United Nations AT/DEC/1204

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1204

Case No. 1272: DURAND Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, First Vice-President, presiding; Ms. Brigitte Stern, Second Vice-President; Ms. Jacqueline R. Scott;

Whereas, on 31 October 2002, Denise Pierre-Louis and Jean Edouard, on behalf of Nancy Durand, a deceased staff member of the United Nations, filed an Application containing pleas which read as follows:

"**II: Pleas**

8. With respect to competence and procedure, the Applicant[s] respectfully request the Tribunal:

…

(c) *to suspend*, if deemed necessary, any time limits for the filing of the application in light of the circumstances;

(d) *to order* the production of the Special Report on the Inquiry into the decedents' death;

(e) *to decide* to hold oral *proceedings* on the present application …

9. On the merits, the Applicant[s] respectfully request the Tribunal:

(a) *to rescind* the decision of the Secretary-General refusing the claims for compensation to the legal heirs of the estate of the late Nancy Durand;

(b) *to award* compensation in the amount of $150,000 to each of the Applicants and legal heirs of the estate of the late Nancy Durand;

(c) *to find and rule* that the Secretary of the Joint Appeals Board [(JAB)] erred as a matter of law and equity in refusing the appeal filed on behalf of the estate of Nancy Durand and that this occasioned a failure of justice;

(d) *to award* the Applicants additional compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the family members and heirs of the estate of Nancy Durand due to the egregious conduct of the Respondent and for the excessive delays in handling this case;

(e) *to direct* that the Applicants be reimbursed $10,000 for the actual expenses incurred on behalf of the estate of Nancy Durand for funeral, transportation and other related costs;

(f) *to award* the Applicants as cost, the sum of $10,000 in legal fees and $1,000 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 8 March 2003 and periodically thereafter until 30 September 2003;

Whereas the Respondent filed his Answer on 24 September 2003;

Whereas the Applicant filed Written Observations on 20 January 2004;

Whereas on 3 June 2004, the Tribunal requested the Respondent to provide additional documentation and on 9 July, subsequent to exchange of further correspondence, the Respondent provided the Tribunal with part of the requested documents;

Whereas the facts in the case are as follows:

Ms. Nancy Durand joined the United Nations Transitional Authority in Cambodia as a P-3 Training Officer on a fixed-term contract, from 2 September 1992 to 1 August 1993. At the time of the events which gave rise to the present proceedings, she was serving with the United Nations Office of Humanitarian Coordinator for Iraq (UNOHCI) as a Geographical Observer at the P-3 level under an appointment of limited duration (300 Series), which appointment was extended until 31 December 1998.

During the month of July 1998, Ms. Durand experienced respiratory difficulties. As a result she did not report for work on 19 July, and cut short an observer operation in the field, returning to Baghdad on 28 instead of 29 July, as

originally planned. Apparently, Ms. Durand failed to report her absences and the matter was brought to the attention of her supervisor, the Chief, GOU.

On 8 August 1998, Nancy Durand passed away.

Subsequently, an investigation by a Board of Inquiry (BOI) was launched into the circumstances of Nancy Durand's death, during which, on 17 August 1998, a statement was given by a colleague and friend of the late Nancy Durand, who had also spent the last hours with the deceased. According to the colleague, Ms. Durand consulted both the United Nations Special Commission (UNSCOM) doctor and the UNOCHI doctor. She was initially treated on an out-patient basis by the UNOCHI doctor, until 7 August, when her condition worsened. On that day, she was seen by the UNSCOM doctor and later by the UNOCHI doctor who made arrangements for her transfer to the UNOCHI medical unit. On 8 August, the UNOCHI doctor referred her to the Ibn Al-Nafees Hospital, Baghdad, where she passed away early in the evening.

On 28 August 1998, Yannick Durand (Nancy Durand's sister) wrote to the Chief, Geographical Observer Unit, UNOHCI (GOU), inquiring about the circumstances surrounding her sister's death. On 14 October she contacted the Executive Office concerned by e-mail, stating that although two months had passed since Nancy's death, she had not yet received an authenticated death certificate, or Nancy's last salary. In response, she was informed on 15 October that a copy of the death certificate had previously been sent to her; as for Nancy's final pay, efforts were being made to expedite its processing.

On 8 March 1999, Yannick Durand again contacted the Executive Office by e-mail, and on the same day was informed that

> "there was a very serious job done in Baghdad and a report has been filed. It is now before our central Advisory Board on Compensation Claims [(ABCC)]. They are the final word … As soon as we have a final determination, we will advise you."

Subsequently, Yannick Durand advised the Executive Office that compensation was not the only issue, but that "there is also acknowledgment of wrong doing, poor judgement, and most importantly apologies to the entire family … I am not quite sure that I understand what is taking so long for the truth to emerge." She was told that the process takes time.

On 11 March, Yannick Durand wrote to the Secretary-General, describing the circumstances of her sister's untimely death and requesting his assistance in expediting the resolution of the case.

On 16 March 1999, the Secretary of the ABCC wrote to the Director, Medical Services Division (MSD), requesting advice as to whether Ms. Durand's death could be considered as service-related. Subsequently, the Director, MSD, recommended that Nancy Durand's death "be considered as related to the performance of her duties on behalf of the Organization".

On 18 June 1999, Yannick Durand was requested to provide documentation as to the parental status regarding Celine Durand, and particularly to provide evidence that Celine was Nancy Durand's adoptive child and that a legal guardian had been appointed to her. On 27 January 2000, counsel for the estate of Nancy Durand responded, explaining that Nancy Durand had brought the child back from Cambodia in 1993 with the intention of adopting her but that, due to Ms. Durand's continuing service with field missions, Yannick Durand adopted the child in 1995. Counsel requested that an exception be made in this case to allow for some compensation to be paid to the Durand family. Counsel also requested copies of the decision taken by the ABCC, as well as a copy of any mission report or BOI report concerning Nancy Durand's death. He was advised that even if the ABCC would determine that Nancy Durand's death was service-related, Celine, as her niece, would not be eligible for compensation under Appendix D.

On 9 June 2000, counsel was informed that no claim had been submitted to the ABCC as there were no recognized dependants eligible for compensation under Appendix D.

On 16 August 2000, counsel wrote to the Secretary-General, "pursuant to Staff Rule 111.2(a) in order to contest an administrative decision regarding the estate of the late Nancy Durand", referring in particular to the poor treatment Ms. Durand had received prior to her death, which "violated the terms of her employment." Counsel further contested the manner in which the case was handled and requested that an *ex gratia* payment be made.

On 6 November 2000, counsel submitted to the JAB an appeal on behalf of the estate of Nancy Durand. Subsequently, he was informed by the Secretary of the JAB that, since the issue subject of the appeal falls within the framework of Appendix D to the Staff Rules, the appeal was not receivable by the JAB.

On 8 November 2000, counsel was advised that the request for an *ex gratia* payment implied that there were no violations of the staff member's terms of employment. Additionally, counsel was advised that, since the determination whether Ms. Durand's death was service-related was a prerequisite for the request of an *ex gratia* payment, the case would be forwarded to the ABCC for their determination.

At its 403rd meeting on 4 May 2001, the ABCC reviewed the merits of the case with the sole purpose of recommending whether or not Ms. Durand's death could be considered service-related. In making their determination, the ABCC were advised, inter alia, by the Medical Officer, that

> "although the correct diagnosis had been made, the late staff member had not received the necessary treatment on time … the staff member had been treated by a local physician who had been replacing the regular physician … this local physician was no longer treating United Nations staff."

On 29 May, counsel was informed that, based on the ABCC recommendation, the Secretary-General had decided on 24 May to recognize Nancy Durand's death as attributable to the performance of official duties on behalf of the United Nations.

On 5 June and again on 8 November 2001, the Controller was requested to approve an *ex gratia* payment to Nancy Durand's estate. On 10 June 2002, agreement was reached to offer Ms. Durand's estate a lump sum amount of $50,000 on an *ex gratia* basis.

On 12 June 2002, Yannick Durand passed away.

On 31 October 2002, the Applicants filed the present application before the Tribunal.

On 21 February 2003, the Applicants, in their capacity as General Guardians of Celine Durand, signed a "Settlement and Release Agreement" accepting an *ex gratia* payment in the amount of $50,000 in favour of the child, without prejudice to any right she might have to an award by the Tribunal.

On 13 September 2004, the Surrogate's Court, King's County, New York, issued Letters of Administration to Denise Pierre-Louis for the Estate of Nancy Durand.

Whereas the Applicant's principal contentions are:

1. The Respondent has either intentionally or with gross negligence delayed and refused to respond to the Durand family's legitimate requests, most

notably whether the responsibility of the Organization is entailed for how it treated Nancy Durand when she was placed in a life threatening situation while working for the Organization.

2. The Secretary of the JAB erred in determining that the appeal was irreceivable. The subject matter of the appeal was not limited to the question of whether this was a service-incurred death. The primary claim was negligence, which was not dealt with by the JAB or by the ABCC, thus denying the Applicants due process on their claims. The recourse to the JAB was sought after the Organization failed to submit the case to the ABCC, in spite of earlier assurances to the family that it would do so.

3. The Applicants are not claiming compensation under Appendix D. Rather, as the deceased staff member's next of kin, they are bringing this Application on her behalf, alleging that the Organization failed to respect her rights as a staff member and had failed in its duty of care towards her. The negligence of the Organization caused or contributed to the untimely death of Nancy Durand.

4. The case was handled egregiously, including inordinate delays.

5. The family has not been reimbursed for the costs of Nancy Durand's transportation and funeral arrangements following her death.

6. An award of costs is justified due to the exceptional circumstances of this case, particularly since the Applicants are not familiar with the United Nations' practices and procedures.

Whereas the Respondent's principal contentions are:

1. The Applicants are not entitled to production of any of the internal reports concerning the death of the staff member.

2. The Secretary of the JAB was correct in refusing the appeal of the staff member's estate. Appendix D to the Staff Rules provides the sole remedy in the event of service-incurred injury or death.

3. The Respondent has in no way impeded the Applicants' opportunity to bring their appeal before the Tribunal.

4. The Applicants are not entitled to compensation under Appendix D.

5. The Applicants are not entitled to compensation due to the conduct of the Respondent or any alleged delays in handling this case.

6. The Estate is entitled to reimbursement of documented funeral, transportation or related costs.

7. The Applicants are not entitled to compensation for legal fees, expenses or disbursements.

The Tribunal, having deliberated from 29 June to 14 July 2004 in Geneva and from 3 to 24 November 2004 in New York, now pronounces the following Judgement:

I. The history of this case is a complicated one. The Application was filed by two of the heirs to the estate of the staff member, who died on 8 August 1998, of illness attributable to the performance of her duties with the United Nations, while on duty in Iraq. These heirs, the deceased staff member's half-sister and half-brother, ask the Tribunal to help them learn the truth about the death of their sibling. To that end, they request that the BOI report, and any official reports emanating from the BOI report, relating to the staff member's death be made available to them, in order that they might finally learn the circumstances leading to the decedent's death and about her last moments before she died. The Applicants also request the Tribunal to order the rescission of the Secretary-General's decision refusing their claims for compensation as the legal heirs to the staff member's estate.

II. The Applicants allege that the Respondent failed to provide the deceased staff member with adequate and appropriate medical care, including the failure to properly and timely evacuate the decedent from Iraq. The Applicants seek compensation for this alleged breach of the Respondent's duty of care and for the injury suffered by their sibling, which allegedly culminated in her death. They also seek additional compensation for the "actual, consequential and moral damages suffered by the family members and heirs of the estate of [the staff member] due to the egregious conduct of the Respondent and for the excessive delays in handling this case". Finally, the Applicants ask the Tribunal to order that they be reimbursed for the actual expenses incurred on behalf of the staff member's estate for funeral, transportation and other related costs, as well as for legal costs, expenses and disbursements.

III. In response, the Respondent argues that the Applicants are not entitled to production of any internal reports relating to the decedent's death, as such reports are confidential and privileged. The Respondent further argues that the Applicants are not entitled to compensation due to the Respondent's conduct, claiming that Appendix D to the Staff Regulations and Rules is the sole remedy for service-incurred death. The Respondent asserts that the Applicants' claims for compensation relating to any alleged delays in handling the case, or for legal fees, expenses or disbursements are also without merit. Finally, the Respondent concedes that the Applicants are entitled to reimbursement of documented funeral, transportation and related costs. As of 24 June 2004, these expenses were yet to be paid by the Respondent.

IV. At the outset, before the Tribunal can adjudicate each of the substantive issues set forth above, it is compelled to turn its attention to the Respondent's conduct in this matter with respect to the production of documents. On 3 June 2004, the Tribunal issued its first request for a copy of the BOI report, as well as any other relevant reports or documents, relating to the decedent's death. The Tribunal requested receipt of such documents on or before 14 June. Thereafter, the Respondent requested an extension of time to respond, and the Tribunal granted that request, but the Respondent failed to produce the requested documents, claiming privilege on the basis that the United Nations'

> "consistent policy has been not to release such reports to staff members or other outside individuals. This is an important policy for ensuring that the Organization receives all information relevant to the inquiry and is able to reach candid conclusions; failure to respect this policy would likely chill sources of such information and the candour of such conclusions."

The Tribunal rejected the stated claim for privilege, on the basis that "[a] policy of nondisclosure effectively only encourages self-serving statements or assertions the veracity of which cannot be challenged or proved. In practice such a policy generally is not conducive to establishing the truth."

V. Thereafter ensued an attenuated correspondence between the Tribunal and the Respondent, relating to the requested documents. The Respondent eventually produced some of the requested documents but maintained his position that the reports he produced were only reviewable by the Tribunal on the condition that the Tribunal

was not permitted to disclose the contents of such reports. The Respondent never produced the Annexes to those reports, despite a further request by the Tribunal.

VI. Article 17 of the Tribunal's Statute authorizes the Tribunal to "at any stage of the proceedings call for the production of documents or of such other evidence as may be required". Thus, the Tribunal was within its explicit statutory authority when it requested that the Respondent produce the BOI report and other related reports. It is also a well-settled tenet of jurisprudence of international administrative tribunals, including the Asian Development Bank Administrative Tribunal (ADBAT), that in cases of claimed privilege, it is the Tribunal, and not the party claiming privilege, which must decide the legality of the claim and which must determine whether evidence is to be provided to the opposing party. (See *Bares*, Decision No. 5 (1995), 1 ADBAT Reports 53.)

VII. The Respondent's contentions with regard to the claim of privilege in this matter are flawed. The Respondent generally asserts two reasons in support of his claim for privilege: (1) that keeping such documents confidential is vital to discovering the truth, and (2) that some documents are always kept confidential vis-à-vis Member States, and therefore reports are submitted to Member States without the annexes attached thereto. On both counts, the Respondent's reliance is erroneous. The Tribunal, in its letter to the Respondent dated 30 June 2004, had previously rejected the Respondent's claim for privilege on this basis, stating that hiding the truth in matters such as this, without offering an additional valid basis for privilege, is not designed to provide candid answers to important questions or to obtain the truth. Additionally, the Respondent's arguments that BOI reports are only provided to Member States without the supporting documentation, is wholly irrelevant to the Tribunal. As the Tribunal noted in its letter to the Respondent dated 23 July 2004,

> "the Guidelines Concerning Boards of Inquiry dated 26 April 1995 … are not inconsistent with the Tribunal's request for the Board of Inquiry report and the other documents requested in its previous letters. We note that the Guidelines deal with production of internal documents of the Organization to outside entities. As the Respondent is well aware, the UNAT is a subsidiary organ of the General Assembly, and thus, cannot be considered as an outside entity. Moreover, the Guidelines provide for a specific exception to the stated policy 'in the interest of justice', which is the current circumstance."

VIII. While the Tribunal does not dispute the Respondent's right to make a claim of privilege based on any reason it chooses, it is the Tribunal which is vested with the ultimate authority to decide whether the claim has merit and should be granted, or whether the circumstances are such that the requested privilege cannot stand. In the instant case, the Tribunal had previously rejected the Respondent's claim for privilege, on the basis asserted in the Respondent's Answer. The Respondent has not asserted any other basis upon which the Tribunal could uphold the privilege. The Respondent acts without legal authority and in violation of article 17, then, when he refuses to produce documents except on the condition he imposes; namely, that the reports be kept confidential and not disclosed to the Applicants.

IX. The Tribunal is disturbed by the Respondent's conduct. It cannot condone an act by the Respondent designed to keep in the dark the circumstances of one of its staff member's death. The Respondent's actions demonstrate an attempt to control the judicial process by deciding the extent to which the Tribunal can review and consider evidence in seeking to do justice. The Tribunal will not acknowledge the right of the Respondent to seek to impose conditions as the basis on which evidence is offered. The Tribunal will continue properly to decide whether a privilege applies and to what extent.

X. Of perhaps more importance to the Applicants and the remaining heirs to the decedent's estate, however, than the Respondent's chilling effect on the pursuit of justice, is the effect such concealment has had. By withholding relevant and potentially enlightening information from the family members, the Respondent deprives them of ever learning the circumstances surrounding their loved one's death and of knowing what she was thinking and feeling in the moments before she died. Thus, for the family, closure may never be had.

XI. Given the Respondent's conduct and refusal to provide the information requested to the Tribunal, except subject to certain legally unacceptable conditions, the Tribunal finds that it cannot consider at all the reports submitted by the Respondent in reaching its decision in this matter. Therefore, the Tribunal has no choice but to decide the case based only on the evidence properly before it.

XII. The Tribunal now turns to the issue of whether the Applicants have standing to bring this claim as the heirs of a deceased staff member. In relevant part, article 2, paragraph 2(a) of the Statute of the Tribunal provides that:

> "The Tribunal shall be open:
>
> > (a) … [T]o any person who has succeeded to the staff member's rights on his or her death."

XIII. The Applicants bring this action on behalf of their deceased half-sibling, as representatives of her estate. However, only one of the Applicants, Denise Pierre-Louis, has provided to the Tribunal letters testamentary issued by the State of New York, which evidence that Ms. Pierre-Louis is the personal representative of the decedent. The Tribunal is satisfied that the letters testamentary granted to this Applicant entitle her to maintain this action, on behalf of her deceased sibling, in accordance with article 2 2(a) of the Statute of the Tribunal, as a person who has succeeded to the decedent's rights as a staff member. (See Judgement No. 386, *Cooper* (1987).) The Tribunal finds, however, that the other Applicant, Jean Edouard has no standing to bring any claims on behalf of the decedent, as he has provided no letters testamentary or other evidence of his claim on behalf of the estate in support of his Application.

XIV. The Tribunal has previously held that the Organization has a legal obligation to protect its staff members and not put them in dangerous situations, if these can be avoided. (See Judgement No. 1125, *Mwangi* (2003).) In *Mwang*i, the Tribunal emphasized the importance it attaches to the duty of safe care by the Respondent, stating:

> "[E]ven were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being …"

XV. The Tribunal has further held in its Judgement No. 872, *Hjelmqvist* (1998) that a staff member has

> "reason to expect that the organization for which [the staff member] volunteered to serve in a dangerous location had a duty to make extreme medical emergency decisions in a manner so as to provide [the staff member] the greatest opportunity to recover fully from any injury to [the staff member's] physical or mental health that resulted from that service".

XVI. This duty of care on the part of the Organization is now codified and incorporated into the Staff Regulations and Rules, thus ensuring such protection to all staff members as a term of their employment, in staff regulation 1.2, which provides:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them."

XVII. An authoritative statement reflecting this general principle of the duty to exercise reasonable care to ensure the safety of staff members is also found within the jurisprudence of other international administrative tribunals, including the Administrative Tribunal of the International Labour Organization. In *in re* Grasshoff (Nos. 1 and 2), Judgement No. 402 (1980), the ILOAT stated:

> "It is a fundamental principle of every contract of employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. … If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment. … It is sufficient to say that, if [the staff member] accepts the order [to work in an unsafe place] … and the employer has failed to exercise due skill and care in arriving at his judgement, the [staff member] is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgement."

XVIII. Similarly, in *Bares* (*ibid*.) the ADBAT recognized the same right of its employees to be reasonably cared for in matters involving their safety, health and security. The ADBAT stated that:

> "the [employer]'s duty is only to exercise reasonable care in every aspect of its activity that impinges or may impinge upon the safety, health and security of its staff."

XIX. In *Bares*, the ADBAT further expanded the duty of care to the agents and representatives of the international organization, finding that the employer

> "can act only through those whom it employs, whether as servants, agents or independent contractors. In selecting such persons to perform the functions with which it is charged, the [employer] must of course use reasonable care to choose those who are fully capable of performing the functions for which they are employed or retained. It must, moreover, ensure that all who perform these functions themselves exercise reasonable care in doing so. … In short, though the [employer] is free to hire a contractor to provide a service … that it might otherwise itself perform directly through its own employees, the [employer] must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment."

XX. In the instant matter, the decedent had the right to expect that the medical care she would receive would be adequate. She had a right to expect that her condition would not be worsened by the treatment afforded her by the Organization or that the Organization would not put her in harm's way. Unfortunately, this was not the case. While the Respondent asserts in a most conclusory fashion that "the correspondence presented in this case demonstrates a serious concern for the staff member's health and safety," the record does not support his contention. The Respondent has failed to produce any evidence which indicates what treatment he afforded the decedent and when. The evidence submitted by the Applicants, on the other hand, makes clear that the Applicant was treated with complete disregard for her health and safety, that she was not afforded even a modicum of decency and concern, and that she suffered severely as a result. In this regard, the Tribunal notes, however, that the UNSCOM doctor, while apparently having no authority to treat her or to make ultimate decisions about her medical care and evacuation, did attempt to provide the decedent with whatever appropriate care he could effect, given his limited authority. While it can never be known if prompt and appropriate medical care on the part of the Organization's care providers, agents and representatives would have prevented the decedent's death, given her illness, there is certainly a greater likelihood that her demise was hastened by the circumstances of the care provided by the Organization.

XXI. Although the Tribunal recognizes the limitations of medical care inherent in some locations in the world, it cannot excuse the severely deficient treatment accorded the decedent. The record is filled with excruciating details, too numerous to elaborate, of the intolerable conditions the decedent was forced to endure, in the UNOCHI unit and at the Iraqi hospital to which she was sent by the UNOCHI doctor. Not only did the UNOCHI doctor fail to act appropriately in terms of actual medical care, he demonstrated a level of disregard for another human being as to outrage even the most hardened souls. The Tribunal notes particularly, for example, the reaction of the UNOCHI doctor, when the decedent's oxygen was running out. His only response when he was informed of the decedent's dire straits was to announce that he wanted to have breakfast, because he had a full tray of food in front of him. The Tribunal understands and is relieved that this doctor no longer provides care for United Nations' staff members.

XXII. Equally as disturbing as the simple lack of adequate medical care, however, was the callous and insensitive way in which the decedent was treated. When she first became sick and reported difficulty with breathing, she took a day off from work. Immediately thereafter, her supervisors sought to discipline her for missing a day of work. No recognition was given by those supervisors of the seriousness of her complaints, nor of the fact that the decedent was working in conditions of extreme heat or that in 502 days of service, the decedent had only taken one sick day. Subsequently, when she contacted the UNOCHI doctor and asked him to come examine her, he refused to come until the next day, instead simply offering to deliver medication to her. Similarly, when she was being moved from the UNOCHI unit, it had been agreed that she would go to the Iraqi hospital, yet the UNOCHI doctor instead attempted to move her back to her hotel room, a location on the third floor, with no elevator and, more importantly, with no medical care. The decedent, with the help of a few friends, in a strange place, far away from her family, was forced to fight with all her remaining strength to ensure her own medical safety. No regard was given to the panic and fear she must have felt in such a horrifying situation. Finally, the decedent also, based on evidence submitted by the Applicant, suffered greatly, physically and emotionally at the hands of the Iraqi medical staff who treated her in the Iraqi hospital. All of this - the lack of adequate medical care, the lack of concern and care for the decedent - was a failure by the Organization to provide her with the reasonable attention and care she

was entitled to receive as a staff member of the United Nations and which constituted an egregious violation of the terms of her employment and contract. For this violation, the estate is entitled to be compensated.

XXIII. The failure of the UNOCHI doctor to recommend the timely evacuation of the decedent was also a violation of the rules governing medical evacuations, as set forth in personnel directive PD/1/1992 of 31 March 1992, on "Medical Evacuation". The decedent met all the qualifications for eligibility for evacuation. Her condition was certainly a medical emergency, and the medical care available - including the filthy facilities, the lack of oxygen and related supplies and the lack of clean drinking water, to name but a few deficiencies - was, without question, completely inadequate to address her medical needs. It is unthinkable to the Tribunal, given these circumstances, that the order to evacuate never came.

XXIV. This failure on the part of the Organization is especially egregious in light of the recommendation by the UNSCOM doctor, who not only repeatedly recommended that the evacuation take place, but who also made all logistical arrangements to facilitate the evacuation. All the UNOCHI doctor had to do was to agree to evacuate, and the decedent would have been transported to Bahrain on the 10:00 am flight on August 8, nine hours before the time of her death. Again, while the Tribunal cannot opine with absolute certainty that had the transport occurred in a timely fashion, the decedent would not have perished, it seems likely that evacuation would have allowed the decedent to be sent to a facility that could have provided her adequate care. Perhaps appropriate care and medicines might have prevented her death. The Tribunal notes in this regard, the record of the 403rd meeting of the ABCC at which this case was heard, which references the advice of the Medical Officer that "the late staff member had not received the necessary treatment on time". The Tribunal finds that the Organization's failure to evacuate in a timely fashion is yet another violation of the deceased staff member's terms of employment, and one for which her estate is entitled to be compensated.

XXV. The Tribunal now turns to the matter of Appendix D, which the Respondent alleges is the sole remedy available in the case of a service-incurred death, and which limits the amount of compensation to which the decedent or her estate is entitled. The

Tribunal finds, however, that the Respondent's reliance on Appendix D is misguided and that the limits of Appendix D, in these circumstances, are inapplicable and irrelevant.

XXVI. Where the compensation claimed by a staff member is compensation that relates to a violation of one of the terms of the staff member's employment or is contractual in nature, Appendix D does not apply to limit such compensation. (See Judgement No. 505, *Daw Than Tin* (1991), and Judgement No. 872, *Hjelmqvist* (1998).)

XXVII. In *Hjelmqvist* (*ibid*.) the Applicant brought his claim to the Tribunal, alleging the Organization's failure to evacuate him in a timely and reasonable fashion after he sustained a gunshot wound while in the performance of his duties with the United Nations. The Tribunal awarded the Applicant three years' net-base salary, to be paid in addition to that amount to which he was entitled and did receive under Appendix D. In reaching its decision, the Tribunal relied on the breach of the Organization's duty of care to ensure the safety and protection of its staff members, a term of employment enjoyed by all staff members.

XXVIII. Similarly, in *Daw Than Tin* (*ibid*.), the Tribunal also made an award in excess of the amount paid pursuant to Appendix D, again based on the negligence of the Organization with respect to another term of employment. In *Daw Than Tin*, the Applicant was the widow of the staff member, who had died of a heart attack while serving the United Nations. The widow received entitlements under the Staff Rules as well as a widow's benefit under the United Nations Joint Staff Pension Fund. However, the Applicant was never informed of her rights under Appendix D. The Applicant lodged an appeal with the JAB 11 years after the death of her husband, after learning that if her husband's death had been determined to be attributable to the performance of his duties, she would have been entitled to compensation under Appendix D. The Secretary-General, based on recommendations of the JAB, agreed to pay the widow $12,000 on an *ex gratia* basis; $10,000 apparently represented the amount she would have received under Appendix D had she timely filed her claim and had she been successful in obtaining a determination that her husband's injury was service-incurred and $2,000 was compensation for the "inexcusable delays" the JAB

found on the part of the Organization. The Applicant sought review of the decision by the Tribunal.

The Tribunal concluded that the Organization had been negligent in not rendering assistance to the widow and in failing to notify her of her rights under Appendix D and of the time within which a claim under that Appendix was required to be made. Taking all the circumstances into account, the Tribunal considered that the *ex gratia* sum of $12,000 offered by the Organization "does not provide adequate compensation for the consequences of the fault of the Administration and that a further sum of $15,000 should now be paid as damages". Thus, the Tribunal awarded the Applicant not only the $10,000 payment related to Appendix D, and a $2,000 payment for excessive delay, but also an additional sum of $15,000 for the Organization's negligence and violation of one of the terms of employment of the staff member.

XXIX. Similarly, the ILOAT, in Judgment No. 402, *in re* Grasshoff (1980), also refused to be bound by the limits of its version of Appendix D, namely, Rule 720, in the case of the Organization's negligence in failing to ensure the safety and protection of a staff member. In reaching its decision, the ILOAT concluded:

> "Rule 720 is contained in a section on social security which deals with benefits provided for the staff member; it should not be interpreted as a clause limiting the Organization's liability in the event of breach of contract. The compensation appropriate to a breach of contract is indemnification for loss actually incurred as a result of that particular breach; it cannot, unless the contract expressly so provides, be settled according to a general tariff."

XXX. In light of the circumstances of the instant case, the limits of Appendix D apply only to address the social security-like benefits to which the deceased staff member or her dependents might have been entitled. It cannot be seen to limit compensation for damages occasioned by the Organization's failure to ensure the safety and protection of its staff member, which is a term of employment to which the deceased staff member was entitled.

XXXI. The Tribunal now turns its attention to the alleged delays in the handling of this matter. The Respondent asserts that "the delay was not unreasonable in the circumstances". While the Tribunal might agree that, given the complicated nature of this matter, some delays were unavoidable, it cannot regard the entire situation as one

that was handled in a reasonably timely manner. The Tribunal finds that the delays were indeed excessive, and, as a result, the Applicants suffered. Of particular note is the fact that because this matter dragged on unresolved for over six years, the decedent's father (the decedent's original Executor), as well as her full sister (another heir of the decedent's estate) died before the matter was resolved, thus adding another layer of complexity to an already complicated situation. Similarly, as of 24 June 2004, nearly six years after the death of the decedent, the Respondent still had not reimbursed the Applicants for the costs of the decedent's funeral and transportation expenses. This is inexcusable and yet another instance of the dilatory manner in which the matter was handled by the Respondent. For this continuous pattern of delay, of which these are but two examples of many, the estate is entitled to be compensated.

XXXII. Lastly, the Tribunal believes that, in view of the particular complexities of the case, it seems appropriate to make an exception to its general practice of not granting reimbursement of legal and procedural costs. This policy, set forth in document A/CN.5/R.2 of 18 December 1950, was based on the simplicity of proceedings before the Tribunal, but it also provided for exceptions to the general rule. In this case, the Applicants were not staff members themselves and had no knowledge of the workings of the United Nations system. The heirs were forced to hire an attorney in order to make any headway in their inquiries. The Tribunal believes that this case is one of the exceptional cases, and therefore awards costs. (See Judgements No. 237, *Powell* (1979); and, No. 665, *Gonzalez de German et al.* (1994).)

XXXIII. In view of the foregoing the Tribunal:

1. Orders the Respondent to pay to the Applicant Denise Pierre-Louis, in her capacity as Administrator of the estate of the late Nancy Durand, compensation equivalent to three years of Nancy Durand's net base salary, at the rate in effect at the time of this Judgement. 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, which ended in Nancy Durand's death;

2. Orders the Respondent to pay to the Applicant Denise Pierre-Louis, in her capacity as Administrator of the estate of the late Nancy Durand, an additional sum of $5,000 as compensation for the excessive delays in handling this case, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;

3. Awards to the Applicant Denise Pierre-Louis, in her capacity as Administrator of the estate of the late Nancy Durand, as costs, the sum of $5,000, in view of the particular difficulties of the case, which the Tribunal considers to be exceptional circumstances, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

4. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Second Vice-President

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

DISSENTING OPINION BY MR. KEVIN HAUGH

I. There is a difficult history to these proceedings. From the outset they have been framed as an action in pure tort, i.e. a claim for damages for the alleged wrongful death of Nancy Durand (hereinafter referred to as “the Deceased”) by reason of the alleged negligence and malfeasance of the Organization or those for whom it is vicariously responsible.

II. The Deceased died in Baghdad, Iraq, on 8 August 1998, whilst on mission in Iraq with UNOHCI. She was not married and left no dependants. The Applicants are the surviving half-sister and half-brother of the Deceased and they make this claim also on behalf of a young girl, who is, legally speaking, a niece of the Deceased, being the adopted daughter of the Deceased's late sister Dr. Yannick Durand who died in June 2002.

There is reason to suspect that this young girl may actually be the natural or biological daughter of the Deceased, although the situation is unclear and uncertain. The Deceased had never made a claim of maternity to the Organization and when a claim for compensation was first indicated, the young girl was described by Dr. Yannick Durand as the adopted daughter of the Deceased, although this claim was never documented and was later withdrawn and abandoned. In law, the young girl is the adopted daughter of the late Dr. Yannick Durand. She had been brought from Cambodia to the United States by the Deceased, who had been on mission in Cambodia. It is said that the Deceased had initially intended to adopt the young girl but that it was then decided that she would be adopted by Yannick instead, as a matter of convenience. In any event the young girl is, in law, the adopted daughter of the late Dr. Yannick Durand and accordingly she cannot be considered for the purposes of this claim as the Deceased's daughter.

III. In my opinion, the claim as advanced was never admissible before this Tribunal as a claim in pure tort, as the Tribunal has no jurisdiction in such claims under the terms of its Statute. However, since the matters complained of in the proceedings can readily be seen in the alternative as a claim alleging a breach by the Organization of the terms of the Deceased's contract of employment, being essentially a claim that the Organization failed to take adequate or reasonable care for the safety and welfare of the Deceased and that she was exposed to unnecessary danger or risk, this claim is admissible as a claim alleging the non-observance of the Deceased's contract of employment and a breach of staff regulation 1.2, which casts an obligation on the Respondent to seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them. I am further satisfied that even without the existence of this Regulation, it was always an implied term of a staff member's contract of employment

that the Respondent, as the employer, owed a duty to take reasonable care for the safety of the staff member and that the Staff Regulation in question is merely a formalized re-statement of what was always the true legal position. I believe that the position is properly dealt with in the Judgement of the majority and I fully agree with what they have stated therein.

IV. The principal grounds alleged in these proceedings, be they considered as particulars of negligence or of non-observance of the Deceased's terms of employment, may be summarised as follows:

A. That the Deceased's complaints of symptoms of illness were not acted upon appropriately by her superiors, who should have accepted them as genuine and referred her for medical investigation or treatment or relieved her from duty and seen to it that she received medical treatment;

B. When ultimately seen by the Organization's medical staff, her illness was not speedily diagnosed or identified and she was not speedily started on appropriate treatment;

C. When it was ultimately recognized that she was suffering from a serious and life threatening condition, they negligently failed to organize her speedy evacuation to Bahrain which was better placed and equipped to provide better medical treatment;

D. That these matters caused or contributed towards what might otherwise have been her preventable death.

I, for one, find it impossible to adequately or rationally evaluate these claims as the Organization has failed to disclose the documents relevant to these issues, or to disclose the Report of the BOI, which is said to have carried out an investigation of the circumstances leading to the death of the Deceased and with these very issues. It is clear that such an investigation was carried out and that a report setting out its findings and conclusions was furnished to the Organization. The Organization has made what is, in my view, an untenable claim that such reports (including the one central to this case) are privileged and accordingly immune from disclosure or scrutiny on the

grounds that this encourages frankness and candour from witnesses and persons questioned in the course of the investigation, so that the Administration can reach candid and proper conclusions, which is submitted might not be the case were such investigations and reports not to be kept secret and confidential. As a general proposition, I believe this submission to be mistaken. Firstly, it presupposes that it is the policy of the Organization never to disclose to the family of a staff member who dies in service the circumstances as found by the BOI to have surrounded the death and, secondly, I believe that to surround such investigations with such a veil of secrecy, rather than encouraging frankness and candour on the part of witnesses would, in fact, encourage or acquiesce in such witnesses making self-serving statements, happy in the knowledge that their statements would remain secret and therefore immune from scrutiny or challenge. As to the Administration's proposition that this secrecy enables it to reach candid and proper conclusions, I rhetorically ask what purpose is to be served by such conclusions, be they candid or otherwise, when on the Administration's said thesis they are to remain secret and not to be disclosed. I do not believe that it is the general policy of the Organization to draw a veil of secrecy over the circumstances surrounding such deaths and to decline to account to the members of the Deceased's family how and why such death had occurred.

The Respondent has offered sight of the materials and the BOI Report to the Tribunal on condition that the information contained therein will remain secret and that the content not be disclosed to the Applicants, so that they will remain in ignorance as to the very matters which go to the heart of these proceedings. It is maintained that non-disclosure of this information is a matter of policy and that this policy should not be breached. I, like my colleagues, have in the circumstances declined to take up the Administration's offer to view the documents with such precondition attached. In my opinion it would be futile to accept it, as I could not then rely on any information so obtained for the purpose of my Judgement in this case for if I did so, I would be necessarily disclosing information gleaned from those documents, both to the Applicants and to a wider public who might happen to read or to hear of my Judgement and I would thereby have breached the precondition imposed. I do not believe it is the general policy of the Organization never to account to the family of a deceased staff member, who dies whilst in the service of the Organization, as to the circumstances or reasons for the death where it has been the subject matter of a BOI report. I fully appreciate that there may be extraordinary circumstances which might justify non-

disclosure in a very specific and unusual case, although even then it is difficult to envisage what peculiar circumstances might justify such a decision. I would, however, observe that where such circumstances may be found, it is more likely that they will be found to exist where there has been a death resulting from violence rather than in the instant case, where the death resulted from natural causes. However, no case claiming "special circumstances" has been made here. The Administration seeks to rely upon what it says are general policy considerations applicable across the board, rather than to tailor a submission to the facts of this particular case. In my view, the stance taken by the Administration, to seek to keep secret the circumstances surrounding this particular death, can lead to only one reasonable conclusion, namely that there was something remiss concerning the manner in which the Deceased was treated and that what has occurred thereafter is a simple, old fashioned cover-up.

Suffice it to say that the necessarily sparse information furnished by the Applicants in these proceedings gives rise to a reasonable inference that, serious mistakes were made and that the response to the Deceased's complaints of illness and the treatment afforded to her were not appropriate or adequate in the circumstances. The net effect of the Administration's response is that it has failed to offer evidence to rebut these allegations, or to offer any countervailing evidence, or to provide any explanations in answer to the allegations made. Mere bald denials that the Deceased was inappropriately treated or mere unsubstantiated assertions that she was well looked after count for nothing with me. If the Administration seeks to challenge the allegations made against it, it must put up its evidence or explain in a rational and persuasive way why such evidence cannot be disclosed. The Administration has failed to do so. In the circumstances, I am content to find as a matter of probability that a breach of staff regulation 1.2 has been made out.

V. I must, however, stress that whilst I am satisfied as a matter of probability that the response of the Administration to the Deceased's complaints of illness was inadequate and inappropriate, and find that there was a culpable failure to provide adequate treatment for her illness, I am not persuaded that these shortcomings resulted in or contributed to the Deceased's untimely death. Acute pulmonary embolism is a well recognised and frequent consequence of a naturally occurring deep vein thrombosis. I am fully satisfied that such events can and do occur even in centres of medical excellence. No medical evidence has been offered on behalf of either the

Applicants or the Respondent on this aspect. In all of the circumstances, I am without evidence which would satisfy me that Nancy Durand's outcome would have been different even if there had been an appropriate response to her complaints and appropriate treatment would have been commenced as speedily as was possible in all of the circumstances. In these circumstances I am unable to make a finding of wrongful death.

VI. This case raises for the Tribunal many important legal issues, which I believe are new to the Tribunal, as I believe that it has never dealt with a claim such as this before. Some of the more important issues arising are as follows:

(1) Whether a claim for general damages or moral damages (i.e. compensation which is not for identifiable financial loss) survives on the death of a staff member for the benefit of surviving members of the family and the estate of the Deceased;

(2) If such a claim survives, whether it is capped or limited by Appendix D of the Staff Rules or whether it is a claim without restriction, as is contended for on behalf of the Applicants;

(3) Whether the claim is admissible before the Tribunal under its Statute, when it has never been examined or investigated by a JAB and has not come to the Tribunal under article 7 of the Statute by way of a direct referral on agreed facts.

(4) If issue (3) raises jurisdictional problems for the Tribunal, whether these may be surmounted or overcome should the Tribunal find that the proceedings which were initiated before the JAB were wrongly rejected by the JAB on jurisdictional grounds, when the JAB declined to accept them on the stated premises that this claim was appropriate for the ABCC and that the JAB had no jurisdiction on the issues.

There are, in my view, other important and novel legal issues in this case but since they have not been specifically raised by either party, I do not consider it appropriate to seek to resolve them here.

VII. Whilst I can readily recognize and accept that actual and identifiable monies due and owing to a staff member at the time of his/her death are recoverable by the staff member's heirs or by the Estate, I find it more difficult to understand why a claim for such general damages as might have been recoverable by a staff member, who could establish a breach by the Respondent of his duties under staff regulation 1.2 with consequent personal injury to the staff member, should necessarily survive the death of such staff member for the benefit of his or her heirs or for the benefit of the Estate. Such damages would ordinarily be payable to the staff member to compensate him/her for his/her pain and suffering and in many jurisdictions such a claim would be extinguished by death. I have a similar difficulty in relation to a claim for wrongful death. I can, again, appreciate why family members who have suffered mental distress or actual pecuniary loss by reason of such a death may be entitled to recover damages for the distress or loss so suffered when the domestic law applicable to the Court or Tribunal charged with adjudicating upon the claim permits for such a claim to be maintained. However, I find it far more difficult to understand why such a claim is maintainable or why damages should be awarded where no mental distress or actual pecuniary loss is actually claimed or where no evidence is offered in support of such a claim. This claim is not advanced as a claim for actual, provable, identifiable financial loss or mental distress suffered by the Deceased's surviving half-brother and half-sister or other person although, of course, I accept that distress and grief have been suffered by reason of her premature death at the early age of 41 years. The claim has been advanced more on the basis that general damages for wrongful death are recoverable as a matter of first principle, which I am told is "*the American way*" and the way of some other jurisdictions, but I believe that if it is, that this is largely because "*the American way*" is more inclined to view damages as appropriate to punish a negligent defendant rather than to compensate an innocent plaintiff for his loss. In my view, this is a fundamental, important and far reaching legal issue which has not been dealt with previously by this Tribunal. I am sorry I was unable to persuade my colleagues on the panel to refer this issue or the issue as to the consequences of Appendix D for the consideration of the full membership of the Tribunal, as permitted now under article 8 of the Tribunal's Statute.

I believe it is the very kind of legal issue which the General Assembly had in mind when it determined to enhance the powers of the Tribunal to refer cases involving

points of law for consideration by the Tribunal as a whole. Whilst I naturally have great respect for the views of my colleagues on this panel, I would have welcomed both the individual and collective wisdom of all of my colleagues on these very important points.

VIII. In the final analysis, the issue as to what claims may survive on the death of an injured person is usually an issue for the domestic law of the country having jurisdiction in such a case. My researches, although far from exhaustive, reveal that in most jurisdictions I have looked at, the nature of such claims as can be maintained for wrongful death are strictly governed by statute. Most of those jurisdictions define by statute the restricted category of persons who can maintain such claims and many of those jurisdictions either preclude or severely limit claims for non-pecuniary loss to a very modest level of compensation. Again, my researches reveal that in most jurisdictions I have looked at, a claim for general damages (i.e. compensation for pain and suffering rather than for pecuniary loss) for personal injuries suffered by a person is extinguished on the death of that individual and that such a claim does not survive for the benefit of such individual's Estate. Here what ought to be considered as "the domestic law" of the United Nations includes the various Staff Rules and, in particular, Appendix D to the Staff Rules which provides for rules governing claims arising from death, injury or illness attributable to the performance of official duties on behalf of the Organization. These rules provide for strictly limited compensation, as payable to a very restricted category of persons in the event of such a death, and provide that the compensation so payable shall be the sole compensation to which the staff member's dependants shall be entitled in the event of such a death. I do not share the views expressed by the majority that Appendix D was intended to deal only with what they describe as social security-type payments. I admire the simplicity and obvious good sense of the first rule of statutory interpretation, which says that when construing a statute, words should be ascribed their natural and ordinary meaning unless to do so would lead to an absurd or clearly unintended result. Alternatively on a "purposeful construction" it seems to me that the clear intention and purpose of the relevant portion of Appendix D was to place a limit on the sums recoverable by surviving family members arising from the service-incurred death of a staff member and to preclude claims without limit, which is an interpretation irreconcilably different from the conclusions reached by my colleagues in the Judgement of the majority. They have

concluded that the relevant part of Appendix D applies only to limit claims for benefits of a social security variety and that the Organization was to remain exposed to claims without limitation, provided that they were to be phrased or formulated so as to seek a different type of compensation arising out of the self same death. I ask myself why the Organization by Appendix D would have intended to limit or restrict just claims for social security-type benefits and to leave itself exposed without limitation to all other claims arising from the same event. I do not believe that it did. I believe that the wording of the relevant parts is clear and unambiguous. Section II article 2 of Appendix D sets out the "principles of award" and at sub-paragraph (a) provides

> "a) Compensation shall be awarded in the event of death, injury or illness of a staff member which is attributable to the performance of official duties on behalf of the United Nations, except that no compensation shall be awarded when such death, injury or illness has been occasioned by:
>
> (i) The wilful misconduct of any such staff member; or
>
> (ii) Any such staff member's wilful intent to bring about the death, injury or illness of himself or another".

Article 3 under the heading "sole compensation" reads as follows:

> "**The compensation payable under these rules shall be the sole compensation to which any staff member or his dependents shall be entitled in respect of any claim falling within the provisions of these rules**". (Emphasis added.)

I should add that quite unlike the situation which prevailed in *in re* Grasshoff (*ibid.*), the above-recited provisions are not to be found in a section dealing with social security. This is an important consideration for it is clear that the very fact that Rule 720 was contained in a section on social security benefits was very central to the ILOAT decision in that case. Furthermore in *in re* Grasshoff, the ILOAT merely found that the Rule in question could not be interpreted as limiting liability for breach of contract, the appropriate compensation being indemnification for the loss actually incurred. A very different type of claim is made in the instant proceedings. It is not a claim for loss said to have been actually incurred but rather a claim for the compensation which it is said that the Deceased would have been entitled to receive had she survived her injuries. For these reasons I believe that *in re* Grasshoff is totally

distinguishable and has no relevance to the matters to be decided in the case before us now.

It seems to me that the majority, in reaching the conclusion that Appendix D applied only to social security-type payments and that it did not preclude other types of claims against the Organization arising from the self same death, can only have done so in defiance of the clear and unambiguous wording of article 3. I cannot identify any rule of construction which can justify this conclusion so that I must disagree with the majority on this important and central issue in this case.

That being said, the ceilings placed on such claims have not been altered since 1966 to take into account the enormous decline in the value of money and in particular the U.S. dollar, which has occurred since that time. Since the provision of an in-house compensation scheme, so as to protect the rights of staff members, is a corollary obligation of the Organization in return for the enjoyment by it of its diplomatic immunity from suit in national courts, and since the scheme can no longer be considered adequate having regard to the paltry amounts now payable thereunder, in my opinion a revision of the scheme is long overdue.

I find it difficult to identify any first principle which guides me to a conclusion that a claim can lie on behalf of a deceased staff member for "wrongful death" other than within the confines and limitations of Appendix D. Accordingly, I am inclined towards the view that the restrictions set out therein apply to this claim. Since none of the persons on whose behalf these proceedings have been brought come within the category of persons identified in article 10.2(d) of Appendix D, in my opinion this claim must fail. "Dependants" are defined as meaning and including only "a wife, dependant husband, dependant child, dependant parent, dependant brother or dependant sister". Neither the Applicants nor the aforementioned young girl come within this narrow category of persons.

IX. I started by saying that there was a difficult history to this claim. The Administration initially gave every indication that the matter was being considered and that it would be dealt with when a conclusion was reached as to the circumstances surrounding Nancy Durand's death. However, since the inquiry was concluded, a wall of silence and secrecy has been erected so as to deny to her family the information sought. I find it extraordinary to advance a claim that all reports of Boards of Inquiry are privileged as internal documents when such reports are frequently placed before the

Tribunal without demur and, in fact, in cases involving the United Nations Relief and Works Agency for Palestine Refugees in the Near East are the cornerstone of the evidence in many cases involving disciplinary or termination issues. I should add that the reports of such Boards of Inquiry usually deal with far more sensitive issues than issues arising from the death of a staff member due to natural causes but, to the best of my knowledge, the Organization has not suffered from any spectacular or disastrous consequences or real prejudice to its reputation or well-being arising from disclosure of the reports of such Boards of Inquiry.

The Administration firstly led the Deceased's family to believe that a claim had been initiated before the ABCC on behalf of the surviving members and that they would be informed as to its result in due course. Later the Administration admitted that no such claim had ever been initiated, as the Administration had taken it upon itself not to do so since it believed such claim would fail. The Administration then acquiesced in the decision of the JAB to decline jurisdiction on the grounds that it was properly a matter for the ABCC and now seeks to have the matter referred back to the JAB, should the Tribunal find that it is admissible and not restricted by Appendix D. In my view, the Administration should have accounted to the family of Nancy Durand as to the full circumstances surrounding her death and it should have done so a long time ago. I would order that the Administration make the Report of the BOI, which investigated the circumstances of Nancy Durand's death, available to the Applicants forthwith or, should the Secretary-General determine that it is in the interest of the Organization to take no further action, that they be paid a sum equivalent to two years' of the Deceased's net base salary as of the time of her death.

X. The Statute of the Tribunal is the source of the Tribunal's jurisdiction and nothing is contained therein which would allow the Tribunal to assume an extra-statutory jurisdiction or to assume powers not expressly or impliedly granted by virtue thereof. By reason of the Respondent's failure in this case to make the BOI Report and other relevant documents available to the Tribunal on acceptable terms, the record is very one-sided and, according to the Respondent, the allegations relied upon by the majority as "facts" would appear to be very much in dispute as between the parties. I consider it to have been mistaken for the majority to have found as uncontraverted "facts" the very serious allegations which are made against a medical practitioner which in any language accuse him of callous if not brutal behaviour which would on

any view constitute a flagrant breach of the Hippocratic Oath without knowing what the other side has to say about these allegations or without knowing what the doctor's response to those allegations may have been or without knowing what view, if any, was taken in relation to those allegations by the persons who constituted the BOI. In my view, the majority's conclusions on such matters have been reached without any regard to the principle *audi alterim partem* and should be disregarded. The same, of course, applies in relation to other findings of fact made in the judgement of the majority, where there has been no agreement between the parties in relation thereto.

XI. In my opinion, the Tribunal has jurisdiction in this matter for the reasons found in the Tribunal's Judgement No. 1074, *Hernandez-Sanchez* (2002). Under article 7 of the Tribunal's Statute, what is required is that the dispute should have been previously referred to the "joint appeals body", which was done in this case albeit that the JAB had declined to embark upon an inquiry or to issue a recommendation. It did so because it considered that the issues raised were issues appropriate for decision by the ABCC and hence it declined to deal further in the matter. That being said, when, as in the instant case, an Application comes to the Tribunal other than on agreed facts and the Tribunal is of the opinion that there is a dispute as to essential facts so that it cannot proceed on an agreed facts basis, the proper course of action is for it to remand the matter to a JAB and ask it to carry out an investigation and to reach a conclusion on the facts, as was done by the Tribunal in Judgement No. 902, *MacNaughton-Jones* (1998) and other cases. It was for this very reason that in my Dissent I refrained from making any specific findings of fact relating to the quality of treatment issue and was content to find, as a matter of probability, that a breach of staff regulation 1.2 had been established, rather than to have reached any specific conclusion of a sort injurious to any individual who had been concerned with the Deceased or her treatment. The Administration had specifically asked that, should the Tribunal propose to find that Appendix D of the Staff Rules did not apply to the proceedings, the Tribunal should refer the matter to a JAB to carry out the appropriate investigation. Since my colleagues not only intended to find that Appendix D did not apply but further intended to find "facts" of ill treatment of the Deceased sufficient to justify exceeding the two-year threshold, in my opinion they were mistaken to find such facts without considering what the other side might have to say in response to the allegations and without allowing a JAB to make a report thereon. I believe that this is the central and

fundamental value as identified in Judgement No.1009, *Makil* (2001), and it should have been observed and honoured by the majority. Had I been persuaded that Appendix D did not apply to this particular case, I would have remanded the matter to a JAB to make appropriate findings.

(*Signatures*)

Kevin **Haugh**
First Vice-President, presiding

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary