

Judgement No. 333*(Original: English)***Case No. 322:
Yakimetz****Against: The Secretary-General
of the United Nations**

Request by a former staff member of the United Nations to rescind the decision not to consider an extension of his fixed-term appointment and to deny him reasonable consideration for a career appointment.

Direct submission of the application to the Tribunal under article 7.1 of its statute.

Observation of the Tribunal that legal issues involved in this case are interspersed with political considerations but that the Tribunal can deal with only the legal issues.—Question of the legal expectancy of renewal.—Consideration of the circumstances of the Applicant's appointment and the previous renewal of his appointment.—Finding of the Tribunal that the three parties concerned (the Respondent, the Government of the USSR and the Applicant) considered that the Applicant was on secondment from his Government.—The Tribunal reiterates its conclusions in Judgements No. 92 (Higgins) and No. 192 (Levcik), that the agreement of the three parties concerned is required for the renewal of the appointment of a staff member on secondment.—Application of staff rule 104.12 (b).—Finding of the Tribunal that the Applicant did not establish that he had a legal expectancy of any type of further appointment at the end of his fixed-term appointment.—Applicant's contention that his relationship with the Government of the USSR was "nominal rather than real".—Contention rejected.—Applicant's contention that his status changed after he resigned from the government service and that a new contractual relationship could be assumed to have been created.—Consideration of the events leading to and following the Applicant's resignation from the government service.—Finding of the Tribunal that since the Applicant was on secondment from his Government none of his actions could bring about any legal expectancy of renewal.—Judgement No. 326 (Fischman).—Consideration of the circumstances of the Applicant's obtaining asylum in the United States.—Tribunal's conclusion that the Applicant was on secondment, which could not be modified except with the agreement of all parties concerned and that there was no change in his relationship with the Respondent.

Applicant's plea that he was denied the right to receive every reasonable consideration for a career appointment in accordance with General Assembly resolution 37/126, IV, paragraph 5.—Observation of the Tribunal that the Applicant, in his dealings with the Respondent, referred to this issue at a very late stage.—The Tribunal infers from the wording of the Respondent's reply to the Applicant's request for review that the Respondent gave the required consideration for a career appointment for the Applicant.—General Assembly resolutions 37/126 and 38/232.—The Tribunal holds that at the time of the contested decision the existing procedure of offering a probationary appointment remained applicable and that the Respondent had the sole authority to decide what constituted "reasonable consideration" and whether the Applicant should have been given a probationary appointment.—Conclusion of the Tribunal that the Respondent exercised his discretion properly.—Difference between the present case and the Rosescu case (Judgement No. 431 of the ILO Administrative Tribunal).—The Tribunal holds that the Respondent's action in the exercise of his discretion cannot be impugned on any of the grounds stated in Judgement No. 54 (Mauch).—Expression of the Tribunal's dissatisfaction with the failure of the Respondent to record sufficiently clearly and explicitly that he had given the question of the Applicant's career appointment "every reasonable consideration".

Application rejected.

Statement of Mr. Endre Ustor.—In view of his status as seconded staff member, the Applicant was not eligible for consideration for a career appointment.—The disapproval of the Respondent's attitude expressed by the Tribunal is not justified.

Dissenting opinion of Mr. Arnold Kean.—Under General Assembly resolution 37/126 the Respondent had a duty to consider the Applicant for a career appointment.—While a decision to

grant such an appointment is at the Respondent's discretion, the Tribunal may review the question whether it is not tainted by a flaw such as defined in Judgement No. 431 of the ILO Administrative Tribunal (Rosescu) or in Judgement No. 54 (Mauch).—Respondent's contention that the possibility of granting a career appointment was conditional on the existence of an expectancy of renewal has no basis.—The fact that the Applicant was on secondment from his Government need not have precluded his being considered for a career appointment, and the views of the Government concerned, while they must be fully taken into account, are not necessarily decisive.—The decision was flawed by fundamental mistakes of fact or law and should be set aside.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President;
Mr. Arnold Kean, Vice-President;

Whereas, on 6 January 1984, Vladimir Victorovich Yakimetz, a former staff member of the United Nations, filed an application in which he requested the Tribunal:

“A. To consider his case at the Spring, 1984, session of the Tribunal.

“B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to the Applicant's United Nations service.

“C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on December 26, 1983.

“D. To adjudge and declare that he had an expectancy of further employment.

“E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment.

“F. To order that his name be forwarded to an appropriate body to give him such reasonable consideration for a career appointment.

“G. To order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.

“H. To order reimbursement of expenses, if any, reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings.”;

Whereas the Respondent filed his answer on 14 March 1984;

Whereas the Applicant filed written observations on 17 April 1984;

Whereas the facts in the case are as follows:

On 20 July 1977, in a letter addressed to the Assistant Secretary-General for Personnel Services, the Deputy Permanent Representative of the USSR to the United Nations recommended the Applicant, a national of the USSR who had been employed by the United Nations in 1969-1974, for a post of Reviser (P-4) in the Russian Translation Service of the United Nations; a personal history form signed by the Applicant was attached to the letter. On 31 October 1977 the Appointment and Promotion Board recommended, and the Officer-in-Charge of the Office of Personnel Services subsequently approved on behalf of the Secretary-General, the appointment of the Applicant “as a Russian Reviser at the First Officer (P-4) level on a fixed-term secondment basis for a period of five

years". On 23 November 1977 the Deputy Chief of the Secretariat Recruitment Service offered to the Applicant, on behalf of the Secretary-General, "a five-year fixed-term appointment, on secondment from the USSR Government, at step IV of the First Officer (P-4) level, as Reviser in the Russian Service". On the same day the Secretariat of the United Nations sent a Note Verbale to the Permanent Mission of the USSR to the United Nations informing the Mission that this offer had been made. The letter of appointment, which took effect on 27 December 1977, was issued on behalf of the Secretary-General on 28 December 1977 and accepted by the Applicant on 24 January 1978; it did not mention secondment and, under item 5 ("Special Conditions"), specified "None". On 5 October 1981 the Applicant was transferred as Programme Officer to the Programme Planning Section, Programme Planning and Co-ordination Office, Department of International Economic and Social Affairs. On 22 October 1982 the Secretariat of the United Nations requested the assistance of the Permanent Mission of the USSR to the United Nations "in securing the consent of its Government to the extension of Mr. Yakimetz's secondment to the United Nations" for one year, that is, up to 26 December 1983. On 15 November 1982 the Permanent Mission communicated to the Secretariat of the United Nations "its agreement to the extension of the contract of V. V. Yakimetz . . . up to 26 December 1983". On 6 December 1982 the Applicant was recommended for promotion to P-5. Effective on 27 December 1982 the Applicant's appointment was extended for one year. The letter of appointment, signed on behalf of the Secretary-General on 8 December 1982 and by the Applicant on 9 December 1982, specified under item 5: "On secondment from the Government of the Union of Soviet Socialist Republics". On 8 February 1983 the Assistant Secretary-General for Programme Planning and Co-ordination sent the following memorandum to the Applicant:

"Our discussions on your leave schedule for the next few months have prompted me to inform you of my intention to request an extension of your contract after your current contract expires on 26 December 1983. As you know it would be only at the end of 1983 that you would have received full training in all aspects of the biennial programme planning cycle so that, as I had indicated to you last year, I believe that it would be in the interests of the Office to have your services continue.

"I would appreciate it if you could let me know at your earliest convenience whether you would be in a position to accept such an extension."

On 9 February 1983 the Applicant applied for asylum in the United States of America. On 10 February 1983 he informed the Permanent Representative of the USSR to the United Nations that he was resigning from his position with the Ministry of Foreign Affairs of the USSR and from all other official positions he held in the Soviet Government and that he had made an application to the Government of the United States of America requesting asylum. On the same day the Applicant notified the Secretary-General, under Staff Rule 104.4 (c), of his intention to acquire permanent resident status in the United States of America; he added:

"For personal reasons, including my obligations to the United Nations as expressed in Staff Regulations 1.3 and 1.9, I have made an application to the government of the United States requesting asylum.

"I have resigned from all official positions I hold in the government of the Soviet Union and a copy of my resignation, delivered today to the Soviet Mission to the United Nations, is enclosed.

"I wish to [assure] you of my continued dedication and devotion to the United Nations and my wish and intention to continue to perform all my obligations under my employment contract. . . ."

On 28 February 1983 the Director of the Division of Personnel Administration informed the Applicant that the Secretary-General had decided to place him on special leave with full pay, effective 1 March 1983 and until further notice, in accordance with Staff Rule 105.2 (a), and that any other decision pertaining to his case would be taken by the Secretary-General at a later stage. On 1 March 1983, in a letter to the Director of the Division of Personnel Administration, the Applicant asked to be advised on the following points:

"1. I should appreciate being advised of the precise reasons as to why the leave has been granted. I do not consider the mere statement of the language of Rule 105.2 (a), 'for other important reasons', satisfactory to advise me as to why this action has been taken.

"2. What would be the effect of the proposed leave on the following:

"(a) My free use of any and all United Nations facilities without having to seek permission in each instance;

"(b) My continuation as a member of the Appointment and Promotion Committee and as Vice Chairman of the Third Working Group;

"(c) The promotion which is in process for me;

"(d) My career development at the United Nations including a possible extension of my present appointment.

"I shall look forward to receiving written answers to my questions at your convenience. In the meantime, I shall remain actively at my post."

On 11 March 1983 the Executive Assistant to the Secretary-General informed the Director of the Division of Personnel Administration that the Secretary-General had also decided that the Applicant should not enter the premises of the United Nations until further notice. On the same day the Director of the Division of Personnel Administration answered the questions put by the Applicant on 1 March 1983, as follows:

" . . .

"2. As to your request to be advised of the reasons for the decision in question, I wish to point out that in the exercise of his authority and responsibility as the Chief Administrative Officer of the Organization, the Secretary-General has determined that, at this juncture and pending further review, it is in the best interest of the Organization that you do not enter the premises of the United Nations. I would ask you therefore to comply with this decision of the Secretary-General with immediate effect and until further notice. You will be advised in due course of any modification to this instruction.

"3. The above also replies, I believe, to the questions you raised in paragraph 2 (a) and (b) of your letter. Concerning the recommendation which was made for your promotion, I am sure that the Appointment and Promotion Board will give it due consideration at an appropriate time in the course of its proceedings. Finally, as regards your question as to the possible extension of your appointment, I would wish to point out that

consideration of this matter at this time would be premature. You may also wish to refer to staff rule 104.12 (b) which is applicable to this issue."

On 17 March 1983 the Applicant wrote to the Secretary-General asking for a review under Staff Rule 111.3 (a) of the decision to place him on special leave and reiterating his request for a written explanation as to why it was considered in the best interest of the Organization that he did not enter the premises of the United Nations; he added, however, that on the advice of his counsel and under protest, he would of course comply with the Secretary-General's decision. On 29 June 1983 the Applicant was promoted to P-5 with effect from 1 April 1983. On 25 October 1983 he addressed the following memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination:

"My fixed-term contract with the United Nations is due to expire on 26 December 1983.

"As you will recall we have had several discussions on the prospects of my continuing employment in the Office for Programme and Co-ordination. I would like to state once again that I have always considered it to be a special privilege to serve the United Nations. It is my sincere belief that during the eleven years that I have been serving the Organization I have always tried to perform my duties to my fullest, however limited, abilities. I also believe that the intense training in all aspects of programme planning and budgeting in the United Nations that I received over the past two years while working in the Office for Programme Planning and Co-ordination has substantially increased my potential usefulness to the Organization.

"In view of the above let me express my hope that you will find it possible on the basis of my performance to recommend a further extension of my contract with the United Nations, or even better a career appointment."

On 8 November 1983 the Assistant Secretary-General replied:

"In your memorandum of 25 October 1983 to me you remind that your current contract with the United Nations expires on 26 December 1983.

"In this connexion I have recently signed your performance report which shows that the excellent work you performed during the first year with the Office for Programme Planning and Coordination has been continued to the full satisfaction of your immediate supervisors. I am glad to note that you have fully met our expectation of continued professionalism, dedication to your task and hard work, which was the basis for your promotion. I consider you a staff member whose contribution over the past two years to the work of this Office, and undoubtedly also to the Offices in which you have served before, meets the high demands of competence and commitment which are to be expected from a United Nations official.

"From my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time."

On 23 November 1983 the Deputy Chief of Staff Services informed the Applicant, "upon instruction by the Office of the Secretary-General", that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e. 26 December 1983. On 29 November 1983 the Applicant protested against that decision in a letter to the Assistant Secretary-General for Personnel Services, which read:

". . .

"I am shocked at this decision since, in response to my queries, I was recently informed by the head of the Office in which I am working that he intended to recommend an extension of my appointment. I would be grateful if you could give me the reasons for this decision. In any case, the procedure followed in arriving at the decision not to renew my appointment is irregular and arbitrary and contravenes the legal expectancy of renewal which I have as well as my acquired rights under the General Assembly resolution 37/126, IV, paragraph 5, which states that the General Assembly:

"...decides that staff members on fixed-term appointment upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment."

"I would be grateful for your urgent attention to this matter. The abrupt manner in which the decision was taken and communicated to me has not allowed me the opportunity to use the internal recourse procedures that our Organization has established for challenging decisions of this kind.

"In order to permit me to resort meaningfully to these internal procedures I would be grateful if you could extend my contract for a period of three months while the matter is under investigation. This request is without prejudice to my claim to a longer-term appointment in the Organization. I am by a copy of this letter requesting the Grievance Panel to look into this case."

On 2 December 1983 the Assistant Secretary-General for Programme Planning and Co-ordination also protested against the decision in question in a letter addressed to the Assistant Secretary-General for Personnel Services; the letter read in part:

"I find it extraordinary that such a decision should be taken without consulting the head of the Office concerned, especially in the case of an officer with eleven years of excellent service to the Organization, who has received a personal evaluation report with the highest rating only four weeks ago, was promoted to the P-5 level and was elected Vice-Chairman of the Appointments and Promotion Committee earlier this year and is currently in the midst of important assignments for one of which he is in some ways uniquely well qualified and which are regarded as of considerable importance by Member States. Bearing all these factors in mind I had assured Mr. Yakimetz, shortly after signing his latest performance evaluation report, that I intended to recommend a further extension of his contract.

"Apart from such matters of principle I wish to place on record the fact that this decision if allowed to stand would create severe problems for my Office over the next few months. Since, as you know, Mr. Yakimetz is barred from entering the Secretariat building the three other professional officers in the Programme Planning Section have had to assume Mr. Yakimetz's responsibilities for several sections of the 1984-1985 programme budget during the Assembly period. Mr. Yakimetz was therefore assigned full and sole responsibility for two important reports that must be completed in the next three months for the April 1984 meeting of CPC and has been working on them for the past several months. To reassign these reports at this stage would mean significant delays in their issuance and a loss in their quality.

"It is in best interest of the Office to continue to have the services of Mr. Yakimetz. Considering Mr. Yakimetz's long and outstanding record

within the United Nations, I strongly recommend that his appointment be extended.”

On 13 December 1983 the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond its expiration date; he stated:

“General Assembly resolution 37/126, IV, paragraph 5, states that ‘staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment.’ Staff regulation 4.4 requires that . . . ‘the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.’ Staff rule 104.14 (a) (ii) says that ‘subject to the criteria of Article 101, para. 3 of the Charter, and to the provisions of staff regulations 4.2 and 4.4, the Appointment and Promotion Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat . . .’ Article 101 (3) of the Charter and staff regulation 4.2 give as the ‘Paramount consideration’ . . . ‘the necessity for securing the highest standards of efficiency, competence and integrity.’

“My Department has made it clear to me that in their view I have met those standards. My performance was rated ‘excellent’ in my most recent Performance Evaluation Report. I was recently promoted to P-5. I was given to understand on many occasions, both verbally and in writing, that my Department intended to recommend a further extension of my appointment or conversion to a career position. The most recent assurance was a memorandum to me dated 8 November 1983 from the Assistant Secretary-General for Programme Planning and Co-ordination, who wrote:

“‘From my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time.’

“I understand that such a recommendation has been made. I have at all times tried to govern my conduct in accordance with the letter and the spirit of the Staff Rules and the terms and conditions of my contract with the United Nations. My Performance Evaluation Report indicates that I enjoy harmonious relationships with my colleagues. I was elected Vice-Chairman of the Appointment and Promotion Committee earlier this year, a position of some trust.

“Given this service record and these assurances, and after six years of continuous service, most staff members would have an expectancy that their candidacy for a career appointment would be ‘given every reasonable consideration,’ as General Assembly resolution 37/126 IV requires. The contested administrative decision appears to preclude such reasonable consideration. The interests of good administration cannot be served by the interruption of the work with which I have been entrusted by my Department. I can think of no impediment to the forwarding of my name to the Appointment and Promotion Board except factors extraneous to my performance. The quoted General Assembly resolution places no restrictions as to eligibility, nor do staff regulations 4.2 and 4.4 nor staff rule 104.14 (a) (ii). Extraneous factors may not be used as a consideration in promotion, extension, transfer or in any of the areas where the paramount consideration must be the necessity of securing the highest standards of efficiency, competence or integrity. Extraneous factors may not be used to

deny a candidate for a post fair and reasonable consideration, a position upheld in Tribunal Judgement No. 310 (*Estabial*).

"To deny me the right to reasonable consideration for a career appointment for any reason unrelated to merit—efficiency, competence, integrity—would, I believe, be a violation of Article 100 of the Charter.

"Therefore, I respectfully request that the Administrative decision be withdrawn and my name forwarded to the appropriate Appointment and Promotion body for reasonable consideration.

" . . . "

In a reply dated 21 December 1983, the Assistant Secretary-General for Personnel Services stated:

" . . . "

"In your letters, after referring to your service record and the evaluations of your supervisors, you state that under such conditions 'most staff members would have an expectancy that their candidacy for a career appointment would be 'given every reasonable consideration', as General Assembly resolution 37/126 IV requires.'

"Your situation, however, is not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.

"Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in staff rule 104.12 (b) and reiterated in your letter of appointment, 'does not carry any expectancy of renewal or of conversion to any other type of appointment'.

"In view of the foregoing, the reasons advanced by you in your memorandum of 13 December do not require the Secretary-General to alter the decision communicated to you by letter of 23 November 1983. That decision is maintained and, therefore, the Secretary-General is not in a position to agree to your request 'that the Administrative decision be withdrawn and [your] name forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for career appointment.

"Should you wish to pursue your appeal, the Secretary-General is prepared to agree to the direct submission of your case to the Administrative Tribunal."

On 6 January 1984 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. No legal impediment existed at the time of the contested decision, or exists now, to the continuation of the Applicant's service with the United Nations:

(a) The Applicant was not in any legally cognizable sense on secondment;

(b) After 10 February 1983, the Respondent had neither the obligation nor the right to solicit or receive instructions as to the Applicant from any authority extraneous to the Organization;

(c) No legal constraint existed, after 26 December 1983, on the Applicant's further appointment to the United Nations.

2. The Applicant had a legally and morally justifiable expectancy of continued United Nations employment, and a right to reasonable consideration for a career appointment.

3. The Applicant was denied the reasonable consideration for further employment to which he had a right.

Whereas the Respondent's principal contentions are:

1. The Applicant has no entitlement, including any legally cognizable expectancy, as regards continued employment on expiry of his fixed-term contract:

(a) The fixed-term contract excludes any expectancy;

(b) No circumstances outside the scope of the contract gave rise to legally cognizable expectations:

(i) The circumstances relating to secondment could not have created an expectancy. The separation from government service during period of United Nations appointment did not result in new terms of contract with United Nations;

(ii) The commendations by supervisors did not commit the Secretary-General to extend the appointment. The pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled;

(iii) General Assembly resolution 37/126, IV, paragraph 5, did not effect a change in procedure on appointment.

2. The Secretary-General's decision against re-appointment was within his sole authority under the Charter and the Staff Regulations:

(a) In reaching his decision, the Secretary-General took into account all the circumstances in the case;

(b) In taking his decision in the case, the Secretary-General acted in the interest of the Organization.

The Tribunal, having deliberated from 11 May to 8 June 1984, now pronounces the following judgement:

I. In this case the legal issues involved are interspersed with political considerations. The Tribunal can however deal only with the legal issues, which are:

(a) Whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;

(b) Whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982, which reads

"Decides that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment",

has been carried out;

(c) The consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship.

The issues mentioned above are not independent of each other; sometimes they overlap and at other times conclusions reached on any of them influence those on others.

II. As regards the controversy about the legal expectancy for further service with the United Nations, the Tribunal notes that although there was no reference to secondment in the Applicant's letters of appointment of 21 November 1969 and of 28 December 1977, his third and last letter of appointment dated 8 December 1982 included a "special condition" that he was "on secondment from the Government of the Union of Soviet Socialist Republics". He accepted this letter of appointment without objection, and in fact he had accepted without comment the Respondent's letter of 23 November 1977, which had preceded the letter of appointment of 28 December 1977 and which had stated that he was offered a five-year fixed-term appointment "on secondment from the USSR Government".

III. A note verbale from the Respondent to the Permanent Mission of the USSR dated 23 November 1977 stated that the Applicant's five-year fixed-term appointment was to be on secondment from the USSR Government, as did a similar Note sent by the Respondent to the Permanent Mission on 22 October 1982 seeking the consent of the Government of the USSR to the extension of the Applicant's appointment on secondment for a further year. The Permanent Mission of the USSR replied on 15 November 1982, communicating its agreement to the extension of the Applicant's appointment.

From the foregoing, it can be concluded that all three parties (the Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being on secondment from the Government of the USSR.

IV. In his letter of 21 December 1983 addressed to the Applicant, the Respondent concluded that, since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible in the circumstances. This accords with the analysis of secondment in the Tribunal's Judgement No. 92 (*Higgins*) as requiring the agreement of the "three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned" (para. VI) and with the decision of the Tribunal in paragraph V of Judgement No. 192 (*Levcik*) that "any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously requires the agreement of the three parties involved".

V. The Respondent's letter of 21 December 1983 also relied, as does his answer to the application, on Staff Rule 104.12 (b), reiterated in the Applicant's letter of appointment, which provides that a fixed-term appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment."

VI. Applying the principles followed in Judgements Nos. 142 (*Bhattacharyya*) and 205 (*El-Naggar*), it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment.

VII. This conclusion needs no modification in the light of two other related arguments put forward by the Applicant. First, it is asserted that the Applicant's connexion with the USSR Government was at best tenuous and informal and that his relationship with "the Ministry of Foreign Affairs was

nominal rather than real". In support, the Applicant points out that in his first and second applications for employment with the United Nations, he answered in the negative the question "Are you now, or have you ever been, a permanent civil servant in your Government's employ?". However, in his application in 1969 he had stated that he was a senior teacher at the Moscow Physical Engineering Institute. Moreover, in his letter of 10 February 1983 to the Permanent Representative of the USSR to the United Nations, he stated that he was "hereby resigning from my position with the Ministry of Foreign Affairs of the USSR and from all other official positions I had in the Soviet Government". He wrote to the Secretary-General in similar vein on the same day.

VIII. The Applicant's second argument is that even if secondment existed or was implied for his service in the United Nations, a change in his status took place from 10 February 1983 onwards when he resigned from the service of the USSR Government, and that in fact a new contractual relationship could be assumed to have been created between him and the Respondent. He argues that the Respondent, by not taking disciplinary action against him, by promoting him, by allowing him to serve out his contract until the date of its expiry (26 December 1983), and by letting him continue as Vice-Chairman of the Appointment and Promotion Committee, created a new, although tacit, agreement in which the Soviet Government was not in any way involved.

IX. The Tribunal notes that apart from the measures described above, the Respondent also put the Applicant on special leave, which he had not asked for, and ordered that the Applicant's entry to the United Nations Headquarters building be barred. He states that the Applicant's promotion was no more than a consequence of his earlier good service. On 11 March 1983 the Respondent wrote to the Applicant that these steps were taken in the best interests of the Organization and advised him that "as regards . . . the possible extension of your appointment, I would wish to point out that consideration of this matter at this time would be premature. You may also wish to refer to Staff Rule 104.12 (b) which is applicable to this issue". This rule stipulates that the fixed-term appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment". The Respondent further argues in his answer to the application that a break between a staff member and his Government does not "constitute in itself grounds for terminating the fixed-term contract of a fixed-term staff member seconded or not". In its consideration of the conflicting arguments, the Tribunal finds that the events leading to and following from the Applicant's resignation from the service of the USSR Government throw much light for the resolution of this controversy.

X. In September-October 1982, the Assistant Secretary-General for Programme Planning and Co-ordination discussed with the Permanent Mission of the USSR a two-year extension for the Applicant's service with the United Nations, but apparently accepted that Mission's argument that "for technical reasons it was easier to propose extensions one year at a time".

XI. About the same time evidence was available that the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant. It was suggested to him that he should leave for Moscow early in 1983 for this purpose, but his application for leave was refused by the United Nations.

XII. The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions. Insofar as

he was on secondment from the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment. If his fixed-term appointment were not based on secondment he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension, but such a situation did not arise. Another consequence of his actions raised the question of his suitability as an international civil servant. In Judgement No. 326 (*Fischman*), the Tribunal referred to the widely held belief mentioned in a report of the Fifth Committee of the General Assembly that

“International officials should be true representatives of the cultures and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations”,

and held that this “must continue to provide an essential guidance in this matter.” In the same judgement, the Tribunal also recalled a part of Information Circular ST/AFS/SER.A/238 of 19 January 1954 which stated *inter alia* that

“The decision of a staff member to remain on or acquire permanent residence status in . . . [the] country [of his duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the Professional category . . .”.

The Applicant had been granted asylum in the United States of America and there arose the problem of his having to waive privileges and immunities with the permission of the Respondent. Such a waiver was necessary for changing his visa category under the United States laws. However there was apparently no immediate problem and it seems that no request was made to the Respondent for agreeing to the Applicant waiving his privileges and immunities. Besides, a private bill was later introduced on the Applicant's behalf in the United States House and Senate.

XIII. In view of the foregoing, the Tribunal concludes that during the period of his service with the United Nations the Applicant was under secondment which, as already stated, could not be modified except with the consent of all three parties and that no tacit agreement existed between the Applicant and the Respondent between 10 February 1983 and 26 December 1983 changing the character of their relationship.

XIV. With these conclusions in mind the Tribunal considered the Applicant's plea that he was entitled to, but was denied, the right to receive “every reasonable consideration” in terms of paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982.

XV. The Tribunal notes that until the end of November 1983, there was no reference to this resolution either by the Applicant or the Respondent. Before this time, the only mention of a career appointment occurs casually in the Applicant's memorandum of 25 October 1983 in which he expresses the hope to the Assistant Secretary-General for Programme Planning and Coordination that he would find it possible “on the basis of my performance to recommend a further extension of my contract with the United Nations, or even better a career appointment” without however citing the General Assembly resolution. A series of letters, memorandums and other communications exists relating to the Applicant's continuation with the United Nations; all of them consider extension of his current contract and none of them refers to the General Assembly resolution. In his letter of 29 November 1983 to the Assistant

Secretary-General for Personnel Services the Applicant drew for the first time the attention of the Respondent to General Assembly resolution 37/126, IV, paragraph 5. A fuller argumentation on the basis of this plea occurs in the Applicant's letter of 13 December 1983. The Tribunal notes in this connection that as early as 3 March 1983, the Director of the Programme Planning and Evaluation Branch concluded his memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination by stating: "Mr. Yakimetz has indicated to me his willingness to continue to work, unless his current status would prevent him from so doing. Your guidance will be very much appreciated." There is no reply to this memorandum in the files and the Tribunal is left with the impression that the Applicant's plea based on the General Assembly resolution came much later in the proceedings.

XVI. However, even if the Applicant did not draw sufficiently early the Respondent's attention to the resolution under discussion, the Respondent was bound nonetheless by its terms and the Tribunal has to decide how and to what extent he carried out his obligations under it.

The Respondent's letter dated 21 December 1983, addressed to the Applicant in reply to his counsel's letter of 13 December 1983, states that he has "given careful consideration to the issues raised in your request for administrative review", and since these issues are particularly related to the provision of the General Assembly resolution in question, the plain and simple inference is that the Respondent had given the required (i.e. "every reasonable") consideration for a career appointment for the Applicant. This is further elaborated in the Respondent's answer to the application when he states:

"Respondent notes that the General Assembly only stated a desideratum, namely, that fixed-term appointees be given reasonable consideration; the Assembly did not specify new procedures for effecting such consideration, or suggest that existing procedures not be utilized, and did not convert fixed-term appointments to probationary appointments, whose holders must, as a matter of right, be reviewed by the Appointment and Promotion Board before being separated after two years of probationary service. Respondent therefore submits that, in the absence of such specification, suggestion or conversion, the existing procedures under the Staff Regulations and Rules, which form an integral part of all staff members' terms of appointment, including Applicant's, remain applicable."

XVII. To this the Applicant replies that the Respondent cannot argue that the pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled, since he himself prevented their fulfillment.

XVIII. The General Assembly resolution is silent on who should give "every reasonable consideration" and by what procedure. That this latter question needed elucidation is evident from a subsequent resolution of the General Assembly adopted on 20 December 1983, i.e. six days before the Applicant's fixed-term appointment came to an end. The relevant part of this resolution (38/232, VI, para. 5) reads:

"*Recommends* that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts".

The Tribunal holds that until the Respondent has accepted the recommendation made by the General Assembly on 20 December 1983, the existing procedure of offering a probationary appointment to a candidate remains applicable, and

that in the absence of such an appointment it is left to the Respondent to decide how "every reasonable consideration" for a career appointment should be given to a staff member under General Assembly resolution 37/126, IV, paragraph 5. In the present case, the Respondent had the sole authority to decide what constituted "reasonable consideration" and whether the Applicant could be given a probationary appointment. He apparently decided, in the background of secondment of the Applicant during the period of one year from 27 December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment. He thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 that he had given "every reasonable consideration" to the Applicant's career appointment.

XIX. In this context, the *Rosescu* case (ILO Administrative Tribunal Judgement No. 431 of 11 December 1980) has been cited by both the Applicant and the Respondent, but their interpretations of its considerations are widely divergent. In the present case, different in many material respects from the *Rosescu* case, there has been no allegation, and far less any evidence, that the Respondent sought instructions from any Member States, or that he had in any manner let the wishes of a Member State prevail over the interests of the United Nations and thus disregarded his duties under Article 100, paragraph 1 of the Charter. Indeed, he states all throughout that the measures he took were in the interests of the United Nations taking into account all the facts, "together with the representations to diverse effect by the permanent missions of two member States".

In Judgement No. 54 (*Mauch*), the Tribunal stated that:

"While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved."

In the present case, the Tribunal holds that the Respondent's action in the exercise of his discretion cannot be impugned on any of the grounds stated above.

XX. In view of the above, the Tribunal holds that the Applicant's pleas cannot be sustained. The Tribunal would however express its dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment "every reasonable consideration" as enjoined by the General Assembly resolution. However, this omission on the part of the Respondent has not caused any discernible injury to the Applicant and he is therefore not entitled to any monetary relief.

XXI. Accordingly, and subject to the comments made in the preceding paragraph, the Tribunal rejects the application.

(Signatures)

Endre USTOR
President

Samar SEN
Vice-President

Geneva, 8 June 1984

Jean HARDY
Executive Secretary

STATEMENT BY MR. ENDRE USTOR

I concur in the judgement as in my view the rejection of the application is fully justified. I cannot, however, accept some parts of the reasoning.

I agree with the finding that the Applicant's appointment had satisfied the requirements of secondment as set out by this Tribunal in earlier judgements (Nos. 92: *Higgins* and 192: *Levcik*). I believe, however, that the doctrine developed in this respect by the Tribunal—based on the very nature of the concept of secondment—precludes not only the extension of a seconded fixed-term appointment but also its conversion to any other type of appointment without the consent of the Government concerned.

In view of the above, the Applicant was in my view not eligible for consideration for a career appointment. In any event, the Applicant, in view of the circumstances in which he elected to break his ties with his country, "could no longer claim to fulfil the conditions governing employment in the United Nations" and could not expect that any consideration would lead to his career employment. As the Respondent exercised his discretionary power correctly by refusing the requests of the Applicant, he does not deserve the disapproval expressed in the judgement.

Endre USTOR

Jean HARDY
Executive Secretary

Geneva, 8 June 1984

DISSENTING OPINION OF MR. ARNOLD KEAN

1. Although I can concur in the view of my colleagues that the Applicant was employed by the United Nations on secondment from the Government of the USSR for the whole of his final fixed-term appointment, and with the rejection of the Applicant's claim in so far as it is based on an expectancy of further employment, I regret that I cannot concur in the conclusion reached by the majority judgement.

2. The majority judgement does not, in my view, adequately consider whether the Respondent gave due effect to General Assembly resolution 37/126, paragraph IV.5. the relevant part of which reads as follows:

"[The General Assembly] *Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment".

It will be observed that consideration for a career appointment was not expressed in the resolution to be conditional on the staff member having a legal expectancy of a further appointment. The resolution, although not yet incorporated in the Staff Rules, was nevertheless a condition of the Applicant's employment, binding on the Respondent, who must have been fully aware of it. (Judgement No. 249: *Smith*).

3. The Respondent does not dispute that the Applicant had, by 1983, completed more than five years of satisfactory service on fixed-term appointments, so that he fell within the terms of the resolution. The Respondent does, however, contend in paragraph 17 of his answer that the relevant paragraph of the resolution (paragraph IV.5) only stated a "desideratum". This contention is without foundation, because the General Assembly expressly used the word "decides" in paragraph IV.5, while in cases where it was only expressing a desideratum (paragraphs IV.7 and V) it used the word "requests", or, in paragraphs IV.3 and 4, the word "recommends". The contrast in the choice of

verb is striking and was no doubt deliberate: Paragraph IV.5 must be regarded as a decision of the General Assembly which the Respondent was obliged to obey.

4. The decision taken by the Respondent in pursuance of General Assembly resolution 37/126, paragraph IV.5 was, however, discretionary. The ILO Administrative Tribunal, in its Judgement No. 431 (*Rosescu*), has considered the extent to which such a discretionary decision is subject to review:

"Although a decision on the extension of an appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. The Tribunal will set it aside if it is tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the facts." (para. 5)

This principle is similar to that adopted by the United Nations Administrative Tribunal in Judgement No. 54 (*Mauch*). The Respondent has submitted in his answer to the application (para. 21) that "the decision not to re-appoint the Applicant was properly based . . . on the interests of the Organization". This would not, however, shelter the Respondent from review of the question whether the decision was tainted by some such flaw as is referred to in the judgements cited above.

5. The Applicant received from the Administration two letters in which his claim was rejected. The first, dated 11 March 1983, was from the Director of the Division of Personnel Administration. It stated that consideration of the possible extension of the Applicant's appointment would be premature at that time. It also referred the Applicant to Staff Rule 104.12 (b) which provides that a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.

6. The other letter giving reasons for the rejection of the Applicant's claim was from the Assistant Secretary-General for Personnel Services and was dated 21 December 1983. It stated the Respondent's view as follows:

" . . . your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, *cannot give you any expectancy of renewal without the involvement of all the parties originally concerned*". (Emphasis added.)

7. This argument was, by its terms, addressed to "expectancy of renewal", as was the tenor of the whole letter, particularly in its reference to Staff Rule 104.12 (b). It was evidently the belief of the writer of the letter that, if the Applicant had no expectancy of renewal, there was no possibility of his receiving a career appointment in pursuance of the General Assembly resolution. That resolution is, however, not conditional upon the staff member having an expectancy of further employment, which is therefore in no way a prerequisite of a career appointment.

8. A second factor which, according to the Administration's letter, was regarded by the Respondent as decisively obviating further consideration of the Applicant for a career appointment under the General Assembly resolution, was that his existing fixed-term appointment was on the basis of secondment under a one-year contract, by which "the Organization agreed so to limit the duration

of your United Nations service". This supposedly agreed limit was expressed in the letter to apply to service generally, and not only to service on secondment.

9. The supposed agreement by the Organization might have been either expressed or implied. No evidence has been produced of any expressed agreement and it must be considered whether any such agreement is implied in the nature of secondment. The Applicant's secondment ended on 26 December 1983, and the question therefore arises whether, on that date and bearing in mind that he had previously resigned any posts he had held with his Government, he was then obliged to return to its service. In its Judgement No. 92 (*Higgins*), para. IV, where the Tribunal considered the nature of secondment, there is reference only to rights of the seconded staff member, and no reference to or implication of a duty on his part to return to the service of the releasing organization. Clearly, as indicated by the Tribunal in Judgement No. 192 (*Levcik*), the staff member's secondment cannot be confirmed or extended without the consent of the releasing Government, but, in the words of the ILO Administrative Tribunal in Judgement No. 431, (*Rosescu*), para. 7.: "if the Romanian authorities had . . . wanted to have the complainant back again, . . . they would have needed his consent".

10. In the Applicant's case, there was in the circumstances no possibility, and no desire on the part of the Government or of the Applicant, that he should rejoin the service of that Government, from which he had recently resigned. The only effect, therefore, of a supposed preclusive agreement (expressed or implied) would have been to prevent the Applicant from being employed, then or at any future time, by the United Nations, however valuable or necessary his services might be. It cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement, bearing in mind the provision of Article 101.3 of the Charter of the United Nations that "the *paramount consideration* in the employment of the staff . . . shall be the necessity of securing the highest standards of efficiency, competence, and integrity". (Emphasis added.)

11. Guidance may be derived from the *travaux préparatoires* used by the General Assembly in preparing the resolution in question, which indicate that, when it came to considering a seconded staff member for a career appointment, it was generally agreed that the views of the Government concerned should be "fully taken into account". The relevant passage (para. 33) of Annex I to the Report of the International Civil Service Commission (ICSC), 1982 (General Assembly Official Records, 37th Session, Supplement No. 30 (A/37/30)) reads as follows:

"The Commission *recommends* that, upon completion of five years of service, each employee be given every reasonable consideration by the employing organization for a career appointment. With regard to staff on secondment, the majority of the members of the Commission stressed the need for each organization, in situations when it wished to retain the services of the staff member beyond the period of the initial agreement, to take fully into account the views of the releasing Government. The other members, while not objecting to this, felt that this should not in any way prejudice the individual rights of the staff member."

Far from there being a generally accepted rule that in the absence of the Government's consent a seconded staff member must always be refused, *in limine*, a career appointment at the end of his period of secondment, this paragraph makes it quite clear that the Government's view was not to be decisive but was to be fully taken into account together with all other relevant

factors. The report of the ICSC does not indicate how much weight, if any, should be given to the views of the releasing Government if the effect of refusing its consent could not have been to recover the staff member for its own service (which in the circumstances of the Applicant's case was clearly impossible) but only to prevent his future employment by the United Nations.

12. For the foregoing reasons, my opinion is that the Respondent's decision was flawed by fundamental mistakes of fact or law and requires to be set aside, and that the Tribunal should accept the Applicant's plea that he was illegally denied his right to reasonable consideration for a career appointment.*

Arnold KEAN

Jean HARDY
Executive Secretary

Geneva, 8 June 1984

Judgement No. 334

(Original: French)

Case No. 327:
Morin

Against: The Secretary-General
of the United Nations

Request by a former technical assistance expert of UNCTAD to rescind decisions denying him compensation for injuries sustained as a result of an accident attributable to the performance of official duties.

Conclusion of the Advisory Board on Compensation Claims that the Applicant was not engaged in the performance of official duties at the time of the accident.—Recommendation to deny the claim.—Recommendation accepted.

Direct submission of the application to the Tribunal under article 7.1 of its statute.

Question of the official nature of the travel during which the accident occurred.—Consideration of the circumstances of the case.—The Tribunal regrets that the Advisory Board did not state any grounds for its recommendations to deny the Applicant's claim.—Consideration of the conditions in which the Applicant was called upon to organize his work.—Finding of the Tribunal that the fact that the Applicant carried out his mission on a Saturday does not make it unofficial and that an expert working in the field can hardly be expected to keep strict office hours.—Conclusion of the Tribunal that the accident was attributable to the performance of official duties within the meaning of article 2 (a) and (b) of appendix D to the Staff Rules.

* Reference has been made in the majority judgement to Judgement No. 326 (*Fischman*), a decision made previously during the present session of the Tribunal. This referred to a report of the Fifth Committee, dated 1953 (Doc. A/2615, para. 70), recording a "widely shared view" that "international officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations". Consideration of this view requires caution because the next two paragraphs of the report (paras. 71 and 72) record that two proposals inconsistent with that view were put forward, one by the representative of Czechoslovakia (which was rejected) and the other by the representative of Lebanon (which was accepted by a majority vote). Both proposals were concerned with the quotas to which officials who had broken their ties with their country should be assigned for the purposes of geographical distribution, a question which would have been meaningless if it had been accepted that such officials "no longer fulfilled the conditions governing employment in the United Nations".