



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/013
(UNAT 1580)
Judgment No.: UNDT/2010/031/Corr.1
Date: 22 February 2010
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

BIDNY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Antonio Bautista

Counsel for Respondent:

Adèle Grant, ALU/OHRM, UN Secretariat

Introduction

1. In October 2007, the applicant submitted an application to the United Nations Administrative Tribunal (UNAT) contesting the decision of the Secretary-General dated 9 May 2006 to accept the findings and conclusions of the New York Joint Appeals Board.

2. The applicant's appeal concerned the non-renewal of her appointment and the difficulties in obtaining a residence visa for the United States of America. The Joint Appeals Board (JAB) rejected the appeal on the grounds that the applicant did not respect the time limits set out in staff rule 111.2 (a) in effect at the time.

3. In her application, the applicant requested UNAT to refer the substantive issues raised in her appeal to the Joint Appeals Board.

4. Pursuant to the transitional measures outlined in United Nations General Assembly resolution 63/253, the application, which was pending before UNAT, was transferred to the United Nations Dispute Tribunal on 1 January 2010.

Facts

5. The applicant joined the United Nations in December 1991. On 10 September 1999, while working as an Auditing Assistant at the G-5 level for the Office of Internal Oversight Services (OIOS), she was released on detail to the United Nations Interim Administration Mission in Kosovo (UNMIK).

6. On 13 September 2000, the applicant reached the mandatory retirement age of 62. Her appointment was nevertheless extended on an exceptional basis beyond that age several times until 31 March 2004.

7. By a letter dated 17 March 2004, the applicant was notified that her appointment would not be extended beyond 31 March 2004.

8. By an e-mail dated 19 March 2004, the applicant requested the Under-Secretary-General, OIOS, to extend her appointment beyond 31

March 2004. That same day, OIOS replied to the applicant that her appointment could not be extended any further.

9. On an unspecified date, the applicant requested to be repatriated to New York following the expiration of her appointment, to enable her to undertake medical examinations prior to returning to Moscow, her place of residence.

10. On 24 March 2004, the Administration started making arrangements for the applicant's return to New York on 1 April 2004.

11. However, the United States authorities did not issue the applicant's visa until 13 July 2004. She therefore remained in Kosovo until 24 July 2004, and her appointment was extended for administrative purposes only (without pay) from 1 April to 31 August 2004.

12. On 17 and 31 August 2004, the applicant wrote to the Under-Secretary-General, OIOS, to find out, in particular, why her appointment had been extended beyond 31 March 2004 for administrative purposes only, without pay and without benefits, despite the assurances that the Under-Secretary-General had given to her. She also wished to know why OIOS had not exerted pressure to speed up the issuance of her residence visa for the United States. She requested the Under-Secretary-General to respond no later than 15 September 2004.

13. On 21 September 2004, having failed to receive a response from the Under-Secretary-General for OIOS, the applicant wrote to the Secretary-General to request a review of both the decision not to renew her appointment beyond 31 March 2004 and the circumstances relating to the issuance of her visa for the United States of America.

14. By a letter dated 18 November 2004, the Administrative Law Unit of the United Nations Secretariat, responded to the applicant's request for review. The letter indicated, on the one hand, that, although regrettable, the United States authorities' delay in issuing the applicant's visa was beyond the control of the United Nations and, on the other hand, that pursuant to

staff regulation 9.5, the mandatory retirement age is sixty-two years and staff members have no enforceable right to claim an exception.

15. On 19 January 2005, the applicant contacted the Panel of Counsel to request a copy of the aforementioned letter, claiming that she had not received the original sent to the address of her son in New York.

16. On 14 February 2005, the applicant filed an appeal with the New York Joint Appeals Board.

17. In late April or early May 2006, the Joint Appeals Board submitted its report to the Secretary-General. The Board found that the applicant failed to observe the time limits in staff rule 111.2 (a) in effect at the time for submitting her request for review to the Secretary-General, and for filing her appeal, and that there were no exceptional circumstances under staff rule 111.2 (f) to justify a waiver of the said time limits. Consequently, the Joint Appeals Board ruled that the appeal was irreceivable.

18. On 9 May 2006, the Under-Secretary-General for Management notified the applicant of his decision to accept the conclusions of the Joint Appeals Board.

19. On 15 August 2006, the applicant requested the United Nations Administrative Tribunal to extend the time limit for filing her application against the Secretary-General's decision of 9 May 2006, which she says that she received on 17 May 2006.

20. In October 2007, after requesting and obtaining five time-limit extensions from the Administrative Tribunal, the applicant submitted her application.

21. Following corrections, the application was forwarded to the respondent on 11 March 2008.

22. On 28 August 2008, after requesting and obtaining two time-limit extensions, the respondent submitted its response to the application.

23. On 2 September 2008, the respondent's response was forwarded to the applicant, who submitted her comments on 3 October 2008.

24. As the case could not be decided by the United Nations Administrative Tribunal before it was abolished on 31 December 2009, it was transferred to the United Nations Dispute Tribunal.

Parties' contentions

25. With regard to receivability, the applicant's main contentions are as follows:

- a. There were exceptional circumstances justifying a waiver of the time limits by the Joint Appeals Board. In August 2004, the applicant wrote several times to the Under-Secretary-General for OIOS to try to find a solution with the senior management. As she did not receive a response, she was forced to write to the Secretary-General on 21 September 2004;
- b. The applicant did not receive the original of the Secretary-General's response. The Panel of Counsel received a copy of the response on 19 January 2005 and informed the applicant thereof on 24 January 2005. The applicant therefore had one month from 19 January 2005 to file her appeal with the Joint Appeals Board, pursuant to staff rule 111.2 (a) (i) in effect at the time.

26. The respondent's main contentions are as follows:

- a. The application is time-barred because the applicant did not respect the time limits set out in staff rule 111.2 in effect at the time;
- b. The applicant did not indicate any exceptional circumstance that could justify a waiver of the time limits.

Judgment

27. Staff rule 111.2 in effect at the time in question provides that:

- “(a) A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the

date the staff member received notification of the decision in writing.

(i) If the Secretary-General replies to the staff member's letter, he or she may appeal against the answer within one month of the receipt of such reply;

(ii) If the Secretary-General does not reply to the letter within one month in respect of a staff member stationed in New York or within two months in respect of a staff member stationed elsewhere, the staff member may appeal against the original administrative decision within one month of the expiration of the time limit specified in this subparagraph for the Secretary-General's reply.

...

“(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.”

28. With regard to the decision not to renew the applicant's appointment beyond 31 March 2004, it follows from the aforementioned rules that, having been notified of the contested decision on 17 March 2004, the applicant had until 16 May 2004 to submit her request to the Secretary-General to review that decision. However, the applicant wrote to the Secretary-General only on 21 September 2004. Her request was therefore late.

29. Furthermore, for both the non-renewal of the applicant's appointment and the difficulties in obtaining a visa for the United States of America — assuming that those difficulties were related to an appealable administrative decision — the applicant had until 20 December 2004 to file an appeal with the Joint Appeals Board, if she did not receive a response to her request for review sent to the Secretary-General on 21 September 2004. However, the applicant filed her appeal only on 14 February 2005. Accordingly, her appeal was also late.

30. Once it is established that the applicant did not respect the time limits set out in the aforementioned staff rule 111.2 (a), the Tribunal has to determine whether there were exceptional circumstances under staff rule 111.2 (f) that prevented the applicant from respecting the said time limits.

31. This Tribunal does not see any reason to depart from the definition of “exceptional circumstances” adopted by the former United Nations Administration Tribunal and upheld by this Tribunal in various judgments (for example UNDT/2010/019, *Samardzic et al.*). According to that definition, exceptional circumstances “consist of events beyond the applicant’s control that prevent the applicant from timely pursuing his or her appeal” (see UNAT Judgment No. 372, *Kayigamba* (1986) as cited for example in Judgments No. 713, *Piquilloud* (1995) and No. 868, *Bekele* (1998)).

32. If the applicant maintains that she was late in submitting her request for review to the Secretary-General because of her attempts to find an informal solution with her senior management in August 2004, those attempts did not prevent her from respecting the time limit, but by that time she had already exceeded the time limit since May 2004.

33. Furthermore, the applicant’s contention that she had one month from the date when she received the Secretary-General’s response through the Panel of Counsel to file her appeal also has no legal basis.

34. In the present case, the Tribunal finds that there was no exceptional circumstance that prevented the applicant from submitting her request for review or from filing her appeal within the time limit.

35. In view of the foregoing, the application is irreceivable because it is time-barred.

Decision

36. For these reasons, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 22nd day of February 2010

Translated from French

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Entered in the Register on this 22nd day of February 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva