respect of any health condition of a staff member connected with or resulting from his service with the Agency.

(*c*) The procedure followed by the Agency with regard to the ascertainment of such health conditions.

44. The Tribunal therefore decides to adjourn consideration of this case.

(*Signatures*)

| Suzanne BASTID | CROOK | Sture PETRÉN |
|---|---|---|
| *President* | *Vice-President* | *Vice-President* |

| R. VENKATARAMAN | Mani SANASEN |
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| *Alternate* | *Executive Secretary* |

*Geneva, 30 August 1956*

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## Judgement No. 64

**Case No. 66: Stepczynski** *Against:* **The Secretary-General of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of the Lord Crook, Vice-President, presiding; Mr. Sture Petrén, Vice-President; Mr. R. Venkataraman;

Whereas Stefan Léon Stepczynski, staff member of the Permanent Central Opium Board of the United Nations at Geneva, filed an application to the Tribunal on 23 January 1956 requesting:

(*a*) That his appeal to the Joint Appeals Board be declared receivable;

(*b*) That the Tribunal, if it decides to deal with the substance of the Applicant's case, should rule that the Applicant had not resided at Geneva for three years before his appointment to the United Nations and that he should therefore be given the benefit of semi-local status;

Whereas the Respondent filed his answer to the application on 2 May 1956;

Whereas the Tribunal heard the parties in public session on 14 August 1956;

Whereas the facts as to the Applicant are as follows:

While serving in the Polish Army in 1939, the Applicant was made a prisoner of war by the German troops. In 1941 he escaped from a prisoners' camp in Germany and entered Switzerland, where he was interned under an order of 18 October 1941, in which internment he remained with the status of military internee, until 14 November 1946. From 14 November 1946 to 24 December 1947, his status was that of civilian internee and was subject to the jurisdiction of the Federal Department of Justice and Police. Since 24 December 1947, the Applicant has resided in Geneva under an ordinary permit, and has been subject to the ordinary legal provisions governing residence of foreigners in Switzerland.

On 1 July 1949, the Applicant entered the service of the United Nations under a six months' fixed-term appointment (made in accordance with the conditions governing local recruitment prevailing at the time) as store-keeper in the Purchase, Supply and Transport Division of the European Office. He was given a further one-year fixed-term appointment on 1 January 1950 and, on 1 November 1951, he was promoted and transferred in the capacity of statistical clerk, on a temporary-indefinite appointment, to the Research and Planning Division of the Economic Commission for Europe. On 12 November 1951, the Applicant requested the Division of Personnel to reclassify him as "semi-local" and to grant him a non-resident's allowance. This request was denied by the Chief of the Personnel Division on 5 December 1951, on the ground that the status of a staff member, as established at the time of his appointment, could not be changed on promotion. A further justification of his claim was presented by the Applicant through the Chairman of the Staff Committee on 6 March 1952. On 17 March 1952, the Chief of the Personnel Division confirmed the earlier negative decision. On 3 April 1952, a further elaboration of the claim was submitted through the Chairman of the Staff Committee. After conducting an inquiry as to the Applicant's residential status in Switzerland prior to his recruitment by the United Nations, the Chief of the Personnel Division, by letter dated 30 April 1952, again rejected the Applicant's claim. On 1 April 1953, the Applicant was promoted and transferred to the secretariat of the Permanent Central Opium Board under a permanent appointment.

On 20 July 1954, the Applicant re-submitted his claim through the Secretary of the Permanent Central Opium Board. This claim was rejected by the Director of the European Office on 4 August 1954. The Applicant's subsequent requests for change of administrative status of 10 August and 2 September 1954 were denied on 12 August and 14 September 1954 respectively. On 27 September 1954, the Applicant appealed to the Joint Appeals Board which declared the appeal not receivable on 12 August 1955, on the ground that the time-limits prescribed in Staff Rule 111.3 had been exceeded. The Secretary-General's confirmation of the decision of the Joint Appeals Board was

communicated to the Applicant by letter of 19 October 1955. On 23 January 1956, the Applicant instituted proceedings before the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's letter of appointment did not specify whether the appointment was on a local or semi-local basis and at the time of his initial recruitment, the Applicant was not aware of the existence of the latter form of recruitment.

2. Pursuant to Staff Rule 31 (document GENEVA/PM/2) and the interpretation of Staff Rule 52 (document GENEVA/PM/3) and Appendix B (iii) (b) of ST/AFS/SGB/94, the Applicant should be classified in the semi-local category since he had not resided normally at Geneva for a period of three years before his appointment with the United Nations.

3. In the Applicant's case, the Swiss authorities rescinded the internment order on 24 December 1947. The period elapsed from this date until his appointment by the United Nations on 1 July 1949 was less than three years.

4. In the course of the oral hearing, the Applicant claimed, under Staff Rules 33, 36, 80, 83, 113 and 125 in force at the time of his appointment, that he was entitled to a number of allowances and benefits relating to expatriation, education grant, home leave, travel expenses, removal expenses and expenses on separation from service.

5. The Applicant also claims that since he was entitled to the repatriation grant under SGB/71 of 11 Juy 1947 and since, for staff members in his category, this grant was replaced by the non-resident's allowance provided in Staff Rule 31, effective 1 January 1951, he is also entitled to the non-resident's allowance.

6. The Applicant supported his claim for the allowances due to internationally recruited staff on the ground that on promotion he was expected to use his knowledge of several European languages.

7. The Applicant claims that he should have been recruited internationally inasmuch as his appointment to the staff of the Permanent Central Opium Board was based not only upon his qualifications but also upon his nationality.

Whereas the Respondent's principal contentions are:

1. At the time of the Applicant's recruitment, it was not the practice for the Secretary-General to state in letters of appointment whether a staff member was employed on a local or an international basis. The appointment, however, was made in accordance with the conditions governing local recruitment then prevailing.

2. Staff Rule 52 (b) in ST/AFS/SGB/81, in force at the time of the Applicant's recruitment, provided that "Staff members in grades 1 through 7 shall normally be recruited locally". To make an exception

for the Applicant, who was in the grade 2 level, would not have been justified on administrative and financial grounds at a time when there was a great number of local applicants.

3. Staff Rule 31, in force at the time of the Applicant's initial request for semi-local status (12 November 1951) created two conditions for the grant of the non-resident's allowance: eligible staff members had to be qualified persons recruited "from outside the country of their official duty station" or "whose residential status at the time of their original appointment is considered by the Secretary-General to warrant such payment". The Applicant did not satisfy either of these two conditions.

4. The acquisition of the status of an ordinary resident at Geneva under Swiss law cannot be accepted as a criterion in determining for purposes of the United Nations Staff Rules that a staff member has "lived" in the Geneva area for a period of three years prior to his appointment by the United Nations, unless it is so stated expressly in the relevant United Nations provision.

5. In arriving at the conclusion that the Applicant had lived in the Geneva area for three years prior to his appointment by the United Nations, the Secretary-General took into consideration all the factors and circumstances surrounding the Applicant's sojourn in Switzerland, for example, that the Applicant was physically present in Geneva since the middle of 1944, that he was free since the middle of 1945 to leave Switzerland for any other country, that during the period of his legal internment he contracted marriage with a Swiss national, obtained a degree from a university and that he held a remunerated post in Switzerland before joining the United Nations.

6. In reply to the Applicant's later contention, the Respondent stated that the Staff Rules cited by the Applicant in support of his claim to various allowances at the time of appointment were only applicable to internationally recruited staff members.

7. The Applicant cannot be regarded as having waived or lost any rights which he would otherwise have had. He was not entitled to the allowance of an "international" recruit in 1949 when he was recruited, nor to the non-resident's allowance of a "semi-local" staff member in 1951 nor at any time thereafter.

The Tribunal having deliberated until 1 September 1956, now pronounces the following judgement:

1. The Tribunal notes that objection regarding receivability of the application was not raised by the Respondent before the Tribunal and it decides to consider the case on merits.

2. For the determination of the Applicant's entitlement to non-resident's allowance, it is necessary to examine the history of the rule granting such non-resident's allowance to the staff members in the General Service category.

3. Rule 52 (b) in SGB/81 effective from 1 July 1948 provided that "Staff members in grades 1 through 7 shall normally be recruited locally." The Applicant was appointed as a "Local Recruit" in July 1949.

4. The Committee of Experts on Salary Allowance and Leave Systems of the United Nations recommended the grant of non-resident's allowance in certain cases.

5. Action taken by the Secretary-General on the Report of the Export Committee is contained in the *Information Circular, European Office No. 262* (IC/Geneva/262) dated 21 March 1950. Paragraph 9 (ii) of the circular which deals with locally recruited staff and semi-local staff mentions "(b) Neither the appropriate scales of pay nor the level of non-resident's allowance can be fixed until after completion of an inquiry which is now being made by the Geneva office (in close collaboration with specialized agencies and the various Staff Committees) into the best prevailing 'outside' scales of pay in Geneva." In paragraph (c) of the same document it is stated that "A further circular will be issued on this point as soon as possible after the completion of the current inquiry."

6. The Joint Report on Conditions of Employment for Certain Categories of Staff in Geneva prepared by ILO, ITU, WHO and UN (Geneva) consists of two parts, namely, the Joint Report (MUN/102/50) and Addendum to Joint Report (MUN/102/50 Add.2). The latter part, which deals with Allowance for Non-Residents, contains the following definition:

"2. *Definition*

"The definition of residence will be as follows:

"Persons recruited for employment at Geneva, who, at the time of their appointment, have been continuously resident for at least three years in French-speaking Switzerland (Suisse romande) or in French territory within a radius of 25 kilometres from Geneva shall be considered as locally recruited, provided always that Swiss nationals residing in French-speaking Switzerland, or within the zone of 25 kilometres from Geneva in French terirtory, and French nationals residing in this latter zone, shall be treated as locally recruited irrespective of the duration of such residence.... It was agreed, however, that any period of employment with an international organization, or any period of diplomatic or consular service should not be counted as residence for the purpose of this definition."

7. On the adoption by the Fifth (Administrative and Budgetary) Committee of the General Assembly of the proposals regarding Salary, Allowances, etc. of the staff members, the European Office of the United Nations in Geneva issued *Information Circular, European Office No. 300*, dated 15 December 1950. Paragraph 11 of the circular which deals with *non-resident's allowance* specifically states

as follows: "The definition of residence will be that established in the Joint Report."

8. The General Assembly adopted resolution 470 (V) dealing with Salary, Allowance and Leave Systems of the United Nations on 15 December 1950. Paragraph 7 of the annex I to the resolution provided "... that the Secretary-General may where he deems it appropriate, establish rules and salary limits for payment of a non-resident's allowance to General Service staff members recruited from outside the local area."

9. Pursuant to the resolution of the General Assembly, Rule 31 (ST/AFS/SGB/81/Rev.2) effective from 1 January 1951, was issued (in part) as follows:

> "(*a*) Whenever the Secretary-General decides that salary rates within the General Service category at an official duty station are not sufficiently high to permit recruitment and retention of qualified staff members from other countries, a non-resident's allowance shall be paid, in accordance with the terms of this Rule, to staff members in that category who have been recruited from outside the country of their official duty station or whose residential status at the time of their original appointment is considered by the Secretary-General to warrant such payment. In no case will the allowance be paid to a staff member serving in the country of his nationality."

10. On 29 January 1952, Chapter 3 of the Geneva Personnel Manual was promulgated (Geneva/PM/3). It is stated therein that "it takes the place, for the European Office, of Chapter 3 of the Headquarters Personnel Manual, and it cancels and supersedes the following Information Circulars (IC/GEN-) 26, 31, 33, 53, 70, 93, 94, 100, 117, 119, 120, 162, 190, 198, 265, 313, 326." Staff Rule 52 (identical with 52 of SGB/81/Rev.2/Geneva) which deals with locally recruited personnel is as follows:

"(*a*) Except as provided in paragraphs (b) and (c), staff members in the General Service Category shall be considered as local recruits and shall not be eligible for:

(i) Travel subsistence allowance for installation purposes;
(ii) Rental allowance;
(iii) Rental subsidy (unless qualified under Rule 34 by virtue of military service);
(iv) Non-resident's allowance;
(v) Education grant;
(vi) Home leave;
(vii) Travel expenses for themselves or their dependents at the time of separation; or
(viii) Removal expenses at the time of separation;

(ix) Repatriation grant.

(b) Staff members in the general service category who have been recruited from outside the area of their duty station and brought to that station at United Nations expense, or who were appointed before 1 January 1951 and whose entitlement to one or more of the allowances or benefits specified in paragraph (a) has been established by the Secretary-General, shall receive the allowances or benefits to which they are entitled under the relevant staff rules."

11. It is clear from the foregoing extract from the Staff Rules that since the Applicant was not recruited from outside the area of his duty station and brought to that station at United Nations expense and since the Applicant's entitlement to any of the benefits specified in para. (a) of the Rule has not been established by the Secretary-General, the Applicant cannot claim non-resident's allowance on this basis.

12. But the case does not rest here. Rule 52 in document Geneva/PM/3 quoted above contains Interpretation and Conditions as follows:

"At Geneva, a staff member shall be considered a local recruit if he either:

"(*a*) Has or has acquired Swiss nationality (whether or not he has a second nationality);

"(*b*) Has at the time of recruitment lived in the Geneva area for three years, the Geneva area being defined as Swiss romande and the area of France within reasonable commuting distance of Geneva (in general this will mean within 25 km of Geneva).

"The Personnel Division will be responsible for determining, before appointment, whether a staff member is to be treated as a local recruit."

13. Both parties agree that the Applicant's claim to the allowances is governed by paragraph (b) of the Interpretation and Conditions mentioned *supra*. While the Respondent asserts that the Applicant had at the time of recruitment lived in the Geneva area for three years and that he should be treated as a local recruit, the Applicant denies that he had lived in the Geneva area for three years within the meaning of the rule and asserts his claim to allowances mentioned in Rule 52.

14. Since the point for determination raises a mixed question of law and fact, details regarding the residence of the Applicant become relevant. The Applicant, a Polish national, was taken prisoner of war by Germany in 1939. He escaped to Switzerland and was there interned on 18 October 1941. From 18 October 1941 to 14 November 1946, the Applicant was under the control of the Swiss Internment Commission with the status of military internee. From 14 November 1946 to 24 December 1947, he had status of civilian internee. On 24 December 1947 the internment order of 18 October 1941 was rescinded by the Swiss authorities (document No. 22).

15. During the period, the Applicant contracted a marriage with a Swiss national and obtained a degree from a Swiss university. On 1 May 1945, he was appointed by the Polish Red Cross to work with the Swiss Committee for Medical Aid to Poland, which appointment he held until 30 June 1949.

16. Two other circumstances have to be noted before the Tribunal proceeds to draw its conclusions. The Federal Department of Justice and Police, Switzerland, in its reply dated 26 April 1952 to a query from the Respondent, stated that "as soon as the armistice was signed, the civil and military authorities organized more than ten repatriation parties to enable Polish civilian and military internees to return either to France or to their homeland.... It may therefore be stated that Mr. Stepczynski could, as early as the middle of 1945, have returned to his own country or to proceed to some other country for which he had an entry permit. From the Swiss point of view there was nothing to stop his departure after the armistice" (Annex I to the Report of the Appeals Board — same as document No. 12 in French text submitted).

17. There was added to Order No. 337 a, dated 27 June 1945 (Annex II to the Report of the Appeals Board — same as document No. 18 in French text submitted) an additional instruction by the General Officer Commanding the Polish Army in the following terms:

"(*a*) Soldiers should not be prevented from opting for one of these alternatives;

"(*b*) Soldiers should be informed that the best solution for each would be to await orders on the subject from those placed in authority over him."

18. It is contended by the Respondent that the term "has lived" used in the Interpretation and Conditions is different from the term "resided" previously used in a similar rule by the League of Nations and the change in the terminology should be given due weight in considering the meaning to be attached to the expression. All the circumstances such as his living in Geneva, getting married, taking a university degree, taking an employment, coupled with the freedom to leave Switzerland that the Applicant had from the middle of 1945 tend to the natural conclusion that the Applicant had lived in Geneva during the relevant period.

19. Though the parties were disputing before the Tribunal whether the Applicant's presence in Geneva as a military internee and then as a civilian internee would amount to his living in the Geneva area within the meaning of paragraph (b) of the Interpretation and Conditions of Staff Rule 52, it was not realized that from the moment the applicant entered Switzerland as an escaped prisoner of war he was *ipso facto* free under The Hague Convention (No. V) respecting the Rights and

Duties of Neutral Powers and Persons in case of War on Land, Article 13 (1907).

20. Oppenheim's *International Law,* by Lauterpacht, says (paragraph 337, at page 719, in Vol. II of the 7th Edition, 1951):

> "Neutral territory is an asylum to prisoners of war of either belligerent; they become free *ipso facto* by coming into neutral territory, whether they have escaped from a place of detention and taken refuge on neutral territory, or whether they are brought as prisoners into neutral territory by enemy troops who themselves take refuge there. This principle has been generally recognized for centuries."

21. It would appear that the legal status of an escaped prisoner of war into neutral territory was fully realized by the Swiss authorities at all times.

Thus in document No. 8, which is an office note prepared by the Administration after discussion with the Swiss authorities, it is stated:

> "Even as a military internee Mr. Stepczynski was completely free to apply for permission to leave Switzerland, which according to Geneva authorities was never refused."

22. The conditions imposed upon the Applicant therefore were in the nature of restrictions on grounds of public security in a neutral territory.

23. In view of the Applicant's status from the time he entered Switzerland in 1941, and his continued stay in the Geneva area until the date of his employment with the United Nations, the Tribunal finds that the Applicant lived in the Geneva area for three years as contemplated under paragraph (b) of the Interpretation and Conditions of Staff Rule 52.

24. The Tribunal therefore rejects the claim.

(*Signatures*)

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| CROOK | Sture PETRÉN | R. VENKATARAMAN |
| *Vice-President and Acting President* | *Vice-President* | *Member* |

Mani SANASEN
*Executive Secretary*

*Geneva, 1 September 1956*