ADMINISTRATIVE TRIBUNAL

Judgement No. 781

Cases No. 855: SHAW
No. 856: WALKER
No. 858: BALDWIN
No. 863: KIMBALL
No. 867: GORDON
No. 872: BERNSTEIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Luis de Posadas Montero, First Vice-President; Mr Hubert Thierry, Second Vice-President;

Whereas at the request of Christine Shaw and Douglas Walker, staff members of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal to 31 March and 31 May 1995;

Whereas, on 13 April 1995, the Applicants Shaw and Walker filed applications containing pleas which alleged that they were:

> "being denied the right to the education grant at United Nations Headquarters on behalf of [their children] solely on the basis of [their] United States nationality and that this constitutes discrimination resulting in unequal pay for equal work ..."

and requested the Tribunal:

> "to reverse the decisions ... denying [their] applications for the education grant for [their] children."

Whereas, on 3 May 1995, C. Stephen Baldwin, a staff member of the United Nations, filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas at the request of Mary E. Kimball, a staff member of the United Nations, the President of the Tribunal extended the time-limit for the filing of an application with the Tribunal to 30 June 1995;

Whereas, on 9 May 1995, the Applicant Kimball filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas at the request of Joan Gordon, a staff member of the United Nations, the President of the Tribunal successively extended the time-limit for the filing of an application with the Tribunal to 31 March and 30 June 1995;

Whereas, on 23 June 1995, the Applicant Gordon filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas, on 28 June 1995, Vivian Bernstein, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 22 August 1995, the Applicant Bernstein, after making the necessary corrections, again filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas the Respondent filed his answer on 2 August 1995;

Whereas, on 28 September and 9 October 1995 respectively, Netta R. Avedon and Phyllis Lee, staff members of the United Nations, requested to intervene in the cases of Shaw, Walker, Baldwin, Kimball, Gordon and Bernstein (hereinafter Shaw et al.);

Whereas, on 25 July 1996, Anne Cunningham and Carolyn Schuler Uluç, staff members of the United Nations, requested to intervene in the case of Shaw et al.;

Whereas, on 30 July 1996, the Tribunal, in accordance with rule 21 of the Rules of the Tribunal and paragraph X.2 of General Assembly resolution 49/223, informed the International Civil Service Commission (ICSC) that six applications were pending before the Tribunal that "may affect a rule, decision or scale of emoluments or contributions of the common system of staff administration" and transmitted a set of the written proceedings to the ICSC at its request;

Whereas, on 10 September 1996, Lilia Amores-Mantas, a staff member of the United Nations, requested to intervene in the case of Shaw et al.;

Whereas all the Applicants filed written observations on 30 September 1996;

Whereas, on 27 September 1996, the ICSC filed a submission to present certain additional considerations with respect to the issues of the case Shaw et al.; and, on 29 October 1996, the ICSC submitted to the Tribunal comments on the Applicants' written observations;

Whereas, on 30 October 1996, the Respondent filed with the Tribunal comments on the Applicants' written observations;

Whereas, on 30 October 1996, the Applicants filed with the Tribunal comments on the ICSC's submission of 27 September 1996;

Whereas, on 30 October 1996, the Tribunal requested the Applicants to provide the Tribunal with all the letters in which the Applicants had requested the Secretary-General to pay them the education grant and all the responses of the Secretary-General thereto;

Whereas the facts in the cases are as follows:

The Applicant Shaw, a United States citizen, entered the service of the Organization on 14 July 1969 and currently serves as Senior Economic Affairs Officer at the P-5 level, on a permanent contract. She applied for the education grant for her daughter Fiona on 1 April 1993. On 6 December 1993 and again on 18 July

1994, she was informed by the Personnel Officer, Staff Administration and Monitoring Service, Office of Human Resources Management (OHRM), that the provisions of staff rule 103.20(b) "do not apply in your case. The Office of Human Resources Management is, therefore, unable to process your request for the education grant."

The Applicant Walker, a United States citizen, entered the service of the Organization on 1 October 1970 and currently serves as Senior Economic Affairs Officer at the P-5 level, on a permanent contract. He applied for the education grant for his daughter Joy, on 1 August 1993. On 6 December 1993, he was informed by the Personnel Officer, Staff Administration and Monitoring Service, OHRM, that the provisions of staff rule 103.20(b) "do not apply in your case. The Office for Human Resources Management is, therefore, unable to process your request for the education grant."

The Applicant Baldwin, a United States citizen, entered the service of the Organization on 28 January 1978 and currently serves as a Technical Support Specialist at the P-5 level, on a permanent contract. He applied for the education grant for his children Timothy, Alexandra and Matthew on 20 January 1995. By a memorandum dated 27 February 1995, he was informed by the Personnel Officer, Staff Administration and Monitoring Service, OHRM, that the provisions of staff rule 103.20(b) "do not apply in your case. The Office of Human Resources Management is, therefore, unable to process your request for the education grant."

The Applicant Kimball, a United States citizen, entered the service of the Organization on 17 January 1977 and currently serves as a Senior Political Affairs Officer, at the P-5 level, on a permanent contract. She applied for the education grant for her children Arthur and David on 24 June, 12 September and 7 November

1994. By a message written on her 7 November memorandum, the Applicant Kimball was informed that "staff working at Headquarters, NY, with USA nationality are not entitled to receive the education grant." On 23 May 1995, she again applied for the education grant. By a memorandum dated 16 June 1995, she was informed that "your claims cannot be processed in view of the fact that your duty station, New York, is in your country of nationality, USA."

The Applicant Gordon, a United States citizen, entered the service of the Organization on 12 January 1976 and currently serves as Chief, Administrative Review Unit, at the P-5 level, on a permanent contract. She applied for the education grant for her children Meredith and Matthew on 29 July 1994. She received a return copy of her memorandum to the Personnel Officer, OHRM, on which was written "your request must be denied given that you are an American national". This was signed by the Personnel Officer and dated 4 August 1994.

The Applicant Bernstein, a United States citizen, entered the service of the Organization on 23 November 1981 and currently serves as a Recruitment and Placement Officer, at the P-3 level, on a permanent contract. She applied for the education grant for her children Peter and Michelle on 14 December 1994. By a memorandum dated 8 February 1995, from a Personnel Officer, Staff Administration and Monitoring Service, OHRM, she was informed that "since the above provisions [staff rule 103.20(b)] do not apply in your case, the Office of Human Resources Management is unable to process your request for an education grant advance."

By letters dated 26 September, 27 September and 21 December 1994 and 6 April and 8 May 1995 respectively, the Assistant Secretary-General for OHRM informed the Applicants that the

Secretary-General had agreed to their appealing directly to the Tribunal against the decisions denying them the education grant.

On 13 April, 3 and 9 May, 23 June and 22 August 1995 respectively, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contention is:

Denying the Applicants the education grant is discriminatory since the denial rests solely on the basis of their United States citizenship. This discrimination results in the Applicants being given unequal pay for equal work, which violates the United Nations Charter.

Whereas the Respondent's principal contentions are:

1. The General Assembly, acting under Article 101, paragraph 1, of the Charter, has promulgated regulations which constitute the fundamental conditions of service of staff. The Secretary-General is obliged to implement the education grant scheme consistently with the direction in staff regulation 3.2 that the grant is payable only to staff who serve in a country other than the country of their nationality.

2. Staff regulation 3.2 does not violate the principle of equal pay for equal work as the allowance payable thereunder is based on the objective criterion of expatriate status. Nor does staff regulation 3.2 violate the principle of equality of treatment contained in Article 8 of the Charter.

3. In addition, staff regulation 3.2(a), by requiring expatriate service for payment of the education grant, does not conflict with the principle contained in Article 101, paragraph 3, of the Charter that the paramount consideration in the determination of conditions of service shall be the necessity to secure staff of the highest standards of competence and efficiency.

The Tribunal, having deliberated from 24 October to 21 November 1996, now pronounces the following judgement:

I. The Applicants are citizens of the United States of America (U.S.), working at United Nations Headquarters in New York. They contest the decisions of the Secretary-General taken under staff rule 103.20(b), denying them the payment of the education grant on the basis of their status as United States citizens working in their home country.

The Secretary-General's decision, as conveyed to the Applicants Shaw and Walker on 6 December 1993, was in the following terms:

> "Staff rule 103.20(b) states that 'a staff member who is regarded as an international recruit under rule 104.7 and whose duty station is outside his or her home country shall be entitled to an education grant in respect of each child in full-time attendance at a school, university or similar educational institution. If such a staff member is reassigned to a duty station within his or her home country, he or she may receive the education grant for the balance of the school year, not exceeding one full school year after his or her return from expatriate service ...'"

In letters to the Applicants, the Assistant Secretary-General for Human Resources Management granted them the right to appeal this decision directly to the Tribunal, as the cases raised only issues of law. All the Applicants raise the same questions and submit similar pleas. Accordingly, the Tribunal orders a joinder of all the cases.

II. The Applicants do not allege any violation of their contracts of employment. Instead, they assert, repeatedly and in a variety of ways (including discussions of such matters as U.S. laws on taxation, naturalization and the U.S. system of education, employment of women, etc.) that the implementation of the education

grant, as originally conceived and planned, has lost its raison d'être, which was essentially to assist the "child's reassimilation in the staff member's recognized home country". It has thereby become totally unjust in its application to the internationally recruited non-expatriate staff members at the Headquarters in New York. From this, they conclude that this grant has in fact become, in New York in any event, a part of the salary of the expatriate staff and that, inasmuch as this "salary supplement" is denied to comparable U.S. nationals at the Headquarters in New York, it is unfair and discriminatory. The Applicants suggest that such a development has made the education grant both outmoded and outdated in such a manner as to place U.S. staff at a disadvantage vis-à-vis their non-U.S. colleagues. They argue that the grant, as at present applied, violates Articles 8 and 101 of the Charter of the United Nations and offends against the principle of equal pay for equal work. In view of these considerations, the Applicants ask the Tribunal to "review" the present implementation of this grant at the Headquarters in New York and declare that it has produced such unfairness and inconsistencies that it should therefore not be administered as at present. The Applicants make no reference to staff of other nationalities who work at duty stations outside of Headquarters and who are also not entitled to the education grant because they are not expatriates. The Applicants also omit to allude to the conditions of work in such other duty stations of the U.N. or its specialized agencies.

III. The Respondent, on the other hand, contends that the General Assembly, as well as the International Civil Service Commission (ICSC), has repeatedly and frequently examined the conditions of entitlement to the education grant and has firmly and consistently maintained that the grant is to be allowed to all expatriate international staff members - irrespective of their place of work. There is nothing in the voluminous discussion of this subject to

show that the application of the education grant can be governed by any selective circumstance prevailing at any given place. The General Assembly, as the supreme legislative body in this matter, has always maintained that this grant is universally applicable and that it is both reasonable and justifiable because of the different conditions of work for expatriates and nationals in the various duty stations. The Respondent, therefore, suggests that this grant and its application or implementation cannot be questioned by any authority in a manner which goes against the repeated wishes of the General Assembly as reflected in its numerous resolutions (vide paragraph IV.7 of resolution 33/119 of 19 December 1978; paragraphs III.4-5 of resolution 37/126 of 17 December 1982; paragraph I.G.2 of resolution 44/198 of 21 December 1989; and paragraph 1 of resolution 49/241 of 6 April 1995).

IV. The Tribunal was thus obliged to consider the question of its competence in this field. The Tribunal noted that it has, on more than one occasion, attempted to clarify or interpret the intention or implied objective of the resolutions of the General Assembly on various administrative matters (cf. Judgements No. 273, Mortished (1981); No. 370, Molinier (1985); No. 408, Rigoulet (1987); and No. 656, Kremer and Gourdon (1994)). In doing so, the Tribunal has often been guided by the expression of views, on any subject under discussion, by the competent UN bodies. In this instance, such a body is obviously the ICSC which, pursuant to article 1 of its statute, was established "for the regulation and co-ordination of the conditions of service of the United Nations common system." Under article 10 of its statute, the ICSC makes recommendations to the General Assembly on allowances and benefits of staff which are determined by the General Assembly; a note to article 10 mentions the education grant. The ICSC has frequently been asked by the General Assembly to study the application of the education grant and make suitable recommendations.

V. The Tribunal finds that on all occasions, the ICSC has maintained, irrespective of changes which have taken place over the years and which have also been the subject of study by the Commission, that this grant is essentially and exclusively an expatriate grant which does not form a part of the salary of the recipient, but is related to the educational needs of the children of expatriate international staff members. The Tribunal also notes that, on many occasions in the past, the General Assembly has, with or without the specific recommendation of the ICSC, revised or modified the implementation of this grant. In the circumstances, the Tribunal finds that the legislative provisions for this grant are clear and that there is no scope for the Tribunal to question or interpret them. Staff regulation 3.2(a) unequivocally excludes from the education grant benefit staff members who reside in the country of which they are nationals. The Applicants, all U.S. nationals, clearly fall under the provisions of staff regulation 3.2(a) (cf. Judgement No. 703, Larsen (1995)).

The intention of the General Assembly has been made clear in such a manner as not to be in doubt; the Assembly has systematically and authoritatively pronounced the grant as related to the fact of expatriation. Indeed, as recently as 6 April 1995, in its resolution 49/241, the General Assembly reiterated its decision that "the repatriation grant and other expatriate benefits are limited to staff who both work and reside in a country other than their home country." It explicitly included the education grant in its discussion of expatriate benefits. In the view of the Tribunal, it has no competence to question such a decision of the General Assembly. The Tribunal is bound to abide by the clear and unequivocal decision of the General Assembly incorporated into the staff regulations and Rules (cf. Judgements No. 337, Cordovez (1984); and No. 749, Demers Dear (1996)).

VI. In view of the above, the Tribunal does not find it necessary to make further comments on the Applicants' pleas and rejects the applications.

VII. Since the applications to intervene, made under article 19.1 of the Tribunal's Rules by Netta R. Avedon, Phyllis Lee, Anne Cunningham, Carolyn Schuler Uluç and Lilia Amores-Mantas, do not disclose that their intervention would rely on evidence or arguments different from those of the Applicants, the Tribunal rejects their applications on the merits.

(Signatures)

Samar SEN
President

Luis de POSADAS MONTERO
First Vice-President

Hubert THIERRY
Second Vice-President

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary