ADMINISTRATIVE TRIBUNAL

Judgement No. 872

Case No. 971: HJELMQVIST

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas, at the request of Lars J. Hjelmqvist, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 June, 30 September and 31 December 1996, 31 March and 30 June 1997, the time-limit for the filing of an application with the Tribunal;

Whereas, on 1 May 1997, the Applicant filed an application requesting the Tribunal, inter alia, to find:

> "(a) ... that Respondent's failure to provide appropriate devices for physical protection in a known high-danger area was an act of gross negligence and the proximate cause of Applicant's irreparable physical and psychological injuries;
>
> (b) ... that Respondent's failure to institute and utilize appropriate procedure for medical evacuation from a known high-danger area was an act of gross negligence and the proximate cause of Applicant's irreparable physical and psychological injuries;
>
> (c) ... that Respondent's failure to act in accordance with PD/1/1992, i.e. to medically evacuate Applicant '... to the place nearest to the duty station where adequate medical facilities are available ... was an act of gross negligence and the

proximate cause of Applicant's irreparable physical and psychological injuries;

(d) ... that Applicant, having been medically evacuated from Iraq to Sweden and officially stationed there from 18 August 1992 until 7 May 1993, was entitled to daily subsistence allowance, given his status as a locally recruited General Service staff member;

...

(g) ... that the extraordinary delay ... in entertaining Applicant's case by the Advisory Board on Compensation Claims was an act of gross negligence;

(h) ... that Respondent's failure to pay Applicant his monthly salary from 1 September 1992 until 29 April 1996 as he was entitled to in accordance with article 11.1(b) of Appendix D to the Staff Rules, was an act of gross neg1igence;

(I) ... that Respondent's ordering and sending Applicant, on 13 September 1993, from New York, his duty station, to Sweden for medical treatment without any necessity of medical evacuation as stated in PD/1/1992, was a deliberate, wrongful act and the proximate cause of the exacerbation of Applicant's physical and psychological injuries;

(j) ... that having been ordered and sent from New York, his duty station, to Sweden, and officially stationed there from 13 September 1993 until 25 June 1995, Applicant, a locally recruited General Service staff member, was entitled to daily subsistence allowance;

(k) ... that Respondent's failure to pay Applicant the above entitlement while in Sweden from 13 September 1993 until 25 June 1995 violated his right to due process;

(l) ... that Respondent's denial to date to pay the entitlement addressed in (I) above, based on the deliberate false interpretation of PD/1/1992, is a willful tortious act;

...

(n) ... that Respondent's refusal to provide any explanations of the conclusions and recommendations of the Advisory Board on Compensation Claims violates Applicant's right to due process;

(o) ... that the forty-thousand-six-hundred-sixty-two dollars[sic] (US $40,162.00[sic]) offered by Respondent for Applicant's permanent vascular and orthopaedic injuries, [and] his chronic Post Traumatic Stress Disorder ..., resulting from the injuries suffered in the line of duty, is inadequate compensation;

(p) ... that Respondent's continuous and extraordinary delays in payment to Applicant's physicians was an act of gross negligence and a contributing cause to the exacerbation of Applicant's psychological injuries;

(q) ... that Respondent's withholding payment for medication without counter-indication to its necessity was a deliberate wrongful act and a contributing cause to the exacerbation of Applicant's psychological injuries;

(r) ... that Respondent's refusal to allow Applicant to view his medical file is an obstruction of justice and the violation of Applicant's right to due process;

(s) ... that Respondent's refusal to allow Applicant to view the file pertaining to his case at the Advisory Board on Compensation Claims is an obstruction of justice and the violation of Applicant's right to due process;

(t) ... that Respondent's refusal to allow Applicant to view his personal file maintained by the Security and Safety Service is an obstruction of justice and the violation of Applicant's right to due process;

(u) ... that Respondent's absolute disregard of the mandates contained in ST/IC/82/77/Rev.1 and ST/IC/88/19 regarding the management and control of Personal and Official Status Files is an act of gross negligence and in violation of Applicant's right to due process;

[and to order the Respondent:]

[I] To make available the files [the Applicant requested];
[ii] [To] comply with the directives contained in ST/IC/82/77/Rev.1 and ST/IC/88/19;
[iii] [To] pay damages to Applicant in the sum of one-million dollars (US $1,000,000.00);
[iv] [To] pay punitive damages to Applicant in the sum of one-million dollars (US $1,000,000.00)."

Whereas the Respondent filed his answer on 29 September 1997;

Whereas, at the direction of the Tribunal, the parties submitted an Agreed Statement

of Facts on 21 May 1998;

Whereas the Applicant filed written observations on 26 May 1998;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 6 July 1998, the Tribunal put questions to the Respondent, to which he provided answers on 16 and 31 July 1998;

Whereas, on 20 July and 3 August 1998, the Applicant provided his comments on the Respondent's 16 and 31 July 1998 submissions, respectively;

Whereas the facts in the case are as follows:

The Applicant entered the service of the UN on 8 September 1987, on a short-term appointment, as a locally-recruited Security Officer at the S-1 level at UN Headquarters. His appointment was extended until 1 March 1988, when he was granted a nine-month fixed-term appointment. That appointment was extended a number of times, for various periods ranging from 3 months to one year, until 2 April 1996. On 1 October 1988, he was promoted to the S-2 level.

The Applicant was placed on special sick leave from 17 August 1992 through 2 April 1996, when he was separated from service for reasons of health.

On 27 May 1991, the Applicant commenced service with the United Nations Guard Contingent in Iraq (UNGCI). As of 15 June 1991, the Applicant was assigned to Suleimaniyah in the Northern Territory.

On 17 August 1992, the Applicant and two colleagues left Suleimaniyah at about 9.15 a.m. in a UN vehicle on patrol to Kalar, about 150 kilometers away. Approximately 45 kilometers from Kalar, several shots were fired from a hill to the right of the vehicle. The Applicant, who was sitting in the front passenger seat, was hit by a bullet which grazed his right forearm and penetrated his lower abdomen. According to the Investigation Report and the Board of Inquiry, the Guard in the back seat attempted emergency first aid to stop the bleeding. Some 30 minutes after the shooting incident, the Applicant was taken to the

dispensary at Kalar where first aid was administered. He was then transferred by car, in a convoy, to Suleimaniyah Hospital, a journey of about two hours.

Also according to the Investigation Report, the Applicant was examined there by a general surgeon, an orthopaedic surgeon, and a neurosurgeon. He was X-rayed and given a blood transfusion. His condition was found to be stable, and his vital signs within normal limits.

On 17 August 1992, the UN representative in Suleimaniyah faxed a report on the "Shooting incident" to the UN Designated Official for Security, describing the Applicant as "in stable condition and alert" and "in high spirit". Because surgical intervention was necessary for his leg wound and facilities at Suleimaniyah were inadequate, the Senior Medical Officer, United Nations Special Commission (UNSCOM), Baghdad, recommended a medical evacuation. On the same day, the Senior Medical Officer, UNSCOM, asked the Deputy Medical Director of the UN Medical Service at Headqarters, by telephone, to authorize the medical evacuation of the Applicant. Authorization was given by the Deputy Medical Director for a medical evacuation to New York via Zurich. On 18 August 1992, a fax was prepared in New York to provide written confirmation of such authorization to the Senior Medical Officer, UNSCOM, in Baghdad. However, that fax, while marked “RUSH”, was not transmitted until 19 August 1992.

According to the statement of facts agreed to by the parties, before the written authorization arrived in Baghdad, UNGCI arranged, in consultation with the Senior Medical Officer, UNSCOM, an immediate medical evacuation to Sweden, the Applicant's home country. Also according to that agreed statement of facts, as well as according to the 19 August 1992 report of the Senior Medical Officer, UNGCI, Baghdad, on 18 August 1992, the Applicant was driven from Suleimaniyah to Kirkuk by ambulance, flown from Kirkuk to Baghdad by helicopter, transported to Habaniya airport, some 80 kilometers away, by UNSCOM ambulance, flown to Kuwait on an UNSCOM flight, and thence to Sweden on a Swiss Air-Ambulance.

In Sweden, the Applicant underwent several operations in Lund University Hospital,

to remove such bullet fragments as were accessible and to transplant a vein from his right leg into his left to replace the ruptured femoral vein. He remained in intensive care for some time, supervised by a surgeon at Lund University Hospital. Soon after his surgery, the Applicant developed a thrombosis in his left leg, and was put on anticoagulants. On 30 September 1992, the Applicant was discharged from Lund Hospital. He then moved to Värnamo, where his parents lived, and his medical treatment was continued at Värnamo Hospital.

On 17 January 1993, the Applicant submitted a claim for compensation under Appendix D to the Staff Rules to the Advisory Board on Compensation Claims (ABCC) for reimbursement of his medical expenses.

In January 1993, the Deputy Medical Director wrote to the Applicant's surgeon in Lund asking for a medical report concerning the Applicant. The physician in Värnamo who was supervising the Applicant's anticoagulant therapy responded that his anticoagulant treatment would continue until March, and that he was due to be seen by his surgeon in Lund in February 1993. On 6 April 1993, the surgeon in Lund completed a Medical Statement in which he noted that the probable duration of the Applicant's disability would be until September 1993. On 14 April, that surgeon reported that, because of the continuing pain in the thigh after exercise, the Applicant would probably not be able to return to work as a Security Officer before September 1993.

On 8 April 1993, the Applicant requested travel authorization to return to New York. On the basis of the surgeon's Medical Statement, the Deputy Medical Director certified him to be fit to travel. He further authorized the Applicant to travel in Business class, based on the recommendation of the Applicant's surgeon. The Applicant returned to New York on 30 April 1993. The Medical Service referred him to a vascular surgeon for an evaluation. The vascular surgeon wrote on 25 May 1993, that the Applicant would require contrast venography to delineate the anatomy of his venous system, but felt that "the additional time of continued physiotherapy to build collateral is preferable at this time and intervention either diagnostically or therapeutically is premature". He noted that: "It is my feeling that his

present plan of returning to Sweden in the late summer, at which point anticoagulants will be decreased, is satisfactory."

On 10 August 1993, the Applicant requested authorization to travel to Lund, Sweden, for re-examination by his surgeon, stating, "Depending on the result of the examination, surgery will be performed in Lund, Sweden". The Deputy Medical Director wrote to the Secretary, ABCC, endorsing this proposal.

The Applicant exhausted his entitlement to sick leave with full pay and sick leave with half pay combined with annual leave, in August 1993. On 1 September 1993, the Applicant was placed on special leave without pay under staff rule 105.2(a)(i) pending resolution of his status.

On 20 October 1993, the Applicant was examined by his surgeon in Lund, who reported that another year of anticoagulants was recommended, and that the Applicant had been referred to a plastic surgeon "for evaluation and probable correction". The surgeon concluded, "It is doubtful whether the patient ever will be completely recovered."

On 8 November 1993, the ABCC recommended that the injury be recognized as attributable to the performance of official duties and approved reimbursement of “all medical expenses, together with the round trip travel expenses to Sweden, certified by the Medical Director as reasonable and directly related to the injury”. The Secretary-General accepted this recommendation on 10 November 1993.

On 12 December 1995, the ABCC recommended compensation under Appendix D in the amount of US$40,612.00, equivalent to a fifty-five per cent loss of function of the whole person under article 11.3 of Appendix D, as well as reimbursement of the round-trip travel between New York and Lund, and special sick leave credit under article 18(a) of Appendix D from 17 August 1992, until the first day of entitlement to a disability pension to be determined by the UNJSPF. This recommendation was adopted by the Secretary-General on 16 December 1995. A cheque for $42,497.80, representing $40,612.00 in compensation, $389.80 in medical expenses certified as of that date, and $1,496.00 for a round-trip Economy air ticket New York/Lund/New York, was issued on 30 January 1996.

On 23 February 1996, the Applicant was informed by the Secretary, UNJSPF, that the Pension Committee had determined him to be incapacitated for further service and consequently entitled to a disability benefit under article 33 of the Regulations of the Fund.

On 29 March 1996, the Chief, Cluster IV, OHRM, recommended to the Assistant Secretary-General, OHRM, that the Applicant's fixed-term appointment be terminated for reasons of health under staff regulation 9.1(a). On 2 April 1996, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to terminate his appointment with effect from the date of the notice.

On 10 July 1996, the Applicant's counsel wrote to the Executive Officer, DAM, claiming daily subsistence allowance (DSA) for the periods of the Applicant's medical evacuation and subsequent medical travel to Sweden. The Executive Officer, DAM, responded on 17 July 1996, noting that under PD/1/1992, DSA was not payable when medical evacuation had been authorized to the staff member's place of home leave, except for actual expenses for a hotel or other accommodations, on the basis of receipts. She further suggested that if the Applicant wished to pursue the matter further he should submit copies of the relevant receipts to the Secretary, ABCC.

On 1 May 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Respondent was grossly negligent in carrying out the medical evacuation of the Applicant from Iraq and failed to follow proper procedures for such evacuation, resulting in the Applicant’s irreparable physical and psychological injuries.

2. The Applicant was entitled to receive DSA for the periods of 18 August 1992 to 7 May 1993 and 13 September 1993 to 25 June 1995, when he was in Sweden undergoing medical treatment. The Respondent’s failure to pay the Applicant such DSA violates the

Applicant's rights.

3. The Respondent insufficiently compensated the Applicant for his service-incurred injuries.

4. The Respondent's delays in paying the Applicant the compensation due him violated his rights and exacerbated the Applicant's psychological injuries.

5. The Applicant should be permitted to review his medical files.

6. The Respondent should be required to pay to the Applicant punitive damages.

Whereas the Respondent's principal contentions are:

1. The Applicant's injuries were recognized as being attributable to the performance of official duties, and he was compensated in accordance with staff rule 106.4 and Appendix D to the Staff Rules.

2. The medical evacuation and subsequent medical travel were in accordance with applicable procedures.

3. The Applicant had no entitlement to DSA while in Sweden.

4. The Applicant had access to all relevant files.

The Tribunal, having deliberated from 6 to 31 July 1998, now pronounces the following judgement:

I. The Applicant argues that his medical evacuation from Iraq to Lund, Sweden, was not in accordance with procedures articulated in PD/1/1992 concerning medical evacuations. The record before the Tribunal regarding how the decision was made to evacuate the Applicant to Sweden is not entirely clear. In response to questions put to the Respondent by the Tribunal, the Respondent provided documentation that indicates that the Senior Medical Officer (SMO), UNSCOM, telephoned the Office of the Medical Director at Headquarters shortly after the Applicant sustained his injury. According to that documentation, the SMO, UNSCOM, was told that the Applicant should be evacuated to New York. The original

submissions by the parties indicated that after the Head of Office (the Chief, UNGCI) decided to evacuate the Applicant to Sweden, a facsimile was received from the Office of the Medical Director at Headquarters, ordering evacuation to New York. It is not necessary to determine whether this order was ignored and by whom, for the Tribunal to reach a decision, as both the Office of the Medical Director and the Head of Office improperly applied to the Applicant the policies for medical evacuation of the Applicant. Nevertheless, on this occasion, the Tribunal wishes to remind the Respondent that it is the duty of the parties to submit a complete and accurate record of the relevant facts to the Tribunal.

II. Under paragraph 8 of PD/1/1992, the Head of Office has the authority to determine the place to which a staff member should be medically evacuated and then advise the Medical Director of the decision. This policy allows the Head of Office to make immediate and informed choices in an emergency situation. In authorizing the evacuation to Sweden, the Head of Office apparently relied on paragraph 17 of PD/1/1992 which states that "for illnesses requiring a prolonged recuperation period, medical evacuation to the place of home leave should be encouraged." In relying on paragraph 17, the Head of Office apparently ignored the nature of the Applicant's injury, as that paragraph refers to "illnesses". The Tribunal does not understand why a gunshot wound to the abdomen was considered an "illness". It seems far more likely that a gunshot wound is an "extreme medical emergency" for which medical evacuation "shall be authorized, as a general rule, to the place nearest the duty station where adequate medical facilities are available bearing in mind the particular nature of illness or injury involved, the type of treatment required, and the languages spoken." (Paragraph 15 of PD/1/1992) Three regional medical facilities in the Middle East are listed in PD/1/1992: Amman, Jerusalem, and Cairo. If the Head of Office had applied the rule, bearing in mind that the injury was a gunshot wound to the lower abdomen with a bullet, or fragments thereof, "lodged near the lesser trochanter of left femur", he should have chosen one of these three places as the destination of the evacuation.

In response to questions from the Tribunal, the Respondent disclosed that, in addition

to the Personnel Directive on Medical Evacuation, there was a specific Medical Evacuation Plan for Iraq. That plan provides detailed guidance for the handling of medical evacuations. The Respondent did not refer to this document until the Tribunal's questions were put to him. If that plan had been utilized by the Head of Office, he could only have considered the gunshot wound as necessitating a "Medical Transport" rather than an "Emergency Medical Evacuation" for the evacuation to Sweden to have resulted. If the gunshot wound calls for an Emergency Medical Evacuation, the evacuation "must be completed within 12 hours", and the receiving hospital specified in the Evacuation Plan is in Kuwait. The Respondent admitted that the Head of Office never considered evacuation to Amman, Jerusalem or Cairo. The Tribunal can only surmise that evacuation to Kuwait was never considered either.

III. The record before the Tribunal clearly reflects that the gunshot wound to the abdomen was not superficial. The report of the Senior Medical Officer, UNGCI, which the Head of Office sent to Headquarters, indicates that it was known at the outset that surgery was necessary and that adequate facilities were not available in Suleimaniyah. The Head of Office's decision to evacuate the Applicant to Sweden rather than to Amman, Jerusalem, Cairo or Kuwait is only the first in a series of poor judgements in relation to the Applicant. Furthermore, it is almost certain that all the ultimate physical and psychological injuries sustained by the Applicant arise from this poor decision. At the time of the first medical review of the Applicant's condition by the physician at Suleimaniyah, the potential danger to the left femoral vein was noted. The significance of no arterial damage "till now" is written in that report, which was a result of an examination only 4 hours after the injury was sustained. Apparently, the harm that could result from an abdominal wound was either not understood or was underestimated by those who made the decision to evacuate the Applicant to Sweden. Some 56 hours elapsed from the time of the gunshot wound until the Applicant received the surgical treatment that was recognized at the outset as necessary. There can be no adequate reason for the error in judgement that was made by those who decided to treat an extreme medical emergency as if it were merely a toothache.

The record before the Tribunal provides in excruciating detail the results of this failure to treat the wound promptly. It can never be known if prompt treatment would have prevented what has occurred, but there is certainly a greater likelihood that the consequences would not have occurred. The Applicant needed immediate skilled attention from a medical team with expertise in treating gunshot wounds. The Tribunal notes that any of the sites listed in the directive or in the Evacuation Plan -- Amman, Jerusalem, Cairo, or Kuwait -- are likely to have this expertise. Thus, the Tribunal finds that there is no doubt that an error was made in the evacuation decision. The Tribunal cannot imagine why the Applicant was evacuated to Sweden, unless there was a misunderstanding of the possible serious consequences after a gunshot wound, however stable the condition of the victim in the immediate aftermath of the injury. The results were grave for the Applicant, who has lost his livelihood, his capacity to enjoy physical activity, and who still suffers from post-traumatic stress syndrome, which in all likelihood has been exacerbated by the reprehensible manner in which the Respondent has treated him since the initial injury occurred. The Tribunal finds that the Applicant had reason to expect that the organization for which he volunteered to serve in a dangerous location had a duty to make extreme medical emergency decisions in a manner so as to provide him the

greatest opportunity to recover fully from any injury to his physical or mental health that resulted from that service. In this regard, the Respondent has failed.

IV. In addition to this basic claim which is the crux of the matter, the Applicant raises several other claims. He argues that the Respondent failed to provide adequate security so as to allow him to conduct his official duties with the degree of protection that would have avoided the injury he sustained. He also challenges the manner in which the Respondent dealt with the issues related to his injury. The Applicant alleges that the compensation and reimbursements paid to him were inadequate in amount and were unduly delayed. The Applicant also contends that the Respondent was mistaken in determining the location of his home and family leave, thereby denying him daily subsistence allowance (DSA) while medically recuperating in Sweden. Finally, the Applicant argues that the Respondent improperly denied him access to certain medical files. Each of these contentions will be dealt with below.

V. Although the Applicant has presented some evidence that supports his claim that the Respondent failed to provide adequate protection, he has not fully substantiated this claim. It is not necessary to do so, however, as the principal claim relates to what occurred after the injury was sustained. The Tribunal rejects this claim.

VI. On 10 November 1993, the Secretary-General approved the ABCC's recommendation that the Applicant's injury be considered as attributable to the performance of official duties on behalf of the United Nations. In response to this service-incurred medical condition, the Respondent, on two separate occasions (30 January 1996 and 24 April 1996), paid lump sum amounts to the Applicant. The $42,497.80 paid to the Applicant in January of 1996 represented $40,612.00 in compensation for an injury attributable to the performance of

official duties, $389.80 in medical expenses certified at that date, and $1,496.00 for a round-trip Economy air ticket from New York to Lund, Sweden.

VII. The Applicant argues that the $40,612 is insufficient compensation for his injury attributable to service with the UN. He contends that the amount fails to take into account adequately his emotional, psychological and physical pain and suffering. But article 11.3(a) of Appendix D states:

> "In the case of injury or illness resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General on the basis of the schedule set out in paragraph *(c)* below ... and applying, where necessary, proportionate and corresponding amounts in those cases of permanent disfigurement or loss of member or function not specifically referred to in the schedule."

The schedule provided in subsection *(c)* of article 11.3 only lists objective physical loss and not emotional or psychological damages. Indeed, the maximum compensation allowed can not exceed twice the annual amount of the pensionable remuneration at the P-4, step V level, for the loss of both arms, hands, legs, feet or sight in both eyes.

VIII. The Applicant argues that the Tribunal has the discretion to assess additional damages for non-physical pain and suffering. However, the UN has specifically addressed the issue of damages for injuries incurred during service with the Organization. Compensation is based on an objective assessment of loss of function derived from medical reports submitted by the claimant and in accordance with the *AMA Guidelines to the Evaluation of Permanent Impairment*. Accordingly, the limitations outlined in article 11.3 are binding and not susceptible to subjective valuations of pain and suffering. The ABCC's recommendation, approved by the Secretary-General, of compensation for 55 per cent of loss of function of the whole person, is not unreasonable for the injuries suffered by the Applicant. The Respondent adhered to the procedures and compensation schedule established by

Appendix D of the Staff Rules. Since the Respondent fairly applied the Staff Rules and paid the amount determined according to the schedule provided in article 11.3(c), the Tribunal will not disturb that decision.

IX. The Tribunal notes that, under article 17 of Appendix D, the "[r]econsideration of the determination by the Secretary-General ... of the type and degree of disability may be requested" by the applicant. A medical board consisting of: (i) a qualified physician selected by the claimant; (ii) the UN Medical Director or a representative; and (iii) a qualified medical practitioner selected by the first two, would then be set up to evaluate the claim for compensation. The Applicant in this dispute made no effort to avail himself of this procedure.

X. The Applicant also charges that the Respondent has not fully reimbursed him for the expenses he incurred. Specifically, the Applicant argues that the Respondent has failed to reimburse necessary Business Class travel expenses for his return flight from Lund to New York after receiving additional medical treatment in Sweden. Prior to returning to Lund for a medical evaluation, the Applicant submitted a request for reimbursement for travel expenses. The ABCC determined that these costs were related to the Applicant's injury attributable to service and therefore reimbursable. The Secretary-General approved this recommendation. None of the documents relating to this reimbursement suggest that the Applicant was entitled to a Business Class fare. Indeed, in connection with a prior reimbursement request in April 1993, for travel from Lund to New York, the Applicant's physician explicitly requested that the Applicant have a Business Class seat. The UN Medical Director's approval of this request also explicitly stated that the reimbursement should be for Business Class. However, the request of 10 August 1993, for reimbursement of round-trip tickets, did not mention the need of a Business Class seat, nor was any approval for Business Class travel given at that time. Nor did the recommendation by the ABCC refer to reimbursement for Business Class travel. Therefore, the Respondent is justified in only reimbursing the Applicant for the amount needed for Economy Class air fare. Staff rule 107.10(a) reads "[f]or all official travel by air,

staff members and their eligible family members shall be provided with Economy Class transportation ..." The Applicant also contends that he should be reimbursed for the Business Class round-trip airfare he subsequently had to purchase from Sabena Airlines in Lund since his return route to New York on Delta Airlines had been discontinued. However, the Applicant had not been authorized to fly Business Class. In addition, staff rule 107.12(a) states that "[u]nless the staff member concerned is specifically authorized to make other arrangements", the tickets for official travel "shall be purchased by the United Nations". There is no indication that the Applicant had been given the authority to make such alternative arrangements.

XI. The Respondent made a second lump sum payment to the Applicant in April 1996, in the amount of $22,379.80. The Applicant contends that the Respondent's final reimbursement is inadequate, not in amount, but in the delay in payment.

XII. Article 18(a) of Appendix D dealing with an injury attributable to the performance of official duties states:

> "Authorized absences occasioned by the injury or illness shall be charged to the sick leave of the staff member. Following the exhaustion of sick leave and subject to any prior separation, the staff member shall be placed on special leave (under staff rule 105.2). Any special leave granted under this paragraph covering the period when the staff member is paid compensation equivalent to salary and allowances in accordance with article 11.1(b) or 11.2(b), shall be deemed special leave with pay, while any period of subsequent special leave shall be deemed special leave without pay."

The Applicant was placed on sick leave with full pay until 31 August 1993. Accordingly, with effect from 1 September 1993, the Applicant was placed on special leave without pay under staff rule 105.2(a)(i) pending resolution of his status. On 21 September 1994, the Applicant wrote to the Secretary, ABCC, in order to request special sick leave credit under

article 18(a) of Appendix D to the Staff Rules. Special sick leave credit was recommended by the ABCC in November 1995 and approved by the Secretary-General on 16 December 1995.

XIII. Unfortunately, this scenario does not fully explain how the rules were applied in the Applicant's case. The Secretary, ABCC, wrote to the Applicant in July 1994, to inform him that

> "you were advised of all your entitlements under Appendix D to the Staff Rules, namely that under the provisions of Article 11.1(b)(ii) of Appendix D, the salary and allowances which you were receiving at the date on which you last attended at duty shall continue to be paid until the date of the termination of your appointment or the expiry of one calendar year from the first day of absence from the injury, whichever is earlier. Taking into account that your accident occurred on 17 August 1992, it therefore could explain the reason your salary was withheld as of September 1993."

This misstates Article 11.1(b) which reads, in relevant part, as follows:

> "the salary and allowances which the staff member was receiving at the date on which he last attended at duty ... shall continue to be paid to the staff member until ... (ii) If, by reason of his disability, he does not return to duty, then until the date of the termination of his appointment or the expiry of one calendar year from the first day of absence resulting from the injury or illness, whichever is the *later*." (Emphasis added)

It remains unclear why the Applicant's salary was cut off in September 1993. In a memorandum to the Executive Officer, Department of Administration and Management (DAM), the Secretary, ABCC, had written that

> "Under Article 18(a) of Appendix D, any authorized absences are charged to the sick leave of the staff member. Following the exhaustion of sick leave, the staff member shall be placed on special leave with full pay covering the period of Article 11.1(b) - one calendar year from the date of accident - and on special leave without pay for any period of subsequent special leave."

But if the Applicant was receiving sick leave with pay after the accident under Article 18(a),

then under a proper reading of article 11.1(b), payment should have continued until the Applicant's termination, since that occurred later than the "expiry of one calendar year from the first day of absence". Unfortunately, how these rules were applied in this case is ambiguous and the Respondent fails to provide a satisfactory explanation. As early as November 1993, the Applicant's injury was recognized by the Secretary-General as attributable to service, yet he did not receive his salary until April 1996. The Tribunal finds this delay unreasonable and the Applicant should be compensated for it.

XIV. The Applicant asserts that not only was he improperly evacuated from Iraq after being shot, but also that the Respondent failed to pay DSA while he was recuperating in Sweden. A staff member's entitlement to DSA is directly dependent on his or her entitlement to home leave. The Applicant, while in New York, was recruited by the United Nations to work at Headquarters. Therefore, under staff rule 104.6, the Applicant was considered a locally recruited staff member, ineligible for home or family leave. However, as both the Applicant and the Respondent note, locally recruited staff members are entitled to home and family leave when detailed on an international mission lasting longer than six months. But the parties disagree on where the Applicant may take home leave: the country of his nationality or the country from which he was locally recruited. The Applicant contends that locally recruited staff members on international detail should be entitled to take home leave in the country where they were recruited. The Applicant argues that, at the time of his injury, not only was he a resident of New York, but his wife was as well. But staff rule 105.3(d), concerning home leave, states "The country of home leave shall be the country of the staff member's nationality". According to staff rule 105.3(d)(iii), only the Secretary-General may authorize a "country other than the country of nationality as the home country, for the purposes of this rule." To be granted such an exception, the staff member must show "that [he or she] 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 and 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". Although, the Applicant's circumstances present grounds for a possible exception to this rule, the Applicant never sought such an exception from the Secretary-General. Therefore, the Tribunal is in no position to grant such a dispensation. The country of the Applicant's nationality is his home country.

The Applicant was medically evacuated to his home country. Under PD/1/1992, the availability of DSA is very limited for medical evacuations to the home country. "Actual expenses for a hotel room or other accommodations (meals included) incurred by the patient … may be reimbursed, on the basis of receipts" for staff members evacuated to their home country. Only expenses incurred during the first forty-five days following evacuation may be reimbursed. Reimbursements are capped at 50 per cent of the subsistence allowance payable to staff members medically evacuated to countries other than their place of home leave. The Applicant made no effort to obtain reimbursements by submitting the necessary receipts.

XV. Finally, the Applicant alleges that the Respondent has denied him access to the relevant files in this dispute. The Respondent contends that the Applicant is mistaken in the application of ST/IC/82/77/Rev.1 and ST/IC/88/19 to medical files and other working files maintained by the Organization. The Tribunal agrees that neither of these information circulars is applicable here and finds that the Applicant has had access to his relevant Official Status file and ABCC files.

XVI. The Applicant maintains that he should have access to the medical records kept on him by the Organization. The Respondent argues that the medical files are maintained by the Organization for the Organization's benefit and not for that of the staff member. These files are therefore not made available to the staff member. They are, however, made available to the staff member's personal physician when necessary. The Applicant charges that keeping these medical files confidential violates ST/IC/82/77/Rev.1 which abolishes confidential files. Unfortunately, the Applicant has misconstrued the application of this provision.

ST/IC/82/77/Rev.1 deals with the abolition of the confidential file contained within the staff member's personnel files and its application refers expressly to "personnel records". The personnel file, however, is distinct from the staff member's medical file. Therefore, ST/IC/82/77/Rev.1 does not relate in any way to medical files. As regards the medical files, the Tribunal requested the Respondent to provide the Applicant's medical file to the Tribunal for a review in camera. In this case, the medical files did contain information crucial to the claims made by the Applicant. The Tribunal did not order transmittal of the medical files to the Applicant because all relevant medical information that was pertinent had already been provided to the Tribunal by the Respondent and then to the Applicant by the Tribunal. The Tribunal fails to understand the rationale for preventing staff from access to their own medical files. It recommends that this policy be reconsidered and reversed.

XVII. For the above stated reasons, the Tribunal finds that the Applicant has been adequately compensated for his injury attributable to official duties and that DSA payments were properly denied. However, the Respondent unreasonably withheld the reimbursement of the Applicant's salary payments and he should be compensated for the delay. Finally and most importantly, the Applicant should be compensated for the injuries he suffered as a result of his improper evacuation from Iraq to Sweden.

XVIII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant three years of his net base salary as compensation. In granting this compensation, which exceeds the two-year limit mandated by article 9 of its Statute, the Tribunal has particularly taken into account the special circumstances of this case, namely the Respondent's gross negligence in the handling of an extreme medical emergency arising in a situation known to be very dangerous to the Applicant, which resulted in severe physical and psychological impairment for the Applicant.

The Tribunal rejects all other pleas.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah Taylor ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary