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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1076

Case No. 1146: SHEHABI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha Echols; Mr. Omer Yousif Bireedo;

Whereas at the request of Mohammed Kheir Jamal Shehabi, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2000 the time limit for the filing of an application with the Tribunal, and once thereafter, until 31 October 2000;

Whereas, on 15 July 2000, the Applicant filed an Application requesting the Tribunal to restore the Applicant's rights as follows:

"(a) Restoration of the Agency's share of contribution to the Provident Fund plus due interest to take effect from the date of appointment.

(b) Payment of due salaries during the time of detention plus interest.

(c) Recognition of previous services with the Agency including the period of detention as qualifying for termination indemnity.

(d) Restoration of seniority in grade and step and payment of salary entitlements plus interest.

(e) Payment of compensation for the injury sustained due to the premeditated discrimination and wilful intention not to treat the Applicant fairly and as [the] Rules stipulate."

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

Whereas the Respondent filed his Answer on 30 August 2001;

Whereas the Applicant filed Written Observations on 4 May 2002;

Whereas the Applicant submitted an additional written statement on 22 June 2002;

Whereas the facts in the case are as follows:

The Applicant joined UNRWA as an Area staff member on a fixed-term appointment for 10 months and 28 days, as a Teacher "F" at Arrabeh School, South Area, Syrian Arab Republic (SAR), on 2 October 1977. On 25 August 1978, the Applicant was granted a temporary indefinite appointment.

On 6 March 1986, the Acting Field Personnel Officer, SAR, (AFPO) informed the Applicant that his request for "special leave without pay … from 10.3.1986 through 31.3.1986, to sit for his university examination at Damascus University" had been approved, but could not be extended. If he did not return to work by 1 April 1986, "appropriate action [would] be taken".

On 7 April 1986, the Field Personnel Officer, UNRWA, SAR, wrote to the Applicant and advised him that if he did not return for duty by 21 April or provide an acceptable explanation, he would be deemed to have abandoned his post and would be separated under the provision of staff rule 109.4.

On 30 April 1986, the Headmaster, Arrabeh School, wrote to the Area Education Officer, SAR, stating that on 31 March, an "unknown man" had handed him a letter of resignation, as well as a "military call up notice" presumably on behalf of the Applicant. The next day,

according to the Headmaster, another "person" who identified himself as a "member of the security staff" called on the school asking after the Applicant and taking with him the alleged letter of resignation. There is no copy of this letter in the records.

In a letter dated 12 May 1986, the Applicant was advised that his services had been terminated as from 31 March 1986.

On 11 June 1986, the Applicant's mother wrote to the Director of UNRWA Affairs, SAR, to confirm that the Applicant had tendered his resignation as he had been called up for military service before his leave expired. According to her, her son had been missing since 22 March, she had advised UNRWA on several occasions that her son was wanted by the "security authorities", and she was very surprised to learn that he had been terminated for abandonment of post. She attached a copy of the military notice and appealed that the termination be rescinded.

In a confidential memorandum dated 1 July 1986, the Legal Consultant, SAR, advised the Administration, SAR, that for the sake of good order in any absence case, an investigation should be held to determine whether the absence was voluntary or beyond the person's will. In this case, after completion of the inquiry, the decision to terminate the Applicant should be reviewed.

On 22 April 1991, the Director-General of the Governmental General Authority for Palestinian Refugees (GAPAR) informed the Director of UNRWA Affairs, SAR, that the Applicant had been arrested on 25 March 1986 and released on 13 March 1991, "without referring him to any legislative authority", and requested that he be reinstated.

Effective 9 May 1991, the Applicant received a new temporary indefinite appointment, at the Grade 6, step I level, subject to probationary service of 12 months.

On 27 May 1991, the Acting Field Administrative Officer, SAR, wrote to the Director of Personnel, UNRWA Headquarters, Vienna, inquiring whether it was possible to offer the Applicant any kind of compensation, as he had not been kept on pay status for a year like "all other cases" but had only been paid his own contributions to the Provident Fund Account, in accordance with paragraph 3 (C) of Area staff rule 109.10. On 5 November 1991, the Agency made arrangements to pay the Applicant the Agency's Provident Fund contribution, and on 26 November 1991, to pay the Applicant "12-months salaries".

On 15 May 1999, the Applicant wrote to the Field Administration Officer, SAR, (FAO). He explained that he had not raised his case "formally and openly" earlier for reasons related to

his safety and security, and requested payment of salary and other benefits. The FAO replied on 14 July 1999, informing the Applicant that his claim was time-barred under staff rule 103.5. The Applicant appealed to the Director of UNRWA Affairs, SAR, on 21 July 1999 to reverse the decision, but was informed, on 29 September 1999, that the decision stood.

The Applicant lodged an appeal with the Area Staff Joint Appeals Board, UNRWA Headquarters, Amman, (JAB) on 12 October 1999. The JAB submitted its report on 22 March 2000. Its evaluation, judgment and recommendation read as follows:

"**III. EVALUATION AND JUDGMENT**

20. … [T]he Board … decided to declare the Appeal receivable and waive the time limits due to the following reasons:

(a) The Board noted that the lapse of time before the Appeal was filed greatly exceeds the time limits prescribed by Area [s]taff [r]ule 111.3 but the [Applicant] failed to raise his [A]ppeal due to security reasons.

(b) The Board also noted that this is an exceptional case and the [Applicant's] right for reviewing the case should not be ruled by time limits.

IV. RECOMMENDATION

22. In view of the foregoing, the Board unanimously declares the Appeal receivable."

On 15 April 2000, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"…

… The Board simply stated that for reasons of security you did not observe the time limits and that your case was an exceptional one, without giving any reasons … Exceptional circumstances cannot be assumed or declared to exist without full consideration of the reasons …

Considering the circumstances of your case, I would not expect you to be able to file an appeal within the period of your detention. I would also be prepared to give you a reasonable period of time after your release to readjust … Had you filed your appeal within a reasonable period after your release, I would have exceptionally considered that the Administration should not rely on the time limits to bar your appeal. But your appeal

> was not filed for over eight years after your release. I cannot consider that period to be reasonable.
>
> In view of the above, I have rejected the conclusion of the [JAB] that the appeal is receivable and have dismissed your appeal. …"

On 30 August 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. As the Agency was aware of the Applicant's detention, it should have rescinded the decision to terminate his contract for abandonment of post.

2. Once the Agency was aware of the Applicant's detention, it should have restored the Agency's share of the Provident Fund contribution and applied the policy governing staff in detention, as available at the time of the incident and as disclosed to the Administrative Tribunal in 1996 (see Judgement No. 759, *Shehabi* (1996)). This policy was wrongly concealed from the staff and the Applicant did not learn of it until 1999.

3. When the Applicant was re-employed, the Agency should have restored his seniority in grade and step.

Whereas the Respondent's principal contentions are:

1. The Application in its entirety is not receivable. The Applicant does not, and could not convincingly, suggest that he required eight years to readjust to the ordinary requirements of everyday life.

2. The Agency's policy in respect of staff who are detained is not secret, as alleged by the Applicant, but contained in an official document.

3. On the merits, the Respondent submits that:

(a) There is no evidence that the Agency knew that the Applicant was in detention;

(b) As the Respondent found out about the Applicant's detention from the GAPAR authorities only after his release, he was justified, at the time, in terminating the Applicant's appointment for abandonment of post;

(c) In any event, the Applicant was paid the Agency's share of the Provident Fund, as well as one year salary, as if the policy had been applied to him;

(d) The Applicant's re-employment was within the discretion of the Field Director and a reinstatement conditional upon repayment of separation payments (including Provident Fund benefits) to the Agency under Personnel Directive A/4.

The Tribunal, having deliberated from 27 June to 26 July 2002, now pronounces the following Judgement:

I. The Tribunal must conclude that the decision of the Administration to terminate the Applicant's service for abandonment of post made in May 1986 was a *bona fide* decision and made on rational grounds, having regard to the evidence which was available to the Administration at the time the said decision was made.

II. The Headmaster of the school in which the Applicant had worked had informed the Administration regarding the letter of resignation purportedly from the Applicant and the call up notice requiring the Applicant to undertake the military service, which he, the Headmaster, said he had received from an unknown man on 31 March 1986. There was no reason known to the Administration as to why this information should not have been taken at face value. The Applicant had failed to return to his duties on 1 April 1986 notwithstanding that he had been informed, when leave without pay was approved, that the said leave would not be extended beyond 31 March 1986 and that, if he failed to return on time, appropriate action would be taken.

It however must be noted that the Acting Deputy Field Administration Officer, SAR, had informed the Officer-in-Charge, Administration, SAR, of his suspicion that three staff members had withheld relevant information from the Administration and had expressed his opinion that the decision to have terminated the Applicant's service for abandonment of post should be reconsidered. It should be further noted that the Applicant's mother had expressed her belief to the Administration that the Applicant had been detained by the Syrian security authorities and that the Legal Consultant, SAR, had advised that this should indeed be checked out. Whilst the Tribunal can find no evidence to support the contention that the decision to terminate the

Applicant's services for abandonment of post was made *mal fide* or was irrational nor can it find any evidence to support the Applicant's contention that the authorities were at all times aware that he was then being detained by the Syrian security authorities, it none the less believes that the decision was adhered to without a proper investigation as to what had occurred, particularly when serious suspicions had been raised as to what had happened to the Applicant. The Tribunal is satisfied that under the provisions of the Administration's own Policy "in respect of Staff who are arrested, detained or brought to trial" of 1 February 1984 further enquiries ought to have been made of the Syrian authorities as to what had occurred and enquiries should have been made of the military authorities to check to see if the Applicant had turned up and enlisted in response to his call up papers. Had even such rudimentary or obvious enquiries been made, it is probable that on a reconsideration of the original decision, it would have become obvious to the Administration that the Applicant had not abandoned his post so that the decision to terminate him on that ground would have been altered.

Based on the decision to terminate the Applicant's service on the grounds of abandonment of post, the Applicant's family had in 1986 been paid the Applicant's separation entitlements as of 31 March 1986, which in accordance with paragraph 3 (C) of Area staff rule 109.10 excluded from the calculation, the Agency's contribution to the Applicant's share of the Provident Fund.

When the Applicant was released from detention some five years later and it became apparent that his absence had been due to his detention by the security authorities, so that as a fact it had been involuntary, the issue as to what further payments should be made to the Applicant was duly assessed. The Respondent asserts that the Applicant was then paid the Agency's contribution towards his share of the Provident Fund together with a sum equating to one year's salary. No issue was then taken by the Applicant as to the nature or calculation of those payments nor did he claim that he was entitled to any additional payments or compensation at that time.

III. The claim now advanced by the Applicant is that the sums paid to his family in 1986 together with the payment of the Agency's contribution towards the Applicant's share of the Provident Fund and the payment equivalent to one year's salary (if they were paid, which he denies) do not discharge the Agency's obligations under the Agency's Policy. This claim was not

advanced on behalf of the Applicant until May 1999, more than eight years after his release by the Syrian authorities and almost eight years after he had allegedly accepted without demur his entitlements as they had been calculated by the Administration not too long after his said release. During this period many relevant financial records have been destroyed or disposed of, the period for retention of such documents as prescribed by Section 37, Chapter I of the UNRWA Finance Manual, having expired. The Respondent accordingly claims inability to produce a receipt for the payment of the one year's salary to the Applicant, but the Tribunal is satisfied that there still exists sufficient documentary evidence to establish *prima facie* that this payment was made and in the opinion of the Tribunal this *prima facie* case has not been displaced by the Applicant. The Applicant hotly denies ever having received a cheque for these payments and says that the copy of the cheque provided by the Agency in furtherance of its claim that these payments were made does not bear his signature and that what purports to be his signature is forged. The absence of complete records cannot be held against the Agency as it arises from the Applicant's long delay in bringing this claim. Accordingly, the Tribunal considers that it would be improper to hold against the Respondent on this issue as the absence of documents is of the Applicant's making and it would be improper that he should derive a benefit as a result of his own unjustified delay.

This absence of financial records amply illustrates the desirability and wisdom for time limits to be fixed for the advancement of such claims and the desirability that such time limits should be enforced. If alleged obligations are left open ended and unrestricted by reason of time limits, it would be incumbent upon the Administration to keep virtually all financial and other records without any limitation as to time and to seek to equip themselves so as to deal with all disputes, no matter when they arose. This would cause the Administration to suffer very detrimental consequences if unable to assess with accuracy the extent of its future financial obligations and the lack of predictability or finality would have a deleterious effect on the management or allocation of its resources. Statutes of limitation are known to virtually every legal system and the need for and benefits of such statutes are virtually universally acknowledged. The Tribunal considers that it is of the utmost importance, that time limits be respected because they have been established to protect the United Nations Administration from tardy unforeseeable requests. As the Tribunal has pointed out "unless such staff rules are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital

importance to its proper functioning" (see Judgement No. 579, *Tarjouman* (1992), para. XVII). Such limits further encourage the speedy resolution of issues which is clearly in the interest of both parties.

The Applicant seeks to excuse his delay in commencing his claim, or alternatively seeks waiver of the time limits on the basis that he was unaware of the Agency's Policy of 1 February 1984 already referred to until he or his Counsel became aware of it in July 1996 as a result of a Judgement in the case of another Mr. Shehabi (Judgement No. 759, *Shehabi* (1996)) and consequently claims that he was until then unaware of what he now alleges to be his rights. He had before the Area Staff Joint Appeals Board sought waiver of any applicable time limits because he was not, at any relevant time, made aware of the Agency's said Policy. He had further asserted in his letter of 15 May 1999 to the FAO wherein he first raised his claim that he had not raised his case "formally and openly earlier, for reasons relating to my safety and security, and until I realised that I could go on with my plea without risks relating to my security and safety". At no time previously or since (including in his Appeal to the JAB or in this Application) has he ever sought to elaborate on this assertion or to provide particulars or details of any such risks or of his grounds for apprehension that his safety or security might be endangered.

In the proceedings before the JAB the Administration took preliminary objection to the receivability of the Appeal based on the Applicant's delay in seeking the review of the relevant decision and also submitted that claims for payments requested by the Applicant were barred by operation of the provisions of Area staff rule 103.5 (on retroactive payments).

The JAB noted that the lapse of time before the filing of the Appeal greatly exceeded the time limits prescribed by Area staff rule 111.3 but concluded that the Applicant had delayed in submitting his Appeal for security reasons. It further expressed its opinion that this was an exceptional case and that the Applicant's rights to seek a review of his case should not be governed by time limits. The Tribunal cannot accept these conclusions for reasons hereinafter appearing.

In answer to these claims the Respondent firstly submits that the Policy "was not a secret document, that it had been distributed to Field Office Directors and known to and applied by the Administration in all Agency Fields". The Respondent further asserts that it is a Policy on the action to be taken by the Agency in certain circumstances and that it does not create any substantial

rights for staff members detained, that is, its terms do not become part of the Applicant's terms of appointment. The Respondent submits that the Applicant's apparent ignorance as to the existence of such a Policy for eight years or so after his release from detention cannot amount to a circumstance that was so exceptional as to justify waiving compliance with time limits in Area staff rule 111.3. He submits that if mere alleged ignorance of Rules and Policies was a proper basis for excusing failure to comply with time limits, such time limits would hardly ever be enforced.

IV. Dealing firstly with the submission that the Applicant's delay in advancing a claim should be excused as he had not raised the case earlier for reasons or risks "relating to his safety and security" the Tribunal firstly observes that no elaboration, explanation or factual information was ever advanced in support of this claim. No grounds to presume it or to maintain it are self-evident nor can they be surmised, as the Syrian authorities had from the time of the Applicant's release already conceded that he had been detained by the security authorities for the period in question and that there was no objection to him being re-employed by the Agency. The Applicant was not inhibited in taking up the claim for a refund of the Agency's contribution to the Applicant's share of the Provident Fund, which he had done within a reasonable time of his release from detention and the Tribunal cannot envisage how a presentation or advancement of any further claim for additional monies due to him or allegedly due to him as compensation under the Agency's internal Rules or systems could have prejudiced his safety or security in any way. The Tribunal must also reject the JAB's other conclusion that the case was exceptional and that his rights to seek review of his case should not be governed by time limits. Following on its Judgement in *Shehabi* (1996) the Tribunal repeats that persons deprived of their liberty should be treated with appropriate latitude and that strict time limits would not usually be invoked against them, as when restored to liberty it is understandable that some passing of time will be necessary in order to readjust themselves to the ordinary requirements of everyday life. In this case it is accepted by the Respondent that time limits would not have been invoked against him either during the period of his detention or until a reasonable time had passed following upon his release. The Tribunal is satisfied that this approach is appropriate, rational and reasonable rather than a conclusion that time limits should be simply dispensed with as if the staff rule had ceased to exist. Accordingly, this ground is rejected.

V. As to the claim that the time limits should be waived by virtue of the Applicant's alleged ignorance as to what he now claims to be his rights under the Agency's Policy, the Tribunal does not consider such a circumstance should be considered so exceptional as to justify waiving compliance with time limits of Area staff rule 111.3. If mere alleged ignorance of Rules and Policies was to constitute a proper basis for excusing failure to comply with time limits, then such time limits would hardly ever be enforced. It should further be observed that on the Applicant's submissions he became aware of the Policy in July 1996 yet his claim was not made until May 1999. The Tribunal emphasises that it likewise does not accept that the Policy should be considered to have been secret or that it would have been refused to the Applicant had he sought details thereof.

It has been acknowledged by the Respondent in his letter of 15 April 2000 that he would not have expected strict compliance with the time limits having regard to the circumstances of the Applicant's case. He indicated that he would not have expected the Applicant to have been able to submit an appeal within the period of his detention and that he would also have been prepared to give the Applicant a reasonable period of time after his release, to readjust to the outside world and to come to terms with the requirements of every day life before he would have been expected to submit his request for administrative review and his appeal to the Area Staff Joint Appeals Board. Had the Applicant filed his appeal within a reasonable period after his release, the Respondent claims that exceptionally he would not have invoked the time bar. The Respondent concluded that since the appeal was not filed for over eight years after the Applicant's release, he could not consider that period to be reasonable. The Tribunal finds that the sentiments so expressed by the Respondent constitute a realistic recognition as to the amount of latitude which should have been afforded to the Applicant and likewise the Tribunal cannot consider that an eight year delay such as occurred here was reasonable or that a time limit so long exceeded should be ignored or waived.

VI. In so far as it is relevant, the Tribunal refers to Area staff rule 103.5 which requires that claims for allowances, grants or other payments are barred, unless made in writing within a year following the date on which the staff member would be entitled to such payment. In so far as the claim now made by the Applicant should be construed as a claim for allowances, grants or other payments these claims are barred by the said staff rule and likewise for reasons already stated the

Tribunal is satisfied that no case has been made which requires that such time limits be waived or extended or ignored.

VII. Accordingly, the Tribunal rejects the Application in its entirety.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Omer Yousif BIREEDO
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary

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CONCURRING OPINION BY MS. MARSHA ECHOLS

I concur in the result and agree that the application should be rejected.

As the JAB concluded, this case presents very special circumstances. It involves the Applicant's loss of a basic human right. It is impossible to say that everyone completely recovers from such a situation and when, if ever, the fear subsides. Yet, the community usually concludes that a victim returns to normal at some point, in the absence of good evidence to the contrary. On the record in this case, there is no specific justification for ruling that the loss of a basic human right should excuse for such a long time an Applicant's compliance with an important

concept of legal protection for everyone. The "exceptional circumstances" do not exist forever. Consequently, the Application must be rejected.

Nevertheless, it should be noted that the Respondent's "Agency Policy in respect of Staff who are arrested, detained or brought to trial" recognized that the protection and support of staff who are detained is of concern. The Agency Policy even refers to the involvement of the General Assembly regarding this issue. The Agency Policy obligates an agency to "*promptly* take the matter [of a detention] up with the authorities, ask for adequate, official information …" (emphasis added) The same policy provides for the possible resumption of duty. Here, the Respondent failed to respond to or investigate informal claims from several persons that perhaps the Applicant had not abandoned his post but was detained. It should have investigated those claims. The results of that investigation would have triggered the Agency Policy and an attempt to protect and support the Applicant.

(Signatures)

Marsha ECHOLS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary