



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1021

Case No. 1112: LASCU

Against: The Secretary-General
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President,
Ms. Marsha A. Echols;

Whereas, on 6 December 1999, Damian Lascu, a staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application containing pleas which read as follows:

"II. PLEAS

1. The Applicant requests the Administrative Tribunal to approve reimbursement by ... UNDP of the sum of \$80,800 which constituted double taxation, based on the application of the Romanian Presidential Decree 233/74 and its Guidelines (...), soon after he became an UNDP employee.

...

3. [The] Applicant requests the Administrative Tribunal to find ... that ... UNDP cannot reject his claims for ... reimbursement based solely on staff rule 103.15 because staff rule 112.2 (b) provides the necessary basis for dealing with issues on their merits ... In the case of claims for tax reimbursement, the normal one-year time limit may be waived if the [United Nations] accepts that there are 'reasonable extenuating circumstances'. Taken together staff rule 112.2 (b) and the concept of reasonable

extenuating circumstances ... remove any impediment to the Secretary-General and the Administrator of UNDP dealing with the merits of the Applicant's claim for retroactive compensation of the taxation he was forced to make to the previous Romanian regime."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limits for filing a Respondent's answer until 31 March 2000 and periodically thereafter until 30 June 2001;

Whereas the Respondent filed his Answer on 28 March 2001;

Whereas the Applicant filed Written Observations on 4 May 2001;

Whereas, on 17 October 2001, the Applicant submitted as additional communication;

Whereas, on 24 October 2001, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNDP, New York, as an Area Officer at the Regional Bureau for Europe, the Mediterranean and the Middle East, on a two-year fixed-term appointment at the P-4 level, on 28 August 1971. The Applicant was on leave of absence from the Romanian Government. After several extensions of his appointment and a promotion, the Applicant was assigned to the UNDP Office in Rwanda, as Resident Representative, where he was promoted to the D-1 level on 1 January 1982. On 17 September 1986, the Applicant was reassigned to UNDP, New York, as Principal Technical Adviser, Bureau for Programme Policy and Evaluation/Technical Advisory Division. The Applicant remained in the same Division until his retirement on 30 November 1991.

Anticipating legislation requiring Romanian nationals under foreign employment to surrender part of their income to the Romanian diplomatic offices, the Applicant was obliged to make such payments as of 7 November 1971. Formal legislation to that effect was introduced in 1974. Instructions for implementation were secret and non-payment resulted in stiff penalties.

The Applicant has produced evidence (receipts and cancelled cheques) that he made payments to the Permanent Mission of Romania in New York amounting to more than \$80,800 between 7 November 1971 and 31 March 1982, when he stopped making payments because of financial hardship resulting from his assignment to Rwanda.

In November 1984, the Applicant's passport and those of his family members were confiscated by the Romanian authorities. On 3 March 1986, the Permanent Representative of Romania wrote to the Administrator, UNDP, informing him that he did not agree to any further extension of contract of the Applicant with UNDP. In April 1986, the Applicant applied for refugee status at the United States Embassy in Nairobi, Kenya. On 17 September 1986, the Applicant acquired permanent resident status in the United States.

On 27 April 1987, the Applicant was tried *in absentia* by a Military Tribunal for refusing to return to Romania and was sentenced to seven years in prison and lost his civil rights for an additional five years. The Military Tribunal also ordered back payment, with penalties, from 1982 to the date of judgement. The Applicant's house was seized in the process. In December 1989, after the fall of the former regime, the Applicant requested review of his case. Following a new trial on 18 January 1989, the Applicant was acquitted, however the question of the payments remained unresolved. In January 1992, the Applicant became a United States citizen and in 1993, he acquired dual citizenship.

On 20 January 1998, the Applicant wrote to the Associate Administrator, UNDP, raising the issue of the monies confiscated by the Romanian Government. On 27 February 1998, the Applicant requested the Administrator, UNDP, to personally intervene with the Romanian authorities to secure prompt payment of the monies or, failing that, to reimburse him. On 27 May 1998, the Associate Administrator advised the Applicant that UNDP was not in a position to compensate him should the Romanian authorities fail to do so. In particular, UNDP was prevented from making retroactive payments by staff rule 103.15 (ii), "given that more than one year has passed since the disbursement of which [he] would be claiming reimbursement". On 23 June 1998, the Applicant requested review of this decision.

On 11 September 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 10 August 1999. Its considerations and its conclusion read as follows:

"Considerations

26. The Panel first considered the Respondent's contention that there is no administrative decision to be appealed, and that if there were one it would be time-barred under staff rules 103.15 and 111.2 (a).

27. The Panel agreed with the Respondent that the Appellant did not identify any administrative decision under chapter XI of the Staff Rules, which could be the subject of an appeal. The Panel took note that the Appellant alleged that the decision he was appealing is that conveyed to him by [the Associate Administrator, UNDP] in his letter of 27 May 1998. The Panel, after carefully reading the above letter considered that it did not contain an administrative decision affecting the Appellant's terms of appointment. It only amounts to an explanation by [the Associate Administrator, UNDP] of the applicability of staff rule 103.15 (ii) to the Appellant's case.

28. The Panel then considered the question of whether the appeal was time-barred. ... The Panel ... observed that the Appellant, who stopped his payments to the Romanian authorities in April 1982, had not raised the matters at issue until 20 January 1998, when he wrote to the Associate Administrator of UNDP referring to the monies paid by him to the Romanian regime.

29. The Panel examined the question of whether there existed exceptional circumstances which would excuse the Appellant's tardiness. It noted that the Appellant alleged that he was not in a position to make any claims or take any action with respect to the salaries previously withheld by the Romanian regime ...

30. The Panel noted that throughout the 1970s, 1980s and early 1990s, numerous staff members from countries formerly part of/or associated with the then Eastern bloc, who challenged administrative decisions on the ground that such decisions were improperly motivated by cold war/political considerations, met, or substantially met, the time-limit requirements for submission of requests for administrative review specified by the Staff Rules. The Panel also noted that, during that time, the Appellant stopped the payment to the Romanian authorities, and applied for, and obtained, refugee status at the United States Embassy in Nairobi. None of the above affected the Appellant's career with the United Nations ...

...

33. ... [T]he Panel concluded that no exceptional circumstances seemed to exist that would justify granting a waiver of the time-limits in the present case, and that the appeal was therefore time-barred.

34. In order not to conclude this case merely on technicalities, the Panel, without prejudice to its position on the time-limits issue, felt that it had to review briefly the substance of the case.

...

36. After having carefully read the records, the Panel concluded that the Appellant did not provide any evidence that the UNDP or the UN was ever made aware by the Appellant of his private arrangement with the Romanian Government. It noted that it

was only recently that this matter was raised by the Appellant and conveyed to the Administration. The Panel found no evidence indicating that the Appellant had asked at any time for Privileges and Immunities protection, in order to obtain the Organization's full legal and political support.

37. The Panel concluded that in this case the Appellant acted as a Romanian citizen vis-a-vis the Romanian authorities ... The Panel noted that the payments were made by the Appellant to the Romanian Mission, and that UNDP never benefitted directly or indirectly from those payments. Nor were those payments by the Appellant part of his conditions of service under the Staff Rules.

...

Conclusion

39. The Panel *unanimously concluded* that the above appeal was time-barred and therefore was not receivable. The Panel also concluded that should the appeal not be time barred it had to be rejected on its merits."

On 6 October 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant. He informed him that the Secretary-General agreed with the Board's findings and conclusions and that he had decided to take no further action on his appeal.

On 6 December 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The administrative decision appealed is the decision communicated to the Applicant by the Associate Administrator, UNDP, dated 27 May 1998, rejecting his request for retroactive settlement of claims related to payments made to the Romanian Government.
2. The JAB erred in declaring the appeal time-barred as it was made within the prescribed time limits.
3. There were "special extenuating circumstances and prejudice" that prevented him from making his claim earlier.
4. The fact that the Applicant was serving for extended periods of time without a contract made it possible for the Romanian Permanent Representative to request his expulsion.

5. The moral and material injuries and prejudice the Applicant was forced to endure in his professional life with UNDP, due to mismanagement decisions made by UNDP affecting his terms of appointment, should be considered by the Tribunal as meriting compensation in addition to reimbursement for the "double taxation" imposed on him by the Romanian Government.

Whereas the Respondent's principal contentions are:

1. The appeal is time-barred as the Applicant took action leading to the current appeal over six years after his retirement from UNDP. Moreover, the Applicant stopped the payments for which he now seeks reimbursement in April 1982, over 15 years before he initiated his appeal.

2. The Respondent submits that the Tribunal's ruling in Judgement No. 856, *Chowaniec* (1997), that "a 14-year delay is inexcusable, even taking the Cold War in to consideration", is fully applicable here.

3. The Respondent does not accept that the Applicant is or has ever been entitled to the payment which he claims in the current Application.

4. The Applicant failed to identify an administrative decision taken during his employment with UNDP against which he is appealing.

The Tribunal, having deliberated from 24 October to 21 November 2001, now pronounces the following Judgement:

I. The Tribunal must examine two issues of a preliminary nature which the Respondent seeks to rely upon in his Answer: first, whether or not there is an administrative decision to be appealed; and, second, if there is such a decision, whether an appeal thereof would be time-barred under the provisions of staff rules 103.15 and 111.2 (a).

II. Insofar as the first issue is concerned, the Applicant claims that the letter of the Associate Administrator, UNDP, dated 27 May 1998, constitutes the administrative decision he purports to appeal. It is the view of the Tribunal, however, that, if the appeal is found to be time-

barred, consideration of the first issue would be unnecessary in order to dismiss the Application. Accordingly, the Tribunal will proceed to examine the second issue, i.e. admitting as a working hypothesis that the aforementioned letter constituted an administrative decision, but that the Applicant's appeal was time-barred nevertheless.

III. Staff rule 103.15 (ii) precludes the Administration from making retroactive payments of any kind when more than one year has elapsed since the disbursement in question was made. The Applicant ceased making payments to his national government in 1982: all disbursements were made at least sixteen years before the letter he relies upon as an administrative decision was written and before reimbursement thereof was contemplated. Accordingly, the staff rule is applicable to the present case.

IV. The Applicant maintains that staff rule 112.2 (b) should have motivated the Respondent to consider that exceptional circumstances existed which warranted making an exception to the time limits contained in staff rule 103.15 (ii). The Tribunal finds this to be the substantive issue of the case but is satisfied that, during the extended period of time between the Applicant's final payment to the Romanian Government and the date on which he chose to raise the matter with the Administration, there were several years during which no special circumstances prevented the Applicant from filing a claim for reimbursement.

The Tribunal recalls Judgement No. 856, *Chowaniec* (1997), wherein it stated:

"The Tribunal has previously considered claims brought long after the events at issue occurred and consistently has held that a claimant must come forward as soon as he or she knew, or had reason to know, that a claim could be made. The Applicant did not come forward until 14 years after the alleged injury occurred. He argues that he could not bring a claim due to adverse conditions at the UN 'during the Cold War'. Even if the Applicant's concern about coming forward was well founded at some point in time, a 14-year delay is inexcusable, even taking the Cold War into consideration. (Cf. Judgement No. 818, *Paukert* (1997).)"

V. The Tribunal is satisfied that the Judgements cited by the Respondent regarding the definition of "exceptional circumstances", and the Tribunal's finding in Judgement No. 372, *Kayigamba* (1986) that a delay of five years amounted to a "delay of an extraordinary length",

are applicable to the instant case. The Tribunal has defined "exceptional circumstances" as "any circumstances beyond the control of the [Applicant] which prevented the staff member from submitting a request for review and filing ... an appeal in time". (Judgement No. 713, *Piquilloud* (1995), para. I, citing *Kayigamba, ibid.*)

The Tribunal has extreme difficulty in finding circumstances which prevented the Applicant from filing his claim in a timely manner. In particular, once the Cold War was over and the former government deposed, and once the Applicant retired at the D-1 level and obtained both a Romanian passport and United States citizenship, the Applicant had nothing to fear from any quarter and had every opportunity to present his claim.

VI. The JAB considered that, without prejudice to its position on the issue of time limits, it had to briefly review the substance of the case in order that it not be determined "merely on technicalities". Nonetheless, it unanimously concluded that "should the appeal not be time-barred it had to be rejected on its merits". The Tribunal cannot but agree with the substance of that conclusion in this particular case, but would like to express its position that legal rules establishing time limitations are as obligatory to the Tribunal as any other legal rule. Time limits exist in every legal system and respond to important legal values which have to be respected, such as order, legal security, and dispatch. The law has considered it necessary to establish such limitations and it is not for the Tribunal to change a clear legal policy.

VII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Marsha A. ECHOLS
Member

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary

