Judgement No. 62

Case No. 62: Julhiard *Against:* **The Secretary-General of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Sture Petrén, Vice-President; Mr. V. M. Perez Perozo;

Whereas Charlotte Julhiard, Editorial Assistant in the Official Records Editing Section of the Department of Conference Services, filed an application to the Tribunal on 25 May 1955 requesting:

(*a*) That the Secretary-General's decision of 23 April 1953 to consider her as being of United States nationality for the purposes of the Staff Regulations and Rules be rescinded;

(*b*) That the Applicant be regarded as a French national for those purposes;

Whereas the Respondent filed his answer to the application on 13 July 1955;

Whereas the Applicant filed a second written statement with the Tribunal on 30 September 1955;

Whereas, at the Tribunal's request, the Respondent submitted, on 21 and 28 November respectively, memoranda concerning the Applicant's home leave in 1950 and her nationality as shown in the list of the staff submitted annually to the General Assembly;

Whereas the facts of the case are as follows:

The Applicant entered the service of the United Nations on 1 July 1946 on an indefinite appointment as a bilingual typist in the French Pool of the Languages Division of the Department of Conference and General Services. On her employment application form, the Applicant stated her nationality as being French-American (dual citizenship). From September 1946 to 29 July 1951, the Applicant was employed as a secretary in the French Section of the Languages Division, and from 30 July 1951 until 31 October 1952, as a translator-trainee in the same section. On 1 November 1952, she was transferred to the Documents Control Division of the Department of Conference and General Services where, at the date of the filing of her application, she occupied the post of Editorial Assistant. On 3 July 1955, the Applicant received a personnel action form classifying her as a United States national for purposes of home leave. By a letter dated 29 June 1953, which was received by the Applicant on 7 July 1953, the Bureau of Personnel notified the Applicant that the question of her nationality had been considered and that, in accordance with Staff Rule 104.8 (b),

it had been decided that she should be considered as being of United States nationality for the purposes of the Staff Regulations and Rules. On 10 July 1953, the Applicant asked the Administration for the reasons for this decision, and on 28 July 1953 the Acting Director of the Bureau of Personnel replied as follows:

"3. The view was reached that it would be difficult for the purposes of the Staff Regulations and the Staff Rules to regard a citizen of the United States as a citizen of another country while she was a resident in the United States; just as it would be difficult to regard a French citizen as a citizen of another country while she was resident in France.

"4. The record shows that your length of residence in the United States and your other associations with that country are both so considerable that they cannot well be overlooked."

On 31 July 1953, the Applicant requested the Administration to reconsider its decision and, upon its refusal, filed an appeal with the Joint Appeals Board on 21 December 1953. In a report dated 2 February 1955, the Board informed the Secretary-General that it found no basis for review of the administrative decision contested by the Applicant, and therefore made no recommendation in support of it. By a letter dated 21 February 1955, the Secretary-General confirmed the decision previously taken. On 25 May 1955, the Applicant instituted proceedings before the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision causes serious injury to the Applicant in that it deprives her of the rights and privileges hitherto accorded to her in conformity with the provisions of the Staff Regulations and Rules applicable to "internationally recruited" staff. In particular, the Applicant is no longer entitled, under Staff Rule 104.7, to home leave, repatriation grant or payment of travel and removal expenses. While it is true that, as the wife of a staff member of French nationality, she continues to enjoy certain privileges, the latter are dependent on her marital status and on the official status of her husband, and are less than those which she enjoyed in her own right as an "internationally recruited" staff member. For instance, when the Applicant accompanies her husband on the home leave to which he is entitled, she cannot claim "travel time... for the outward and return journeys" under Staff Rule 105.3. She also ceases to be entitled to the French national holiday of the Fourteenth of July.

2. The Respondent's decision constitutes an excess of authority and an arbitrary act in so far as it radically alters an essential element in the Applicant's official status resulting from her contract of employment and terms of appointment, although no new fact has occurred to change the Applicant's personal status in the matter of nationality

since she entered the service of the United Nations nor has the Respondent alleged any past error to justify his reversal of policy.

3. The Secretary-General, by originally recognizing that the Applicant was of French nationality, had created certain rights which he failed to respect when he later revoked the decision. Thus, the Respondent contravened the principle of the inviolability of the individual effects of administrative acts.

4. The Respondent's decision, taken under Staff Rule 104.8 (b), appears to be due to a confusion between the purpose of the Rule, which is solely to determine a nationality for administrative purposes, and the grounds on which the determination is made and which involve considerations that are external to the United Nations and are legal as well as political, linguistic and sentimental.

5. The Respondent's decision is improper because, in applying the criterion laid down in Staff Rule 104.8 (b), he committed errors of fact and of law in evaluating the factors which may serve to determine the staff with which the Applicant is "most closely associated". The criterion must be applied individually and not *in abstracto*.

6. The Applicant contends that, in attaching great importance to the length of her residence in the United States, the Respondent took a view leading to a result directly contrary to that which it is the purpose of Staff Rule 104.8 (b) to achieve. That purpose is to assign a single nationality to a staff member, and not to regard him as having one nationality on some occasions and another on others, according to his place of residence, which, paradoxically, would be tantamount to assigning him different nationalities according to his duty station.

7. As to the weight attached by the Respondent to the fact that the Applicant is the holder of a United States passport, the Applicant maintains that it is perfectly natural and proper that, as a national of two States, she should have in her possession a passport issued by the authorities of each of them. She specifically disputes the view that, in the present case, the fact that she applied for and obtained a United States passport carries more weight in the determination of her nationality for the purposes of the Staff Regulations and Rules than the fact that she applied for and obtained a French passport.

8. The Applicant contends that the language factor has not been given its due importance. In this connexion, she points out that, as from 1 January 1951, she received a language allowance for English which is equivalent to an admission on the part of the Administration that English is not her mother tongue. She also states that, for a total of seven years, she occupied posts to which she had clearly been assigned because she was French by mother tongue, upbringing and education. It is only since 1 November 1952, when she was transferred to her present post in the Bureau of Documents, that her functions have not been of the type for which a French education is essential.

The Applicant refers to the "Survey of the Problem of Multiple Nationality" (document A/CN.4/84), where language is specifically included among the factors which should be taken into consideration in determining whether in a case of multiple nationality, an individual is more closely associated with one State than with another.

9. As to the weight apparently attached by the Respondent to the question of taxation, the Applicant states that the fact that she does not pay taxes in France, where United Nations officials are exempt, and is required to do so in the United States, where United Nations officials are not exempt, cannot be taken into account in evaluating her links with those two countries. Lastly, as to the reimbursement by the Administration of the taxes a staff member may be called on to pay a Member State, such reimbursement does not constitute a benefit for that official, but a means whereby the Administration ensures equality of treatment among staff members.

Whereas the Respondent's answer is:

1. The decision contested by the Applicant was made under the terms of Staff Rule 104.8 which gives the Secretary-General discretionary power to make a determination of nationality for the purposes of the Staff Regulations and Rules with a view to ending administrative difficulties arising from the dual nationality of some staff members.

2. The Respondent does not deny that the Applicant also has close associations with France, but states that he was required, under the terms of Staff Rule 104.8, to choose one nationality only for administrative purposes. Among the elements contributing to his decision to classify the Applicant as an American citizen, the Respondent mentions the following:

(*a*) The Applicant was born in the United States and lived in that country until the age of six;

(*b*) After spending most of her time in France from 1925 to 1941 (with a two-year interval in the United States), the Applicant, upon attaining her majority, applied for and received a United States passport and returned to the United States in 1941 on that passport. The Applicant is still a holder of a valid United States passport;

(*c*) Since 1941, the Applicant has resided continuously in the United States and was a resident of the United States at the time of her appointment with the United Nations in 1946;

(*d*) Each year since 1946, the Applicant has claimed and received reimbursement for income taxes paid by her to the United States. Staff members who are not citizens or permanent residents of the United States are exempted from the payment of income tax.

3. The Respondent's decision does not affect any acquired rights of the Applicant. The Respondent submits that although the United Nations was aware of the Applicant's dual nationality, it considered

her from the beginning as a United States national rather than as a French national for administrative purposes. The fact that the Applicant was granted home leave to France in 1948 and 1952 would seem to be attributable to some uncertainty over her nationality status and cannot possibly be construed as an acquired right. The Respondent points out in this connexion that, in 1950 and 1954, the Applicant went on leave to France at United Nations expense as the wife of a staff member of French nationality and not in her own right.

4. Regarding the Applicant's contention that her professional assignments show that the Organization regarded her as a French national, the Respondent replies that the Applicant had been assigned for some time to the French Typing Pool and later to the French Translation Section, but since 1952, has been working in the Bureau of Documents. Obviously, neither the Applicant's past nor present assignments have anything to do with her nationality.

5. In the Respondent's view, the alleged damage suffered by the Applicant appears to be reduced substantially to the fact that, being regarded as a United States national, she cannot be excused from work on the French national holiday (14 July) under Staff Rule 101.3. The Respondent submits that this hardly seems sufficient ground for bringing a case before the Administrative Tribunal.

6. The Respondent contends that, if the Applicant really wished to be regarded as a French citizen, she could have renounced her United States citizenship.

7. In the light of the circumstances of this case, it could hardly be maintained that the Respondent's decision was arbitrary or capricious. In the absence of proof of improper motive, the Administrative Tribunal has consistently declined to review the exercise of the Secretary-General's dicsretionary power or to substitute its judgement for that of the Secretary-General.

8. The Respondent concludes that the Applicant's motive is to take advantage of all the benefits deriving from both nationalities and to enjoy a privileged position over her colleagues. In the light of the above, the Tribunal may wish to consider whether the Application should be dismissed as frivolous.

The Tribunal having deliberated until 3 December 1955, now pronounces the following judgement:

1. The Application requests the Tribunal to order that the Secretary-General's decision of 23 April 1953, which was confirmed on 21 February 1955, to consider her as being of United States nationality for the purposes of the Staff Regulations and Rules, be rescinded and that the Applicant be regarded as a French national for those purposes.

Though making no formal submission to that effect, the Respondent suggests that, having regard to the facts of the case and to the circumstance that the Applicant has suffered no damage as a result

of the contested decision, the Tribunal might wish to consider whether the Application should be dismissed as frivolous.

Under article 7, paragraph 3 of the Tribunal's Statute, an application may be declared inadmissible on the ground that it is frivolous. The text of the paragraph is as follows: "In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous."

In the present case, the Joint Appeals Board has not, to the Tribunal's knowledge, unanimously found the application to be frivolous. The conditions for the application of this provision have not, therefore, been fulfilled.

In view of the Respondent's submission in his answer, the Tribunal has examined the nature of the damage the Applicant alleges she has suffered.

The Applicant maintains that the Respondent's decision to consider her as being of United States nationality has resulted in her losing home leave, repatriation grant and payment of travel and removal expenses in her own right (Staff Rule 104.7). She is thus deprived of the travel time granted to staff members travelling on home leave, which amounts to twelve days every two years.

The Respondent contends that, as the wife of a staff member of French nationality, the Applicant is still entitled to home leave despite the fact that she is classified as a United States national. The damage she has suffered is reduced to the fact that, as a United States national, she cannot be excused from work on the Fourteenth of July.

2. The Tribunal observes that every staff member as a consequence of his recruitment by the United Nations, is entitled to the benefits provided for in the Staff Regulations and Rules. He enjoys those benefits in his own right and may file applications with the Tribunal alleging non-observance of his contract or conditions of employment, even if he is enjoying equivalent benefits indirectly as the spouse of another staff member.

Without going into the comparative advantages of home leave obtained by a staff member as a spouse or in his own right, the Tribunal is of the opinion that since the Application alleges non-observance of a provision of the Staff Rules capable of affecting the Applicant's legal status as a United Nations staff member it must be examined as regards substance.

3. The contested decision is criticized, first, on the ground that the Respondent has allegedly committed an excess of authority and an arbitrary act in so far as he has radically altered an essential element in the Applicant's official status resulting from her contract of employment and terms of appointment, although no new fact has

occurred to change the Applicant's personal status in the matter of nationality since she entered the service of the United Nations.

According to the Applicant, the Respondent decided as early as 1946 to regard her as being of French nationality. She contends that that decision created certain rights, which should be respected.

The Respondent denies that such a decision was made. He maintains that, although the United Nations was aware of the Applicant's dual nationality, it considered her from the beginning rather as a United States national than as a French national for administrative purposes. The fact that she was granted home leave in her own right, together with travel time, would seem to be attributable to some uncertainty over her nationality status.

4. The Tribunal observes that, before Staff Rule 104.8 came into force, the Respondent had found it necessary in applying various provisions of the Staff Regulations and Rules, to consider the special position of staff members with dual nationality. Some of those provisions, however, did not refer to "nationality" or to the country of which a staff member was a "national", but to the "country of origin" or the "home country".

Under Provisional Staff Regulations, provision was made at the time of appointment for the payment of travel expenses "to and from the place recognized as the staff member's home". A staff member employed by the United Nations in a country other than his home country was to be entitled to an allowance for children studying in the home country. The provision relating to home leave stated: "... A staff member whose home country is the country of his official duty station or who continues to reside in his home country while performing his official duties shall not be eligible for home leave."

The Staff Rules which have been in force since 1 July 1951 use the term "nationality" in English and "*ressortissant*" in French. Rule 80, for example, provides that "The primary purpose of home leave is to allow staff members who are serving outside the country of their nationality periodically to spend a substantial period of leave in that country".

5. In attempting to determine whether the Respondent had made a definite choice between the Applicant's two nationalities before the contested decision taken on the basis of Staff Rule 104.4, the Tribunal found that most of the official documents quoted by the two parties shed no light on this point. This is true of the documents in which reference is made to the Applicant's dual nationality and of the personnel action forms dealing with other matters, in which no reference is made to the place of home leave. The memorandum of 11 January 1951 (Annex No. 15) containing an entry to the effect that the Applicant would not receive non-resident's allowance cannot be regarded as proof that a decision had been taken in regard to her

nationality, since under the rules relating to the allowance in question the latter depends on the place of residence at the time of appointment and not solely on nationality. The same applies to the documents containing a reference to the normal place of residence (Annex No. 16), as an entry under that heading does not involve a choice of nationality.

6. The Applicant, on the other hand, draws attention to three facts, which, she submits, are evidence of a choice on the part of the Respondent between French and United States nationality.

Two of these facts have not been contested by the Respondent. The first is that, from 1949 to 1953, the Applicant was described as French in the list of staff submitted annually to the General Assembly by the Secretary-General. The second is that until 1952 she was excused from work on the French national holiday.

Lastly, the Applicant states that she was granted home leave in France in 1948, 1950 and 1952 and was allowed travel time in those years, which means that she was enjoying that benefit in her own right.

In his answer, the Respondent admits that the Applicant had home leave in 1948 and 1952, but states that in 1950 she went to France solely as the wife of a staff member of French nationality. After re-examining the official documents at the Tribunal's request, the Respondent has, however, admitted that in 1950 the Applicant travelled to France in her own right and was granted travel time.

Thus, in various connexions and, in particular, for the purposes of Rule 80 of the Staff Rules in force on 1 July 1951, the Respondent treated the Applicant as a French national, just as he had previously regarded France as her home country.

7. The parties disagree on the importance to be attached to the reimbursement by the United Nations of the taxes levied by the United States Government on the Applicant's salary.

The Applicant's contract (Annex No. 13) contained the following statement: "Any taxation levied on your salary by your national government will be refunded to you by the United Nations Organization." The Respondent contends that, by reimbursing the amount of the income tax paid by the Applicant to the United States, the United Nations has shown that it has regarded her as a United States citizen from the beginning of her employment. In the Applicant's opinion, the clause quoted above does not provide that the United Nations has regarded her as a United States citizen from the beginning; she maintains that the clause was regularly included in contracts of employment and does not refer to any specific country. Furthermore, the reimbursement of taxes does not constitute a benefit for the official concerned, but a means whereby the Administration ensures equality of treatment among staff members.

The Tribunal recognizes that the clause relating to the reimburse-

ment of taxes was regularly included in contracts at the time the Applicant was recruited and that its presence is not in itself sufficient to determine the nationality assigned to the Applicant by the Respondent. But the Tribunal observed that the reason why the taxes paid by the Applicant to the United States Government were reimbursed was that the Respondent regarded that Government as the Applicant's national Government for the purposes of the above-mentioned clause.

8. The Tribunal therefore concludes that the Respondent regarded the Applicant as French for the purposes of certain Staff Rules, but at the same time regarded the United States Government as her national Government. These facts are not inconsistent with the declaration of dual nationality made by the Applicant in her application for employment. The Tribunal therefore cannot accept the argument that the nationality specified by the Respondent in the Applicant's contract was to the exclusion of any other nationality. Consequently, it cannot admit that the Applicant thereby acquired a right or that the Respondent should be bound to observe that right now that a new Staff Rule makes it mandatory for the Secretary-General to select a single nationality for the purposes of the Staff Rules and Regulations by reference to a criterion laid down in that Rule.

9. The Applicant further contends that, in applying Staff Rule 104.8, the Respondent has disregarded or misinterpreted the criterion laid down in that Rule. She claims that, in following that criterion, the Respondent committed errors in evaluating the factors which may serve to determine the State with which the Applicant is "most closely associated".

While asserting that the United States is the State with which the Applicant is most closely associated, the Respondent states that the Secretary-General has discretionary power to make a determination of nationality. He points out that, in the absence of proof of improper motive, the Tribunal has consistently declined to review the exercise of the Secretary-General's discretionary power or to substitute its judgement for that of the Secretary-General.

10. The Tribunal observes that Staff Rule 104.8 specifically authorizes the Secretary-General to determine the nationality of a staff member for the purposes of the Staff Regulations and Rules. In exercising this power, the Secretary-General is in no way bound by the action taken by national authorities in granting passports or exercising their powers of taxation.

Under Staff Rule 104.8, however, the Secretary-General is required in exercising this prerogative to comply with the principle that the nationality assigned shall be that of the State with which "the staff member is ... most closely associated".

That being so, the Tribunal can, without substituting its judgement

for that of the Secretary-General, consider whether, having regard to the circumstances, it was reasonable for the Secretary-General to conclude that the Applicant was most closely associated with one State rather than with another.

In the present case, the points taken into account by the Secretary-General appear to be the fact that the Applicant was born in the United States; that she lived in the United States up to the age of six and subsequently from 1941 onwards, in addition to a period of two years from 1937 to 1938; that she applied for a United States passport on attaining her majority and at present holds such a passport; and that the taxes she has paid to the United States Government have been reimbursed by the United Nations since 1946.

11. The Tribunal must first point out that if, as the Respondent states, the reason for the inclusion of Staff Rule 104.8 was to ensure that the United Nations did not have to pay home leave expenses and at the same time reimburse taxes levied by the United States, the text of the Rule, as at present drafted, makes no reference to that purpose. If that was the only factor to be taken into account, all staff members with United States and another nationality would automatically be assigned the former, which would obviously conflict with the provision requiring the Secretary-General to choose the nationality of the State with which the "staff member is... most closely associated".

The Tribunal further points out that the Respondent's argument that "had the Applicant really wanted to be regarded as a French citizen, she could have renounced her American citizenship" disregards the purpose of Staff Rule 104.8. The purpose of that Rule is to provide a solution to the administrative problems created by possession of more than one nationality and not to bring indirect pressure on staff members to renounce one of their nationalities.

The factors taken into account by the Respondent have been discussed at length by the Applicant. While she does not question the correctness of most of them, she draws attention to the fact that she settled in the United States in 1941 on account of the war. She has emphasized that she has close links with France and that those links have been strengthened by her marriage to a Frenchman. Lastly, she contends that the Respondent should have taken account of other factors, and particularly of her native language.

12. The Tribunal is not called upon to express an opinion as to the State with which, having regard to all circumstances, the Applicant is most closely associated. It considers, however, that, quite apart from the question of taxation, the facts taken into account by the Respondent unquestionably constitute links between the Applicant and the United States. Those links are such that, in the exercise of his discretionary power, it was reasonable for the Respondent to conclude that, for the purposes of Staff Rule 104.8, the United States is the

State with which the Applicant is most closely associated. The Tribunal accordingly rejects the application.

(*Signatures*)

Suzanne BASTID	Sture PETRÉN	V. M. Perez PEROZO
President	*Vice-President*	*Member*

Mani SANASEN
Executive Secretary

New York, 3 December 1955

Judgement No. 63

Case No. 60: Hilpern *Against:* **United Nations Relief and Works Agency for Palestine Refugees in the Near East**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; the Lord Crook, Vice-President; Mr. Sture Petrén, Vice-President; Mr. R. Venkataraman, alternate;

Whereas Walter Hilpern, former Manager of the Cairo Office of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, whose contract was terminated by decision of 15 April 1952, filed an application with the Tribunal on 18 October 1954, requesting that the Tribunal order the payment of:

(*a*) Three months' salary in lieu of sick leave . . .	£E 450
(*b*) Three months' salary as indemnity based on length of service	£E 450
(*c*) Special indemnity for improper termination and vexatious delay in the treatment of his case	£E 10,000
TOTAL	£E 10,900

(*d*) Costs, in addition to the above claims;

Whereas the Respondent, in his answer filed on 13 May 1955, raised the question of the Tribunal's competence to hear cases involving staff members of UNRWA;

Whereas the Tribunal, in its Judgement No. 57 of 9 September