Registry's translation, the French text alone being authoritative.

FORTY-EIGHTH ORDINARY SESSION

In re CLEGG-BERNARDI

Judgment No. 505

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) on 30 October 1980 by Mrs. Vivienne Linda May Clegg-Bernardi, the FAO's reply of 14 January 1981, the complainant's rejoinder of 24 February, the FAO's surrejoinder of 10 April, the FAO's additional memorandum of 23 October supplied at the Tribunal's invitation and the complainant's observations thereon of 7 December 1981;

Considering the applications to intervene filed by

Miss Gisèle Brocard

Mrs. Maria Cerreto-Esposito

Mrs. Brenda van Eeden-Curina

Mrs. Vivian Fabrizi-Sechi

Mrs. Jan Elizabeth Gayfer-Ciuchini

Mrs. Pamela Goodwill-Indo

Mrs. Josiane Hababou-Zamperini

Miss Jennifer Harrold

Miss Gerdy Hoefnagels

Mr. Y.E. Katsaros

Mrs. Aida Manrique

Mrs. Diana Populin-Roverelli

Mrs. Mary Redfern

Mrs. Isabel Reyes de Ugarte

Mrs. Catherine Rowley-Dragani

Mr. Tarek Sadek;

Considering the FAO's observations of 19 February 1981 on the applications by Mrs. Cerreto-Esposito, Mrs. Redfern and Mr. Sadek, its observations of 10 April on the application by Mrs. Reyes de Ugarte, its observations of 19 May on the application by Mrs. Rowley-Dragani and its observations of 14 December on the application by Mrs. van Eeden-Curina;

Considering Mrs. Cerreto-Esposito's reply of 23 April 1981, Mrs. Redfern's reply of 16 April and Mr. Sadek's reply of 22 April to the FAO's observations on their applications, the FAO's observations of 19 May on those replies, and Mrs. Cerreto-Esposito's further communication of 13 July;

Considering Articles II, paragraphs 5 and 6, and VII of the Statute of the Tribunal. Article 17, paragraph 2, of the Rules of Court, FAO Staff Regulations 301.136 and 301.16, FAO Staff Rules 302.3091, 302.4061, 302.40631 and 302.7111, FAO Staff Rules 302.40611 and 302.40621 as in force up to 31 January 1975, and FAO Manual section 316;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, a British subject, joined the staff of the FAO as a stenographer at grade G.3 on 19 December 1974 on a short-term appointment governed by FAO Manual section 316. Her appointment having been extended, she was granted a fixed-term appointment from 1 June 1975 to 31 May 1976, extended in turn to 31 December 1976 and then to 31 December 1977. On 1 June 1977 she was promoted to grade G.4 and 1 January 1978 granted a "continuing" appointment. On 11 January 1978 she appealed to the Director-General against the refusal of her application for "non-local status" on the grounds that there had been no provision in the Staff Rules in December 1974 allowing the recruitment of a non-Italian as a local employee; that the FAO's policy of refusing non-local status to all General Service category staff had not been put into effect until 1 February 1975; and that she was in the same position as several officials who had been retroactively granted such status. By a letter dated 22 February 1978 the Assistant Director-General for Administration and Finance informed her that the Director-General had rejected her appeal. Meanwhile, on 31 January 1978, she had filed an appeal with the Appeals Committee. In its report dated 25 October 1979 the Committee held that the FAO had "acted correctly" in granting her short-term appointments under Manual section 316. It did not find, however, that she had been made aware of the FAO's intention of abandoning its longstanding policy of granting non-local status to expatriate General Service category staff on conversion of their short-term to a fixed-term or continuing appointment. It therefore unanimously recommended granting her nonlocal status from 1 June 1975, the date on which she had been given a fixed-term appointment. By a letter dated 30 July 1980 the Deputy Director-General informed her that the Director-General rejected her appeal. That is the decision she now impugns.

B. The complainant observes that all non-Italian staff in the General Service category used to be entitled, under former Staff Rule 302.40621, to non-local status and the accompanying benefits, such as payment of travel and transport expenses on appointment, installation allowance and non-resident's allowance, and entitlement to home leave. In accordance with Staff Rule 302.40611 local staff members were nationals of the country of the duty station. The FAO Council decided in November 1974 that a new policy of making all General Service category staff local should take effect after 31 January 1975, but, in the complainant's view, to make "petty savings", and quite illegally, the FAO applied the policy before that date, from the end of October 1974, after the Finance Committee of the Council had merely recommended introducing it. The complainant objects that others in a position similar to her own have obtained non-local status. A Mrs. Borradaile-Cicconi, recruited as a short-term official in September 1974, won her appeal to the Appeals Committee and had her status converted from local to non-local with effect from June 1975, when she obtained a fixed-term contract. Several others got non-local status at the same time. The same rules and policy should have been applied to the complainant, who was recruited before 1 February 1975, when the new rules came into effect. The new rules are, in any case, of dubious legality since they introduce different treatment for different groups of nonItalian General Service category staff. For example, a Miss Chevallier was told in a letter dated 25 August 1977 that she was to have non-local status, the Director-General having decided that "certain cases were to be reviewed". The refusal of non-local status to the complainant and several others was arbitrary, discriminatory and not based on the rules. The inequity was compounded in 1978, when the FAO granted a Miss Hertz and a Miss Warren benefits of non-local status "exceptionally", even though they had been recruited after 1 February 1975. Other staff members recruited from outside Italy after that date - for example a Mr. Goolamallee - were given similar benefits. The Director-General granted a Mrs. El Kharboutly non-local status, even though she was employed as a short-term official under Manual section 316, because she was engaged in continuing regular work. That is exactly the complainant's position: she was given short-term appointments at first although she was to do work of a regular and continuous nature. She invites the Tribunal to order the FAO to grant her "non-local status with all the international entitlements and benefits".

C. In its reply the FAO observes that non-local status is not granted under the Staff Rules now in force. Until 31 January 1975 all non-Italian General Service category staff recruited under the Staff Rules, wherever recruited, had non-local status in accordance with former Staff Rules 302.40611 and 40621. These rules were repealed with effect from 1 February 1975 to carry out a decision taken by the FAO Council in November 1974. In accordance with the

new rule, 302.40631, only those recognised at 31 January 1975 as non-local and in continuous service since then are treated as such and receive the entitlements. The complainant joined the FAO on a short-term appointment granted by the Director-General in exercise of his authority under Staff Regulation 301.136, and the terms of her appointment were governed by Manual section 316. Manual section 316.12 describes as "locally recruited" those "who, at the time of their appointment, wore residing within commuting distance of the duty station", nationality being irrelevant. This afforded a legal basis for local recruitment of non-Italians before 1 February 1975. The FAO's former policy was to tell short-term officials on appointment that if they completed 12 months' continuous service or were given a fixed-term or continuing appointment they would be classified as local or nonlocal in accordance with the Staff Rules in force. That was the policy which in November 1974 the Council decided to alter, and from the end of October 1974 - after the Finance Committee had recommended the change - short-term staff were no longer told on appointment that they might qualify for non-local status. By 1 June 1975, when the complainant obtained a fixed-term appointment and thus came under the Staff Rules, the rules prescribed non-local status only for those who had held it on 31 January, which she had not. She had been given no expectation of non-local status, since by December 1974 the practice of offering such prospects to short-term staff during their briefing on appointment had been discontinued - and quite reasonably so in view of the Council's decision. There was therefore no inequality of treatment: she was not in the same position as Mrs. Borradaile-Cicconi and the others she mentions, to whom prospects of non-local status had been held out at the time of their briefing. Whatever may have been said at the complainant's briefing, the FAO was under no duty to tell her that she would not be given non-local status; all she could expect was the treatment prescribed by the Staff Rules in force at the time, and that is what she got. As for her allegation that she was given short-term appointments to carry out regular continuous work, the FAO is not bound to offer any particular kind of appointment. It invites the Tribunal to dismiss her claims as unfounded.

D. In her rejoinder the complainant again contends that the FAO started in 1974 recruiting non-Italian General Service category staff on short-term appointments for continuous work: at least 50 expatriate secretarial staff needed for regular programme work, including herself, were recruited on short-term appointments - a misuse of Manual section 316. It is immaterial that after October 1974 recruits were no longer told that they might qualify for non-local status: on learning of the difference between local and non-local status they could legitimately expect that, having joined the staff before 1 February 1975, they might become entitled to non-local status. The Council's decision was a departure from the United Nations common system. There was in any case no need to tell short-term staff that they might become non-local if they were being recruited as genuine short-term employees. All non-Italian General Service category staff recruited before 1 February 1975 should have been recruited as non-local, apart from genuine short-term personnel. As for those who, according to the FAO, had a legally enforceable expectation of non-local status, the complainant's own position under the rules was exactly the same and there has therefore been a breach of the principle of equality, an implied condition of her employment. As the Appeals Committee observed, expectations generated by briefing afford fair grounds for grant of non-local status; besides, the Committee found that she,too had been given a legitimate expectation of such status. There was further inequity in the grant of international entitlements to Miss Hertz and Miss Warren.

E. In its surrejoinder the FAO observes that it has long recruited short-term staff to cover absences of regular staff and to fill temporary posts and vacancies. The complainant was not recruited for continuous services. Nor is it true to say that the change in policy was a departure from the common system: the rules of the system vary widely. The discontinuance of the practice of telling new staff that they might qualify later for non-local status does alter the position. The Appeals Committee was mistaken in holding that the mere absence of evidence that the complainant was given notice of the change in policy could have given her legitimate reason to expect non-local status: a briefing for a short-term appointment could not create any legitimate expectation of entitlements pertaining to another sort of appointment simply because the latter were not mentioned. As for the briefing of short-term staff before the end of October 1974, they were told, if they put the question, that they would get non-local status only if, not when, they completed 12 months' short-term employment or got a fixed-term or continuing appointment. As to the allegations of inequality of treatment, the FAO explains in detail the differences in the situation of other staff members, which, in its view, warranted different treatment. Miss Hertz and Miss Warren were not granted non-local status, but only certain entitlements. The FAO again invites the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS:

The issues

1. The impugned decision is based on Staff Rule 302.40631. Under this rule a non-local staff member is a staff member in the General Service category who was recognised at 31 January 1975 as a non-local staff member under the Staff Rules then in force and has since remained in continuous service. The Tribunal will comment on the origin, validity and application of this rule.

The origin of Staff Rule 302.40631

2. Former Staff Rules 302.40611 and 302.40621 determined local and non-local staff members by the criterion of nationality. Non-local staff members had various entitlements which local staff members did not.

Staff members who joined the General Service category under short-term contracts, i.e. those appointed for less than 12 months, were not subject to former Staff Rules 302.40611 and 302.40621. Under Staff Regulation 301.136 their conditions of employment were determined by the Director-General. Moreover, Staff Rule 302.01 provided that the Staff Rules should apply to them only to the extent indicated in the FAO Manual or their terms of appointment.

The practice was, however, to give short-term staff the possibility of fuller access to the benefits of the Staff Rules. Those who inquired were told at their briefing that they would come under the Staff Rules if they completed 12 months' continuous satisfactory service through extensions of their short-term appointment or were granted a fixed-term or continuing appointment. If one of the conditions was fulfilled, they would be classified as local or non-local in accordance with the Staff Rules applicable to other staff.

3. At its 63rd Session, in July 1974, the FAO Council asked its Finance Committee to consider amending the Staff Rules to provide that anyone recruited in Italy for the General Service category at headquarters should be a local staff member, regardless of nationality.

The Finance Committee met from 7 to 21 October 1974. After considering several expedients which it did not find wholly satisfactory it recommended regarding all General Service category staff as local, whatever their nationality or the place of their recruitment, but preserving the entitlements of those who already held non-local status.

At its 64th Session, in November 1974, the Council endorsed the Finance Committee's recommendation and decided:

(a) that the new policy would be to regard as local all General Service category staff recruited after 31 January 1975, whatever their nationality or the place of their recruitment;

(b) that the Finance Committee would look into the consequences of that policy at its 34th Session; and

(c) that those with non-local status on 31 January 1975 would preserve their entitlements as long as they remained in continuous service.

4. Staff Rules 302.40611 and 302.40621 were accordingly repealed with effect from 1 February 1975. The new rule, 302.40631, which appears in 1 above, set the conditions under which General Service category staff might in future claim non-local status.

The practice of informing short-term staff that they might in time qualify for non-local status did not fit the new rules. Indeed, as stated in par-agraph 18 of the FAO's reply, it had been discontinued at the end of October 1974, after the Finance Committee recommended the policy of granting local status to all General Service staff.

The validity of Staff Rule 302.40631

5. The complainant questions the validity of the rule on the grounds that it prescribes different treatment for staff in the same position.

In fact Rule 302.40631 does not violate the principle of equality. It does, by implication, prescribe local status for all General Service category staff appointed on or after 1 February 1975, and so puts them on a par. But it is to be read together with Staff Rules 302.7111(i) and (vi) and 302.3091 and Staff Regulation 301.16, which allow for the grant of special benefits to such staff when required in order to recruit them. Thus the Staff Rules make a distinction between groups of General Service category staff members. The desirability of the distinction may be

open to question, but it is enough to defeat any allegation of inequality.

The application of Staff Rule 302.40631

6. The complainant's first objection is that the Director-General applied the rule to her retroactively. The plea fails.

It is true, and the FAO itself admits, that Staff Rule 302.40631 came into force after the complainant's initial short-term appointments, on 1 February 1975. But the Director-General based his refusal of non-local status on the fact that she did not have it on 1 February 1975, and he disregarded what had gone before. In other words, he did not apply the rule retroactively: he based his decision on the facts at the date when the rule came into force.

7. The complainant's second objection is that she was treated differently from staff members who, like herself, held short-term appointments before 1 February 1975 but who were granted non-local status after that date. This plea also fails.

To begin with the FAO treated alike all those given short-term appointments before 1 February 1975 and until then not treated as non-local; that is to say, it gave them all local status. But after the Appeals Committee reported on the case of Mrs. Borradaile-Cicconi it drew a distinction between those who were given short-term appointments before the end of October 1974 and those appointed between that date and 1 February 1975. In particular, it granted non-local status to the former in accordance with the practice described above, while it continued to treat the latter as local.

The difference in treatment between the two groups was warranted by the difference in the facts. Under the practice followed up to the end of October 1974 staff who were granted short-term appointments before that date may have been informed of the possibility of their qualifying for non-local status. Accordingly they had or may have had the expectation of qualifying some day. It was therefore fair to take account of that expectation and grant them non-local status on the terms established under the practice. From the end of October 1974, however, i.e. after the Finance Committee had made its recommendation to the Council, those who recruited short-term staff were told to discontinue the practice of mentioning the possibility of qualifying for non-local status, which was to be removed by an amendment to the Staff Rules. In other words, the old practice was abolished, the result being that those who were given short-term appointments after the end of October 1974 had no reason to expect non-local status and could not claim it by virtue of the principle of equality.

The Director-General respected the distinction he had drawn: he granted non-local status only to those appointed before October 1974, however broadly the term "appointed" may have been interpreted. That is true not only of Mrs. Borradaile-Cicconi and 14 others in the same position as she but also, contrary to what the complainant maintains, of Mrs. El Kharboutly, Miss Martí and Miss Telford. Mrs. El Kharboutly was given a short-term appointment on 1 April 1974, left on 21 December 1974 and was reappointed on 13 January 1975. Miss Martí held non-local status for a period and was then reappointed, on 4 November 1974, as a result of negotiations begun the month before. Miss Telford was offered a two-year appointment on 21 October 1974. The material distinction from the complainant's case is that these three officials were or might have been informed before the end of October 1974 of the possibility of their qualifying for non-local status.

8. The complainant also submits that she was treated less well than Miss Warren and Miss Hertz, who obtained the benefits she was refused. There is, however, no question of inequality such as to vitiate the impugned decision.

The benefits refused to the complainant were granted to Miss Warren and Miss Hertz under Staff Rules 302.3091 and 302.7111(i) and (vi) and Staff Regulation 301.16. The complainant does not contend that she qualified under those rules.

9. Lastly, the complainant contends that her short-term appointments were tainted with irregularity on the grounds that her duties were of a lasting nature.

The FAO argues convincingly, however, that the duties attributed to the complainant before 1 February 1975 were of a kind normally performed by temporary staff. On 19 December 1974 she stood in for an official who was ill. On 2 January 1975 she was assigned to a branch which was being reorganised. Her later appointments are irrelevant since Staff Rule 302.40631 precludes the grant of non-local status to staff appointed on or after 1 February 1975. The Appeals Committee was therefore right in rejecting the arguments she bases on the duration of her appointments. The Tribunal need not consider the FAO's contention that it enjoys complete discretion in giving

short-term appointments to General Service category staff.

The Tribunal's decision

10. It appears from the foregoing that the complainant's pleas in support of her claims must fail and that the complaint must be dismissed.

Since the complaint is dismissed, so too are the applications to intervene, and there is no need to consider the question of their receivability.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

DISSENTING OPINION OF LORD DEVLIN

(Original in English)

Points of dissent

1. The legal issues involved in this case are not easy to pinpoint. As happens not infrequently when there are profound differences of opinion, one side cannot see why there should be any difficulty at all. Rule 302.40631 provides, as stated in paragraph 1 of the majority opinion, that a non-local staff member is one who was recognised as such at 31 January 1975. The Director-General has nevertheless purported to "grant non-local status" to staff members who were not so recognised at 31 January 1975. His decisions contain no reasoning but a study of them shows that they are confined to staff members who had before 29 October 1974 (the date, as will be seen from the judgment in Hoefnagels, Judgment No. 506, is uncertain) formed (perhaps under certain conditions) an expectation that they would eventually attain to non-local status. It seems to me to be impossible to argue (and indeed it is not so argued) that the words "recognised at 31 January 1975 as a non-local staff member" can be made to include unrecognised persons who expected to be recognised at some later date. Therefore the assumption must be (though this likewise is unargued in the dossier) that the Director-General has some power extraneous to the terms of the rule to exempt from its operation any cases which he deems to be deserving of the indulgence, subject only to the principle that he must not discriminate unfairly. This would mean that the Director-General is purporting to exempt certain persons from the operation of the law. This is an exercise of the power to dispense claimed by the English Crown, i.e. the executive power, until it was condemned by the Bill of Rights in 1688. Its condemnation as an instrument of arbitrary government has ever since been accepted as a cardinal principle of Anglo-American constitutional law. In my opinion it should likewise be accepted as a cardinal principle of the jurisprudence of this Tribunal that a Director-General has no power, unless it is expressly conferred upon him by the regulations, to exempt himself or any other person from the operation of the rules he has made. This is the first point.

2. Some applications for non-local status the Director-General accepted; others he rejected. In no case, as I have said, did he publish his reasons in his decision. Thus there was no way of testing whether or not he was discriminating unfairly. This is the second point. In my opinion it should be a principle of administrative law that the Director-General be required to give his reasons for rejecting a recommendation of the Appeals Committee. If this is not a principle of universal application, it should be applied at least in cases relating to equality of treatment. The principle of equality of treatment and of non-discrimination has as one of its objects, perhaps the most important, the contentment of the staff. For this object to be fulfilled staff members must not only be equally treated but must be able to see that they are being equally treated. If the Director-General has good reasons for discriminating between one person and another, he must make his reasons known. It is not enough that he should have a good reason which he keeps to himself. This is the second important point.

3. Two other points arise which, if they stood entirely by themselves, might not justify an expression of dissent, but which must be taken in conjunction with the major points I have mentioned. As I have said, it became apparent from a study of the Director-General's decisions that he was distinguishing between staff recruited before and staff recruited after 29 October 1974. This was the supposed date of a recommendation by the Finance Committee; for its terms, see the majority opinion, paragraph 3. It is not suggested that the recruits were or should have been aware of the recommendation or that the recommendation by itself can justify the Director-General's distinction. The

distinction is said to lie in a consequential change in the practice on recruitment. In my opinion the change, if any, in practice was insignificant and affords no true ground for distinction between two categories. This is the third point. Fourthly, there was alleged in the instant case to be a ground of distinction which, if proved on the facts, would unquestionably have been effective. But before the Appeals Committee the proof failed, the point was abandoned and the distinction which I have described as insignificant was for the first time relied upon and made the basis of the argument submitted by the Organization to the Tribunal. In my opinion this should not have been allowed. I have said that it is not enough that the Director-General should have a reason which he keeps to himself; it is still more objectionable that he should keep himself free to produce a second reason if the first one fails.

4. I shall now proceed to develop these four points in relation to the facts of this case. When I say that the Director-General was acting arbitrarily, I mean that he was acting in excess of his powers. I have not the least doubt of his anxiety to do justice and to find a satisfactory solution of a difficult problem.

The qualifying period and the practice

5. The first solution found by the Organization to the problem of non-local status was the introduction of what it called a "qualifying period". Non-Italians, as the persons entitled on engagement to expatriate benefits can broadly be called, were not to be given them until after they had served one year without them. If the Director-General had power to engage staff on any terms he wished, there would have been no legal difficulty about this. But he has that power only in cases covered by Staff Rule 301.136. The rule states:

Other Personnel. The Director-General shall determine the salary rates and the terms and conditions of employment applicable to personnel specially engaged for conference and other short-term service or for service with a mission, to part-time personnel, to consultants, to field project personnel, and to personnel locally recruited for service in established offices away from Headquarters.

Acting under this rule the Director-General determined in MS 316 "the general terms and conditions of employment applicable (in accordance with their terms of appointment) to persons engaged for periods of less than twelve months (short-term personnel)". These are general terms, from which there is a number of exceptions, e.g. staff at field missions and projects, consultants, etc. MS 316.3 provides that daily rates are paid to personnel engaged for less than two months (e.g. to service meetings - interpreters, precis writers, verbatim reporters, etc.) and monthly rate to personnel engaged for two months or more but less than one year. "Where the foreseen need for personnel, e.g. stenographers, exceeds twelve months they should be engaged on a yearly basis." Under 316.25 the appointment of a short-term employee may be renewed upon mutual agreement; if a short-term appointment is extended to twelve months or more or is converted to a permanent appointment, the provisions relating to change of status apply.

6. The words in the rule "specially engaged for conference and other short-term service" suggest that the rule is not intended to authorise short-term service in general. The object appears to be to give the Director-General a free hand to supplement his regular staff by offering temporary employment for special purposes such as conferences or in emergencies. The complainant contends (with in my opinion some justification) that this rule was used improperly in cases where the foreseen need exceeded twelve months to impose on recruits to the permanent staff the qualifying period during which expatriate allowances would not be paid. However, it was for 20 years the practice to use it in that way. In its contentions the Organization says:

"'It was the established practice for personnel officers to tell short-term staff recruited under MS 316 who raised the question at the time of their briefing[(1)] that, if they accrue twelve months of continuous satisfactory service through extensions of their short-term appointment, or if they were granted a fixed-term or a continuing appointment (no firm assurance being possible in this respect), they would cease to be covered by MS 316 and would receive a new type of appointment covered by the Staff Rules. Such staff members are also told that, if this eventuality materialised, they would be classified as local or non-local in accordance with the provisions of the Staff Rules applicable to regular staff currently in force (the determining criteria being, at the time, nationality)."

The Borradaile-Cicconi case

7. Mrs. Borradaile-Cicconi was recruited as "other personnel" in September 1974. When the time came for her to receive her fixed-term appointment in accordance with "the practice", non-local status had been abolished. Before the Appeals Committee she asserted that she "had been told verbally by a personnel officer that after one year's

continuous satisfactory service her status would be converted from local to non-local and said that "she considered that this constituted a firm promise". It was argued on her behalf that she had an acquired right and this was strenuously contested by the Organization. The Committee impliedly rejected this contention by a finding that she had been offered "the prospect of virtually automatic conversion to non-local status upon completion of one year's continuous satisfactory service" and "had been recruited in circumstances that had indeed generated legitimate expectations tantamount to a moral obligation". The Committee's conclusion was:

"A practice of 20 years' standing took on something approaching legal force and made it just and fair that the Organization should honour the routine, expectation generating remarks of its briefing officer ... there was no cause for her to suppose that the subsequent change of rules should apply to her ... an equitable right may therefore be said to have come into being."

The Committee recommended accordingly that Mrs. Borradaile-Cicconi be granted non-local status from 1 June 1975, the date on which she received her fixed-term appointment.

8. The Director-General wished to accept this recommendation not only in the case of Mrs. Borradaile-Cicconi but also in the case of a dozen or so other recruits who claimed to be in the same position. But how could he grant a status which Rule 302.40631 restricted to those who already had it? Rule 303.222 permits him under certain conditions to exempt individual cases from the operation of a staff rule, thus showing incidentally, I should have thought, that there is no general power of exemption. The rule states: "When the interests of the Organization so require, the Director-General may make individual exceptions to the provisions of the Staff Rules and of the FAO Manual, provided that such exceptions are not inconsistent with the Staff Regulations and that they are agreed to by the staff members directly affected and are, in the opinion of the Director-General, not prejudicial to the interests of any other staff member or group of staff members." What the Director-General had in mind, however, was not an indulgence peculiar to an individual case; Rule 303.222 has not been invoked by the Organization as justifying his activities in this case. What he had in mind was the exclusion from the operation of the rule of a whole category of persons with a reasonable expectation. Under Rule 303.221 the Director-General can amend the rules. The proper way of attaining his objective was by an amendment to the rule which would define the category he wished to exempt.

9. It may be suggested that to insist upon the formulation of an amendment when its terms can be settled by the Director-General himself is to insist upon an unnecessary formality. This is not so. The insistence is only upon such formality as is necessary for the observance of the rule of law. The essence of that rule is that the ruler, even when he can make what law he likes, must state what the law is that he is making; and that when it is made it is as binding on himself as on his subjects and cannot be changed by him except with the same formality in which it is made. The neglect of this vital principle would destroy constitutional government; in an international organisation it would leave staff members in complete uncertainty as to their rights and duties. In the present case an amendment was necessary if only to define the exempted category. The terms of the Borradaile-Cicconi recommendation left open the possibility of two categories, one wide and one narrow. Both categories would have been based on the existence of an expectation. The wide category would have included all those whose expectation was founded on the knowledge that it had for the past 20 years been the practice to offer an appointment carrying non-local status to all those "other personnel" who had successfully completed the qualifying period. The narrow category would have been confined to those who specifically inquired at the recruiting interview and so became the recipient of the "expectation generating remarks" of the briefing officer. The subsequent unanimous recommendations of the Appeals Committee in this and other cases in which they stated that they were following their decision in the Borradaile-Cicconi case show that in that case they intended it to apply to the wide category.

10. In my opinion the narrow category would be quite unrealistic and, had it been embodied in an amendment, should have been rejected as an arbitrary distinction and not in conformity with the principle of equality of treatment and non-discrimination. If what had been given at the recruitment was an assurance, the position would have been different. But all that happened was that the recruit, if she asked, was told no more than what the Staff Rules then provided (see paragraph 5 above), viz. that after one year she would, if her employment was continued, become one of the regular staff with non-local status. The Organization has throughout insisted that it gave no undertaking. The recruit could have acquired the same information by studying the Staff Rules. But since the practice had been in existence for more than 20 years and must have been generally known, she could have learned about it from any source. It is highly improbable that she would refrain from inquiring at the recruiting interview because she was not interested; non-local status was obviously a considerable attraction. If she did not inquire, it must have been because she already knew the answer and did not need to have it confirmed. Thus the receipt of

information at the recruiting interview affords no basis for a fair and equitable distinction.

11. There were, as I have said, a dozen others who claimed to be in the same position as Mrs. Borradaile-Cicconi and to whom likewise non-local status was "granted". None of them was ever even asked whether she had made an inquiry and received an expectation-generating answer. The Organization acted, it says, upon the "possibility that they could have been led to believe that upon appropriate extension they would eventually be eligible for non-local status". If the possibility of being led to believe is the test, the narrow category becomes as broad as the wide one. There are also two cases of persons recruited after 29 October, namely Mrs. El Kharboutly and Miss Mart!, being given non-local status on the ground that the connection with the Organization had been formed before 29 October. In neither case was any inquiry made as to whether at any time the recruit had received any express information from a personnel officer at a briefing interview or otherwise.

The complainant's case

12. When the complainant's case was first rejected by the Administration, she was told that "in accordance with the new policy, you were specifically told during your briefing that, should your appointment in due course be converted into a fixed-term one, you could have no expectation of being granted non-local status". This allegation was not supported by the evidence. The Appeals Committee found that, in the absence of evidence of specific notice of the changes in the Organization's employment practices, the complainant "had legitimate reason to believe that she would be entitled to non-local status". The Committee recommended accordingly. In rejecting the recommendation the Director-General said only that he had "concluded that there are no valid grounds for granting you non-local status". In its argument presented to the Tribunal the Organization abandons the allegation that the complainant was warned. It replaces it with the allegation, which may fairly be assumed to be true, that, having made no inquiry at the briefing interview, she was not answered by any expectation-generating remarks. This is all that is now relied upon to distinguish her case not only from that of Mrs. Borradaile-Cicconi but also from those of the other dozen of successful applicants. Since all that the Director-General has said is that he saw no valid grounds for granting the complainant non-local status, there is nothing to show that he himself or anyone authorised by him to decide the case attached any importance at all to this insignificant distinction: there is nothing to elevate it above the status of a lawyer's plea.

Conclusion

13. The ultra vires acts of the Director-General have created a confused situation. Since the majority opinion controls the decision in this case, it would be superfluous for me to take up much space in working out what I believe to be the correct solution. It cannot be found simply by saying that the Tribunal cannot order the Director-General to "grant" non-local status to the complainant since that would be to order him to add another illegal act to those he has already committed. The Tribunal could perhaps order him to amend Rule 302.40631. But maybe a formal order would not be necessary. The answer may lie in the general rule of law that equity looks on that as done which ought to have been done: aequitas factum habet quod fieri oportuit. If there are two ways by which one pers an on r a right on another, one legal and the other illegal, and the person, whether deliberate] or by an inadvertence, chooses the illegal way, the matter can be resolved as if he had chosen the legal way; and he can be required to do such further acts as may be necessary to perfect that choice.

14. What amendment would now have to be made to the rule so that it covers all the cases in which the Director-General has "granted" non-local status? If he had granted it only to Mrs. Borradaile-Cicconi, he could perhaps (though I could not myself have endorsed the distinction) have confined the amendment to a category of cases in which there had been expectation generating remarks. But there are at least another dozen cases in which there is no evidence whatever of any such remarks having been made. To include them the category would have to be wide enough to include all those who, in the words of the Appeals Committee, "had legitimate reason to believe that she would be entitled to non-local status" and whose belief had not been destroyed by specific notice of the change in practice. If the rule had by amendment been so framed, the complainant's case would have succeeded.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

1. Emphasis added.

Updated by PFR. Approved by CC. Last update: 7 July 2000.