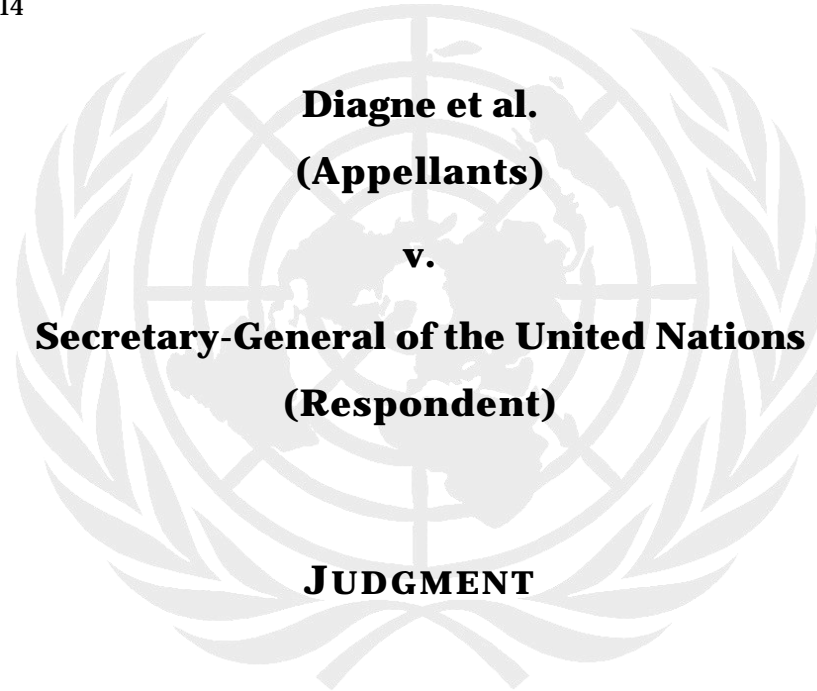




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2009-014



**Diagne et al.
(Appellants)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Rose Boyko, Presiding Judge Jean Courtial Judge Mark P. Painter
Judgment No.:	2010-UNAT-067
Date:	29 October 2010
Registrar:	Weicheng Lin

Counsel for Appellants: Bart Willemsen

Counsel for Respondent: Cristián Gimenez Corte

JUDGE ROSE BOYKO, Presiding.

Synopsis

1. Magatte Diagne, Assane Diagne and Ismaila Dieme (Diagne et al.) missed the deadline to apply for administrative review under the former Staff Rules. Although missing the deadline for administrative review would also disentitle them from pursuing an appeal to the Joint Appeals Board (JAB), in narrow circumstances an exception could be made under former Staff Rule 111.2(f) to excuse the missed deadline if they could establish that it was due to circumstances beyond their control. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that there was no persuasive evidence to this effect.
2. This Tribunal finds that no error in fact or in law was made by the UNDT. The appeal is therefore dismissed.

Facts and Procedure

3. Diagne and the other appellants joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in Senegal as Security Guards in June 1999. Their short-term appointments were converted to indefinite appointments in January 2000.
4. By letter dated 23 September 2005, Diagne and the other appellants were notified that their indefinite appointments would be terminated on 31 December 2005, in view of a new security plan for Senegal. They were separated at the end of 2005.
5. In January 2006, Diagne and the other appellants requested the Inspector General of Employment Affairs of Senegal to initiate arbitration in respect of the termination of their UNHCR employment. An attempt at conciliation was made, but it did not yield results.
6. On 8 March 2006, Diagne and the other appellants wrote to the Resident Coordinator of Operational Activities of the United Nations system in Dakar requesting his support for their reinstatement. By letter dated 9 March 2006 addressed to the High Commissioner for Refugees, the local lawyer for Diagne and the other appellants also requested their reinstatement.

7. By letter dated 16 August 2007, Diagne and the other appellants requested that the Secretary-General review the decisions to terminate their indefinite appointments with effect from 31 December 2005.

8. On 10 November 2007, Magatte Diagne sent another letter to the Secretary-General essentially repeating the contents of the letter of 16 August 2007. This letter was signed only by Magatte Diagne.

9. By letter dated 2 May 2008, the Chief of the Administrative Law Unit responded to Magatte Diagne's letter of 10 November 2007. Magatte Diagne was informed that his claim was time-barred and that he had a right to appeal to the JAB by "no later than two months from the date this letter is received."

10. On 19 February 2009, Diagne and the other appellants filed a statement of appeal with the JAB in New York. The case was transferred to the JAB in Geneva on 3 March 2009. The Secretary-General filed his reply on 20 May 2009. The case was subsequently transferred to the Dispute Tribunal following the abolition of the JAB on 30 June 2009.

11. On 30 October 2009, Judge Laker of the UNDT Geneva issued a summary judgment (Judgment No. UNDT/2009/057). The UNDT determined that the application to the JAB was time-barred as it was filed after the time limit set out in former Staff Rule 111.2(a), and, in accordance with former Staff Rule 111.2(f), there were no exceptional circumstances to justify the waiver of the time limit to appeal to the JAB.

12. On 14 December 2009, Diagne and the other appellants filed an appeal from Judgment No. UNDT/2009/057. Due to an oversight, the Registry of this Tribunal did not forward the appeal to the Secretary-General until 12 April 2010. The Secretary-General's answer to the appeal was filed on 27 May 2010.

Submissions

Appeal by Diagne et al.

13. Diagne and the other appellants contend that the UNDT erred in law in concluding that the ruling of Carstens, J., of the UNDT in *Morsy*¹ concerning the interpretation of “exceptional cases” under Article 8(3) of the statute of the UNDT (UNDT statute) could not be considered. While the JAB could waive time limits in “exceptional circumstances” under former Staff Rule 111.2(f) and the UNDT can waive time limits in “exceptional cases” under Article 8(3) of the UNDT statute and Article 7(5) of the rules of procedure of the Dispute Tribunal (UNDT rules), the perceived difference between “exceptional circumstances” and “exceptional cases” is simply one of linguistics. The present case should be remanded to the UNDT for adjudication under the proper test.

14. Alternatively, Diagne and the other appellants maintain that, as found by Adams, J., in *Rosca*² the definition applied by the former Administrative Tribunal of “exceptional circumstances” is unduly restrictive and driven by policy objectives rather than statutory language.

15. The notion that ignorance of the law is no excuse has little application in civil cases, and has no application in the present case.

Answer by the Secretary-General

16. The UNDT correctly determined that the present case should be considered under former Staff Rule 111.2 and the related jurisprudence of the former Administrative Tribunal, and that the present case was time-barred.

17. The UNDT correctly found that insufficient knowledge of English language did not constitute an “exceptional circumstance” justifying a waiver of the time limit for the submission of the appeal to the JAB, and that the fact that a party was not aware of the Staff Rules regarding the appeals procedure did not establish an “exceptional circumstance.” The Secretary-General maintains that Diagne and the other appellants have failed to establish

¹ *Morsy v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/036.

² *Rosca v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/052.

that there was an exceptional event which prevented them from submitting their application to the JAB in time.

18. The Secretary-General agrees with Diagne and the other appellants that the distinction made by the UNDT in *Morsy* between “exceptional circumstances” and “exceptional cases” is artificial and erroneous. In the view of the Secretary-General, the UNDT’s interpretation in *Morsy* fails to take into account the legislative history of the UNDT statute. Article 8(3) of the UNDT statute is based on Article 7(5) of the Statute of the former Administrative Tribunal, and not on former Staff Rule 111.2(f). It would be erroneous to infer that the use of the term “cases” instead of “circumstances” was deliberate and was intended to give the UNDT wider latitude to waive time limits. The Secretary-General stresses that the introduction of the term “exceptional cases” was intended to ensure that the UNDT’s authority to suspend and waive time limits would be more limited than that exercised by the former Administrative Tribunal.

19. The Secretary-General submits that the appellants have not provided any compelling reasons for departing from the established jurisprudence of the former Administrative Tribunal, which allowed for the waiver of a time limit in “exceptional” situations where it was demonstrated that the failure to meet the time limit was due to circumstances beyond the control of the party. He also submits that the proposal made by Diagne and the other appellants that the Appeals Tribunal should depart from the jurisprudence of the former Administrative Tribunal on time limits is unwarranted, especially in view of the fact that the former Administrative Tribunal’s approach has been followed by the UNDT in several judgments.

Considerations

20. The UNDT issued a summary judgment in which Judge Laker determined that the application was time-barred as it was filed after the time limit set out under former Staff Rule 111.2(a), and he could not find any exceptional circumstances to justify the waiver of the time limit to appeal to the JAB under former Staff Rule 111.2(f). Judge Laker referred to the discussion in the UNDT’s Judgment in *Morsy* about the difference in scope between the phrase “exceptional circumstances” used in former Staff Rule 111.2(f) and the phrase “exceptional cases”, which appears in Article 8(3) of the UNDT statute and Article 7(5) of the UNDT rules. He decided that he would apply the former Staff Rules exclusively as this was

the applicable law until 30 June 2009, thus covering completely the period of time at stake in the present case. Judge Laker also decided to apply the definition of “exceptional circumstances” used by the former Administrative Tribunal, which was defined as circumstances “beyond the control of the Applicant.”³

21. All the appellants missed the deadline to apply for administrative review under former Staff Rule 111.2(a). Although missing the deadline for administrative review also disentitled them from pursuing an appeal to the JAB, in narrow circumstances an exception could be made under former Staff Rule 111.2(f) to excuse the missed deadline if they could establish that it was due to circumstances beyond their control. The UNDT found that there was no persuasive evidence to this effect.

22. The reasons given by the appellants to explain their delay was their lack of comprehension of the English language. However there was little evidence to persuade the UNDT or this Tribunal that this was a factor beyond their control such that it prevented them from pursuing their appeal in a timely manner. They could have sought assistance and there is no evidence that they did so. The other explanation given for the delay was that they were not aware of the effect of the former Staff Rules. As ruled by the UNDT, ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules. Therefore, the appellants each failed to bring themselves under the “exceptional circumstances” provision of former Staff Rule 111.2(f), as interpreted by the former Administrative Tribunal, which interpretation this Tribunal affirms.

23. Also at issue is whether the UNDT should have applied Article 8(3) of the UNDT statute and Article 7(5) of the UNDT rules, which provide that delays can be excused in “exceptional cases”. First, it was not an error to apply the law that was in existence throughout the entire period of the delay. Secondly, no argument was made about any retrospective effect of the new UNDT statute and there was no express repeal of the former provisions. And lastly, we perceive no legal difference between “exceptional circumstances” and “exceptional cases”: we believe the correct standard to be consistent with the former Administrative Tribunal’s jurisprudence — a delay can generally be excused only because of circumstances beyond an applicant’s control.

³ UNAT Judgment No. 372, *Kayigamba* (1986), UNAT Judgment No. 913, *Midaya* (1999), and UNAT Judgment No. 1054, *Obuyu* (2002).

24. This Tribunal finds that no error in fact or in law was made by the UNDT. The appeal is therefore dismissed.

Judgment

25. This Tribunal finds that no error in fact or in law was made by the UNDT. The appeal is therefore dismissed.

Dated this 29th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Boyko, Presiding

(Signed)

Judge Courtial

(Signed)

Judge Painter

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar