authorize Geneva, Switzerland, instead of Bahrain. The authorization of Bahrain was based on wholly rational considerations and was at one time the Applicant's own choice. Similarly without merit is the Applicant's contention that it is improper for the Respondent to condition the grant of an exceptional and temporary change in her place of home leave by requiring her to pay the difference, if any, should the cost be greater for home leave to Bahrain than to Saudi Arabia. This is an entirely reasonable condition and is well within the Respondent's discretionary authority. It is absurd to suggest, as the Applicant does, that such a condition which legitimately protects the interests of the Organization is impermissible under staff rule 105.3, particularly since the basic principle is by no means foreign to the Staff Rules. See, e.g., staff rules 107.1(b) and (c) and it is analogous to the provisions of Personnel Manual 30703.1.2(2). See also staff rule 105.3(d)(iii)as reported in A/C.5/44/2 dated 20 September 1989.

XIX. For the foregoing reasons, the applications are rejected in their entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN

Vice-President

Arnold KEAN
Member

New York, 28 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary

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DECLARATION BY MR. ROGER PINTO

(ORIGINAL: FRENCH)

I regret to have been unable to accept all of the reasoning developed by the Tribunal in its judgement. Regarding the result, my only point of dissent is the following: the Respondent's refusal to recognize a permanent change in the Applicant's country of home leave to Bahrain, allowing the normal payment of travel expenses and of transportation, appears to me, in the circumstances invoked by the Applicant which have not been contested by the Administration, to be contrary to the United Nations Charter, to the Universal Declaration of Human Rights and to the International Covenant on Civil and Political Rights, the strict observation of which is imposed on the Organization of the United Nations.

(Signatures)

Roger PINTO
President

New York, 28 February 1991

R. Maria Vicien-Milburn
Executive Secretary