

ADMINISTRATIVE TRIBUNAL

Judgement No. 415

Case No. 439: MIZUNO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, President; Mr. Francisco A.
Forteza; Mr. Ioan Voicu;

Whereas, at the request of Jiro Mizuno, a former staff member of the Office of the United Nations High Commissioner for Refugees, hereinafter referred to as UNHCR, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit in which to file an application until 30 June, 31 July and 31 August 1987;

Whereas, on 14 August 1987, the Applicant filed an application in which he requested the Tribunal:

"II. PLEAS

7. With regard to competence and procedure, the Applicant respectfully requests the Tribunal:

To find that it is competent to hear and pass judgement on the present application, in accordance with article 2 of its Statute;

To consider the present application receivable under article 7 of its Statute.

8. On the merits:

To find that the unanimous recommendation of the Joint Appeals Board was well founded in law and in equity and was fully supported by the facts;

To adjudge and declare that the Applicant had a reasonable expectation that his fixed-term contract would be

extended;

To adjudge and declare further that the Respondent's refusal to extend Applicant's contract of employment was arbitrary and capricious and violated Applicant's rights of due process;

To order the reinstatement of the Applicant either in his former office or in an appropriate post for his qualifications and experience, pending the implementation of the Joint Appeals Board's recommendations;

To order the Respondent to compensate the Applicant for loss of earnings since his separation from service, including any increments that would have been due;

To order the Respondent to pay the Applicant a sum to be determined as compensation for the moral and material injury suffered by the Applicant as a result of his unjustified separation from service and as compensation for the undue delay in considering his case.

To order that the amount of compensation, to be set in accordance with Article 9(1) of the Statute in the event that the Secretary-General decides to pay compensation in lieu of specific performance, be fixed at three years (as of 26 November 1987) net base pay as an exceptional measure.

To order compensation in the amount of \$5,000 for legal costs."

Whereas the Respondent filed his answer on 10 December 1987;
Whereas the Applicant filed written observations on 7 March 1987;

Whereas, on 14 April 1988, the Applicant submitted additional comments and documents;

Whereas the facts in the case are as follows:

Jiro Mizuno entered the service of the United Nations on 15 July 1977. He served on two successive fixed-term appointments as an Assistant Political Affairs Officer in the Office of General Services and separated from the service of the United Nations on 14 November 1978. The Applicant was subsequently recruited by UNHCR on

27 January 1979 as a Junior Professional Officer (JPO) at the P-2, step 1 level. He served on a series of successive fixed-term appointments as an Associate Legal Officer in the Protection Division, General Legal Section at the Headquarters of the UNHCR in Geneva. On 27 July 1981, he was offered a one year fixed-term appointment as a regular UNHCR staff member at the P-2, step III level. His appointment was extended for two further fixed-term periods of one year each until 27 July 1984. On 19 July 1983 he was promoted to the P-3 level.

During 1981 and 1982, the Applicant applied on 12 November 1981 for the post of Protection Officer in the Americas Section and South Asia Section; on 7 April 1982 for the post of Legal Officer in the General Legal Section in Geneva and on 13 September 1982 for the posts of Legal Officer, Office of the Director, Protection Division in Geneva; Deputy Representative at the UNHCR Branch Office in the United Kingdom of Great Britain and Northern Ireland; and Protection Officer at the UNHCR Branch Office in Japan.

In an inter-office memorandum dated 25 February 1983, the High Commissioner circulated to the staff of his Office revised procedures and criteria for appointments, promotions and postings. In a further inter-office memorandum dated 19 July 1983, the High Commissioner announced to the staff new guidelines for the reassignment of staff in the Professional category to be applied with immediate effect. According to the guidelines, the Standard Assignment Length (SAL) applicable for officers recruited for assignment at Headquarters (Geneva) would be two years and for other staff members four years, except for those with substantial supervisory responsibilities, in which case the assignment could be extended for one year. All staff members who had exceeded the standard requirement length for their duty station were expected to write to the Chief, Career Development and Training Unit, to express their preferences as to their next assignment.

At the time these new procedures were introduced, the Applicant had been serving at the Headquarters of UNHCR for over

four years. (As a JPO from 1979 and as a regular UNHCR staff member since 1981).

On 21 September 1983 the Chief, Career Development and Training Unit, informed the Applicant by telephone that there were a number of available posts in the field that could be suitable for his next assignment. He asked the Applicant to exercise his choice among seven posts. The Applicant declined to do so on the ground that he wished to complete the work that had been currently assigned to him.

In a memorandum dated 27 September 1983, the Chief, Career Development and Training Unit, informed the Applicant that the Appointment and Promotion and Postings Board (APPB), had reviewed his name in connexion with seven posts located in Botswana, Lesotho, Somalia, Tanzania, Zambia, Turkey and Juba (Sudan). Since he had exceeded his SAL in Geneva and had not applied for any of those posts, indicating that he preferred to remain at Headquarters for some time, the APPB had instructed him to seek from the Applicant in writing, his reasons for not wishing to accept any of those posts.

Having received no reply, the Chief, Career Development and Training Unit, again wrote to the Applicant on 14 October 1983, asking him to set forth in writing his wishes concerning his next assignment. In a reply dated 14 November 1983, the Applicant informed the Chief, Career Development and Training Unit, that the main reason he had declined to choose any of those seven posts was that he wished to complete the work presently assigned to him. Nevertheless, in order "to comply with the Office's policy" he stated his willingness "to serve in the field offices ... most suitable to [his] qualifications ... in the eastern part of Asia or the North American continent".

On 18 November 1983, the Applicant applied for the post of Protection Officer in Tokyo.

On 9 December 1983, the Chief, Career Development and Training Unit wrote to the Applicant a memorandum that reads as follows:

"Thank you for your memorandum of 28 November 1983[sic]the contents of which have been noted. Your wishes for a reassignment will be borne in mind as we review vacancies and staffing needs in the months to come."

On 21 December 1983, the APPB decided that "... in view of [the Applicant's] persistent evasive answers or refusals to accept a field assignment, ... his contract should not be renewed beyond its present expiration date, i.e. 26 July 1984".

In a memorandum dated 30 January 1984, the Head, Personnel Services, informed the Applicant that the APPB had instructed him to convey to the Applicant that because of his repeated refusals to accept field posts proposed by the APPB and in view of the unacceptable arguments he had advanced in his memorandum of 14 November 1983 to the Chief, Career Development and Training Unit, the High Commissioner had approved the Board's recommendation not to extend his appointment beyond its expiration date on 26 July 1984.

In a reply dated 15 February 1984, the Applicant asked the Head, Personnel Services, to request the APPB to reconsider his case on the ground that there appeared to be a "misunderstanding of the context of [his] memorandum of 14 November 1983 in regard to [his] willingness to take up a field posting". He asserted that he was "particularly keen" to complete a specific assignment and had considered it was "in the interests of the Office" that he should indicate the areas of field posting in which he would be able to contribute most effectively to the objectives of the Organization, but "in no way was [he] refusing to be posted to the field in an area other than those for which [he] had indicated a preference".

On 24 February 1984, the Deputy Head, Personnel Services, informed the Applicant that the contents of his memorandum had been brought to the attention of the APPB at its last meeting on postings. The Board had noted "that it did not find new grounds to change its previous position concerning [the Applicant's] contractual status" and the decision not to extend his appointment would be maintained.

On 1 May 1984, the Applicant applied for two posts: one in Nairobi, the other in Islamabad.

On 4 June 1984, the Applicant wrote to the Head, Personnel Services to explain that the reason he had not accepted any of the field assignments offered to him was that his supervisor, the Director of International Protection preferred that the Applicant continue to serve at Headquarters until the end of 1984. In addition, in early 1984 the Applicant had suffered from a stomach hernia which required treatment for three months. He expressed the hope that these explanations would eliminate any misunderstandings concerning his initial refusal to serve in the field.

On 22 June 1984, the Head, Personnel Services, asked the Director of International Protection to confirm whether or not he had told the Applicant not to accept posts in the field, since "this would constitute information which should be placed before the Board, without, of course, any guarantee that even if this were to be the case, the Board would change its earlier recommendations".

In a reply dated 28 June 1984, the Director of International Protection stated:

"...

As you know I had recommended in the past a promotion for Mr. Mizuno because I considered that he was extremely helpful to the Division in its efforts to promote and strengthen refugee law in Asia. Because of the excellent contacts he has in his area and because I felt that Mr. Mizuno's contribution to the work of international protection was best used in this particular context, I had told him in 1983 that I did not wish him to go to the field at this stage as I needed him in Geneva. I had also added that I felt that at some later stage it would be in the interest of his career that he go to a field posting."

At a meeting held on 6 July 1984, the APPB discussed the contents of the new submissions by the Applicant and his supervisor, found that there were no grounds to change its previous position and decided to reaffirm its decision not to extend the Applicant's appointment beyond its expiration date. The Acting Head, Personnel

Services, notified the Applicant of this decision in a letter dated 12 July 1984.

On 19 July 1984 and 25 July 1984, the Applicant applied for the posts of Protection Officer in Karachi and Rome respectively.

At the request of the Director of International Protection, the Applicant's appointment was extended "for service reasons, exceptionally", for a further fixed-term period of three months, until 26 October 1984. The Applicant was informed that this last extension did not "modify the decision of the APPB taken at its meeting of 6 June 1984".

On 12 September 1984, the Applicant requested the Secretary-General to review the administrative decision not to extend his appointment beyond 26 July 1984 and asked that conciliatory efforts be made in accordance with staff rule 111.2(a).

On 24 October 1984 the Director, Division of Personnel Administration at United Nations Headquarters, informed the Applicant that the Secretary-General had decided to designate a Presiding Officer from the Geneva Joint Appeals Board to conduct the conciliation proceedings. In addition, he had requested the UNHCR "to favourably consider the extension of [his] contract on an interim basis pending the conciliating procedures". Later, on 18 December 1984 the Chairman of the Conciliation Panel reported to the Joint Appeals Board (JAB) his conclusion that the positions of the parties were so diametrically opposed that they excluded compromise or conciliation.

On 26 October 1984, the Applicant separated from the service of the UNHCR. On 19 November 1984, the Applicant lodged an appeal with the Joint Appeals Board.

The Board adopted its report on 18 August 1986. Its conclusions and recommendations read as follows:

"...

42. The Board formed the impression that Appellant, observing the reality of postings and exceptions, which the Board referred to in para. ... above, appeared to consider that the matter

of the field assignment was a negotiable process.

43. The Board also believes that to the extent possible personal preferences should be respected and that the consultations with the staff member before reassignment should be adequate. However, personal preferences should not override the principle of the rotation scheme, as it is clearly stated that 'UNHCR staff are subject to assignment ... to any of the activities or offices of the UNHCR' (emphasis added) [Criteria to be applied by the UNHCR Appointment and Promotion Board (APB)].

(b) Alleged discriminatory treatment against Appellant

44. ...

45. The Board makes the following comments:

- (i) having examined the present situation on the basis of the material before it, and information provided at the hearings, regarding the rotation practised at UNHCR, the Board agrees with Appellant that application of the rotation scheme to staff members whose SAL has long been overdue has been uneven and, apparently, there are a number of staff members still serving in Geneva as an exception to the policy, although they have a standing liability to undertake field assignments. The Board believes that the more exceptions there are, not only in number but also in duration of extended stay at Headquarters, the less the functioning of the rotation system can be effective, objective and equitable;
- (ii) however, as regards Appellant's request that the Board be furnished with a full list of staff members whose SAL has expired without undertaking fixed field assignments, the Board is of the opinion that under its terms of reference, the Board need not conduct a comparative examination of Appellant's experience with that of other colleagues whether Appellant has been differently treated vis-à-vis them in respect of the administration of their field postings, the Board has to concern itself with the examination of the alleged violation of Appellant's own terms of appointment. As he claimed that there were procedural irregularities in his case in reaching such a decision of non-renewal, the Board examines below the issue of procedural irregularities.

(c) Procedural irregularities

46. ...

- (i) During Autumn 1983, there were exchanges of communications between Appellant and the HCR Administration regarding his reassignment to a field post. As part of this process of written exchanges, Appellant received on 9 December 1983, a memorandum entitled 'Your reassignment', which read that '[t]hank you for your memorandum of 28 November 1983, the contents of which have been noted. Your wish for a reassignment will be borne in mind as we review vacancies and staffing needs in the months to come.'
 - (ii) On 30 January 1984, Appellant was informed by the Head, Personnel Service that '(i) in view of your repeated refusals to accept field posts proposed by the APPB, the Board has directed me to inform you that arguments you have put forward, as contained in your memorandum of 14 November 1983 ... are not acceptable and that your present contract will not be renewed beyond its expiry date of 26 July 1984.'
47. The records of the relevant conversations in this case are somewhat sparse and, the Board is not, therefore, in the position, from available records to ascertain whether any, or sufficient, warnings were given to Appellant about the possible consequences in the event of his being unwilling to accept any of the field postings offered to him.
48. The Board is of the view that this was a somewhat precipitate move from the stage where on 9 December 1983 Appellant was informed that his wishes 'will be borne in mind as we review vacancies and staffing needs in the months to come' to the final determination on 30 January 1984 that his contract would not be renewed.
49. Before such a stage was reached, Appellant should, in the opinion of the Board, either have been actually posted to one of the field assignments offered to him and/or he should have been formally warned in writing, that the consequence of failure to accept reassignment to a posting would be the non-renewal of the contract.

RECOMMENDATIONS

50. Having regard to the above findings with respect to the procedure followed in this case and mindful of the requirements of due process, the Board also has taken into account the positive appreciation of Appellant's work as contained, inter alia, in the memorandum dated 24 April 1983 from the Director of the Protection Division. The Board was also mindful of the various applications which Appellant made subsequent to 30 January 1984 for a field posting.

51. In the circumstances, the Board recommends that an equitable approach to the appeal would be for Respondent to offer a field post to Appellant, taking into account the availability of field postings, the rotation policy of UNHCR, and the skills, experience, and previous status of Appellant. The field posting recommended would be prospective in nature. The Board does not make any recommendation with regard to compensation for the period which has elapsed since the termination of Appellant's contract with UNHCR.
52. ..."

On 20 January 1987, the Assistant Secretary-General for Personnel Services informed the Applicant that:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided:

- (a) To maintain the contested decision;
- (b) Not to accept the Board's recommendation, and
- (c) That your name be placed on UNHCR's roster and that you be given due consideration as an external candidate should a suitable vacancy arise in UNHCR.

The Secretary-General's decision not to accept the Board's recommendation is based on his conclusion that there is no legal obligation on the part of UNHCR to offer you a field post."

On 14 August 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The action taken by the Respondent in deciding not to renew the Applicant's fixed-term appointment was discriminatory in nature and violated the basic requirements of due process.
2. The Respondent failed to respect the provisions of the relevant circulars and administrative instructions governing reassignment of staff.
3. The Applicant had a legitimate expectation of continued

employment with the Organization.

4. The Respondent's actions toward the Applicant constitute veiled disciplinary action in violation of staff rule 110.3.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal right to remain in the service of the Organization beyond the duration of his last fixed-term contract.

2. The Applicant's re-assignment to new duties after a number of years spent at Headquarters was a proper exercise of administrative discretion in UNHCR subject to the relevant rules governing re-assignment of staff.

3. The procedures leading to the decision of the non-renewal of the Applicant's fixed-term appointment by UNHCR were proper and in conformity with the relevant Staff Rules.

The Tribunal, having deliberated from 27 April 1988 to 24 May 1988, now pronounces the following judgement:

I. The Tribunal decides that it is competent to judge the present application in accordance with article 2 of its Statute and that, further, the application is receivable under article 7 of its Statute.

II. The principal plea of the Applicant that he was wrongfully separated from the service with the UNHCR, in spite of a succession of fixed-term appointments, has first to be examined in the light of appointment, promotion and posting policies as elaborated by UNHCR in 1983. The basic documents are: one entitled "Revised Procedures and Criteria for Appointments, Promotions and Postings" issued on 25 February 1983 and the other with the rubric "Guidelines for the Reassignment of Staff in the Professional category (P-1 to P-5)" dated 19 July 1983. In these documents, whose provisions are well-known to all staff members, the need for suitable rotation in

the postings of staff in the Professional category is emphasized, stations are classified basically according to the degree of amenities and facilities they provide and Standard Assignment Length (SAL) which determines when a staff member is expected to be transferred from a post is worked out. The document dated 25 February 1983 states, inter alia:

"Staff completing a Headquarters assignment should request field service and expect to be assigned to field posts."

The Guidelines dated 19 July 1983 referred to above, state in part:

"...

(iii) Implementation

These guidelines shall come into effect immediately. All staff members in the professional category, who will have exceeded the standard assignment length for their duty station should write to the Chief, Career Development and Training Unit, and express their preferences as to their next assignment. It should be noted that the SAL is the period spent at a duty station and not in a particular post."

From these provisions, the Tribunal concludes that the staff members can express preferences between duty stations, but in the absence of any indication of such preferences, the Administration can assign any staff member to any field station it considers appropriate. The final decision of what is appropriate is entirely in the hands of the Administration, but ample provisions exist in these documents for consultation and for taking into account any special considerations that may be relevant for a specific posting for a particular staff member.

III. By the second half of 1983, the Respondent had decided that the Applicant was due for a field posting and since the Applicant had not asked for any, he was, on 21 September, given the choice (by Mr. Gary G. Troeller, Chief, Career Development and Training Unit)

over the telephone of seven stations - Gaborone (Botswana), Maseru (Lesotho), Mogadishu (Somalia), Kigoma (Tanzania), Lusaka (Zambia), Ankara (Turkey) and Juba (Sudan): five of these fall in Category II and two in Category III (Sudan and Zambia). Under the two circulars mentioned above the Applicant was expected to move normally to a Category II (less comfortable) or Category III (hard) station. The next day, the Applicant informed the Respondent (Mr. Troeller) that he declined to accept any of the seven stations offered. By a letter of 27 September, Mr. Troeller asked him to give in writing "your reasons for not wishing to accept any of the above-mentioned posts".

To any staff member familiar with the rules and regulations, this would appear as an important communication which required urgent action; yet it remained unattended. On 14 October 1983, a reminder was issued which concluded with: "You are therefore reminded to let me [Mr. Troeller] have in writing your wishes for your next assignment. The Board will attempt to accommodate your wishes to the extent possible, compatible with the overall staffing requirements of the Office". The Board referred to is the Appointment, Posting and Promotion Board (APPB) that is the final authority in these matters, subject to the approval of their decision by UNHCR.

Even this reminder went unanswered for nearly a month and on 14 November 1983, the Applicant apologised, but without any explanation, for the delay and stated that the "major reasons I gave at that time" (22 September 1983) "was that I wished to complete the present work assigned to me which I highly value". However, in the application he says that he "consulted his Director ... who indicated that because of the Applicant's contribution to the work of international protection ... the Director needed the Applicant at Geneva". The Tribunal notes that neither in September 1983 nor for many months later did the Director come forward to sustain this view; even his Deputy, who was representing the Department in the APPB, did not mention this opinion of the Director. Eventually, on

22 June, 1984, when asked by Mr. Conway (Head, Personnel Services) to comment on the Applicant's plea that he declined to accept any of the posts at the Director's instance, Mr. Moussalli (the Director) said that in 1983 he did not wish the Applicant to go to the field "at this stage as I needed him at Geneva". He did not, however, take any action to modify, far less try to annul the decision of the APPB that "the services of Mr. Mizuno had to be terminated in the circumstances". Indeed, on 16 July 1984, he simply asked for an extension of the Applicant's work with him by "two to three months" - this request was met, and the Applicant's appointment was extended for three months, i.e. until 26 October 1984.

IV. In his memorandum of 4 June 1984, the Applicant wrote, inter alia, to Mr. Conway, Head, Personnel Division:

"Upon my promotion to Legal Officer (subject to assignment to that level) in July 1983, I had a discussion with Mr. Moussalli, Director of International Protection, from which I understood that he preferred me to continue my service at Headquarters until the end of 1984".

The Tribunal notices minor discrepancies in the different versions of the conversation between the Applicant and Mr. Moussalli, apparently held some time in September 1983. After a lapse of time this was perhaps inevitable, but it appears incomprehensible that the Applicant did not mention in clear terms what Mr. Moussalli had told him when the Applicant wrote his letter of 14 November 1983. Had he done so, or better still, had Mr. Moussalli taken any measures on or about September or some time later in 1983, either at the suggestion of the Applicant or at his own instance, to express his view and present full facts to the APPB, the course of events could have been different. However, in the absence of any evidence that the Applicant wished that Mr. Moussalli should be consulted on the subject, the Tribunal cannot conclude that the APPB's proceedings were vitiated; in any event, after 22 June 1984, when Mr. Moussalli wrote his letter to

Mr. Conway, Mr. Sergio Vieira de Mello, Acting Head, Personnel Services wrote on 12 July 1984 to the Applicant that, after giving "careful consideration to all aspects", the APPB confirmed its earlier decision. This letter of 12 July 1984 also makes it clear that the Board had discussed "the information submitted by you as well as by your Supervisors". In the circumstances the Tribunal concludes that the APPB was not remiss in its procedure and that it took all the Applicant's arguments into account in coming to its decision.

Meanwhile, the Applicant had brought the argument based on his state of health for declining to accept any of the seven posts offered to him. But records do not show that he had this problem (stomach hernia) before the middle of January 1984 and this could hardly be given as a reason for his refusal of offers made by Mr. Troeller as early as 21 September 1983.

There is also some controversy about his SAL at the expiry of which a staff member's field posting becomes due. Mr. Conway, in a submission to the JAB claimed that the Applicant was indeed overdue for a field posting and that his length of service was as relevant for his promotion as for his posting. Be that as it may, the Tribunal notes that if the Applicant opposed his field posting in September 1983, on the ground that his SAL had not expired, he omitted to mention it as late as 14 November 1983 when he informed Mr. Troeller again that he could not accept any of the seven posts offered to him.

On two occasions at least the Applicant tries to explain away his attitude on the ground of "misunderstandings". Thus, in his memorandum of 15 February 1984 to Mr. Conway on "My contractual status with UNHCR" he refers to "some misunderstanding of the context of my memorandum of 14 November 1983". Again, on 4 June 1984, in another memorandum to Mr. Conway on the same subject, he refers to "a misunderstanding regarding my past position". A careful scrutiny of the records shows that if there was any misunderstanding, it was at least to some extent due to the

Applicant's omission to put all the facts before those who are responsible for taking decisions. The Tribunal cannot fail to note that on many occasions the Applicant tended to believe that he should decide where and how he could best serve the Organization, and what jobs were most suited to his rank and ability. In the view of the Tribunal these matters are to be decided, after proper and regular discussion, by the Administration and not by the Applicant.

Furthermore, these "misunderstandings" could not be removed through discussion, including an attempt at conciliation.

V. In examining the plea of the Applicant that he had not refused any field posting and the Respondent's accusation that he had indeed "repeatedly" declined field postings, the Tribunal had the benefit of the analysis of this controversy by the JAB. The Tribunal agrees with the JAB that the Applicant was under no obligation to apply for a field posting; the relevant rules refer to what a staff member should or should not do; they do not say that the staff member must apply and that after a period of considerable stay at Headquarters he or she must be sent to a post in the Category II or III. The Tribunal holds that while the Rules and Guidelines provide for much flexibility, the general pattern and expectation are clear: after some length of service in a comfortable post, a staff member can expect posting to a less comfortable post.

Any other interpretation could hardly serve the purposes of UNHCR, who is expected to look after refugees "in many countries round the world". In this background the Applicant asked for field postings on the following occasions:

(i) During July 1981-July 1983, when the new regulations came into force as Deputy Representative, London and Protection Officer, Japan;

(ii) During November 1983 as Protection Officer, Tokyo;

(iii) After 7 February 1984, i.e., after he knew about the decision on his separation to be made effective from 26 July 84:

1.5.84, Deputy Representative, Nairobi

1.5.84, Protection Officer, Islamabad

19.7.84, Protection Officer, Karachi

25.7.84, Protection Officer, Rome

The Applicant's desire, in 1982, to be posted in London is not relevant as this was before the new regulations came into force.

The Tribunal cannot attach much value to the requests made after 7 February 1984 when the Applicant had already been informed of the APPB's view that his contract would not be renewed because of his rejection of all the field posts offered to him. Indeed, the post of Protection Officer, Karachi was available before January 1984 and the Applicant did not apply; he did so only on 19 July 1984, soon after the APPB had finally reconfirmed its decision by 12 July 1984.

The only application made at the relevant time was for the post in Tokyo on 18 November 1983. On 9 December 1983, he received an acknowledgement to this application in terms that he claimed, later and at different stages, meant that his refusal to accept any of the seven posts offered to him on 21 September 1983 no longer had the significance earlier attached to it. The Tribunal, however, notes that the Applicant did not withdraw his application for a job in Tokyo, even though he asserted that Mr. Moussalli had wished, and the Applicant had certainly agreed, that he should "continue his service at Headquarters until the end of 1984". The Tribunal does not accept the interpretation given to a routine acknowledgement, but recognizes that it was ill-timed to such an extent that the Applicant could, but for all the discussions he had at different times with his senior officers, consider that his efforts in revising the APPB decision was bearing fruit.

VI. In these efforts the officials of the Permanent Mission of Japan to the United Nations were involved. Even if at one stage the Applicant is on record as having "regretted the insistence of the Japanese Mission" it is clear that the officials of the Mission continued to bespeak support on behalf of the Applicant. The Tribunal would not wish to comment on this aspect, but it notes that

in acknowledging the important communication of 30 January 1984 from Mr. Conway, the Applicant said that he had received it on 7 February 1984, yet the Mission officials were discussing it with the Administration (Mr. S. Vieira de Mello, Head of Personnel Services) two days earlier, on 5 February 1984. At any rate, the record indicates that the intervention of the Mission officials did little to help the Applicant and perhaps caused some irritation among the officials dealing with his case.

VII. In this background, and taking into consideration all the facts surrounding the controversy about the Applicant's field posting, the Tribunal holds that the APPB's decision was based not so much on the conclusion that the Applicant did not wish to be posted outside Headquarters, but that he was not prepared at the relevant time to go to any hardship post. The controversy about "repeated" refusals has to be seen in this context - the Applicant maintains that he refused only once, while the Respondent believes that since he could not select even one of the seven posts, it meant that he had in practice given seven refusals.

VIII. All these questions were subjected to a lengthy and elaborate examination in the JAB, even though the Applicant complained that he was not given "full opportunity for an open hearing" and of unduly protracted proceedings. The Tribunal does not find that there has been material irregularity in the proceedings of the JAB - the Board is competent to decide what is the best procedure to follow and the delay in the disposal of this case, regrettable as it may be, is not of an unusual nature given the plethora of details which had to be carefully considered. Besides, the Applicant and his Counsel (selected from the New York rather than the Geneva Panel of Counsel) put themselves at a disadvantage for the day-to-day proceedings of the JAB; they had indeed asked for the transfer of the case to New York, but, following normal procedure in cases of this nature, the JAB denied this request. In addition, Mr. Zoupanos, Chairman, Panel

of Chairpersons, Geneva JAB, undertook conciliation under staff rule 111.2(a), but could not bring the parties to a settlement. However, the suggested general terms of settlement, cannot in the opinion of the Tribunal, be used by one side as a commitment or evidence by the other side in any respect. The JAB, in the background of this failure at conciliation, and in the light of its own examination, recommended that a field post should be offered to the Applicant and that such posting would be "prospective in nature". The Chairman of the Board later explained that this phrase meant that "Mr. Mizuno should be offered an established post under the regular budget which might, if the incumbent gave satisfaction, lead on to other postings (and not, for instance, an L post which might be abolished upon the completion of the project or a floating assignment)". The Respondent did not accept this recommendation and there is no record of his reasons for not accepting it except to indicate that "there is no legal obligation on the part of UNHCR to offer you a field post". He decided however that "your name be placed in UNHCR's roster and that you be given due consideration as an external candidate should a suitable vacancy arise in UNHCR". The Applicant asserts that the Respondent was in error in not accepting the recommendation of the JAB. The Tribunal considers that the Secretary-General is competent to pronounce on the recommendations of the JAB, leaving the Applicant to seek such remedy as may be available. Finally, the Tribunal has not found any evidence of discrimination; clearly the rules and regulations about rotation had to be applied at the discretion of the Respondent and in the interest of the Organization and after suitable consultation. Besides, the JAB had already commented that the question at issue was not how the other staff members were dealt with, but whether the Applicant was deprived of due process or was treated unjustly or became a victim of prejudice. There is no evidence to conclude that the Respondent's decision was vitiated by any of these considerations.

IX. In discussing the development of events, the Tribunal has kept in mind the consequences which follow from the application of the two circulars of 1983, and has concluded that while the APPB's decision cannot be impugned on the grounds that adequate scrutiny of the Applicant's claims and representations was not made, there are certain aspects of this case which require further examination.

The Tribunal notes that the Respondent is not free of traces of annoyance and of suspicion of dissimulation and lack of candour on the part of the Applicant at some of the actions he had taken, but such an impression would not exempt the Respondent from fully respecting and protecting those rights of the Applicant to which he is entitled. The first offer - in fact the only offer, withal for seven posts - was made to the Applicant for a field posting on 21 September 1983 and by telephone. He was asked for an immediate reply, for reasons which have not been made clear. Later, when he did not reply urgently to Mr. Troeller's letter of 27 September 1983, no pressing reminder or telephone call was made. Subsequent events also indicate that action having been decided upon in September 1983, the Applicant was not considered for any other field post. Whatever may have been the reasons for such an omission, the Tribunal concludes that the haste with which the Applicant was asked to make up his mind was not in full conformity with the requirements of due process, even after making allowances for the part played by the Applicant himself.

The Tribunal accepts that the acknowledgement sent by Mr. Troeller on 9 December 1983 to the Applicant's request for a posting to Tokyo was of a routine nature; nonetheless, coming only a few days after he had sent in his letter on 14 November 1983 to Mr. Troeller himself, he could, not unnaturally, read more into this routine acknowledgement. The Applicant seems to imply the statement that "your wishes will be borne in mind as we review staffing needs in the months to come" foreshadowed some kind of tolerance of his refusal to accept any of the seven posts offered to him on 21 September 1983. The Tribunal holds that such an interpretation

is strained, but that the Applicant is entitled to entertain it in the prevailing circumstances.

As regards the Respondent's refusal to extend the Applicant's contract even by a short time when the conciliatory procedure was undertaken, the Tribunal finds this step by the Respondent lacking in justification, especially as Mr. Behrooz Sadry (Director, Division of Personnel and Administration, New York) had requested such an extension, evidently with the agreement of the Secretary-General. The arguments about the late receipt of the cable from New York and also about the fixed-term contract having already expired, are not convincing; if the Respondent so wished, he could have accommodated the request made by Mr. Sadry and thus have given some relief to the Applicant. The Tribunal holds that the Applicant is entitled to some monetary compensation on this account.

X. The Tribunal is of the view that the Applicant could have no reasonable or legal expectation for the renewal of his contract. An essential element in the General Assembly's resolution 37/126, para. IV, providing "for every reasonable consideration" after five years of continuing good service by staff members holding fixed-term contracts was missing. First, but for an extension of three months, given at the request of Mr. Moussalli with the clear proviso that this was without any prejudice to the decision of termination of his contract communicated to the Applicant by Mr. Sergio Vieira de Mello on 12 July 1984, his total service when the APPB decided to separate him on January 1984 was under 5 years; secondly, since the Respondent had apparently concluded that the Applicant was unwilling to go to any of the seven places offered to him, his action and attitude was not in conformity with what was expected from staff members and as laid down in the two circulars in 1983. The Tribunal considers that the refusal of the Applicant of all the offers of 21 September 1983 could not be interpreted as a clear indication of "repeated" refusals and could only be treated as the Applicant's reluctance to accept any hardship post. This conclusion is

reinforced by Mr. Conway's submissions before the JAB: he writes, inter alia, "When a Recruitment Officer, at the request of the APPB approached Mr. Mizuno about the Protection Officer post in Canberra, Australia, explaining that UNHCR would have to resort to external recruitment if Mr. Mizuno turned it down, Mr. Mizuno replied that he had stated in writing that he would only consider posts in Ottawa, New York, Washington or Tokyo". The Tribunal has not come across such a statement in any written communication from the Applicant, but considers it consistent with what he has said in various applications for field postings, as also with his selection of posts. The Tribunal cannot consider the statement by Mr. Conway as misleading, as claimed by the Applicant; he has given no arguments to show why it should be treated as misleading.

Furthermore, only two Performance Evaluation Reports on the Applicant exist on the personnel file - one for the period 27.1.79 to 31.7.81, accepted by the Applicant, initially describing his work as "good performance", while the second, for nearly three years, - 1.8.81 to 26.7.84 - was not signed by the Applicant: there is no evidence that he sought any recourse procedure in respect of this latter report on his work covering a period of nearly three years. No explanation is forthcoming why the Performance Evaluation Reports were not prepared regularly and on time; nor does any evidence exist to show the extent to which the APPB evaluated the Applicant's performance before it decided not to extend his current contract.

In the absence of valid performance reports, the Tribunal has little option but to reject the plea that the Applicant had a claim to or reasonable expectation for continuous employment either under General Assembly resolution 37/126 or by the application of the Tribunal's past decisions. It should be noted that the Assembly resolution provides "for every reasonable consideration" after five years of satisfactory continuous service on fixed-term contracts; it does not prescribe that such consideration would automatically mean renewal of the contract or that fixed-term contracts cannot be terminated on due dates. In the Applicant's case all aspects were

considered by the APPB even before the current contract was due to expire, and before it had been established that his performance was satisfactory all throughout the period he served on fixed-term contracts.

XI. The question whether the Secretary-General, in rejecting the JAB recommendation for the Applicant's continued appointment, was influenced by the Applicant's attitude towards field postings or by the prospect of finally granting him an indefinite contract, or by some other factor, is not before the Tribunal. However, the Tribunal is only aware that in a matter like this, to ask the Secretary-General for specific performance may come in the way of his discretion in dealing with fixed-term contracts, even as an "equitable approach" as suggested by the JAB.

Finally, the Tribunal takes the view that although the Applicant had ample opportunity to realize what the consequences of his actions could be, he did not receive any formal warning that his current contract would not be extended because of his refusal to accept any of the seven posts. The regulations and the repeated advice of the senior officers should have been enough of a warning, but considering that UNHCR circulars regarding field postings were issued in 1983 and that the Applicant had only a few years' service with UNHCR, it would have been more appropriate to give him some formal warning. What he did in fact receive is a termination notice dated 31 January 1984 and finally reconfirmed on 12 July 1984. In the Tribunal's view, this cannot be construed as a veiled disciplinary measure, as the Applicant contends.

XII. In the circumstances, the Tribunal is unable to sustain the Applicant's claim that he had a reasonable or legal expectation for the renewal of his contract, or that his contract has been unfairly terminated. The Tribunal concludes, however, that in addition to lack of full application of all the requirements of due process, the Respondent's handling of this case in certain aspects has been such

as to entitle the Applicant to some monetary compensation, which the Tribunal assesses at \$US 3,000.

XIII. Accordingly, the Tribunal awards \$US 3,000 to the Applicant and orders the Respondent to pay it to him.

XIV. All other pleas are rejected.

(Signatures)

Samar SEN
President

Francisco A. FORTEZA
Member

Ioan VOICU
Member

Geneva, 24 May 1988 R. Maria VICIEN-MILBURN
Executive Secretary