

Judgement No. 66

**Case No. 67 :
Khavkine**

**Against: The Secretary-General
of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; Mr. Sture Petré, Vice-President ; Mr. Jacob Mark Lashly ; Mr. R. Venkataraman, alternate ;

Whereas Arnold Khavkine, former Programme Officer of the United Nations Technical Assistance Administration, filed an application with the Tribunal on 3 May 1956, requesting :

(a) The rescission of the Secretary-General's decision of 22 July 1955 whereby the Applicant was denied the right to sign the waiver of privileges and immunities in order to acquire permanent residence status in the host country ;

(b) The re-establishment of the Applicant in *status quo ante*, i.e., in status he had before separation, with due regard to his previous administrative level and to the opportunities for promotion, missed in the period between separation and re-establishment, for which he had been considered prior to his separation ;

(c) The payment to the Applicant of full salary from the date of separation to the date of re-establishment, including all increments and benefits which Applicant would have received as a staff member during the intervening period ;

(d) The award to the Applicant of \$150 in respect of costs ;

(e) Alternatively, in the event that the Secretary-General avails himself of the option given him under article 9.1 of the Statute of the Tribunal, the award of damages equal to full salary, including all benefits and increments normally received, for a period of three years ;

(f) In addition, Applicant requests the Tribunal to award to him an amount corresponding to salary and allowances from the date of expiration of the contract to the date of the Tribunal's decision ;

Whereas the Respondent filed his answer to the application on 18 July 1956 ;

Whereas the Tribunal heard the parties in public session on 26 and 27 November 1956 ;

Whereas the facts as to the Applicant are as follows :

The Applicant, born in Russia and having acquired French nationality, entered the service of the United Nations on 7 October 1946 as a translator in the Languages Division of the Department of Conference and General Services, for the duration of the General

Assembly. On 5 January 1947, he received a temporary-indefinite appointment which was converted, on 28 August 1947, to an indeterminate (later called permanent) appointment. The Applicant was transferred, in the capacity of Economic Affairs Officer, to the Department of Economic Affairs on 9 May 1949 and to Technical Assistance Administration on 6 August 1950. On 10 July 1955, the Applicant was notified by the United States authorities that he would be granted a permanent residence visa (for which he had applied in 1940) on 4 August 1955, provided he signed the waiver of privileges and immunities required under Section 247(a) of the United States Immigration and Nationality Act of 24 December 1952. The Applicant requested the Secretary-General's authorization to sign the waiver in question by letter of 13 July 1955. This request was denied by letter of 22 July 1955. On 29 July 1955, the Applicant submitted his resignation with effect from 1 November 1955. By letter dated 2 August 1955, the Administration accepted the Applicant's resignation. On 21 October 1955, the Applicant asked the Administration to reconsider its decision and, upon its refusal, filed an appeal with the Joint Appeals Board on 18 November 1955. The Board reported to the Secretary-General on 31 January 1956 that it had no recommendation to make in support of the appeal. On 3 May 1956, the Applicant instituted proceedings before the Tribunal.

Whereas the Applicant's principal contentions are :

1. The Secretary-General's refusal to authorize the Applicant to sign the waiver for the acquisition of permanent residence status was an improper application of administrative power. The negative ruling was based upon improper motives, i.e., that authorizations of this kind would only be given "in the most exceptional and compelling circumstances".
2. Freedom of movement and change of residence are rights proclaimed in article 13 of the Universal Declaration of Human Rights. There is no justification for denying the right of freedom of residence to a staff member provided that the change of residence does not interfere with his duties in the Secretariat.
3. The procedure established by the authorities of the host country for acquisition of permanent residence in that country is entirely compatible with the status, duties and functions of a United Nations official. Neither the Charter nor the Staff Regulations or any other provisions entitle the Secretary-General to object to the filing of the waiver of privileges and immunities required for this purpose. The waiver required under United States law for the acquisition of permanent residence status does not require a waiver of the privileges and immunities necessary for "the independent exercise of their functions" (Article 105 of the Charter). The privileges and immunities involved in the waiver and specifically the immunity from taxation

have no relation to the staff member's official functions. It is pointed out that the Staff Regulations (article 1.8) refer exclusively to privileges and immunities related to official acts.

4. The Secretary-General cannot rely upon the report of the Fifth Committee to validate his action. Constitutional processes were not observed by the Fifth Committee in undertaking to modify and change the terms of employment of staff members without receiving delegation of any such power from the General Assembly. The action of the General Assembly was also not legal for the reason that no resolution was presented to the General Assembly which was applicable to these terms of employment. For this reason too, the directive of the Secretary-General violated and contradicted previous action of the General Assembly.

5. The intentions manifested and the decisions taken by the Fifth Committee of the General Assembly at its eighth session do not justify the Secretary-General's decision. It was not the intention of the Fifth Committee to limit the granting of authorization to staff members (to change to permanent residence status) to exceptional cases alone. It was the intention of the Fifth Committee (document A/2615, paragraphs 66 and 69) to make a distinction between staff members who had been unaware, when applying for permanent residence status, of any problems which subsequently would arise in this connexion and persons subject to future recruitment policies. In the Applicant's case, his application for permanent residence was made in 1940.

6. Fiscal considerations and results from the Fifth Committee's decisions cannot justify the contested decision. Refusal to authorize staff members to acquire permanent residence status without reimbursement of tax payments by the United Nations cannot be defended on the ground that it might be contrary to established principles. In any case and whatever decision is taken regarding the question of tax reimbursement, the Applicant contends that he should be entitled to sign the waiver under the decisions of the Fifth Committee, particularly since no important additional financial burden would be occasioned.

7. The contested decision cannot be justified under the terms of the Applicant's contract with the United Nations. Staff Rule 104.4 (c) which is applicable in this case embodies no restrictive policy in the matter of granting authority to acquire permanent residence status.

8. The Applicant's resignation was brought about as a result of moral compulsion exercised upon him by the Administration.

Whereas the Respondent's principal contentions are :

1. The Applicant's contention that he was denied the right of freedom of movement and residence within the borders of the host country is without merit and his reference to the Universal Declaration of Human Rights is irrelevant. The Applicant confuses general human

rights with particular conditions of service which govern his employment contract.

2. The policy of the Secretary-General to restrict the granting of permission to execute a waiver of privileges and immunities in order to assume the legal status of a permanent resident in the host country to cases in which he is convinced that exceptional and compelling circumstances warrant the decision is based primarily upon his duty to enforce the principle of geographical distribution in the selection of staff as prescribed in Article 101, paragraph 3, of the Charter, and reaffirmed in Staff Regulation 4.2. The relationship between the visa status of the staff and the principle of geographical distribution was enunciated by the Secretary-General in Information Circular ST/AFS/SER.A/238 of 19 January 1954.

3. The Secretary-General's restrictive policy is also guided by the principle of reimbursement to staff members of national income taxation. It is based upon the principle of equality among staff members as enunciated by the General Assembly at its first session in resolution 13 (I) part V. Thus the policy consistently followed by the Secretary-General has been that all staff members without exception, who are permitted to sign the waiver, also receive income tax reimbursement.

4. As regards the question of the legality of the Fifth Committee's decisions, which the Applicant questioned, the Respondent contends that the Fifth Committee, in its report (document A/2615, paragraph 73), was expressing itself on matters of policy merely for the guidance of the Secretary-General. There was no intention to extend the general discretionary powers of the Secretary-General, which he already held in these matters nor were these decisions in conflict with the policies previously laid down by the General Assembly. Thus no formal resolution was required for adoption by the General Assembly.

5. The Respondent contests the Applicant's charge that the contested decision cannot be justified by any text or provision applicable and points out that Staff Rule 104.4(c), cited by Applicant, relates only to the obligation of staff to notify the Secretary-General of their intention to change their residence and nationality status and does not deal with the waiver policy to be followed by the Administration. Paragraph 14 of Information Circular ST/AFS/SER.A/238 concerning staff already in permanent residence status necessarily was of limited application, but the clear wording of the circular as a whole shows that it was not intended to have a temporary effect only. Moreover, administrative circulars may at times have the effect of staff regulations and rules (Tribunal Judgement No. 55).

6. As regards the Applicant's argument that the procedure established in the host country for acquisition of permanent residence status involves the waiver of fiscal immunity as distinct from judicial immunity and that the Secretary-General is not entitled to object to

the filing of a waiver of such immunity, the Respondent contends that the contested decision was made by the Secretary-General in the exercise of his discretionary power, inherent in the duties of heads of international organizations, which was vested in him by the General Assembly when it adopted Section 20 of the Convention on Privileges and Immunities of the United Nations and the Staff Regulations of the United Nations. It was not based on improper motivation and hence there could be no misuse of power.

7. The Secretary-General's right to waive the privileges and immunities of staff members is not limited, as the Applicant contends, to privileges and immunities related to official acts. This was not the intention of the General Assembly when it adopted Staff Regulation 1.8, which in no way qualifies the scope of the privileges and immunities subject to the determination of the Secretary-General "with whom alone it rests to decide whether they shall be waived".

8. The Respondent denies that there was any misinterpretation of the Fifth Committee's decisions on the part of the Secretary-General. The Fifth Committee, in considering the problem of tax reimbursement at the eighth session of the General Assembly, evidently had not intended to go further and authorize waivers without reimbursement by staff members who were not stateless persons. Had the Fifth Committee intended otherwise, it would not have decided that persons in permanent residence status would in future be ineligible for appointment as international staff unless they changed to international visa status.

9. As for the Applicant's contention that in view of the Fifth Committee's decision to cancel certain benefits and allowances of staff members who acquire permanent residence status, the authorization to sign the waiver would impose no additional financial burden upon the Organization, the Respondent points out that the correctness of the Secretary-General's judgement cannot be tested by reference to financial considerations alone. In exercising his discretion as to when any waiver of privileges and immunities can be authorized, the Secretary-General necessarily takes into account all elements affecting the interests of the Organization.

10. The Applicant's contention that his resignation was brought about as a result of moral compulsion exercised upon him has no basis in fact. His resignation from the Secretariat was voluntary and did not result from an administrative action on which the Tribunal may pass judgement for non-observance of his contract of employment or terms of employment.

The Tribunal having deliberated until 7 December 1956, now pronounces the following judgement:

1. The Applicant requests the Tribunal to decide that the refusal by the Secretary-General to authorize him to sign the waiver of

privileges and immunities required under the United States law in order to acquire a permanent residence status was illegal. He contends that his resignation in consequence thereof was without legal basis, null and void.

The Applicant asks for reinstatement with all rights of his permanent contract.

2. The question put to the Tribunal arises from the adoption by the United States Congress of the Immigration and Nationality Act dated 24 December 1952.

Under this Act, "the United States authorities shall adjust to non-immigrant status any non-United States citizen in permanent residence (immigrant) visa status who has an occupation status which would entitle him to a diplomatic or international organization visa (G-4). The Attorney-General will cancel the record of such person's admission for permanent residence, and his immigrant status will therefore be terminated. The adjustment of status which is thus required is made inapplicable by the Act, however, if the individual files with the Attorney-General a written waiver of all rights, privileges, exemptions, and immunities under any law or any executive order which would otherwise accrue to him because of his having an occupational status entitling him to the non-immigrant status." (As summarized in circular ST/AFS/SER.A/238).

According to an opinion of the Attorney-General of the United States, "a staff member who signs the waiver can enjoy, under United States law, the same privileges and exemptions as are available to a United States citizen employed by the United Nations, but cannot assert privileges not available to a United States citizen. Specifically, he would remain immune from suit and legal process in relation to his official United Nations functions, but he would become liable to United States income taxation on his United Nations income". (As summarized in circular ST/AFS/SER.A/238).

3. The matter of waiving the privileges and immunities of members of the staff of the Secretariat has been regarded as of great importance in view of its connexion with Article 105 of the Charter.

Article 1.8 of the Staff Regulations states:

"The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations. In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived."

Accordingly, while under the American law the waiver of privileges and immunities may be a matter of personal concern, under the law

of the United Nations it is a matter for the Secretary-General to decide and no waiver can be executed by a member of the staff without his authorization.

4. In view of the problems involved by the application of the Immigration and Nationality Act to the United Nations staff, the Secretary-General requested the General Assembly to provide him with guidance in this respect.

In the circular dated 19 January 1956 (ST/AFS/SER.A/238), the Secretary-General informed the staff of certain decisions taken by the General Assembly at its eighth session upon the report of the Fifth Committee on the subject of adjustment of the positions of various staff members affected by the provisions of the United States law in question. The Fifth Committee report expressed the view that "any internationally recruited member of the Secretariat who asked and received authority to change from a G-4 (or equivalent) visa status to a permanent residence status should not thereby acquire any entitlement to reimbursement of national income taxes. However, in exceptional cases to be defined by the Secretary-General in the staff rules, a member of the Secretariat may be permitted to change his status without thereby forfeiting the possibility of acquiring entitlement to such reimbursement" (A/2615, paragraph 66). The report, however, disclosed that a number of delegations expressed a strong measure of opposition to any extension of the policy of national income tax reimbursement (Official Records, General Assembly, eighth session, Agenda item 51, paragraph 63, *et seq.*).

5. The Applicant contends that the Secretary-General in making his determination in this instance, relied upon the above-mentioned procedures by the Fifth Committee and that the actions of that Committee taken in respect of waiver of privileges and immunities are completely illegal and are in violation of constitutional processes; that the decision of the Fifth Committee to establish a special category for staff members who might change their G-4 visa to one of permanent residence status would be unenforceable as the proposal was not reduced to writing as provided in rule 121 of the Rules of Procedure; and that, in the absence of a specific resolution passed by the General Assembly, the proceedings of the Fifth Committee cannot support the refusal of the Secretary-General to authorize a staff member to waive privileges and immunities.

In the view of the Tribunal the proceedings of the Fifth Committee in question followed the normal course. In meetings of a main committee, it is within the province of the Chairman under rule 121 to take up any oral proposal, and, following the usual practice, an oral proposal covering this subject was adopted by the Committee which was reflected in its report to the General Assembly.

The Applicant further contends that in the absence of any resolution

passed by the General Assembly, the Respondent cannot rely on the proceedings of the Fifth Committee in support of his refusal to authorize the waiver of privileges and immunities.

In the view of the Tribunal, this contention is inconsistent with the procedures normally followed by the United Nations. The normal procedure in the General Assembly is that after the adoption of the agenda for the session, items belonging to the same category of subjects are referred to one of the main committees (rule 99). After discussion, the Committee then prepares its report on the item to the General Assembly.

In accordance with rules 67 and 68, the report already adopted by the main committee would not be brought up for discussion unless as many as one-third of the members present should consider discussion necessary. It is clear that the adoption of a report by a main committee, has, after its submission to the General Assembly, the same validity and effect as a specific decision of the General Assembly in respect of the matters contained in the report. It will be noted that paragraph 73 of the report of the Fifth Committee (document A/2615, Exhibit 6) contains the following recital: "It was the understanding of the Committee that these decisions should be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to these policies thus approved through appropriate amendments to the Staff Rules". It appears from paragraph 14 of the summary records of the 426th meeting of the Fifth Committee, that the Chairman had explained that "the Committee had taken a decision and the Secretary-General should take it into account in implementing the principles adopted" (Exhibit 11). The report of the Fifth Committee was presented to the 471st plenary meeting of the General Assembly.

The Tribunal therefore finds that the procedure followed by the Fifth Committee is in conformity with the rules of procedure and that the Respondent is entitled to rely on the decisions of the Committee.

6. The Secretary-General informed the staff in the circular issued on 19 January 1954 (ST/AFS/SER.A/238) of the decisions taken by the Fifth Committee and indicated the manner in which he intended to implement those decisions when the question of waiver of privileges and immunities should arise in connexion with the acquisition of permanent residence status. In the circular it was stated that requests for permission to sign the waiver of privileges and immunities in order to change from non-immigrant to a permanent residence status would be considered individually, with attention given to how such a change might affect the principle of geographical distribution. In general, staff members in salary categories G-5 and above were to be granted authorization to sign the waiver of privileges and immunities only when the Secretary-General was convinced that the urgent and compelling circumstances of the case warranted such a decision. These proceedings

leave no room for doubt that implementation of the policy of the Fifth Committee and the General Assembly concerning changes in staff procedures made necessary by the action taken by the United States authorities was left to the sound discretion of the Secretary-General and that the situation was fully disclosed to the staff by the Secretary-General.

7. The Applicant vigorously contends that the Secretary-General does not have discretionary power to decide such questions as changes in nationality or citizen status, or tax exemptions, and in particular those exemptions which are peculiarly within the sole and direct interest of the staff member involved, and not of those types or classes of immunities or privileges contemplated under Article 105 of the Charter, or regulation 1.8 of the Staff Regulations, which could be waived only by the Organization itself. It is argued by the Applicant that the problem presented by the United States Immigration and Nationality Act of 1952, comes down to the single question of waiver of income taxes upon his salary and income derived from his services with the United Nations, and that with this question the Secretary-General has nothing to do, since it does not involve the official functions of a staff member and the powers of the Secretary-General must be circumscribed by the purposes and interests of the United Nations.

In staff regulation 1.8 it is provided that in every instance where a question arises as to the privileges and immunities attached to the United Nations by virtue of Article 105 of the Charter, the staff member involved shall immediately report to the Secretary-General, with whom it rests to decide whether they shall be waived. It seems clear, even in instances where only the staff member is required to make a claim or execute the waiver of privileges and immunities and personally accepts the primary benefits of the waiver, that where (as here) the transaction bears upon executive management at various points and thus affects the substantial interests and purposes of the United Nations, it is the duty of the staff member to submit the problem to the Secretary-General who has the right of decision.

That the Applicant was aware of the existence of such a right of the Secretary-General is evident from paragraph No. 2 of his letter dated 13 July 1955. In requesting the Secretary-General for permission to execute the waiver of privileges and immunities, the Applicant stated: "I appreciate the fact that such authorizations are not always granted to staff members in the Professional category."

For the foregoing reasons, the Tribunal holds that the Respondent's decision under consideration was within the scope of his authority as Secretary-General.

8. There is yet a further consideration which even more strongly bears upon the right of the Applicant to recovery and relief. It is the

resignation. No charge has been made that the resignation and acceptance were not valid when given, or that they were obtained by fraud upon the part of the Secretary-General or any other person ; or that the exchange of the resignation and acceptance papers came about through mutual mistake. The relief sought is revocation of a determination of the Secretary-General to withhold his official permission for the Applicant to sign and submit a waiver of privileges and immunities such as was required by the United States Government. There appears to have been no difference or misunderstanding between the Applicant and the Secretary-General as to the facts. The Applicant had decided to sign the necessary waiver ; the Secretary-General had decided that it was against his duty to give it, and refused to do so. The impasse was resolved by the Applicant, who resigned from his position effective in three months. The permission then was made available.

The Applicant complains that his resignation was "brought about as the result of moral compulsion exercised upon him", but it appears from the facts submitted that the decision to resign was made according to what at the time seemed to him to be his own best interests. There was no substantive choice involved, since at the outset his mind was made up. In his letter of 13 July 1955 (Exhibit 1) he stated, "As I feel I must take this opportunity to acquire permanent residence status in this country..." There is no suggestion of choosing here—his decision as to ultimate action had been made, and announced. It remained only to determine how the decision could be implemented and his declared purpose accomplished.

9. At this point the Applicant was confronted with a procedural election. Upon the refusal by the Secretary-General to authorize a waiver which was the *sine qua non* imposed by the United States Government, two courses of procedure were presented: (a) to execute the waiver without the permission of the Secretary-General and if as a consequence he should be terminated, to approach the Tribunal with a clear issue as to the validity of his termination ; or (b) to resign his position with the Secretariat, thus removing any obstacle as to the waiver.

The Applicant, when squarely confronted with these alternatives, described his choice as follows in his letter of 29 July 1955 :

"I have therefore regretfully come to the conclusion that the only way for me to acquire permanent residence status in the United States is to resign from the Secretariat of the United Nations" (Exhibit 3).

Having chosen the second alternative, the Applicant resigned and was promptly officially informed that the Secretary-General had no objection to his signing the waiver for which permission previously had been declined. In the absence of any ground which would warrant cancellation of the resignation submitted by the Applicant, it follows

that the resignation bars further prosecution of any rights or claims upon his part against the United Nations.

10. The Tribunal has noted that the Applicant claims that the refusal of the Secretary-General to permit him to sign the waiver was in violation of the Universal Declaration of Human Rights in that it amounted to a denial of a freedom of residence. In his answer the Respondent states that this contention of the Applicant is irrelevant and that he confused general human rights with particular conditions of service which govern his employment contract. With this position of the Respondent the Tribunal is in agreement.

11. For the foregoing reasons and conclusions, it is the judgement of the Tribunal that the application should be dismissed, which is accordingly ordered.

(Signatures)

Suzanne BASTID
President

Sture PETRÉN
Vice-President

Jacob Mark LASHLY
Member

R. VENKATARAMAN
Alternate

Mani SANASEN
Executive Secretary

New York, 8 December 1956

Judgement No. 67

Case No. 68 :
Harris
Eldridge
Glassman
Older
Bancroft
Elveson
Reed
Glaser

**Against: The Secretary-General
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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; Mr. Sture Petré, Vice-President ; Mr. Omar Loutfi ;

Whereas Jack Sargent Harris, Hope Tisdale Eldridge, Sidney Glassman, Julia Older, Frank Carter Bancroft, Leon Elveson, Jane Reed and Eda Glaser filed an application with the Tribunal on