

his obligation in the present case or that his decision was tainted by prejudice or by any other vitiating factor.

VII. It is in this connexion that the Applicant requests the Tribunal to order the Respondent to produce copies of all documents stating advice or recommendations on which the Respondent relied when he made his decision to reject the recommendation of the Joint Appeals Board that the Applicant receive an *ex gratia* payment.

The Tribunal has held that "rules of equity and justice do require access to documents and information within the exclusive possession of the Administration in so far as it relates to the staff member concerned and is relevant to the proceedings under consideration. Unless access is given to 'relevant' documents to the Applicant, it would amount to lack of due process in the preparation and presentation of his case" (Judgement No. 74, *Bang-Jensen*, par. 9).

In the present case, however, production of the documents requested by the Applicant is not "relevant" to the proceedings inasmuch as the Secretary-General enjoys complete freedom to seek or act on the advice of either the Office of Personnel Services or the Department in which the Applicant served or both. Such a procedure cannot be considered an illegal delegation of authority or responsibility as the Applicant argues.

VIII. For the foregoing reasons, the application is rejected.

(Signatures)

Endre USTOR  
*Vice-President, presiding*

Samar SEN  
*Member*

*New York, 5 October 1981*

Arnold KEAN  
*Member*

Jean HARDY  
*Executive Secretary*

## Judgement No. 276

(Original: French)

**Case No. 260:**  
**Badr**

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

*Request by a staff member that his period of service as a judge in the Republic of the Congo be counted as part of his contributory service for the purposes of the Pension Fund.*

*Arbitration procedure prescribed in the "judiciary contract".—Competence of the Tribunal in accordance with the precedent set in Judgement No. 176.*

*The Applicant's claim that his contractual status in the Congo was that of a technical assistance expert.—Principle according to which an Applicant cannot use his factual status as an argument to claim a legal status different from his contractual status.—Consideration of the relevant terms of the "judiciary contract".—Nature of the functions performed by the Applicant in the Congo.—The Applicant's claim is*

*rejected.—The Applicant's claim that his "judiciary contract" did not exclude his participation in the Pension Fund.—Clause in the contract stipulating that the magistrate did not acquire the status of a member of the United Nations Secretariat.—Documents excluding the right to participate in the Pension Fund.—The Applicant's contention is rejected.—The Tribunal finds that the Applicant is not entitled to any benefit and hence cannot avail himself of the provisions of article 24 (b) of the Pension Fund Regulations.—Application rejected.*

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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Francisco A. Forteza, Vice-President; Mr. T. Mutuale; Mr. Samar Sen, alternate member;

Whereas, on 19 March 1981, Gamal Moursi Badr, a staff member of the United Nations, filed an application in which he named the Secretary-General of the United Nations as first Respondent and the United Nations Joint Staff Pension Board as second Respondent;

Whereas, in the pleas of his application, the Applicant requests:

“A. That the first Respondent be enjoined to:

“(a) Recognize the true nature of the Applicant's appointment covering the period from 17 January 1963 to 16 January 1965 as that of a technical assistance expert entitled to participation in the Pension Fund, and,

“(b) Advise the UNJSPF Secretariat accordingly, under rule B.1 of the Administrative Rules of the Fund, so that it may take action for giving effect to the provision of article 24 (b) of the Regulations; and

“B. That the second Respondent be enjoined to restore the Applicant's service from 17 January 1963 to 16 January 1965 under the provision of article 24 (b) of the Regulations of the Fund, so that the said period would be taken into consideration for the purpose of calculating the Applicant's retirement benefit.

“The second Respondent's decision not to take any action at this time (as reflected in his memo of 21 October 1980, annex 12) will have to be rescinded in the process.

“Subsidiarily, in case the first Respondent avails himself of the option provided him in article 9, paragraph 1, of the Statute of the Tribunal, it is requested that the Tribunal fix the amount of compensation to be paid to the Applicant at a monthly sum equal to the additional monthly retirement benefit which the Applicant would have been entitled to under the Regulations of the Pension Fund as a result of the restoration of his prior contributory service, to be paid to the Applicant as long as he is in receipt of a retirement benefit and thereafter to his widow as long as she is in receipt of a widow's benefit.”

Whereas the first Respondent filed his answer on 1 July 1981;

Whereas the Applicant filed written observations on that answer on 7 July 1981;

Whereas the second Respondent filed his answer on 15 July 1981;

Whereas the Applicant filed written observations on that answer on 17 July 1981;

Whereas the second Respondent submitted additional written statements on 22 and 29 July 1981;

Whereas the Applicant submitted an additional written statement on 24 July 1981;

Whereas the facts in the case are as follows:

From 17 January 1963 to 16 January 1965, the Applicant was placed at the disposal of the Republic of the Congo (now the Republic of Zaire) by virtue of a contract, hereinafter called the "judiciary contract", entered into by the Applicant and the United Nations under an agreement then about to be concluded between the United Nations and the Government of the Republic of the Congo. On 8 January 1970, he entered the service of the United Nations Secretariat under a probationary appointment and became a participant in the United Nations Joint Staff Pension Fund. On 1 January 1972, his appointment was converted to a permanent appointment. In a letter dated 2 July 1980 addressed to the Secretary-General under Staff Rule 111.3 (a), the Applicant requested that his period of service from 17 January 1963 to 16 January 1965 be included in his contributory service with respect to the Pension Fund, under article 24 (b) of the Fund's Regulations; he pointed out that no decision excluding him from participating in the Pension Fund during the period in question had ever been communicated to him and requested (a) that a declaratory decision be taken recognizing the true nature of his appointment covering that period as that of a technical assistance expert entitled to participation in the Pension Fund and (b) that, under rule B.1 of the Administrative Rules of the Fund, its secretariat be accordingly advised so that it might take action for giving effect to the provision of article 24 (b) of the Regulations. On 31 July 1980, the Chief of Staff Services forwarded a copy of that letter to the Secretary of the Joint Staff Pension Board with a covering memorandum in which he indicated that, in view of the nature of the Applicant's request, and bearing in mind that it involved the interpretation and implementation of the Joint Staff Pension Fund Regulations, he was transmitting it to him for appropriate action. On 4 August 1980, the Assistant Secretary-General for Personnel Services notified the Applicant, in reply to his letter of 2 July 1980, that his request was not covered by Staff Rule 111.3 (a) since he was not requesting that an administrative decision be reviewed; but that it would be given thorough consideration, that it had initially been referred to the secretariat of the Pension Fund, that a decision would be taken in due time and that then, should he wish to challenge it, he would have available the full range of recourse procedures, including the right to file an application with the Tribunal. On 21 October 1980, the Deputy Secretary of the Pension Board wrote as follows to the Chief of Staff Services in reply to his memorandum of 31 July 1980:

"Before proceeding further it might, perhaps, be useful to clarify what it is that is at issue. It should be noted from the outset that there are two separate matters involved which should not only be kept apart and dealt with separately but should also be clarified. The first of these concerns the correct interpretation of the terms of his employment during the above period with a view to determining whether he was correctly or erroneously excluded from participation in the Pension Fund. This matter, I think you will agree, is not within the competence of the Fund. It is quite clear, however, that the second point cannot be dealt with until the first matter has been settled. The reason for this is because article 24 quite specifically states, in part, that:

"... (b) The prior contributory service in the Fund of a former participant to whom a benefit under these Regulations is due but has not been paid, or to whom a disability benefit has been or is being paid, and who again becomes a participant, shall be restored."

“In view of the above, and since Mr. Badr was not a participant during any part of the period in question and no benefit was due to him under the Regulations of the Fund, this provision is not applicable. As no benefit is or was due, there is therefore nothing to restore and hence article 24 has no relevance.

“In summary, therefore, it would seem that since his contention appears to be that he was erroneously excluded from participation in the Pension Fund, it is clear that this matter must be resolved first by the Office of Personnel Services with the assistance, if necessary, of the Office of the Legal Counsel, before this office can address itself to the second point referred to above.”

On 18 March 1981, the Chief of Staff Services informed the Applicant that the Secretary-General would not object to the direct submission to the Tribunal of his application concerning restoration of prior contributory service; in so doing, the Secretary-General's intention was to avoid the necessity of any consideration of the case by the Joint Appeals Board, but he reserved his position on all other aspects of the case including, in particular, the timeliness of the claim. On 19 March 1981, the Applicant filed the application referred to above.

Whereas the Applicant's principal contentions are:

1. Notwithstanding the terms of the judiciary contract, the Applicant was in fact exercising the functions of a technical assistance expert and a project manager; as such, he was of right an associate participant in the Pension Fund.

2. Neither the judiciary contract nor the offer of appointment contains any explicit exclusion clause.

3. Under the Pension Fund Regulations in force at that time, the Applicant had acquired the right to restoration of a period of prior contributory service upon being re-employed; that right has been confirmed and, indeed, reinforced by the later Regulations.

4. The Administration cannot invoke against the Applicant the fact that he did not make his claim earlier: since restoration is automatic, the Regulations of the Fund impose no mandatory time-limit; the situation of which the Applicant is complaining resulted from the Administration's own failures; and an honourable employer does not invoke technicalities to frustrate the manifest rights of an employee.

Whereas the first Respondent's principal contentions are:

1. Even if the Applicant had a colourable right to participate in the Pension Fund, his claim would now be time-barred after the passage of more than 10 years since the occurrence of the events in issue, during which time he has remained silent.

2. The Applicant did not acquire the rights (or incur the obligations) of a United Nations staff member, and, in particular, he did not acquire the right to participate in the Pension Fund when he accepted a judiciary contract which contained clauses indicating that he was not a staff member of the United Nations during the period of his service under that contract.

3. The Applicant's allegations as to his factual situation cannot support his claim to a legal status different from his contractual status.

Whereas the second Respondent's principal contentions are:

1. The Pension Board has taken no decision in connexion with the Applicant's request, either in the memorandum of 21 October 1980 or otherwise. Neither has it delegated the power to take such a decision to the Standing Committee or to its Secretary.

2. The regulations of the Pension Fund do not provide for direct submission of an application to the Tribunal.

3. If the Secretary-General were to be enjoined to act as requested by the Applicant, rule B.1 of the Administrative Rules of the Fund would require the retroactive correction by the Secretary-General of an administrative error of the United Nations. Once the error was corrected by the Secretary-General the period in question would be added automatically to the Applicant's contributory service after payment by the United Nations of the amount due under article 25 (e) of the Fund's Regulations.

The Tribunal, having deliberated from 24 September to 6 October 1981, now pronounces the following judgement:

I. The application expressly names two Respondents: (1) the Secretary-General of the United Nations, who agreed that the case should be submitted directly to the Tribunal; and (2) the United Nations Joint Staff Pension Board. The Secretary of the Pension Board, having received a copy of the application, contested its validity with regard to the Pension Fund, and there was an exchange of views on that subject with the Applicant. The Tribunal will rule on that question after taking a decision on the application directed against the Secretary-General.

II. The Applicant considers that, under article 24 (b) of the Pension Fund Regulations, he is entitled to have his service from 17 January 1963 to 16 January 1965 taken into consideration for the purpose of calculating his retirement benefit. The facts set forth in the first part of this judgement show that the Assistant Secretary-General for Personnel Services notified the Applicant that his request of 2 July 1980 was not covered by Staff Rule 111.3 (a), since he was not requesting that an administrative decision be reviewed. The Applicant was, however, assured that although article XI of the Staff Regulations and chapter XI of the Staff Rules were not applicable, that did not in any way imply that his request would not be thoroughly considered. On 18 March 1981, the Chief of Staff Services informed the Applicant that the Secretary-General would not object to the direct submission to the Tribunal of an application concerning restoration of prior contributory service. In these circumstances, although the contract which bound the Applicant from 1963 to 1965 provided that disputes arising from that contract would be settled by recourse to an arbitration procedure, the Tribunal declares that it is competent in accordance with the precedent set in Judgement No. 176, *Fayad*. It notes that the parties have agreed to submit to it a dispute concerning an obligation which the United Nations may have incurred *vis-à-vis* a staff member of the Organization.

III. The Applicant, who entered the service of the United Nations on 8 January 1970 and became a participant in the Pension Fund on that date, requests that he be allowed to benefit under article 24 (b) of the Regulations of the Fund, according to which

“the prior contributory service in the Fund of a former participant to whom a benefit under these Regulations is due but has not been paid . . . , and who again becomes a participant, shall be restored.”

According to the application, the Applicant, on the basis of a contract entered into with the United Nations, in fact exercised from 17 January 1963 to 16 January 1965 the functions of a technical assistance expert and was therefore entitled to participate in the Pension Fund. Having received no benefits for that period of service, the Applicant considers he is entitled to have it restored after a decision recognizing its true nature has been taken.

The purpose of the application is thus to have the Tribunal recognize the true nature of the Applicant's professional activity during his stay in the Congo in order to enable him to establish a right to participate in the Pension Fund for that period.

IV. The Applicant does not contest that he signed with the Organization a so-called "judiciary" contract, drawn up to assist the Government of the Congo to find qualified people to exercise functions relating to the administration of justice, according to which he was to exercise the functions of a "judge, court of first instance". He contends, however, that in principle a contract is not characterized by the label attached to it and that it is for the Tribunal to characterize the contract in the light of the obligations which it entails for the parties.

On the basis of the functions he exercised in the Congo, the Applicant seeks to establish that his contractual status was in fact that of a technical assistance expert and even that of a project manager. In particular, he invokes an "evaluation report" on his performance prepared on 16 November 1964 by the principal Legal Adviser in Leopoldville, which begins with the words "appointed as a jurist within the framework of the United Nations technical assistance to the Congo". It should be noted, however, that this report, prepared at a time when the Applicant knew that his contract was about to expire, seems to be a general and favourable evaluation of his merits: there was no reasonable need for it to describe precisely the legal particularities of the very special type of contract which bound the Applicant to the United Nations.

The other documents produced by the Applicant show clearly that he worked in the Ministry of Justice and that such titles as "*conseiller juridique*" and "UN Legal Adviser to the Ministry of Justice" were used frequently by the Applicant himself, by the Congolese authorities and by certain United Nations organs in the Congo.

Lastly, the Applicant does not seem to have been appointed "judge of a court of first instance", as provided in article 1 of his contract.

According to the Applicant, the effect of this situation is that, being bound by contract to the United Nations, he was incontestably a staff member of the United Nations and could not be excluded from participation in the Pension Fund under the manifestly untrue pretext that he was a judge appointed by the Head of State of the Congo. Furthermore, the contract signed by the Applicant contained no clause formally excluding him from participation in the Pension Fund. The clause concerning the payment, upon his separation from service, of 8 per cent of his annual salary per year of service as an "indemnité de non-titulaire" also provides, as an alternative, for the payment of a repatriation grant, and according to the Applicant cannot be interpreted as excluding him from the right to a pension.

V. The Applicant thus concludes that, when he received an appointment with the United Nations, he acquired the right to restoration of his period of service in the Congo.

VI. The Tribunal has already recognized that in principle an Applicant cannot use his factual situation as an argument to claim a legal status different from his contractual status (Judgement No. 233, *Teixeira*). In Judgement No. 176, *Fayad*, the Tribunal analysed, in connexion with a similar contract, the complex legal relationships deriving from the terms of the judiciary contract combined with the agreement between the United Nations and the Government of the Congo aimed at providing that Government with qualified personnel to exercise functions relating to the administration of justice.

In the present case, the Tribunal notes that the Applicant was informed of the special

features of the contract offered to him in the Congo by a telegram of 5 October 1962 and by a letter from the Assistant Chief of Secretariat Recruitment, Office of Personnel, dated 22 October 1962, which was accompanied by a specimen copy of the contract. This letter contains practical indications concerning the scope of the terms of the contract.

VII. The Tribunal observes that the preamble part of the contract indicates clearly its link to the "urgent need" of the Government to obtain "qualified personnel to exercise functions relating to the administration of justice in the Congo". It states that the Government has requested the United Nations "to help it to find" qualified people. Pursuant to that request, "the United Nations . . . has proposed Mr. Gamal Moursi Badr" and "the Government of the Republic of the Congo has decided to appoint Mr. Gamal Moursi Badr a magistrate of the Republic".

The contract was thus concluded between the United Nations, which "wishes to obtain the services of Mr. Gamal Moursi Badr (hereinafter referred to as 'the Magistrate')", and the latter, who was "prepared to accept the proposed appointment".

The Tribunal also notes that the letter of 22 October 1962 states: "We are not in a position to inform you where you will be stationed when you arrive in the Congo. This will be determined in the light of the needs of the judiciary service, and the decisions concerning postings are exclusively the responsibility of the Congolese Government"; the contract itself provides (art. 1, para. 1):

"The functions of the magistrate will be the following: Judge, Court of First Instance; they may be changed from time to time by agreement between the Government and the magistrate".

According to the file, it seems that when the Applicant arrived in the Congo he was not assigned to a court; he was assigned to functions relating to "the administration of justice", in other words, he dealt with general problems which his training enabled him to handle. Such functions are entrusted to magistrates in many countries, and it is not surprising that this should have been the case at a time when the Congo had just become independent. The Tribunal notes that in 1967, when completing a personal history form with a view to his recruitment by the United Nations, the Applicant wrote: "During my term in the Congo I was in charge—on the Congolese side—of the recruitment and posting of judges. I also had the occasion of acting as U.N. Senior Consultant a.i., in charge of the whole judiciary program".

It is thus undeniable that the Applicant did not exercise the functions of a judge but dealt rather with matters relating to the judiciary services as a whole. That is clear from the title which he used on 24 December 1964 when he wrote to the Director of Personnel: "Gamal M. Badr, Judiciary Service", which is also used in the reply. Whereas, upon his arrival in Leopoldville, he described himself only as a "magistrate", on 26 November 1964 he used the formula "Legal Adviser-Magistrature".

VIII. The Tribunal therefore observes that, as permitted under article 1 of the contract, the Applicant's functions were determined according to the needs of the Government and the Applicant's aptitudes without any change in his contractual régime.

IX. The Tribunal notes that throughout the Applicant's stay in the Congo, the United Nations administrative authorities continued to indicate the specific nature of his contractual régime, namely that of the magistrates. That is clear from numerous documents, originating in particular in the Office of Personnel, addressed to the United Nations authorities in the Congo, concerning among other things the portion of salary payable in

convertible currency, the purchase of a car and the repatriation of dependants. The Applicant is expressly referred to as "magistrate" or "judge". When the question of separation from service arises, the Administration once again mentions the fact that "the contracts of the magistrates will not be extended in 1965".

In conclusion it cannot be denied that the United Nations always considered that the Applicant's contract belonged to a special category and that at no time during his stay in the Congo did the Applicant contest that situation. Even though he was not assigned to a post as judge, the Applicant played the role of a magistrate attached to the Ministry of Justice, where he performed the required duties under the authority of the Congolese Government.

In those circumstances, the Tribunal cannot accept the Applicant's contention that his situation was in fact that of a technical assistance expert when his contractual status was never contested while he was exercising his functions.

X. Concerning the situation regarding the Pension Fund during the period covered by the contract, the Tribunal recognizes that the contract contains no special provisions on that subject. It notes, however, that by stipulating that the magistrate did not acquire the status of a member of the United Nations Secretariat, the contract excludes the person concerned from the status of a staff member of a member organization of the Fund. In its Judgement No. 176, *Fayad* the Tribunal, in excluding the right to participate in the Fund, based its argument on the one hand on the terms of a letter setting out the conditions of employment and on the other on the wording of a personnel movement form excluding participation in the Fund. Similar documents exist in the present case. The letter of 22 October 1962 from the Office of Personnel states that at the end of the appointment the Applicant will receive an *indemnité de non-titulaire* calculated at the rate of 8 per cent of his net base salary: "This *indemnité* is intended to help you maintain any contributions to a pension scheme other than that of the United Nations". It should be noted that the Applicant did in fact receive the *indemnité* in question before leaving the Congo. In the personnel movement forms prepared in 1963, the heading "Pension Fund" is followed by the word "excluded". The Office of Personnel saw fit to include the following notation on those forms: "This appointment is strictly governed by terms and conditions of the contract specifically designed for the Congo Judiciary".

Consequently, the Tribunal rejects the Applicant's contention that his contract as a magistrate did not exclude his participation in the Pension Fund.

XI. The Tribunal therefore finds that the services performed by the Applicant from 1963 to 1965 could not enable him to acquire the status of participant in the Pension Fund because he was not a staff member of a member organization and, moreover, such participation was expressly excluded by "the terms of his appointment".

Thus, the Applicant was not entitled to any benefit and hence cannot avail himself of the provisions of article 24 (b) of the Regulations of the Pension Fund to obtain restoration of prior contributory service.

XII. Having concluded that the Applicant cannot avail himself of the provisions of article 24 (b) of the Regulations of the Fund, the Tribunal is not required to rule on the question of the time-limits that must be observed when requesting restoration of prior contributory service.

XIII. With reference to paragraph I above and in the light of the conclusions set forth in paragraph XI, the Tribunal decides that the Secretary-General of the United



Nations need take no initiative *vis-à-vis* the Pension Fund on the basis of rule B.1 of the Administrative Rules of the Fund and that, in these circumstances, the United Nations Joint Staff Pension Board should not be included as a Respondent at the beginning of this judgement.

XIV. For these reasons, the application is rejected.

(Signatures)

Suzanne BASTID

President

Francisco A. FORTEZA

Member

T. MUTUALE

Member

New York, 6 October 1981

Samar SEN

Alternate Member

Jean HARDY

Executive Secretary

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## Judgement No. 277

(Original: English)

**Case No. 259:**  
**Bartel**

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

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*Application for the revision of Judgement No. 269.*

*Request for oral proceedings.—Rejected.—Request for revision.—Article 12 of the Statute of the Tribunal.—Facts that the Applicant claims to have discovered.—The facts were not unknown to him within the meaning of article 12.—Application rejected.*

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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Francisco A. Forteza, Vice-President, presiding; Mr. Samar Sen;  
Mr. Arnold Kean; Mr. T. Mutuale, alternate member;

Whereas, on 10 June 1981, the Applicant filed an application in which he requested, *inter alia*, a revision of Judgement No. 269 rendered in his case on 8 May 1981;

Whereas the relevant part of the application read as follows:

“The Applicant . . . states at this time that he has been supplied with new information, statement(s), and/or Affidavits which is of such a nature as to be a