



Administrative Tribunal

Distr. Limited  
30 September 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1436

Case No. 1508

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas on 10 November 2006, a former staff member of the United Nations, filed an Application in which he requested the Tribunal, inter alia:

“II. PLEAS

8. [T]o find that:

- (a) the decision to separate the Applicant [from service] was arbitrary;
- (b) the facts do not support the decision taken;
- (c) the JAB [Joint Appeals Board] misunderstood the context; and,
- (d) having found this to be true, to find that the Secretary-General’s decision is flawed by numerous procedural errors and interpretations of fact that led to an incorrect decision not to renew the Applicant’s contract.

9. [T]o order that:

- (a) the Applicant be reinstated in the position and grade held prior to his separation (Associate Legal Officer, NOB [ National Officer B level]);
- (b) the Applicant’s steps in grade NOB be upgraded from the date of his separation to the date of the Tribunal’s judgement;

(c) the Applicant be [awarded] compensation for direct material damage in the form of ... gross salary and benefits [for the period] from 1 May 2000 to [the date of issuance of the Tribunal's Judgement in this case]; and,

(d) the further payment of compensation for ... moral suffering and professional prejudice [suffered by] the Applicant in the amount of USD 50,000."

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 8 May 2007, and once thereafter until 8 June;

Whereas the Respondent filed his Answer on 30 May 2007;

Whereas the Applicant filed Written Observations on 31 August 2007;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

***"[Applicant]'s Professional Record***

... The [Applicant] entered the service of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR) on 24 November 1998 as an Associate Legal Officer, category National Officer, level A (hereinafter referred to as NO), step 1 on a short-term appointment (300 series) in Moscow, Russian Federation.

... On 1 March 1999, his short-term appointment was extended for four months.

... On 1 May 1999, he was granted a one-year fixed-term appointment as Associate Legal Officer, Category NO, level B and step 6 in Moscow under the 100 series.

... The [Applicant's] appointment was not renewed after 30 April 2000 and he was separated from service.

***Summary of Facts***

... In July 1999, UNHCR issued new human resources policies in the areas of postings, promotions and contracts in [an] Inter-Office Memorandum ... (hereinafter referred to as IOM/FOM 65/99). It became effective 1 January 2000 and provided for inter alia indefinite appointments to all staff members appointed through the Appointments, Postings and Promotions Board (hereinafter referred to as APPB). In August 1999, [another] Inter-Office-Memorandum ... (hereinafter referred to as IOM/FOM 82/99) was issued on UNHCR's new contract policy dealing in particular with transitional measures for staff holding a valid contract on 1 January 2000 whose appointment was to be converted to an indefinite [appointment] upon recommendation.

... At the end of August 1999, the supervisor of the [Applicant], ... sent the [Applicant's] Performance Appraisal Report (hereinafter referred to as PAR) via e-mail to the [Applicant] who was in Ankara, Turkey, at that time where he was trained in refugee status determination as one of UNHCR's Moscow's protection unit officers. The PAR covered the period from 24 November 1998 to 31 August 1999. It was not favourable for the [Applicant] and the supervisor had not signed it.

... On 23 September 1999, the UNHCR Personnel Administration Section (hereinafter referred to as PAS) issued a Personnel Action form for the [Applicant] in which, with reference to IOM/FOM 65/99, his fixed-term appointment was converted to an indefinite appointment with effect 1 January 2000. A recommendation by the Regional Office of Moscow (hereinafter referred

to as ROM) had not been received at that time. However, neither a copy of the PAR nor a letter of appointment was transmitted to the [Applicant] and therefore never signed by him.

... At the end of September 1999, [the] Senior Protection Officer [(SPO)], replaced the [Applicant's] supervisor. At the end of October, the Administrative Officer in the ROM asked [the SPO] and now supervisor of the [Applicant], to discuss the contractual status of three locally recruited staff members concerning recommendations for the extension of their contracts beyond 31 December 1999. On 26 October 1999, [the SPO] sent an e-mail to the Administrative Officer in the ROM recommending the extension of the [Applicant's] contract beyond December 1999. By e-mail dated 15 October 1999, he had expressed his satisfaction with a task accomplished by the [Applicant].

... After the [Applicant's] former supervisor had left his post, ... the newly arrived Senior Administrative Officer [(SAO)], took notice of the [Applicant's] poor PAR (Performance period from November 1998 to August 1999).

... [The SAO] discussed the issue with the [Applicant's] new supervisor and they agreed to meet with the former supervisor of the [Applicant], [the supervisor] and the [Applicant]. The meeting took place mid-November 1999 and it became clear that the [Applicant's] PAR had been prepared without any discussion although the [Applicant] had received a copy. However, according to the [Applicant] the meeting [only took] place between him and his former supervisor. [The SAO] prepared a note for the file about this meeting, which was dated 9 December 1999 and signed by him and the Regional Representative.

... Furthermore, according to the above-mentioned note for the file, all participants agreed during the meeting that [the supervisor] would discuss the PAR with the [Applicant]. The PAR would then follow the normal course of being signed by the staff member, the second reporting officer, etc. In case there was a rebuttal, this would follow its course. Furthermore, it was agreed upon that [the SPO] would agree on objectives with the [Applicant] and would evaluate his performance by the end of March. Finally, they decided that at the end of March a decision would be taken as to whether the [Applicant] would be extended or given an indefinite contract. Furthermore, it mentioned that this course of action had been agreed upon by all participants of the meeting and also by the Regional Representative. However, the [Applicant] contests that this agreement was ever reached.

... On 23 November 1999, the Administrative Officer of the ROM sent an e-mail to the Officer-in-Charge, Personal Administrative Section [PAS], informing him that at this stage the ROM cannot recommend the [Applicant]s for an indefinite appointment and therefore, the Office would like to let the [Applicant's] contract expire in April 2000. She further asked him to cancel the personal action form 99-M-738 and to make the corresponding changes in the staffing table.

... One day later, the Officer-in-Charge, PAS, replied via e-mail to [the SAO] asking him for more background information on the case – specifically if there had been an initial recommendation to extend the [Applicant's] contract - since the Indefinite Appointment had already been entered into the system. [The SAO] informed the Officer-in-Charge, PAS, as follows: 'This is the case of a s/m whose 'draft' PAR is not so good. I say 'draft' because it was completed by his supervisor ... but not discussed with him. He now has a new supervisor ...' Furthermore, he notified PAS about the meeting that took place in mid-November 1999 and the agreement that was reached.

... Following this exchange of e-mails, a personnel action form was issued which cancelled the personal action form ... 99-M-738 and therefore the conversion to an indefinite appointment.

... On 9 December 1999, the note for the file [dated the same day] was endorsed by the Regional Representative and sent to PAS, Geneva, by fax.

... From 1 December 1999 until 24 December 1999, the [Applicant] went on annual leave. He was outside the country from 9 December 1999 until 24 December 1999.

... In December 1999, the [Applicant] received the final copy of his former supervisor's appraisal who commented [on] the overall performance in the PAR as follows: '[the new] staff member had difficulties in finding [his] proper role in the UNHCR Office and the protection unit in particular. He has been working in relative isolation from the rest of the unit, thus limiting the extend [sic] to which he could learn from the work done by the colleagues. [The Applicant] could have shown more imitative (sic), although he had always diligently carried out tasks assigned. [The Applicant] was informed about his strengths and weakness[es] and it was agreed that [the] issuance of a permanent contract would depend on further improvement [of] his performance. [The Applicant needs] substantial training in refugee law issues'. However, on 6 January 2000, the [Applicant] signed the PAR and ticked the box 'I agree with this appraisal' but added numerous comments to it. The Reviewing Officer did not sign the PAR.

... By e-mail [dated] 20 March 2000, [the SAO] notified PAS that according to [the SPO] the [Applicant's] performance is not at the NO level B and that there will not be a recommendation to extend/convert his contract. Furthermore, he noted that [the SPO] had spoken about this with the [Applicant].

... On 28 March 2000, [the SPO] wrote an e-mail to [the SAO] informing him that he had met with the [Applicant] at the end of February 2000 and that the meeting was held after [the supervisor had] consulted with [the SAO] and with his supervisor, the Deputy Representative. The Regional Representative was also informed. According to this e-mail [the SPO] had informed the [Applicant] that he would recommend the non-extension of his contract because on each of the main tasks entrusted to him, he had not performed according to what is expected from a NO. He further confirmed that he had asked the [Applicant] to prepare a PAR form, following objectives jointly designed in 1999. However, despite several reminders, the [Applicant] had failed to do so until the end of March 2000.

... Also on 28 March 2000, the [Applicant] informed his supervisor via e-mail about the late arrivals of some of his colleagues. The [Applicant] considered the discipline in the protection unit (e.g. late arrivals) to be questionable and had sent e-mails to the senior management to complain about the situation and to ask for improvement several times (especially in July 1999 and March 2000).

... On 29 March 2000, [the SPO] sent an e-mail to the [Applicant] asking him to refrain from this kind of 'comments and checking'. The same day, the [Applicant] sent an e-mail to the Regional Coordinator and the Deputy Regional Representative and the [Applicant]'s Reviewing Officer complaining about his supervisor's behaviour and telling them that the latter had informed him that '[he] had aggravated the atmosphere in the Protection Unit and that he ([the SPO]) would personally initiate the procedure of [his] separation (...)'.

... By memorandum dated 30 March 2000, the Regional Coordinator informed the [Applicant] that as his performance has not significantly improved to warrant extension of his contract, the contract will be allowed to expire on 30 April 2000 and will not be renewed. The [Applicant] received this memorandum on 6 April 2000.

... On 6 April 2000, the [Applicant] wrote an e-mail to the Regional Coordinator, informing him that the Deputy Regional Representative had approached him on 3 April 2000 to request the [Applicant]'s resignation and that he had told him that the memorandum of separation was already signed. However, according to the [Applicant], he did not show him the memorandum and told him that he would receive it on 6 April 2000.

... The PAR covering the period from September 1999 to March 2000 was finalized by the [Applicant]'s supervisor on 21 April 2000 and handed over to the [Applicant] who signed it on 24

April 2000. The [Applicant] disagreed with the appraisal and ticked the corresponding box. The supervisor's comment stated, inter alia, that '(...) the [the Applicant] show(ed) a strong commitment to improve his performance but, [despite] substantial coaching ... only partially succeeded. (...) He failed to provide comprehensive case summary and sound legal analysis. Eventually, most of the cases he prepared had to be re-drafted (...). In conclusion, the s/m cannot work without intense and constant supervision and coaching (...)'

... According to the Respondent, the [Applicant] never sent his signed copy of the PAR back to the ROM or informed anybody in the ROM of his disagreement. However, on 28 April 2000, the [Applicant] sent a memorandum entitled 'Letter of Appeal' to the Chairman of the Staff Council of UNHCR, Geneva. He asked for 'action and possible help' and 'to consider the Memorandum submitted as a formal Letter of Complaint/Rebuttal against UNHCR ROM's [arbitrary] decision to separate [him] from the Organization'. The [Applicant] further stated that 'herewith, [he submits] the formal Letter of Appeal according to Rule 111.2 para (b) to request a review of the UNHCR ROM's 'Memorandum' of March 30, 2000 with regard to Non-renewal of [his] appointment'. The [Applicant] copied this letter to the Secretary-General.

... The same day, the [Applicant] also sent a letter of rebuttal to the UNHCR Headquarter's Rebuttal Unit in Geneva 'against UNHCR ROM's decision of 30 March 2000 not to renew [his] contract', asking to 'consider the Memorandum of 28 April 2000, the Letter of Appeal /[appeal against the Administrative decision] ....

... The [Applicant]'s memorandum was transmitted to the UNHCR's Legal Affairs Section (hereafter referred to as LAS) and forwarded to the Chief a.i. Performance and Career Planning Section, Career and Staff Support Service (hereinafter referred to as PCPS) at Headquarters in Geneva.

... By letter dated 16 June 2000, the then Chief of LAS informed the [Applicant] that his submission 'should be handled under two different procedures, namely (a) under the appeal procedure set out in Chapter XI of the Staff Rules, as far as [he] contests the decision not to renew [his] fixed-term appointment beyond its expiry date [of] April 30 and (b) the PAR rebuttal procedure as far as [he] disagree[s] with the PAR'. Furthermore, [the Chief] informed the [Applicant] that she had forwarded all the documentation related to a rebuttal to the Officer-in-Charge, PCPS.

... Concerning the [Applicant's] intention to appeal the administrative decision not to extend/convert his fixed-term appointment, the then Chief of LAS drew the [Applicant's] attention to staff rule 111.2 and explained this provision to him. She offered to return his submission to him so that he could amend it and send it to New York or send it back to her and she would forward it to New York. Furthermore, she wrote that 'I herewith confirm that UNHCR's administration was informed of your intention to contest the decision not to extend your contract within the time limits stipulated in staff rule 111.2 (...). UNHCR will therefore not invoke the receivability of (his) appeal *ratione temporis*'. Finally, she recommended [that] the [Applicant] ... wait for the outcome of the rebuttal of his PAR before submitting a request for administrative review to the Secretary-General since the decision not to renew the contract was based on his performance and the [JAB] would defer any consideration of the appeal until the rebuttal procedure had been terminated.

... By memorandum dated 22 March 2001, the Chief a.i., PCPS, sent the rebutted PAR back to the ROM, to the Deputy Regional Representative and the [Applicant's] Reviewing Officer. He pointed out that the Reviewing Officer's signature was missing on the [Applicant's] PAR but that the Reviewing Officer has to be involved in case of a disagreement between the supervisor and the staff member. Without his signature the rebuttal procedure could not be pursued. Furthermore, the Chief a.i., PCPS, [requested that] the Reviewing Officer ... confirm whether a discussion that had taken place between the [Applicant] and the parties involved could be considered as an attempt for local conciliation.

... By memorandum dated 4 April 2001, the Administrative Officer at the ROM sent back the [Applicant's] PAR. It was signed and annotated by the Deputy Regional Representative and [the] Reviewing Officer. In his comment, he confirmed that 'a meeting was held with [the Applicant] in relation [to] his performance on the 9th of December 1999 [and] no substantive improvement had been recorded since'.

... By letter dated 11 June 2002, the Chief a.i., PCPS, apologized for the delay in following the [Applicant's] case. He sent to the [Applicant] a copy of his PAR including the comments and the signature of the Deputy Regional Representative and the Reviewing Officer. Furthermore, the [Applicant] was requested to inform the PCPS by 28 June 2002 whether he intended to have the 'PAR recorded and filed with his comments' or wanted to 'initiate a rebuttal procedure'.

... By letter dated 9 July 2002, the [Applicant] sent an additional statement to the Chief a.i., PCPS, which he wanted 'to be considered in conjunction with his letter of appeal and his letter of rebuttal of April 28 2000'.

... By e-mail dated 14 October 2002, the Rebuttal Panel inquired from [the SPO] about the [Applicant's] performance. By e-mail dated 20 November 2002, [the SPO] replied to the Rebuttal Panel, informing it that out of the 21 cases interviewed and summaries prepared by the [Applicant], 14 had to be re-drafted. He pointed out in his e-mail that [he] and the Associate Resettlement Officer [verbally] addressed ... the performance with the [Applicant] and that several meetings took place to formally discuss the performance of the [Applicant].

... On 17 March 2003, a Rebuttal Panel submitted its report on the [Applicant's] performance covering the period from 21 September 1999 to 30 March 2000 to the Chief a.i., PCPS. The Rebuttal Panel wholly rejected the [Applicant's] rebuttal and concluded to uphold the original PAR.

... By letter dated 25 March 2003, the Head, Career and Staff Support Service, informed the [Applicant] on the outcome of the rebuttal of his PAR. He was further informed that the Panel's decision would be final. The [Applicant] acknowledged receipt of the letter on 11 April 2003.

... By e-mail dated 19 May 2003, the [Applicant] contacted the Secretary of the Geneva JAB and asked him to provide all the necessary information concerning the appeal procedure. On 22 May 2003, the Secretary of the Geneva JAB sent him the 'Rules of procedures and guidelines of the Geneva Joint Appeals Board' by e-mail and drew his attention to staff rule 111.2. The [Applicant] received this e-mail.

... On 4 June 2003, the [Applicant] wrote a letter to the Secretary-General requesting administrative review. He stated that '(...) I hereby contest the administrative decision not to renew my contract under paragraph (k) of Chapter XI/Article 111.2/Staff Rules (...) the decision was motivated by prejudice or some other extraneous factor...'. He attached inter alia the memorandum of 16 June 2000 from the Chief of LAS and explicitly mentioned that he considers 11 April 2003 as a starting date for the time limit.

... On 11 June 2003, the Officer-in-Charge, Administrative Law Unit (hereinafter referred to as ALU), New York, acknowledged receipt of the [Applicant's] letter. The letter was sent to the [Applicant's attention] to the UNHCR's office in Moscow. In the letter, the [Applicant] was asked 'to submit some explanation as to why [he] feel[s] that the decision not to renew [his] contract is (...) motivated by prejudice or some other extraneous factor, in order to have [his] memorandum considered as a request for review'.

... By letter dated 16 January 2004, the [Applicant] sent a request for review of the decision not to renew his contract to the Secretary-General, referring to his request for review dated 4 June 2003. The same day, the [Applicant] sent a letter to the Officer-in-Charge, ALU, New York, equally referring to the statement of request for administrative review of 4 June 2003. According

to the [Applicant], he had no chance to respond to the letter of the Officer-in-Charge, ALU, New York, of 11 June 2003 on time because he suffered two massive cardiac arrests cured at the hospital in his hometown of Makhachkala, Republic of Daghestan, Russia. He stated that he was hospitalised for the rehabilitation procedure, which started at the end of June 2003 and ended in January 2004 and that UNHCR ROM only informed him at the beginning of January 2004 that there was a letter for him to pick up.

... On 25 March 2004, the Officer-in-Charge, ALU, New York, sent an e-mail to the [Applicant] acknowledging receipt of his request for administrative review dated 16 January 2004. By another e-mail dated 29 March 2004, she informed the [Applicant] that there would be no further reply from ALU related to his request for review and that '(his) right to file an appeal with the JAB in Geneva has now attached (sic)'."

On 26 April 2004, the Applicant filed an appeal with the JAB in Geneva. On 9 July 2007, the JAB submitted its report. Its considerations and recommendation read, in part, as follows:

***“Considerations***

*Admissibility*

...

59. The Panel noted that the date of the administrative decision was 30 March 2000 and that the Appellant received notification of the decision in writing on 6 April 2000. Therefore, the time limit to request the Secretary-General to review the administrative decision was 6 June 2000. However, the Appellant only sent the request for review to the Secretary-General on 4 June 2003 and therefore did not comply with staff rule 111.2 (a). However, this non-compliance could not be considered as his fault. On 28 April 2000, the Appellant had sent a memorandum entitled 'Letter of Appeal' to the Chairman of the Staff Council of UNHCR, Geneva, copied to the Secretary-General and a letter of rebuttal to the Rebuttal Unit in Geneva. By letter dated 16 June 2000, the Chief of LAS in Geneva - to whom this 'Letter of Appeal' was transmitted - explained to the Appellant that his request for review was procedurally flawed and offered him to assist him in order to comply with the procedural rules. Furthermore, she told him that UNHCR would not invoke the admissibility of the appeal *ratione temporis* since the UNHCR administration was informed of the Appellant's intention to contest the administrative decision. Finally, she recommended [that he] wait for the outcome of the rebuttal procedure before submitting a request to the Secretary-General because the JAB would defer any consideration of the appeal until the Rebuttal Panel had decided on the case. The Panel recalled that the Appellant [had been] informed about the outcome of the rebuttal procedure by letter dated 25 March 2003 and that he had acknowledged receipt of the letter on 11 April 2003. It found that the Appellant had received misleading information from the Chief of LAS and therefore accepted the Appellant's view to deem the day he received the decision of the Rebuttal Panel (11 April 2003) as the beginning of the time limit stipulated in staff rule 111.2 (a) (ii).

60. Since the Secretary-General did not reply, staff rule 111.2 (ii) applies. The Secretary-General received the request for review on 6 June 2003. As a result, the date of expiration to submit the statement of appeal was 6 September 2003. The Panel noted that the Appellant did not comply with this deadline because he submitted his statement of appeal only on 26 April 2004 after having submitted a second request for review on 16 January 2004. Furthermore, it stressed that the Secretary of the JAB in Geneva informed him on 22 May 2003 in detail about the procedure and so he knew that in case of no response from the Secretary-General, he had to send his statement of appeal to the JAB within three months.

61. Noticing the above-mentioned out of time submission despite the knowledge of the procedural rules, the Panel examined if exceptional circumstances hindered the Appellant to comply with the time limit. Therefore, it considered the application of staff rule 111.2 (f) which states that

‘An appeal shall not be receivable unless the time limit specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the Panel constituted for the appeal’.

and Article 13 of the rules of procedure and guidelines of the Geneva JAB which stipulates that

‘When the question of receivability has been raised, the Panel constituted to consider the appeal shall rule first on this preliminary issue. The Panel may request statements, supporting evidence and comments relating to this issue and shall decide, on the basis thereof, if exceptional circumstances justify the waiver of the time-limits under Staff Rule 111.2 (f), bearing in mind that the onus of proving exceptional circumstances lies with the Appellant’.

The Panel took into account that according to the [Tribunal] ‘only circumstances beyond the control of the Appellant, which prevented the staff member from submitting a request for review and filing an appeal in time, may be deemed to constitute exceptional circumstances. Exceptional circumstances are events beyond the Appellant’s control’ (UNAT Judgement No. 383, *Kayigamba* (1986)).

62. The Appellant stated in his appeal that he had suffered two cardiac arrests, that he had been hospitalised from the end of June 2003 until January 2004 and that therefore he could not comply with the deadline. The Panel requested him to provide an Attestation from the Hospital. The Panel found that according to the medical certificate provided on 27 February 2006 the Appellant [had not been] hospitalised ... but had had only several doctor appointments. Furthermore, it noted that the diagnosis was kept very general and did not expressly confirm that he had suffered two massive heart attacks. Although the Panel recognized that the Appellant had medical problems, it was not convinced that he was not able to submit his statement of appeal within the deadline. The Panel decided however to give him the benefit of the doubt.

63. Additionally, the Panel examined ... whether the fact that the Appellant sent a second completed request for review to the Secretary-General on 16 January 2004 and that the ALU confirmed ... by e-mail on 29 March 2004 that he could now file his appeal with the JAB in Geneva could also constitute exceptional circumstances which would justify the waiver of the time limit. The Panel stressed that the first step in the appeals procedure is to send a request for review to the Secretary-General and that the ALU [was] at that time in charge of that review. Furthermore, it pointed out that the ALU [was] also bound by the staff rules as a party [to the case]. Nevertheless, the Panel noted that the ALU accepted the Appellant’s second request for review, which he submitted on 16 January 2004. This created a new legal situation that bound the Administration. Furthermore, the Panel stressed that the information given to the Appellant on 29 March 2004 that he could now file his appeal with the JAB in Geneva made him believe that he had complied with all the procedural requirements. Therefore, the Panel found that the ALU by processing the case [cured] the failure of the Appellant to comply with the deadline foreseen by the Staff rules.

64. Consequently, the Panel concluded to accept the existence of exceptional circumstances beyond the Appellant’s control and as a result considered the appeal to be admissible *ratione temporis*.

65. Concerning the admissibility *ratione materiae*, the Panel confirmed that the Appellant did indeed contest an administrative decision under the terms of staff regulation 11.1.



66. In view of the foregoing, the appeal was deemed receivable.

...

*Merits*

68. The Panel turned to the question as to whether the Appellant could expect the extension of his appointment and the conversion to an indefinite contract. It pointed out that according to staff rule 104.12 (b) (ii)

‘The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.’

69. The same wording is contained in the Appellant’s letter of appointment. In this context the Panel also recalled that the [Tribunal] has held that ‘employment with the Organization ceases on the expiration date of the fixed-term contract and that prior renewals, verbal promises and outstanding performances do not create a legal expectancy of renewal’ (UNAT Judgement No. 1049, *Handling* (2002)). However, the Panel acknowledged that ‘[e]xceptions to this rule may be found in countervailing circumstances, such as an express promise or an abuse of discretion including bias, prejudice or other discrimination against staff members, or any extraneous or improper motivation on the part of the Administration’ (UNAT Judgement No. 1232 ... (2005)). The Panel found that the Administration never raised any expectancy concerning the renewal/conversion of the Appellant’s contract and never promised the renewal/conversion of the contract vis-à-vis the Appellant. The e-mail sent by the Appellant’s supervisor to the Administrative Officer of the ROM on 26 October 1999 recommending the staff member for an indefinite appointment was an internal e-mail within the office in Moscow. The Appellant was not even copied on this e-mail. Furthermore, the Panel stressed that the Appellant was aware that his performance was not satisfactory and that a renewal/extension of his contract would depend on the improvement of his performance. Finally, the Panel stressed that no abuse of discretion, which could have created expectancy, could be observed. The Panel also took note of staff rule 104.12 (b) (iii), which does not apply in the present case because the staff member had not completed five years of continuous service on a fixed-term appointment.

70. In this context, the Panel also pointed out that contrary to the Appellant’s view, he did not fulfil all the requirements for an indefinite appointment stipulated in para. B 1 of IOM/FOM 82/99 because no positive recommendation existed. The Panel stressed that only an initial internal and informal recommendation existed which was not even communicated to Headquarters in Geneva. Furthermore, the Panel noted that the new supervisor had the discretion to revoke an initial internal recommendation and to postpone the decision about a recommendation to March 2000 in order to have the opportunity to evaluate the Appellant’s performance.

71. The Panel took into account that the Appellant claimed several procedural flaws in the context of the preparation of his two PARs. Therefore, the Panel examined the allegations of the Appellant in detail. Concerning the allegation that the then Reviewing Officer did not sign the PAR of January 2000, the Panel recalled para. 26 of the Annex of IOM 54/97-FOM 61/97 which stipulates that

‘(...) Before the completed PAR 1 form is transmitted to the staff member the Reviewing Officer signs the form and thereby confirms that the appraisal process has been correctly followed’.

Since the Reviewing Officer did not sign the PAR, the Panel recognized a procedural flaw. It also stressed that a mid-term progress review did not take place during the appraisal period (24 November 1998 until 31 August 1999) since it is not noted on the PAR. This constitutes another procedural error. It recalled that according to para. 14 of the Annex of IOM 54/97-FOM 61/97 a mid-term progress review has to be conducted during months 6 and 7 of the Career Management

System Year and that the supervisor and the staff member discuss inter alia the staff member's progress in meeting objectives and problems and how to solve them.

72. The Panel then drew its attention to the question as to whether the preparation of the PAR of April 2000 was procedurally flawed. It did not follow the argumentation of the Appellant that the fact that the PAR was presented to him one week before his departure and that therefore there was no room for conciliation constitutes a procedural flaw. Paras. 9.5 and 9.6 Attachment 1.2 of IOM 54/97-FOM 61/97 state that

'If (...) a staff member continues to contest the evaluation of the objectives, a comment or rating, the staff member has the following options: a) to opt for local conciliation mechanism (...) b) immediate revoke the rebuttal procedure, by signing the PAR form at the appropriate space (...)'

'In case the staff member chooses the option of the local conciliation, the staff member makes a written statement that the local conciliation is sought within one week from being handed the PAR form for signature, to the relevant Administration/Personal Officer'.

Bearing these paragraphs in mind, the Panel highlighted that the Appellant signed the PAR on 24 April 2000 and ticked the box 'I disagree'. Therefore, he opted against the conciliation mechanism. Consequently, the Panel denied any procedural flaw. The Panel also decided that the fact that the Reviewing Officer did not seek the views of other supervisors was not a procedural error because the Appellant always had only one supervisor at the same time. Initially, his supervisor was [the supervisor of record] and later [the SPO] supervised him. The two PARs indicate this clearly.

73. Concerning the question as to whether the missing signature of the Reviewing Officer on the PAR of April 2000 and his confirmation on 4 April 2001 that 'a meeting was held with [the Applicant] in relation with his performance on the 9<sup>th</sup> December 1999 [and] no substantive improvement had been recorded since' constitutes a procedural flaw, the Panel decided that indeed the missing signature of the Reviewing Officer is a procedural error since it violates para. 6 Annex of IOM 54/97-FOM 61/97 .... In regard to the confirmation of the Reviewing Officer, the Panel took note that his statement is not true because on 9 December 1999 the Appellant was outside the country and therefore the performance could not have been discussed. In case the Reviewing Officer referred to the meeting of mid-November, the Panel stressed that according to both parties the Reviewing Officer was not present at that meeting. The Panel expressed its doubts as to whether the Reviewing Officer was actively involved in solving the dispute concerning the performance of the Appellant. It noted that para. 9.3 of the Attachment 1.2 of IOM 54/97-FOM 61/97 states that

'Where the disagreement persists after discussion, they should be referred to the Reviewing Officer. Reviewing Officers do not have the authority to change annual appraisal. However, having followed the PAR process through different steps, they are in a position to mediate between the parties'.

Since this provision only contains the word 'should', the Panel decided that no procedural irregularities occurred even if the Reviewing Officer was not involved. Additionally, the Panel remarked that according to the information contained in the PAR of April 2000 also no mid-term review had taken place which constitutes a procedural irregularity.

74. The Panel then considered the allegation of the Appellant that he had no opportunity to state his view before his performance was rated in April 2000 and that this constitutes a procedural flaw. It recalled that paras. 16 and 25 of the Annex of IOM 54/97-FOM 61/97 stipulate that

‘During months 10 and 12 of the Career Management System year staff members and their supervisors will meet to discuss the performance over the previous year’ and

‘A staff member’s supervisor is responsible for (...) giving the staff member feedback’.

The Panel underlined that the Appellant had at least [one] possibility to express his view when he met with his supervisor in February 2000 and it stressed that it does not doubt that this meeting took place. Consequently, the Panel [concluded that the decision was not flawed].

75. The Panel then turned to the allegation of the Appellant that the non-completion of the PAR prior to the decision not to renew/convert his contract constitutes a procedural error. It recalled para. 21 of the Annex of the IOM 54/97-FOM 61/97, which [provides] that

‘The PAR shall be prepared annually (...). Notwithstanding the normal cycle, the completion of the PAR is required in the following circumstances – prior to taking a decision not to renew a contract for performance reasons’.

The Panel noted that the memorandum of non-renewal reached the Appellant on 6 April, that the PAR [had been] completed on 24 April 2000 and that his contract [expired] on 30 April 2000. It [recalls the Tribunal’s jurisprudence] (e.g. Judgement No. 826, *Beliyeva* (1997), No. 1084 *Sabbatini* (2002), No. 1237 ... (2005)) concerning this question and ... note[d] that the [Tribunal] ... consider the non-completion of the PAR prior to taking a decision not to renew a contracts as a procedural irregularity. However, the situation of the appellants in these judgements differs significantly from the situation of the Appellant in the present case. The Panel underlined that in the present case the Appellant had only been working [with] UNHCR [for] one and a half year[s]. He had a fixed-term appointment, which, if not renewed [expired on the date cited in the letter of appointment]. The contract was neither renewed nor was the appointment changed into an indefinite one because the performance of the Appellant was not good. This was confirmed by two PARs and by two different supervisors. Furthermore, there was no sudden decline of the performance but the Appellant constantly showed a performance below the expected level. The Appellant knew a long time before the contested decision was taken that his contract would not be renewed; it was stated in his PAR of January 2000 and he was advised of the need to improve his performance. Furthermore, he did not facilitate the preparation of his PAR of April 2000 since he refused to cooperate with his supervisor in this matter. Therefore, the Panel decided that in the present case it does not constitute a procedural flaw that the memorandum of separation was handed out before the PAR was completed. The Panel also noted that the Appellant received his PAR before the expiration of the contract ....

76. The Panel also considered the allegation of the Appellant that the cancellation of the personal action form 99-M-738 at a time when there was no valid PAR constitutes a procedural flaw. It noted that there is no provision dealing with this issue. Furthermore, the Panel expressed its firm view that although the PAR was not valid when the personal action form was cancelled in November 1999, this procedure was not flawed. In November, after the meeting with the management, the Appellant knew that at this time his performance was not good enough to recommend a conversion of his fixed-term contract into an indefinite contract no matter if the PAR was valid or not at that time. The cancellation of the personal action form in November was the logical ... decision [in order to allow the Appellant] ... several months to improve his performance.

77. The Panel examined the Appellant’s arguments that the decision not to renew/convert his contract was based on improper motives and prejudice, that his removal was based on some extraneous factors and that his rights were ignored. The Panel pointed out that where the Appellant alleges improper motives and prejudice, the burden of proof in such matters rests with the Appellant (UNAT Judgements No. 312, *Roberts* (1983), No. 428, *Kumar* (1988)). The Appellant did not sufficiently satisfy the burden of proving that the decision not to grant him an extension of his contract/an indefinite appointment was motivated by any other factor than by his

poor performance. The Appellant merely raises speculations as to whether [improper] motives entered into the Respondent's decision to let the contract expire on 30 April 2000. The procedural flaws the Panel identified do not lead to the assumption that the evaluation process was seriously flawed and that therefore an implication arises that had the preparation of the PAR of April 2000 been correctly [completed], the contract may or would have been extended. Furthermore, the Panel stressed that the allegations of the Appellant that his performance was not correctly assessed in his PAR of April 2000 [had] been overruled by the Rebuttal Panel whose decision to uphold the original PAR is final.

78. The Panel also stressed ... that contrary to the Appellant's point of view, he was not deprived of any relevant information concerning his performance and the termination of his contract. He received the note for the file - although the date is controversial -, the PAR from January indicating that the granting of an indefinite appointment depends on the improvement of his performance and the second PAR. Furthermore, he was notified [verbally] at least once in February that his performance was not at a NO level B and that there will not be a recommendation to extend/convert his contract. Concerning the question as to whether the handing over of the note for the file of 9 December 1999 took ... place on 6 April 2000 along with the memorandum of 30 March 2000 constitutes a procedural flaw, the Panel stressed [that] there is no provision dealing with this issue. The Panel noted that it remained unclear whether the Appellant received the note for the file in April 2000 or - as the Respondent claims - already in December 1999 because [neither party] was able to [substantiate] its allegation[s]. Since the burden of proof rests with the Appellant and he did not satisfy it, the Panel did not [conclude that there was] a procedural flaw.

79. The Panel took note of the Appellant's allegation that the decision of the Rebuttal Panel was a biased verdict and that the rebuttal procedure was not transparent. It underlined that the accuracy of the rebuttal is outside the scope of the JAB mandate. In this context, the Panel also concluded that the Rebuttal Panel did not use an outnumbered definition of the rating '4' but the definition mentioned in para. 19 of the applicable IOM 54/97-FOM 61/97 (4 = 'partly met standard and needs improvement') and in para. 12.4.9 of the SAMM/99.

....

### ***Conclusions and Recommendations***

81. In the view of the above, the Panel concludes that the decision not to extend/convert the fixed-term appointment was in conformity with the applicable rules.

82. Accordingly, the Panel recommends [to] the Secretary-General to reject the appeal.

### ***Special Remarks***

83. The Panel would like to draw the attention of the Secretary-General to the abnormally long duration of the PAR rebuttal procedure. The Appellant initiated the rebuttal procedure on 28 April 2000 and the final decision was not submitted to him until 11 April 2003. Therefore, it took almost three years to examine the case. The Panel is very concerned about such a delay and recalls that para 9.22 of the Attachment 1.2 of the IOM/FOM N° 54/97 stipulates that '[t]he Panel shall submit its report within six weeks of receipt of the Rebuttal File, to the Secretary of the Rebuttal Board'. The Panel points out that it is of utmost importance that the Administration respects the procedural rules and complies with the deadlines. This is especially true if a fixed-term appointment is terminated due to the poor performance of a staff member.

84. Finally, the Panel would like to draw the attention of the Secretary-General to the misleading information given to the Appellant by the Chief of UNHCR/LAS in Geneva and the Officer-in-Charge, ALU in New York. The Panel wishes to point out that LAS and ALU are

bound by the staff rules and that according to staff rule 111.2 (a) (ii) the review of the request has to be completed within two months if the staff member is stationed outside New York.”

On 18 May 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case. He accepts the JAB’s recommendation and has accordingly decided to take no further action in this case.”

On 10 November 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The decision not to renew his contract was improperly taken and arbitrary.
2. The JAB misunderstood his appeal.
3. The Secretary-General’s decision is flawed and should be rescinded.
4. He should be appropriately compensated.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s claim is not receivable. No exceptional circumstances have been cited that would warrant a waiver of the time limits.
2. The Applicant had neither the right nor the legal expectancy of continued employment with the Organization.
3. The contested decision and actions were not vitiated by prejudice, discrimination, or other extraneous factors.
4. The decision not to renew or convert the Applicant’s fixed-term appointment was based on his unsatisfactory performance.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The Applicant entered the service of UNHCR on 24 November 1998 as an Associate Legal Officer, at the NO, level A, on a short-term appointment in the Regional Office, Moscow, Russian Federation. On 1 March 1999, his appointment was extended and, on 1 May, he was granted a one-year fixed-term appointment at the NO level B. On 30 April 2000, after his fixed-term appointment was not renewed, the Applicant separated from service. He appealed the decision not to renew his contract to the JAB. On 22 March 2006, the JAB recommended that the Secretary-General reject the Applicant’s appeal on the merits.

II. On 18 May 2006, the Secretary-General agreed with the JAB's recommendations, expressly indicating that such was "the final decision on the appeal" and that "[t]herefore, any recourse in respect of it should be addressed to the Administrative Tribunal". That is the impugned decision.

III. The Respondent claims that the Application is irreceivable because it was filed more than 90 days after the Applicant had received notice of the JAB's recommendation. According to article 7 (4) of the Statute of the Tribunal "[a]n application shall not be receivable unless it is filed ... within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant". Article 7 (3) states that "[i]n the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant ... the application shall be receivable ....".

IV. Moreover, the Tribunal notes that there have been many procedural delays attributable to both parties. Therefore, to decide on those grounds to find the Application irreceivable would in the Tribunal's opinion, constitute a breach of the Applicant's procedural due process rights. Consequently, the Tribunal declares the Application to be receivable and not time-barred.

V. As to the merits of the Application, the Tribunal notes that the JAB considered that the Applicant had not received favourable performance appraisals and that therefore, the decision not to renew his contract was well grounded. The JAB further considered that, even if some irregularities had occurred prior to the decision not to renew the Applicant's contract, these did not amount to a violation of the Applicant's due process rights or constitute extraneous factors. The Applicant disagrees with the JAB's recommendations and questions its reasoning. However, the Tribunal finds that the JAB's recommendations were thorough and well-reasoned.

VI. It is clear that if the Applicant was already advised of his prior negative evaluation and refused to participate in the preparation of the next PAR, he cannot now consider that to be a fault of the Organization or a procedural irregularity. The old adage *nemo turpitudinem suam allegare potest*, no one can allege his own fault, clearly applies here. Moreover, the Applicant had known since November 1999 that "his performance was not good enough" and "he was notified [verbally] at least once in February ... that there [would] not be a recommendation to extend ... his contract".

VII. The Tribunal endorses the JAB's findings that the allegations "that [the Applicant's] performance [had] not [been] correctly assessed in his PAR of April 2000 [had] been overruled by the Rebuttal Panel, whose decision to uphold the original PAR is final".

VIII. As to the Applicant's claim of prejudice and other extraneous motives, the Tribunal concurs with the JAB that "[t]he [Applicant] did not ... satisfy the burden of proving that the decision not to grant him an extension of his contract ... was motivated by any other factor than by his poor performance".

IX. The Tribunal further endorses the JAB's finding that "contrary to the [Applicant's] point of view, he was not deprived of any relevant information concerning his performance and the termination of [his] contract. ... Since the burden of proof rests with the [Applicant] and he did not satisfy it, the Panel did not assume a procedural flaw".

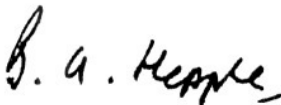
X. After reviewing the 17 annexes to the Application, the Tribunal concludes that the Applicant did not substantiate his claim of any wrongdoing on the part of the Respondent. He merely reargues all the facts that had already been considered by the JAB. The Applicant, *inter alia*, reiterates that an internal memorandum evaluated him positively at the beginning of his performance period, contrary to subsequent evaluations, and that his written denunciation of the late arrival at work by 15 minutes or more of some colleagues had produced ill-will and "retaliation". Yet all of these and other assertions of fact had already been reasonably considered by the JAB, and no new evidence was proffered before the Tribunal. Therefore, the Tribunal concludes that the JAB's conclusions and recommendations, and the Secretary-General's decision were not vitiated by any improper or extraneous factors.

XI. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)



Spyridon **Flogaitis**  
President



Bob **Hepple**  
Member

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the bottom.

Agustín **Gordillo**  
Member

Geneva, 31 July 2009

A handwritten signature in black ink, written in a cursive style with a horizontal line above the first few letters.

Tamara **Shockley**  
Executive Secretary