(Signatures)

Suzanne BASTID
President

Samar SEN
Alternate member

Endre USTOR
Vice-President

Jean HARDY
Executive Secretary

Francisco A. FORTEZA
Vice-President

Geneva, 13 May 1981

Judgement No. 271

(Original: English)

Case No. 251: Kennedy *Against:* **The Secretary-General of the United Nations**

Request for revision of Judgement No. 265.

Conditions for admissibility of an application for revision.—Statement on which the request relies.—That statement does not bring out any new facts which might decisively affect the judgement of the Tribunal.—Request not receivable.

Comments by the Tribunal on some of the Applicant's contentions.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Samar Sen; Mr. Arnold Kean;

Whereas, on 3 February 1981, the Applicant filed an application in which she requested under article 12 of the Statute of the Tribunal a revision of Judgement No. 265 rendered in her case on 19 November 1980;

Whereas the application was based on a "written deposition" by Dr. J. B. Mathieson dated 15 October 1980 which read:

"TO WHOM IT MAY CONCERN:

"As I have been informed that the question of Miss Iris Kennedy's termination has come before the Administrative Tribunal of the United Nations, I wish to make the following observations. With regard to the functions of Commonwealth Director of Health for Western Australia, the post is essentially an administrative one. The Department provides a service in connection with the Immigration Department for

the purposes of vaccination, quarantine, infectious diseases and other immigration requirements. After all these years it comes as a surprise to learn that Miss Kennedy has lost her job because of illness and the complications in her family life in 1972. It seemed appropriate to me, when contacted by Dr. Irwin, to refer Miss Kennedy to my personal physician, Dr. Cohen, but I have to concede that he is not a specialist in pulmonary disorders. Judging from the cables received from Dr. Irwin in 1972, I felt that it was incumbent upon me only to ascertain Miss Kennedy's fitness to travel and I delegated this responsibility to Dr. Cohen. After this I was no longer involved except for keeping Dr. Irwin posted by cable. If there had been any inkling that her career might be placed in jeopardy, an official Medical Board could have been arranged, but no such request was made.

"Dr. Timothy Welborn, who is well-known to me, was in touch with me after Miss Kennedy consulted him and I certainly did not object to her doing so. Welborn also had discussions with Dr. Cohen, but adhered to his opinion that Miss Kennedy was, in fact, not fit to travel—a view also held by Dr. Max Canning. As it transpired, Dr. Welborn's judgement was vindicated when he received a letter from her New York specialist, Dr. Barach, who is renowned in medical circles as a foremost world authority in this field. His text book 'Treatment Manual for Pulmonary Emphysema' is widely used in medical schools, including Western Australia. In the event, I personally thought Miss Kennedy was herself the best judge of her ability to travel. When she consulted Dr. Welborn, I certainly felt that it was her prerogative to have a physician of her own choice. Furthermore, her New York specialist having been contacted, it was agreed that she would be wise to remain in Perth for the time being. Since the consequences have been so disastrous for Miss Kennedy, I regret that more formality was not observed. Owing to these unfortunate circumstances I have learned that Miss Kennedy has not been employed for the past 8 years. From our point of view, the consultations were merely to determine when the patient would be fit to travel and, in this instance, the communication between doctors was mainly by telephone.

"It is regrettable that the UN Medical Director assumed that an official enquiry took place. This was not so. The circumstances in which Miss Kennedy was placed at that time were very trying indeed. The family is a very old and respected one in the community and I regret that the matter was not handled with more understanding. Owing to the extremely extenuating circumstances which existed, of which I was ignorant at the time, I believe special consideration should be exercised in reaching a final decision at the hearing. Her brother is a very highly decorated naval officer and is permanently and totally disabled owing to the war and since her mother's death has become her responsibility.

"I trust that this explanation will serve to illustrate that, at this vast distance, it was not always easy to interpret the requirements of the United Nations Medical Director.

"(J. Bryan Mathieson)
"Commonwealth Director of Health
"*Western Australia*"

Whereas the Applicant requested oral proceedings on 3 February 1981;

Whereas the Respondent filed his answer on 25 March 1981;

Whereas the presiding member ruled on 16 April 1981 that no oral proceedings would be held in the case;

Whereas the facts in the case were set out in Judgement No. 265;

Whereas the Applicant's principal contentions are:

1. Dr. Mathieson's deposition contains new elements and their cumulative effect is to establish without doubt that medical assessment of the Applicant's fitness to travel and return to New York was erroneously made by the Medical Director and in the event she was justified, by her inability to travel, in not returning to her duties, thus negating any presumption of abandonment of post.

2. The Tribunal failed to admit, or give reasons for failing to admit, the Applicant's plea to have the evidence of Dr. Barach recorded. The Applicant intended thereby to establish that Dr. Barach was never consulted by Dr. Irwin, and that Dr. Mathieson's opinion on the Applicant's health was not dependable.

3. Having in effect denied the Applicant's request for recording Dr. Barach's evidence, the Tribunal, in accepting the finding of the Joint Appeals Board that Dr. Irwin had consulted Dr. Barach, was in breach of due process.

4. The Tribunal further erred in its reasoning when it determined that there was a failure on the part of Dr. Barach to write to the Medical Director about the Applicant's state of health, when requested by her to do so early in October 1972.

Whereas the Respondent's principal contentions are:

1. The application is not receivable as the alleged "new fact" was apparently known to the Applicant before the date of the judgement and in any event the application was not submitted within the prescribed time-limit.

2. Should the Tribunal nevertheless decide to examine the application on its merits, the application should be rejected:

(*a*) Dr. Mathieson's 1980 deposition shows glaring contradictions and discrepancies when compared with the statements and opinions he communicated in 1972-1973 to the Medical Director on the same subject matters, as recorded in the documents that were before the Tribunal. To the extent that his recent statements and opinions differ from those he expressed in 1972-1973, as recorded in the relevant documents, they should be disregarded;

(*b*) The facts described in Dr. Mathieson's 1980 deposition are not "newly discovered". They were previously known to the Tribunal and the judgement was made after taking them into consideration;

(*c*) Even assuming that some elements of the deposition could be considered as new facts, they are not of decisive significance justifying a revision of the Tribunal's judgement.

The Tribunal, having deliberated from 28 April to 13 May 1981, now pronounces the following judgement:

I. Under article 12 of the Statute of the Tribunal, an application for revision of a judgement has to satisfy three conditions before it can be admitted. First, it has to be based on the "discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence". Secondly, the application must be made "within thirty days of the discovery of the fact"; and thirdly, it must also be filed "within one year of the date of the judgement". The judgement of the Tribunal for which revision is now sought was given on 19 November

1980 and the application for its revision was made on 3 February 1981; thus the third condition for admissibility has been met.

As regards "the discovery of some fact of such a nature as to be a decisive factor", the Applicant relies wholly on the statement of Dr. Mathieson dated 15 October 1980. The Tribunal considers that the tenor and the timing of this statement, as well as the circumstances in which it has been made, repeat a pattern of medical evidence submitted by the Applicant; medical certificates of some length and generality have been produced long after the events and not infrequently they simply attempt to meet some arguments or conclusions advanced by the Respondent or the Joint Appeals Board or the Tribunal. These documents detract therefore from the naturalness and spontaneity of best evidence.

Apart from this deficiency, the present statement by Dr. Mathieson contradicts many of his earlier statements and messages—as indeed has been pointed out by the Respondent—and fortifies the Tribunal's conclusion that the procedure followed in the determination of the Applicant's state of health has frequently been confused and unsatisfactory. In its Judgement No. 265 of 19 November 1980, the Tribunal stated: "The conclusion is inescapable that either because of the nature of the Applicant's ailment and treatment or because of the difficulties of long-distance correspondence and consultation, no proper assessment of the Applicant's state of health and fitness to travel was made". The present statement of Dr. Mathieson further confirms this conclusion and does not in any manner bring out new facts which might decisively affect the judgement of the Tribunal. Such details as this statement contains do not answer even simple questions about the nature of treatment and medical advice the Applicant might have received, say between the date when Dr. Cohen last saw her and the date when Dr. Welborn attended her for the first time. The Applicant appears to have changed her personal physician from time to time, her ailment and treatment often followed bewilderingly disjointed courses, and her faith and reliance on any particular doctor varied frequently. Thus, in spite of past complaints by and against Dr. Mathieson, the Applicant now leans heavily on Dr. Mathieson's statement issued about 8 years after the events. Furthermore, this document has obviously been solicited and contains views without any supporting material. Finally, it refers to issues not relevant to the consideration of the case before the Tribunal.

Dr. Mathieson's statement on 15 October 1980 contains no relevant and significant facts about the Applicant's ailment and treatment in the latter half of 1972 and in any event the Tribunal cannot, on medical matters, substitute its judgement for the findings of the competent medical authorities of the United Nations. The Tribunal has already commented on the unsatisfactory procedure followed in determining the medical condition of the Applicant and has concluded that the Applicant could have set in motion the procedure prescribed in Staff Rule 106.2 (*a*)(viii), that she failed to do so, and that the Respondent exercised his discretion properly in all the circumstances of the case in deciding to terminate her services.

Inasmuch as the Applicant has not established any new facts, it is unnecessary to consider if the application is time-barred under article 12 of the Statute which requires an application for revision of a judgement to be made within thirty days of the discovery of a new fact. This time-limit is mandatory and the Tribunal has no power to extend it. Besides, the Tribunal notes that no sufficient justification has been given for the delay in submitting the application; Dr. Mathieson's statement is dated 15 October 1980 while the judgement of the Tribunal was not pronounced until 19 November 1980, and the application for revision was filed on 3 February 1981. Even if it is assumed that Dr.

Mathieson's statement contains new facts, as argued by the Applicant, there has been a gap of over three and a half months before it was brought to the notice of the Tribunal.

II. For all these reasons the application for revision cannot be considered to have met the requirements of article 12 of the Tribunal's Statute.

III. In spite of the non-receivability of the present application, the Tribunal wishes to comment on some of the Applicant's contentions.

The Applicant contends that the Tribunal should have recorded the evidence of Dr. Barach who was her personal physician in New York for several years, especially in view of the certificate Dr. Barach wrote on 8 June 1977. The Tribunal notes that this certificate mentions and contradicts Dr. Irwin's statement that he had, in October 1972, consulted Dr. Barach about the Applicant's condition. Dr. Irwin's note of 17 October 1972 was not discussed by the Joint Appeals Board until November 1978 and it is not at all clear how Dr. Barach came to know of it on 8 June 1977. Presumably, the Applicant who visited New York in late 1976 came to know of it and informed Dr. Barach about it. The Joint Appeals Board did not issue its report until 27 February 1979—that is more than 20 months after Dr. Barach gave his certificate—and yet there is no record to show that the Applicant brought this certificate to the attention of the Board. Furthermore, when counsel for the Applicant was requested to comment on the apparent contradiction between Dr. Irwin's statement recorded in 1972 and Dr. Barach's certificate of 1977, no explanation was given of the omission of the Applicant to file Dr. Barach's certificate before the Joint Appeals Board, or why Dr. Irwin should make an erroneous statement except on the ground of his alleged bias against the Applicant. The Applicant has levelled similar charges of bias against several other doctors attending on her at different times. At present however she relies on certificates from three doctors—Drs. Barach, Mathieson and Hodby—in support of her pleas.

The value of Dr. Barach's certificate written several years after the event must be weighed against the evidentiary merit of the note of a conversation between Dr. Barach and Dr. Irwin made in October 1972. The Joint Appeals Board "noted that the statement by the Medical Director, Dr. Irwin, that he had consulted Dr. Barach was corroborated by a contemporary note in the appellant's medical file, as testified by the present Medical Director, Dr. Gatenby". The Tribunal accepted the finding of the Board on this point and found no reason to examine either Dr. Barach or Dr. Irwin on it. The Tribunal also noted that all the attempts by the Applicant to controvert the opinions of the United Nations medical authorities have been made long after 1972, while at the time when those opinions were formed, she did not send any certificates acceptable to the Medical Director or invoke a Medical Board under Staff Rule 106.2 (*a*)(viii). In all these circumstances, any suggestion that the Tribunal's omission to record Dr. Barach's evidence might have interfered with due process has no merit.

Another contention of the Applicant regarding the Tribunal's judgement No. 265 relates to the Tribunal's opinion that Dr. Barach should have communicated his views on her health even without being asked to do so by the United Nations medical authorities. The Tribunal has not been supplied with a copy of the letter the Applicant must have written to Dr. Barach at the time she asked the Administration to seek Dr. Barach's views. In the circumstances, and given the refusal of the Respondent to entertain the Applicant's request for leave or her plea of inability to return to New York, it would have been normal and appropriate for Dr. Barach to send his assessment, even if no initiative had been taken by the United Nations medical authorities. In fact Dr. Irwin did

consult Dr. Barach and although this was denied by Dr. Barach about five years later, the Tribunal accepted the conclusion of the Joint Appeals Board that such a discussion did take place. An assessment by Dr. Barach in 1972 of the Applicant's condition would have been a natural expectation, especially in view of his concern for the Applicant's welfare as recorded in his certificate of 8 June 1977. Besides, Dr. Barach was writing to Dr. Welborn about the Applicant and it is reasonable to conclude that, assuming his anxiety about her and her health at the time, he would have made his views known to the United Nations medical authorities as well. He however took no such initiative in the matter.

IV. The application is rejected.

(Signatures)

Suzanne BASTID
President

Arnold KEAN
Member

Samar SEN
Member

Jean HARDY
Executive Secretary

Geneva, 13 May 1981

Judgement No. 272

(Original: English)

Case No. 256: Châtelain

Against: **The Secretary General of the International Civil Aviation Organization**

Request for rescission of a decision to terminate an appointment on the ground of unsatisfactory service.

It is unnecessary to decide the question whether, at the date of the contested decision, the Applicant was still on probation.—Description of the system of confidential reports established by Article IV, paragraph 12, of Part III of the Service Code and by General Secretariat Instruction 1.4.2 (Rev.4).—Consideration of the procedure followed in the Applicant's case.—Conclusion of the Tribunal that the procedure did not comply with General Secretariat Instruction 1.4.2 (Rev.4).—Denial of the Applicant's right to defend herself against the accusations made against her.—The contested decision is vitiated.—Award to the Applicant as compensation of a sum equivalent to eight months' net base salary and of her costs.—The Respondent is ordered to place a copy of the judgement in the Applicant's personal file.
