(3) The Applicant be paid $400 as costs;

(4) All other pleas are rejected.

(*Signatures*)

Suzanne BASTID
President

Francis T. P. PLIMPTON
Member

H. GROS ESPIELL
Member

Jean HARDY
Executive Secretary

New York, 31 October 1968.

Judgement No. 124

(*Original: English*)

Case No. 111: Kahale

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

Request for the rescission of a decision discontinuing an assignment allowance retroactively.

Argument drawn by analogy with Staff Rule 103.15.—Absence of rules providing prescriptive limitations on claims by the Respondent against staff members.—Considerations of equity.—Contention that the proceedings of the Joint Appeals Board were invalid.—No illegality found.

Examination of the merits of the case.—Entitlement to the assignment allowance was contingent on the family's remaining at the duty station.—Staff Rule 103.21 (a).*—Question whether, having temporarily left the duty station to join the Applicant on mission, his family should be considered as having continued to reside there.—By continuing to pay the allowance without objection, the Administration admitted that the family of the Applicant had not really left the duty station in any substantive sense.—Underlying purpose of assignment allowances.*

Rescission of the contested decision.—Restitution to the Applicant of the amount deducted from his salary as a result of the contested decision.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Louis Ignacio-Pinto; Mr. Francis T. P. Plimpton; the Lord Crook, Vice-President, alternate member;

Whereas, on 16 February 1967, Georges Kahale, a staff member of the United Nations, filed an application to the Tribunal concerning payment of an assignment allowance;

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

Whereas, under paragraph 10 of that article, the Executive Secretary of the Tribunal returned it to the Applicant and called upon the Applicant to make the necessary corrections not later than 10 March 1967;

Whereas the Applicant, after making the necessary corrections, again filed the application on 10 March 1967;

Whereas the pleas of the application read:

"I respectfully submit that the Tribunal:

"(*a*) Declare non-receivable the Secretary-General's claim for the recovery of the assignment allowance, since it is based on the premise that the Administration is not bound by any prescriptive time-limit;

"(*b*) Rescind the administrative decision embodied in Personnel Action No. ONUC 63-3264;

"(*c*) Order that the amount of $1,087.40 deducted from my salary be paid back with accrued interest.

"In the event the Tribunal decides that the claim laid by the Administration to recover the alleged overpayment is receivable, I respectfully request that the case be examined as it had been originally presented by the Representative of the Secretary-General before the Joint Appeals Board. The reversed stand taken by the Administration subsequent to the hearing constitutes an altogether new case and calls for new proceedings. I respectfully submit, therefore, that the Tribunal:

"(*a*) Declare illegal and invalid the proceedings of the Joint Appeals Board in my particular case, since I was denied due process;

"(*b*) Order the rescission of the Joint Appeals Board's conclusions since they rest on the assumption that 'the Board should not challenge' the interpretations made by the Respondent in reference to the contested decision;

"(*c*) Order the rescission of the Joint Appeals Board's decision which was made exclusively on legal grounds, particularly since no legal argument was invoked in the conclusions to support this decision;

"(*d*) Rescind the administrative decision embodied in Personnel Action No. ONUC 63-3264, as well as the Secretary-General's decision based on the recommendation of the Appeals Board;

"(*e*) Order that the amount of $1,087.40 deducted from my salary be paid back with accrued interest;

"(*f*) Order the payment of the sum of $1.00 as token compensation.

"In the event that the Tribunal decides to examine the case as presented by the Representative of the Secretary-General subsequent to the hearing, I submit that the administrative decision discontinuing my assignment allowance retroactively be rescinded since the Administration failed to establish the non-existence of the obligation or to negate the existence of a good cause motivating the payment of the assignment allowance during my detail to ONUC. It is therefore requested that the Tribunal order the payments referred to in . . . (*e*) and (*f*) above. In pursuance of article 15 of the Rules of the Tribunal, I respectfully request that oral proceedings be held so that I may be given the right of oral argument and of comment on the evidence submitted by the Respondent."

Whereas the Respondent filed his answer on 1 May 1967;

Whereas the Applicant filed written observations on 15 November 1967;

Whereas the Tribunal heard the parties at a public session held on 21 October 1968;

Whereas the Respondent submitted an additional statement on 23 October 1968 at the request of the Tribunal;

Whereas the Applicant submitted comments on that statement on 29 October 1968;

Whereas the facts in the case are as follows:

In September 1959 the Applicant, who was an Associate Social Affairs Officer (P-2) at Headquarters in New York, was transferred to the United Nations Regional Social Affairs Office for the Middle East at Beirut effective on 10 September 1959. This change of duty station entailed a change of post adjustment, an entitlement to an assignment allowance of $1,000 and an entitlement to an installation grant. The expected duration of the assignment was two years. In November 1959, the Applicant was promoted to P-3 effective on 1 September 1959 and, as a result of this promotion, the assignment allowance to which he was entitled amounted to $1,200. Having been advised upon the expiry of the two-year term that his services were required in the Congo, he requested information on the proposed assignment in a cable addressed to the Director of Personnel in New York. Mr. El Haj, of the Office of Personnel, replied by the following cable, dated 12 September 1961:

> "Your 52 Social Affairs agreed your assignment as Deputy Civilian Officer Congo beginning 15 November for nine months or one year if dependants join you Stop Duty station to be decided by Officer in Charge Civilian Operations Stop Dependants travel subject your obtaining accommodation in advance subsequent arrival and also to approval Chief Administrative Officer Stop Upon completion Congo assignment you will be reassigned Beirut as agreed by Henderson Stop Should dependants not join you Congo suggest they remain home country or Beirut Stop Pleased advise you have been granted Post Allowance PPP 4 for duration ONUC assignment."

On 29 September 1961 the Applicant requested further details regarding the financial aspect of his Congo assignment in a cable addressed to Mr. El Haj, who replied on the same day by a letter reading in part as follows:

> "...
>
> "Coming now to the financial aspect of your detail to ONUC, we have been able, as you already know, to obtain that you receive, during your stay in the Congo, a Special Post Allowance to P-4 level. This means that you will be paid at the P-4 level, step I, which represents $7,330 net per annum.
>
> "As a special arrangement, staff members assigned to ONUC receive a subsistence allowance in lieu of both the installation grant and the assignment allowance (the payment of these two allowances being discontinued until further notice). The rate of the subsistence allowance is at present 1,000 Congolese francs for the first 60 days which follow the arrival in the Congo. After 60 days, you will receive 900 Congolese francs per day. This amount is subject to reduction should accommodation and food be provided, and it could also be modified later on, without notice. The post adjustment will be paid at the rate applicable to Beirut (class 4); at the P-4 level, this amounts to $1,175 per annum.
>
> "..."

On 15 November 1961, the Applicant addressed to Mr. El Haj a letter marked "Personal and confidential" which read in part:

> "...

"Since I am at present at the P.3 (VI) level, the special post allowance does not greatly affect my salary. It amounts to a salary increment plus a modest increase in post adjustment, and entails a net-pay-increase of only $29 a month. On the other hand, however, my salary would be reduced by approximately one fifth if I were to lose my entitlement to the $1,200 assignment allowance, and if the post adjustment rate during my Congo assignment were to be that applicable to Beirut (Class 4: $1,175) and not to New York (Class 8: $2,375).

"I am aware that under Staff Rule 103.21 'the salaries of staff members assigned from another duty station shall continue to be subject to the post adjustment, if any, applicable at the duty station from which the staff member was assigned'. You will note, however, that under Rule 103.7 (e.i.) 'a staff member who is assigned to a duty station classified *lower* in the schedule of post adjustments than the duty station in which he has been serving may continue to receive for a reasonable period the post adjustment applicable to the latter while the members of his immediate family (spouse and children) remain at the duty station'.

"As far as I am concerned, the post adjustment rate in the mission area is *higher* than that applicable to the duty station in which I am at present serving. If I were to lose my entitlement to the assignment allowance my salary would be considerably reduced while my family remains at the duty station, and this is incompatible with the intent and purpose of Rule 103.7 (e.i.).

"Rule 103.21 provides that the mission subsistence allowance takes place of assignment allowance and installation grant. This can well apply to staff members whose dependants are authorized to travel to the mission area, or to those detailed from Headquarters as the post adjustment rate is that applicable to New York. In my case, however, my family has no alternative but to remain in Beirut and the post adjustment rate is that applicable to this duty station. If my assignment allowance were to be discontinued my salary would be reduced to that of a *P.2* officer detailed or transferred from Headquarters to the same mission area, although the P.4 Special Post allowance indicates that I will be called upon to assume the duties and responsibilities of a P.4 post level.

"I very much hope, therefore, that you will find it possible to maintain my present salary level either by maintaining the assignment allowance while my family remains in Beirut, or by authorizing my return to New York with my family prior to my Congo assignment, so that his assignment takes place from Headquarters with New York post adjustment rate. My reassignment to Beirut will not entail any additional travel expenses as my home leave falls due in 1962. I would very much appreciate a cable reply as time is running very short and I am only two weeks away from the date of my departure . . .".

Mr. El Haj replied as follows by a cable dated 22 November 1961:

"Your fifteen November your family has three alternatives First can after your arrival Leopoldville and on approval of Chief Administrative Officer join you on condition that you remain one year and your family minimum six months Secundo Remain home country Syria Third Remain Beirut your last duty station Stop Third alternative will entitle you keep assignment allowance."

Effective on 1 January 1962, the Applicant was assigned to ONUC as Deputy Civilian Officer with entitlement to a mission subsistence allowance and to a special post allowance to P.4. In fact, he arrived in Kinshasa on 6 December 1961, and he continued to receive his assignment allowance concurrently with the above-mentioned mission subsistence allowance. The expected duration of the Congo assignment was nine months, subsequently extended to one year. On 5 June 1962 the Applicant's dependants (wife and son) arrived in the mission area. His son, who was on education grant travel, returned on 26 September 1962 to Beirut, where he attended the American Community School as a full time boarder for the academic year 1962-63. The Applicant's wife remained with him in the Congo until 13 April 1963 when, upon the completion of the assignment, which had been extended further up to 31 March 1963, both left the Congo to return to Beirut.

On 4 June 1963, the following cable was sent from Headquarters to the United Nations Regional Social Affairs Office for the Middle East:

> "Please advise Georges Kahale assignment allowance was paid to him concurrently with daily subsistence allowance erroneously during detail to ONUC. Personnel action has been processed discontinuing allowance retroactively from 5 June 1962 when wife joined him in Congo to date his return to Beirut. Deduction will be made in five installments starting end of June."

By a cable dated 21 June 1963, the Applicant replied as follows:

> "Express serious reservations regarding ex post facto decision discontinue retroactively allowance. Amount received and spent in good faith and recovery allowance this stage would cause serious financial hardship unjustified by administrative practices. Would not have accepted extension Congo assignment had eye known possibility discontinue allowance retroactively. Urge review decision. In event unfavourable reply reserve right appeal memorandum follows."

On 28 June 1963, the Administration addressed to the Regional Social Affairs Office for the Middle East another cable which read:

> "Please convey our regrets to Georges Kahale for delay in discovering that he was being paid subsistence allowance and assignment allowance simultaneously. If real financial hardship exists would consider spreading deductions over longer period. Assure him that decision was taken after careful review of several cases in same circumstances."

The assignment allowance was discontinued as from 6 December 1961 by Personnel Action No. ONUC 63-3230 (undated); subsequently, the effective date of the discontinuation was changed from 6 December 1961 to 5 June 1962 by Personnel Action No. ONUC 63-3264, dated 4 June 1963. By a letter of 10 July 1963 addressed to the Secretary-General, the Applicant requested a review of the administrative decision to discontinue his assignment allowance. Having apparently received no reply, he filed on 28 August 1963 an appeal with the Joint Appeals Board in New York. It was originally intended to have the case examined by an *ad hoc* Board in Beirut. However, the Applicant was transferred to Geneva on 1 November 1964 and the appeal was referred to the Joint Appeals Board of the European Office of the United Nations, which submitted its report to the Secretary-General on 27 September 1966. The concluding sections of the report, excluding references to the various exhibits, read as follows:

> "VI. *Conclusions unanimously adopted by the Board*

"73. The Board found that it was not necessary to initiate new proceedings, as suggested by the Appellant in his memorandum of 11 March 1966, since despite the regrettable fact that some of the arguments advanced by the Administration at different stages of the proceedings appear to be conflicting, the fact remains that, irrespective of its nature, Mr. El Haj's cable of 22 November 1961, as interpreted by the Administration, has been honoured and acted upon by the latter.

"74. The Board was of the opinion that the exact date—4, 5 or 6 June 1963—on which the cable advising the Appellant of the retroactive discontinuance of his assignment allowance was sent to, or received by, the Appellant was immaterial, since it had to recognize that the present Staff Rules and Regulations provide no prescriptive time-limit for claims of the Administration against a staff member in the case of an overpayment.

"75. But, considering that in all the main national legal systems it seems to be well established that no indebtedness is imprescriptible, and considering further that in the case of the United Nations such an imprescriptibility in favour of the Administration in the case of an overpayment to a staff member hardly seems fair when compared to the short one year prescriptive time-limit before the expiration of which a staff member must present his/her claim in case of an underpayment, under Staff Rule 103.15, the Board felt that it would be very desirable that the Administration's claim should also be subjected to a certain definite prescriptive time-limit.

"76. Consequently, the Board respectfully draws the attention of the Secretary-General of the United Nations to this question of a prescriptive time-limit for the Administration's claims against staff members and wonders whether he would not deem it appropriate to ask some competent body or official to study the matter in view of an eventual amendment or addendum to the Staff Rules.

"77. The Board regretted that the Administration, after having invoked allegedly similar cases of retroactive discontinuance of assignment allowance that had been paid in the Congo concurrently with a mission subsistence allowance, did not deem it possible to give any information about these cases to the Board in order to enable it to evaluate to what extent they were similar.

"78. The Board considered also that the absence of a clear and unambiguous definition of the term 'family' for the purpose of all Staff Rules and Regulations and administrative documents, except in the cases where it is specifically provided, was unfortunate, and felt it desirable that such a definition should be established and made readily accessible to all staff members.

"79. The Board came to the conclusion that when the Appellant's wife and son joined him at his duty station in the Congo in June 1962, his 'family' could no longer be considered as having remained in Beirut, despite the fact that the Appellant's son returned there in September 1962 to continue his studies. The Board reached this conclusion because it felt that it should not challenge the Administration's interpretation of the term 'family' or the concept of a 'move of the family', as stated in the memorandum of the Representative of the Secretary-General dated 27 April 1966. It also took into consideration the fact that the concept according to which 'a child

attending boarding school, ... is regarded as continuing to reside with his/her parents if the child but for being at the school ... would have been residing with the parents' appears to be in harmony with the general principle of law that the residence of a minor child is normally that of his father or tutor.

"80. Consequently, the Board felt that after 5 June 1962 and until his return to Beirut with his wife in April 1963, the Appellant was not entitled to receive an assignment allowance concurrently with a mission subsistence allowance, the condition laid down in Mr. El Haj's cable of 22 November 1961 being no longer fulfilled and the provisions of Staff Rule 103.21 (*a*) having therefore become applicable.

"VII. *Recommendations unanimously adopted by the Board*

"81. In view of the foregoing, the Board does not feel that, at law, the Appellant has a valid claim and therefore it does not find it appropriate to recommend to the Secretary-General to reconsider the decision appealed against by the Appellant.

"82. In reaching this decision, the Board nevertheless cannot but regret the errors made by the Administration, in particular the granting of an assignment allowance contrary to a Staff Rule, not as an exception, but admittedly as the result of an 'administrative error', and the continued payment of that allowance when the condition under which it had been granted was apparently no longer fulfilled, that is after the Appellant's wife had joined him in the Congo, although the proper authorities should normally have been aware of her presence there, even if the Personnel and/or Finance Services at Headquarters were not officially and directly advised of the circumstance. This continued payment may very well have incited the Appellant to accept the extension of his initial assignment with ONUC, in September 1962, when he was asked whether he was willing to extend it; afterwards, the unexpected reimbursement required by the Administration was very probably the cause of some inconvenience to the Appellant, if not of actual hardship.

"83. The Board regrets also the abruptness with which the retroactive discontinuance of the assignment allowance was notified to the Appellant by the cable of 4 June 1963 and the absence of any attempt to reach with the Appellant, before deciding in Personnel Action form ONUC 63-3264 that the amount was 'to be recovered in five monthly instalments effective June 1963', an agreed settlement as to the modalities of repayment which would have excluded possible hardship, undue inconvenience and hard feelings."

On 17 November 1966, the Director of Personnel informed the Applicant that the Secretary-General had accepted the recommendation of the Board and had confirmed the administrative decision to suspend the assignment allowance as of 5 June 1962 and recover the overpayment made to him. On 10 March 1967, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. As to the non-receivability of the claim laid by the Administration:

(*a*) The prescriptive time-limit of one year provided for in Staff Rule 103.15 with regard to staff members' claims against the Administration also applies to the Administration's claims against the staff. If the opposite view were to be held, the staff would not be protected against belated claims. From a legal standpoint,

the claim that the Administration is not bound by any prescriptive time-limit is not founded in justice. In fact, the Administration need not assume an imprescriptible right to protect the interests of the United Nations. Furthermore, the argument that the contested decision was notified within the time limitation considered, but not recommended for adoption, by the Consultative Committee on Administrative Questions is irrelevant, and the Respondent cannot legally argue that the Applicant was notified "approximately" within the time prescriptive limit;

(*b*) The proceedings of the Joint Appeals Board were invalid: the Chairman was designated by the Office of Personnel, acted as a third party and made various attempts to justify the administrative decision by invoking arguments which often conflicted with those of the Administration; the Board followed a procedure incompatible with the intent and purpose of Staff Rule 111.3 and with the specific provisions of paragraphs (*h*) and (*k*); the Administration reversed its stand after the hearing and the Board proceeded with the case without giving the Applicant an opportunity to comment on the new stand taken by the Administration; finally, the Board apparently assumed that an interpretation given by the Administration should not be challenged, and its conclusions contained no reference to any legal arguments on which its recommendations could have been founded.

2. As to the merits of the case as originally presented to the Joint Appeals Board: the contested decision has no valid motive and is incompatible with the intent and purpose of the Staff Regulations and Rules for the following reasons:

(*a*) The payment of the assignment allowance concurrently with a subsistence allowance was not due to a clerical error since the clerical staff is not empowered to discontinue the payment of an assignment allowance without specific instructions and did not fail to execute an administrative directive discontinuing the allowance;

(*b*) The Applicant had no prior knowledge of his entitlement since Mr. El Haj's letter of 29 September 1961 and cable of 22 November 1961 were informative in character and provided contradictory information; moreover, the contention to the contrary was subsequently negated by the Administration itself;

(*c*) The authorities concerned were duly notified of the arrival of the Applicant's wife in the mission area;

(*d*) The premise that both the Applicant's wife and his son had joined him in the mission area is false since his son had travelled on education grant;

(*e*) The reference to the case of staff members who were allegedly in the same circumstances is misleading and irrelevant;

(*f*) The claim that the payment of an assignment allowance was incompatible with Staff Rule 103.21 was negated by the Administration itself; at any rate, Staff Rule 112.2 provides that exceptions may be made by the Secretary-General.

3. As to the merits of the case as presented by the Administration after the Board's proceedings:

(*a*) It is clear from the record that the decision embodied in Mr. El Haj's cable of 22 November 1961 was not an administrative action taken in error but a decision taken *en connaissance de cause*. Therefore, either the payment of the assignment allowance was consistent with Staff Rule 103.21, or the Secretary-General had made an exception to this rule. Furthermore, the assumption that the term "family" for the purpose of the Staff Rules and Regulations necessarily includes both spouse and children is not founded;

(*b*) There was a good cause—namely, the interest of the United Nations, the nature of the Congo assignment and the recruitment difficulties—which motivated the payment of the assignment allowance.

Whereas the Respondent's principal contentions are:

1. The Tribunal may receive the application and determine the validity of the contested administrative decision since the Applicant's rights to appeal were fully observed in accordance with chapter XI of the Staff Rules and article 7 of the Tribunal's Statute. The practice of addressing questions and receiving statements and replies after oral hearing, in particular, is legally unexceptionable provided that each party has some reasonable opportunity to address himself in writing to such statements and particularly to any new arguments or legal issues or facts not previously raised. Therefore, the Applicant's rights to due process were not violated by the Joint Appeals Board's consideration of a reply by the Secretary-General's representative on which he was given four days to comment. Far from being disregarded, the Applicant's appeals rights were most assiduously observed, and the Secretary-General had before him prior to his final decision not only the report and recommendation of the Board but a detailed summary of the Applicant's arguments and all his written submissions including his references to inconsistency of legal arguments. Therefore, having been seized with the application subsequent to a Board report to the Secretary-General on the dispute, it is for the Tribunal to determine whether or not the contested decision constituted non-observance of the Applicant's terms of appointment.

2. The decision to discontinue the Applicant's assignment allowance during his Congo service and to recover payments made after 5 June 1962 was valid:

(*a*) The Applicant was not entitled to receive such payments at the time when they were made:

(i) He had no contractual entitlement to receive assignment allowance in addition to the mission subsistence allowance during the period of his Congo service. No exception to Staff Rule 103.21 was made in regard to the ONUC mission and Mr. El Haj's cable of 22 November 1961 could not change the Applicant's terms of appointment which were governed by the Staff Rules and Regulations. Nor can financial conditions attached to any particular mission assignment be deemed subjects of offers and acceptances between individual staff members and personnel officers;

(ii) The cabled advice and the Applicant's reliance thereon did not entitle him to continued payment of the assignment allowance subsequent to 5 June 1962. In the terms of the cable, there can be no doubt that the Applicant's family joined him in June 1962 and that his son's school attendance did not justify considering the "family" as "remaining" in Beirut. Accordingly, even if the Organization could be held liable for the misleading contents of the cable, its responsibility would be limited to the period ending 5 June 1962 which is no longer in issue;

(*b*) The payments thus made were properly recoverable:

(i) The Applicant had no right to retain payment in excess of legal entitlements. A moral obligation as distinct from a legal obligation may be the basis of an *ex gratia* payment but only after approval by the Secretary-General, and there was no such approval. In the absence of any entitlement, the amount overpaid was due back from the Applicant and recoverable by the Organization;

(ii) The recovery of the overpayment was not prevented by expiry of any applicable time-limits nor was it unduly delayed. There is no limitation on claims by the Organization specified in the Staff Regulations and Rules, and the contested decision was notified approximately one year after the first recovered overpayment was made, which was even well within the time limitation considered, but not recommended for adoption, by the Consultative Committee on Administrative Questions.

The Tribunal, having deliberated until 31 October 1968, now pronounces the following judgement:

I. The Applicant first contends that the Respondent's cable from New York to the Applicant in Beirut, dated 4 June 1963 (possibly not received for several days), notifying the Applicant of the retroactive discontinuance, as of 5 June 1962, of his Beirut assignment allowance, was not given within one year of the effective date of the discontinuance, and was therefore invalid and ineffective by reason, by analogy, of the one year's prescriptive limitation placed by Staff Rule 103.15 on staff members' claims against the Respondent.

However, the Staff Rules contain no such prescriptive limitation on claims by the Respondent against staff members, and none can be read into the Staff Rules. Indeed, a proposal that such a prescriptive limitation be included in the Staff Rules has never been acted upon. The proposal was for a two-year limitation; it is common statutory practice in many countries for the limit on claims against the State to be less than the limit on claims by the State.

It does not follow that Respondent should be considered free, without regard to general principles of equity, to assert claims against staff members after any lapse of time, no matter how protracted, but the delay in this case of approximately one year would not, by itself, call such equitable principles into play.

However, the Tribunal notes that uncertainty will always flow, as it does in this case, from the lack in the Staff Regulations and the Staff Rules of any prescriptive limitation on claims by the Respondent against staff members.

II. The Applicant next contends that the proceedings of the Joint Appeals Board were invalid. However, the Tribunal finds no illegality. The Applicant was given adequate opportunity to reply to all of the Respondent's contentions, inconsistent with each other though they may have been, and full mention was made in the Board's report of all of the Applicant's contentions. As to the composition of the Board, which was that of the European office, the provisions of Staff Rule 111.4 govern and not those of Staff Rule 111.2 (*a*), which are applicable only to the Board at Headquarters.

III. As to the merits, the Applicant contends that the Respondent had no legal right to discontinue the Beirut assignment allowance as of 5 June 1962, when the Applicant's wife and son left Beirut (the son for a holiday from school) and joined him in the Congo.

The Applicant bases his contention on the Administration's cable of 22 November 1961. That cable gave the Applicant, as he was about to leave for the Congo, three alternatives as to his family's (1) joining him in the Congo, (2) staying in his home country, Syria, or (3) remaining in Beirut, his last duty station; alternative (3) would entitle him to keep his Beirut assignment allowance.

The cable must be read against the Administration's prior letter of 29 September 1961 which stated that the Congo subsistance allowance was in lieu

of the installation grant and the assignment allowance (which were discontinued until further notice), and also read against the Applicant's letter of 15 November 1961, asking that his Beirut assignment allowance be maintained "while my family remains in Beirut".

There was thus clear notice to the Applicant that receipt of the Beirut assignment allowance was contingent on his family's remaining in Beirut, and that the allowance would be discontinued if his family joined him in the Congo.

This is particularly so in the light of Rule 103.21 (*a*), which authorizes a subsistence allowance in the case of a special mission such as that to the Congo

> "*in lieu of* assignment allowance under Rule 103.22, installation grant under Rule 107.20 and any post adjustment to the area applicable under Rule 103.7 (*a*)." [Emphasis supplied]

Indeed, the provision in the cable of 22 November 1961 permitting the Applicant to receive a Beirut assigment allowance while his family remained there, and at the same time to receive a Congo special mission subsistence allowance, could be argued to be a violation of Rule 103.21. However, while it is clear that the Rule would prohibit a *Congo* assignment allowance to the Applicant while he was receiving a Congo mission subsistence allowance, it appears that the Rule was not intended to prevent a *Beirut* assignment allowance to a Congo staff member for a family remaining in Beirut.

Be that as it may, the Respondent has not attempted to revoke or recover the Beirut assignment allowance paid to the Applicant during the period while his family *was* clearly remaining in Beirut, namely, from 6 December 1961 until 5 June 1962. Accordingly, the legality of that payment, or of the provision therefor in the cable of 22 November 1961, is not in issue.

What the Respondent by the cable of 4 June 1963 did retroactively discontinue and recover was the Beirut assignment allowance paid the Applicant *after* 5 June 1962, when his wife and son joined him in the Congo. The Applicant contests this action as, in effect, a violation of the statement in the cable of 22 November 1961 that if the Applicant's family remained in Beirut he would be entitled to keep his assignment allowance.

The question, then, is whether, within the meaning and intent of that cable, the Applicant's family did remain in Beirut after 5 June 1962. On that date his wife and son came to the Congo, the son for a vacation from school, and the wife expecting to return to Beirut at least when the Applicant's Congo appointment expired on 30 September 1962.

It can be argued (and the Respondent argues) that from 5 June 1962 the family no longer remained in Beirut. Yet the absence in the Congo was obviously temporary in the case of the wife, and even more so in the case of the boy, who was merely on vacation and was to return to Beirut for boarding school; the Applicant continued to maintain the family's Beirut apartment (in December 1961 they had changed from a two-bedroom apartment to one with one bedroom when the Applicant left Beirut for the Congo).

The Administration of course knew of the wife and son's going to the Congo on 5 June 1962 (and knew that the son was going merely for a vacation) but continued to pay the Applicant the Beirut assignment allowance without objection. This was in effect a practical construction by the Administration of its commit-

ment in the cable, namely that the family had not really left Beirut in any substantive sense.

Such construction is in harmony with the underlying purpose of assignment allowances as stated in the Secretary-General's report to the seventeenth session of the General Assembly (A/C.5/932) dated 15 October 1962, namely, to compensate staff members for the dislocation aspects of an assignment of limited duration (up to five years) to another post where temporary living accommodations in the new post are involved without transportation of the member's furniture and other household effects from his home station. Here the Applicant had been transferred in September 1959 from Headquarters to Beirut for two years, and was thus entitled to the assignment allowance in respect of his Beirut stay. The Applicant's Beirut living accommodations, which the assignment allowance was intended to adjust for, of course continued despite his wife and son's going to the Congo on 5 June 1962.

On 6 September 1962 the Administration cabled the Applicant asking whether he was willing to extend his Congo appointment. The Applicant agreed, and the appointment was extended to 31 March 1963. The Applicant states that he would not have agreed to the extension if he had known of any possibility that his Beirut assignment allowance would be discontinued retroactively. No such possibility had been or was indicated to the Applicant until the cable of 4 June 1963, months after his return to Beirut and after he had spent the allowances.

The meaning of the cable of 22 November 1961 was not clear as applied to a situation where the family home was maintained in Beirut, where after a vacation the boy returned there to school, and where the wife, originally coming to the Congo for a few months, stayed for an additional six. However, the Administration, by continuing to pay the allowance without objection, in effect construed the cable as meaning that the Applicant's family still remained in Beirut within its terms. The Applicant relied on that construction, not only in assuming in good faith that the allowance was properly paid (and in spending it), but in agreeing to extend his Congo service for an additional six months.

This being so, the Tribunal decides the Administration's cable of 4 June 1963, reversing its prior practical construction of the cable of 22 November 1961, was not justified.

IV. For the foregoing reasons, the Tribunal:

(1) Rescinds the administrative decision embodied in Personnel Action No. ONUC 63-3264;

(2) Orders that the amount of $1,087.40 deducted from the Applicant's salary be paid back to him;

(3) Rejects all other pleas of the application.

(*Signatures*)

Suzanne BASTID
President

Francis T. P. PLIMPTON
Member

L. IGNACIO-PINTO
Member

Jean HARDY
Executive-Secretary

New York, 31 October 1968.

STATEMENT BY THE LORD CROOK

While it is necessary for me to leave New York this day, I have taken part throughout in the consideration of this case, having been present at the oral

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

(*Signature*)
CROOK

New York, 26 October 1968.

Judgement No. 125

(*Original: French*)

Case No. 123: Ho (Change of visa status)

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

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

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

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

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

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

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

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

Whereas the Respondent filed his answer on 22 July 1968;

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