

proceedings and having taken part in the consideration and drafting of the judgement (which I would have signed with the other members of the Tribunal).

(Signature)

CROOK

New York, 26 October 1968.

Judgement No. 125

(Original: French)

Case No. 123:

Ho (Change of
visa status)

Against: The Secretary-General
of the United Nations

Request for the reinstatement of entitlement to home leave of a staff member who lost it by acquiring permanent resident status in the host country.

Request for oral proceedings.—Request rejected, the circumstances of the case not warranting such proceedings.

Principal request.—Staff Regulation 5.3, Staff Rules 105.3 and 104.7.—The criterion applied by the Administration in refusing to grant the Applicant his home leave entitlement was correct.—It would be an anomaly to grant home leave to a staff member who has become a permanent resident of the host country.—In order to determine whether home leave entitlement exists, it is necessary to consider the staff member's legal status at the time when that entitlement should have been exercised.—The behaviour of the Administration may have led the Applicant to believe that he was entitled to take home leave once more.—The Respondent must reimburse the expenditure incurred by the Applicant on that account.—Award to the Applicant of \$200 for that purpose.

Request for the removal of an alleged illegal condition attached to his career service.—The Tribunal cannot take cognizance of the matter in the absence of a specific administrative decision against which an appeal has been made.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Héctor Gros Espiell;
Mr. Louis Ignacio-Pinto;

Whereas, on 30 April 1968, Cheng-Hao Ho, a staff member of the United Nations, filed an application requesting the Tribunal:

“To rule that the action of the Respondent depriving the Applicant of his right to home leave, while he was still the holder of a G-4 visa, and attaching an illegal condition to the Applicant's career service on the ground of his permanent residence status was illegal, and to order the reinstatement of the Applicant's entitlement to his 1967 scheduled home leave and the removal of the illegal condition attached to his career service.”;

Whereas the Respondent filed his answer on 22 July 1968;

Whereas, on 20 August and 8 October 1968, the Applicant filed written observations in which he requested that oral proceedings be held and that compensa-

tion to the amount of \$200 be awarded him "for the expenses incurred for the preparation of home leave which was arbitrarily suspended";

Whereas, on 23 September 1968, the Executive Secretary of the Tribunal, on the instructions of the President, informed the Applicant that it would not be possible to hold oral proceedings at the forthcoming session of the Tribunal but that the Tribunal would be seized of his request in order that it might decide on whether to hold such proceedings at a later stage;

Whereas the Applicant submitted additional statements on 6 and 7 October 1968;

Whereas, on 17 October 1968, the Applicant submitted additional information at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, a Chinese national, was recruited in New York by the United Nations on 29 January 1951 as a Junior Security Officer at the G-4 level. On 1 March 1955 he received a permanent appointment and was promoted to the G-5 level, acquiring thereby the benefits associated with international recruitment, including home leave entitlement. On 8 December 1966 the Applicant, who held a G-4 (non-immigrant) visa, requested from the Office of Personnel permission to apply for a change of his visa status from G-4 to permanent resident. His request was granted. On 3 March 1967 he asked for authorization to sign the waiver of privileges and immunities required under United States law and, by a memorandum dated 8 March 1967, the Acting Chief of Staff Services, Office of Personnel, replied as follows:

"This is to inform you, in answer to your request, that the Secretary-General authorizes you to sign the waiver of privileges and immunities as provided in the United States Immigration and Nationality Act of 1952. It is understood that this waiver does not constitute a limitation of the immunities relating to your official acts as a staff member of the United Nations.

"In this connection your attention is again directed to the policy the Secretary-General intends to follow with respect to the administrative consequences of the signature by staff members of the waiver, as announced in Information Circular ST/AFS/SER.A/238 and Secretary-General's Bulletin ST/AFS/SGB/94/Rev.2, both of 19 January 1954.

"It is important that you inform your Personnel Officer of the date on which you actually sign the waiver.

"In case you decide not to sign the waiver and are thus converted to international organization visa status (G-4), you are reminded of your obligation to notify immediately the Office of Personnel of this fact in writing."

On 15 June 1967, the Applicant informed the Administrative Officer, Office of General Services, that he wished to take his home leave from 21 September through 31 October 1967. On 31 August 1967, the Personnel Officer for the Office of General Services reminded the Applicant that he had to inform the Administration of the date on which he had signed the waiver. In reply, the Applicant sent to the Personnel Officer, on 7 September 1967, a memorandum stating *inter alia*:

"The waiver submitted will not become effective until the status is actually adjusted. My application for adjusting my status is still being considered by the United States Immigration Office. I shall let you know as soon as the result is received."

On 8 September 1967, the Personnel Officer wrote again to the Applicant, insisting on being informed of the exact date on which the waiver had been signed and giving him notice that all benefits accruing to him as an international recruit ceased immediately as a consequence of his having signed the waiver. By a memorandum dated 14 September 1967, the Applicant requested the Personnel Officer to reconsider the decision to cease all benefits accrued to him as an international recruit, pointing out, *inter alia*, that his plan to take home leave from 21 September through 31 October 1967 had been approved by his supervisor and that he had made travel arrangements accordingly. On 27 October 1967, the Applicant addressed the following memorandum to the Personnel Officer:

"In accordance with ST/AFS/SER.A/238 of 19 January 1954, I would like to inform you that the application of adjusting my status from G-4 to permanent resident, which was authorized by the Secretary-General, was approved by the United States Immigration and Naturalization Service, effective on 20 October 1967. I am hereby to request that all benefits accrued to me as an international recruit be ceased with the exception of my 1967 home leave entitlement.

"With regard to my 1967 home leave, it was originally scheduled from 20 September thru 31 October 1967, and it was unexpectedly interrupted. Upon instruction of Mr. Joseph Devlin, Administrative Officer, on 17th of this month, I have again obtained the approval of my supervisor to re-schedule my home leave from 20 December thru 10 January 1968. All required visas are also in process.

"According to Rule 105.3 of the Staff Rules, home leave shall be granted to the eligible staff member once in every two years of qualifying service. I acquired my home leave entitlement on 15 March 1955 as a result of re-classification to G-5 grade. From March 1955 up to October 1967, it was twelve and a half years, during which I was granted five home leaves on the following dates:

"1. 1 May 1957

"2. 27 June 1959

"3. 12 May 1961

"4. 3 January 1963

"5. 9 June 1966 (postponed from 1965 due to the exigencies of service).

"It is, therefore, requested that my 1967 home leave entitlement, which was accrued to me from the past two years of qualifying service, not be affected as the result of changing my status."

By a memorandum of 6 November 1967 the Personnel Officer transmitted to the Applicant a copy of a personnel action establishing the change from G-4 visa to permanent residence status and discontinuance of international benefits, effective on 20 October 1967, and informed him that it had been decided that his entitlement to home leave no longer existed in view of the change in his visa status; the Personnel Officer added:

"You have in the past expressed great concern for promotion to the Professional category which resulted in several promotion recourses. In this connexion, I wish to draw your attention to the policy followed by the Organization that General Service staff members on Permanent Resident visa are not considered eligible for promotion to the Professional category

unless they give a written assurance they will convert to a G-4 visa. The foregoing should not imply that the possibility of such a promotion exists at the present time and that only your change of visa may preclude it; it is just a reminder of possible consequences resulting from the change of your visa status.”

On 16 November 1967 the Applicant wrote to the Chief of Staff Services, Office of Personnel, requesting that the decision of the Personnel Officer be reviewed. The Chief of Staff Services replied by the following memorandum, dated 7 December 1967:

“1. In reply to your memorandum of 16 November 1967, I wish to confirm the points conveyed to you by Mr. Trisciuzzi [the Personnel Officer] in his memorandum of 6 November 1967 that you have lost entitlements to all international benefits, including home leave, because you have acquired permanent residence status, effective 20 October 1967. Home leave is conferred in the interests of the Organization, which must be determined at the time of proposed exercise. The official purposes of such leave ceased with your acquisition of permanent residence.

“2. Although your other observation does not present any practical issue at this time, you should take note that it would be inconsistent with the decisions of the General Assembly for you to be promoted to the professional category while continuing in permanent residence status.

“ . . . ”

On 11 December 1967, the Applicant requested the Secretary-General to review the above decision of the Chief of Staff Services. In a reply dated 4 January 1968, the Acting Director of Personnel stated:

“1. I wish to refer to your memorandum dated 11 December 1967 addressed to the Secretary-General, concerning the discontinuance of your entitlement to home leave upon obtaining a Permanent Resident visa in the United States.

“2. On behalf of the Secretary-General, I have reviewed your appeal but have found no grounds to recommend that he change the decision whereby your entitlement to home leave was discontinued.

“3. In your memorandum you also raised some questions concerning the possibilities of your promotion to the Professional category. Since this matter does not present any practical issue at this time, I do not consider that there is any administrative decision to be reviewed.”

The Applicant having filed an appeal with the Joint Appeals Board, the Board submitted its report on 18 March 1968. The concluding section of the report read as follows:

“Conclusions and recommendations

“30. The appellant has voluntarily relinquished his international recruit status by establishing permanent residence in the country of his duty station. It was not disputed that all allowances and benefits associated with international recruitment ceased upon the change of his visa status. The first part of the appeal was, in effect, solely related to the appellant’s alleged loss of entitlement to home leave for 1967 during the period when he remained on G-4 visa. The Board unanimously decides to deny the appellant’s request for ‘reinstatement’ of that entitlement on the grounds that the appellant had renounced the claim for home leave by virtue of his application for

permanent residence in a country other than that of his home leave and that continued exercise of that entitlement after the establishment of such permanent residence would be contrary to the basic purpose of home leave. However, in view of the fact that the appellant had been permitted by the Administration to proceed with arrangements for the home leave prior to his acquisition of the permanent residence status, the Board deems it equitable to recommend to the Secretary-General that the appellant be allowed to submit a claim of reimbursement for such expenses as he may have incurred in connexion with arrangements for the home leave, to be processed as if the claim were made under a regular Travel Authorization which had been issued and then cancelled for official reasons.

“31. With regard to the second part of the appeal, concerning the question of appellant’s possibilities of promotion as they might be affected by the change of visa status, the Board declines to review the matter for the reason that since no administrative decision was involved, it did not present an appealable action under Staff Regulation 11.1.”

On 1 April 1968, the Director of Policy Co-ordination in charge of the Office of Personnel informed the Applicant that the Secretary-General had decided to maintain his decision denying the Applicant home leave travel after 20 October 1967, the date on which the change of the Applicant’s residence status had taken effect; that he had decided that no further action be taken on the question of the Applicant’s possibilities of promotion as they might be affected by the change of visa status; and that he had accepted the Board’s recommendation for allowing the Applicant to submit a claim for reimbursement for such expenses as he might have incurred in connexion with arrangements for the home leave. On 30 April 1968, the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s obligations prescribed in Information Circular ST/AFS/SER.A/238 and in Secretary-General’s Bulletin ST/AFS/SGB/94/Rev.2 were faithfully observed. There was no ground to deprive him of his 1967 scheduled home leave before his status was actually changed.

2. By invoking “intention” as a basis to deprive a staff member of his statutory rights, the Administration has set a very dangerous precedent.

3. The waiver was simply a form used to apply for a change of visa status; the change occurred when the application was approved.

4. It seems to be inequitable that while the Board accepted the Administration’s argument based on Information Circular ST/AFS/SER.A/238 on the significance of a waiver form, it refused to grant the Applicant a final home leave provided under the same circular.

5. The Applicant’s inability to proceed on home leave in 1967 was attributable to the Personnel Officer’s arbitrary action and the extensive delay occasioned by internal consultation on the new ruling permitting the Applicant to retain his entitlement to home leave.

6. The “reminder of possible consequences resulting from the change of [his] visa status” addressed to the Applicant with regard to his possibilities of promotion was superfluous and illegal, and in fact ruled out the Applicant’s opportunities for promotion.

Whereas the Respondent’s principal contentions are:

1. An entitlement to home leave acquired by a staff member under Staff Rule 105.3 may be lost under Rule 104.7 at any time prior to its exercise if the staff member changes his status to become a permanent resident of a country other than that of his nationality. This interpretation is in accord with the spirit of the Staff Rules since the principle underlying home leave is that it is for the benefit of the Organization in that it permits a staff member to renew his national contacts. The above interpretation is also fully consistent with the views of the General Assembly on the subject of change of residential status.

2. Inability of the Applicant to take home leave prior to the change of his residential status is not attributable to failure by the Secretary-General to observe the terms of his appointment. The decision of 8 September 1967 denying the Applicant's request for home leave was in accordance with Information Circular ST/AFS/SER.A/238 and Secretary-General's Bulletin ST/AFS/SGB/94/Rev.2, and could be considered as arbitrary only if it were the case that no reasonable relationship exists between the loss of entitlement to home leave and the execution of a waiver.

3. No administrative decision has been taken denying the Applicant a promotion to the professional category on the ground of his status as a permanent resident.

The Tribunal, having deliberated from 17 October to 1 November 1968, now pronounces the following judgement:

I. The Applicant has submitted a request for oral proceedings to the Tribunal. The Tribunal rejects this request, considering that the circumstances of the case do not warrant such proceedings.

II. The Applicant requests the Tribunal "to rule that the action of the Respondent depriving the Applicant of his right to home leave, while he was still the holder of a G-4 visa, and attaching an illegal condition to the Applicant's career service on the ground of his permanent residence status was illegal and to order the reinstatement of the Applicant's entitlement to his 1967 scheduled home leave and the removal of the illegal condition attached to his career service."

The Tribunal notes that the Applicant, who held a G-4 (non-immigrant) visa and had been promoted to the G-5 level on 1 March 1955, acquiring as from that date all the benefits associated with international recruitment, including home leave entitlement, requested from the Office of Personnel on 8 December 1966 permission to apply for a change of his visa status from G-4 to permanent resident. On 3 March 1967 he asked for authorization to sign the waiver of privileges and immunities required under United States law. On that occasion, the Acting Chief of Staff Services, Office of Personnel, sent him a memorandum dated 8 March 1967 containing the following passage: "In this connexion your attention is again directed to the policy the Secretary-General intends to follow with respect to the administrative consequences of the signature by staff members of the waiver, as announced in Information Circular ST/AFS/SER.A/238 and Secretary-General's Bulletin ST/AFS/SGB/94/Rev.2, both of 19 January 1954." The Personnel Officer gave the Applicant a similar warning on 8 September 1967.

On 15 June 1967, the Applicant stated that he wished to take his home leave from 21 September through 31 October 1967.

On 27 October 1967, the Applicant notified the Personnel Officer that his change of visa status had been approved, effective on 20 October 1967, and that he waived all the benefits associated with international recruitment, with the exception of his 1967 home leave entitlement.

On 6 November 1967 the Personnel Officer informed the Applicant that in view of the change in his visa status he was no longer entitled to home leave. The Personnel Officer also stated that according to the policy followed by the Organization "General Service staff members on Permanent visa are not considered eligible for promotion to the Professional category unless they give a written assurance that they will convert to a G-4 visa".

III. Home leave entitlement is provided for in Staff Regulation 5.3, which lays down the following general principle: "Eligible staff members shall be granted home leave once in every two years." This principle is developed in Staff Rule 105.3, which provides that "Staff members, other than those considered as local recruits under Rule 104.6 or excluded from home leave under Rule 104.7, who are serving outside their home country and who are otherwise eligible shall be entitled once in every two years of qualifying service to visit their home country at United Nations expense for the purpose of spending in that country a substantial period of annual leave. Leave taken for this purpose under the terms and conditions set forth in this rule shall hereinafter be referred to as home leave."

Rule 104.7, to which the aforementioned rule refers, states, in the part relating to staff members who lose their home leave entitlement: "A staff member who has changed his residential status in such a way that he may, in the opinion of the Secretary-General, be deemed to be a permanent resident of any country other than that of his nationality may lose entitlement to non-resident's allowance, home leave, education grant, repatriation grant and payment of travel expenses upon separation for himself and his dependants and removal of household effects, based upon place of home leave, if the Secretary-General considers that the continuation of such entitlement would be contrary to the purposes for which the allowance or benefit was created."

IV. In accordance with Staff Rule 104.7 and the indications contained in the memoranda of 8 March and 8 September 1967, the Applicant, by acquiring permanent resident status, lost his home leave entitlement as from 20 October 1967.

The Tribunal considers that the criterion applied by the Administration in refusing to grant the Applicant his home leave entitlement was correct. The decision taken by the Acting Director of Personnel on behalf of the Secretary-General on 4 January 1968 constitutes a legally unassailable application of Staff Rule 104.7, which authorizes a decision that "the continuation of such entitlement [including that to home leave] would be contrary to the purposes for which the allowance or benefit was created". The Tribunal considers that, generally speaking, to authorize a staff member to benefit from home leave when as a permanent resident he is considered as having been recruited locally would be an anomaly contrary to the spirit—that is, the meaning and purpose—of home leave as established and regulated by the Staff Regulations and Rules.

In order to determine whether all the conditions laid down in the Staff Rules (Rules 104.7 and 105.3) are fulfilled and whether home leave entitlement exists, it is necessary to consider the staff member's legal status at the time when that entitlement should have been exercised.

Hence, there cannot be a question of home leave entitlement acquired previously nor of a possible restoration of that entitlement: even assuming that a staff member has fulfilled all the other conditions required for the possible existence of that entitlement, the entitlement can only exist in law if the staff member, at the time when he is to begin exercising that entitlement, meets all the requirements laid down in the Staff Rules, particularly the rule which provides that he must have been recruited internationally.

V. The Applicant states that on 15 June 1967 he asked to take his home leave from 21 September through 31 October 1967. The Tribunal notes that if the leave had been granted immediately, the Applicant would have been entitled to take it: the change of visa status took effect on 20 October 1967, and that is the date which the Personnel Officer finally chose as a basis for stating that the Applicant was no longer entitled to home leave.

It should, however, be noted that on 3 March 1967 the Applicant had asked for authorization to sign the waiver of privileges and immunities. The Respondent was therefore aware that the Applicant wished to change his visa status and could legitimately consider that the granting of home leave was not justified at the time when the Applicant, on his own initiative, agreed to relinquish the status of an international recruit.

Nevertheless, the Applicant's request, submitted on 15 June 1967, met with no objection on the part of the Administration, which approved it. It was not until 8 September 1967 that the Personnel Officer informed the Applicant in writing that the benefits accruing to him as an international recruit ceased as a consequence of his having signed the waiver of privileges and immunities.

Until that date, the behaviour of the Administration may have led the Applicant to believe that he was entitled to take home leave once more. The expenditure incurred by him in that connexion must therefore be reimbursed by the Respondent.

VI. In his observations of 8 October 1968, the Applicant requested \$200 compensation "for the expenses incurred for the preparation of home leave which was arbitrarily suspended"; on 17 October 1968, at the Tribunal's request, he explained that that sum would cover "the expenses in connection with the preparation for the suspended home leave, such as the renewal of passports, the arrangements for accommodations and so on, including \$100 spent by his mother to plan her trip from central China to South Coast in an attempt to meet the Applicant in Hong Kong".

The Tribunal considers that payment of this sum is justified, since it corresponds to the need to reimburse expenses actually incurred by the Applicant when he expected to exercise an entitlement which he did in fact possess prior to 20 October 1967 and which he could have exercised if the Administration had acted with the promptness normally expected of it.

VII. The Applicant states in his plea that the contested decision attached an illegal condition to his career service.

If this statement refers to the tenor of the Personnel Officer's memorandum dated 6 November 1967, the Tribunal considers that the general principle referred to in that memorandum is not applied in any specific administrative act which could have affected the rights of the Applicant. In those circumstances, the Tribunal cannot take a decision on the matter, since there has been no appeal against an administrative decision in conformity with Staff Regulation 11.1.

VIII. For these reasons, the Tribunal decides:

- (i) That the Respondent must pay the Applicant \$200 in compensation for the expenses incurred in connexion with home leave;
- (ii) That the other requests are rejected.

(Signatures)

Suzanne BASTID
President

H. GROS ESPIELL
Member

L. IGNACIO-PINTO
Member

Jean HARDY
Executive Secretary

New York, 1 November 1968

Judgement No. 126

(Original: English)

Case No. 121:
Salvinelli

Against: The United Nations
Joint Staff Pension Board

Request for the rescission of a decision of the Joint Staff Pension Board whereby the children's benefits to the children of a former FAO staff member were to be paid to their guardian.

Request for the production of the full text of the contested decision.—Request rejected, this measure not being material to the case.

Principal request.—Contention that the amount of the children's benefits should be remitted to the Applicant on the ground that the Applicant is the natural guardian of the children.—Plea rejected by reason of an order of Court placing the children under the care of the legal guardian.—Plea based on the definition of dependants.—Plea rejected by reason of the same order of Court.—Contention that the said order was invalid.—The legality of the order of Court cannot be raised before the Tribunal.—Contention that the said order of Court was contested by the Applicant.—Absence of any evidence that the said order was amended or that any application was made or is pending.

The request is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; the Lord Crook, Vice-President; Mr. Zenon Rossides;

Whereas, on 20 September 1967, Piera Salvinelli, a former staff member of the Food and Agriculture Organization of the United Nations, hereinafter called FAO, filed an application against a decision of the United Nations Joint Staff Pension Board;

Whereas the application did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;