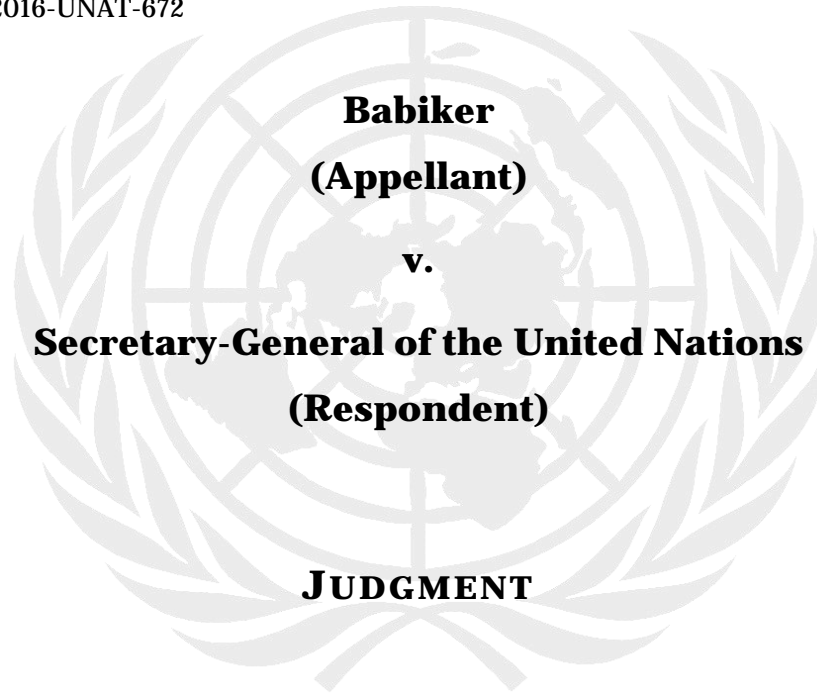




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-672



Before: Judge Rosalyn Chapman, Presiding
Judge Sophia Adinyira
Judge Inés Weinberg de Roca

Case No.: 2016-883

Date: 30 June 2016

Registrar: Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Zarqaa Chohan

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The Appeals Tribunal has before it an appeal by Dr. Fatima Ahmed Babiker of Judgment No. UNDT/2015/108, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 11 November 2015, in the case of *Babiker v. Secretary-General of the United Nations*. Dr. Babiker filed her appeal on 7 January 2016, and the Secretary-General filed his answer to the appeal on 11 March 2016.

Facts and Procedure

2. In June 2011, Dr. Babiker began working as a Program Specialist at the P-4 level with the United Nations Development Programme (UNDP) in Haiti on a one-year fixed-term appointment. In that capacity, Dr. Babiker worked on two Global Fund (GF) projects. Her fixed-term appointment was renewed once, and it expired on 9 June 2013.

3. On 4 March 2013, Dr. Babiker had a conversation with her supervisor, the Global Fund Program Coordinator, UNDP Haiti, in which her supervisor verbally advised her that her position would not be extended beyond the contract period.

4. On 15 March 2013, Dr. Babiker sent an e-mail to her supervisor in which she stated:

Following our discussion last week Monday, [sic] it is my understanding that my position will not be extended beyond this current period. I would highly appreciate it if you could confirm this to me by 19 March 2013, especially that my contract is coming to an end in the beginning of June 2013 and soon after will my [United Nations Laissez-Passer]. In the event I do not hear from you by this time, I will construe a non-response as confirmation of the decision not to extend my contract.

5. Later that day, Dr. Babiker's supervisor replied to her, stating:

Yes, I can confirm to you that from my discussions with the senior management and the GF, it was decided that your position will not be renewed. This is due to the resource constraints and the exigency of the GF and the CCM [Country Coordinating Mechanisms] that we should reduce [Human Resources costs] by promoting national staff to take some high profile positions. *You will be notified in due course by the [Country Office (CO)], as per the normal procedures.* However, as I explained to you a new P4 position will be opened combining most likely the Program, Capacity Development and may be [sic] M&E [Monitoring and Evaluation] specialist. We are

still working of [sic] the Job description. When the position will be opened, you may apply if you are interested. (Emphasis added.)

6. On 18 April 2013, the Senior Country Director of UNDP Haiti sent Dr. Babiker a letter, which stated, in part:

This is in reference to your current Fixed Term Appointment as Programme Specialist - HIV/AIDS post # 57935, Global Fund, within the UNDP Office in Port-au-Prince, Haiti.

In order to comply with applicable Special Conditions set by the Global Fund in the agreement between UNDP on Human Resources, which commits UNDP as the PR for TB and HIV grants in Haiti to gradually nationalize international posts, and in light [of] the overall UNDP Haiti's strategy to build the capacity of national partners, UNDP Haiti has restructured the staffing of the Global Fund program management unit (PMU).

In view of the above reasons, I would like to inform [you] that your assignment with UNDP Haiti will reach completion upon expiration of your fixed-term appointment on 9 June 2013.

7. On 28 May 2013, Dr. Babiker, represented by counsel, sent a request for management evaluation to the Management Evaluation Unit (MEU) of the Secretariat of the "decision not to renew [her] position, Haiti Program Specialist (P4) and [to] terminate [her] employment with UNDP". By letter dated 31 May 2013, the MEU informed Dr. Babiker that it did not have the authority to review administrative decisions of UNDP, and advised her to submit her request for management evaluation directly to a specific person at UNDP. On 7 June 2013, Dr. Babiker sent an amended request for management evaluation to UNDP.

8. On 17 June 2013, the UNDP Bureau of Management (BOM) responded to Dr. Babiker's request for management evaluation, stating:

In your request [for management evaluation], you raise a number of allegations. Those allegations concerning your claim of being subject to retaliation must be addressed by the UNDP Ethics Office[.] ... Additionally, you also claims [sic] to being [sic] the victim of harassment. Such allegations must be investigated by the Office of Audit and Investigations ("OAI")[.] ... As a consequence, your request has been referred to OAI for its appropriate assessment.

Without such assessments, the Organization will be unable to respond to those aspects of your request that are based on such allegations. *The review of your request will therefore be suspended pending the determination by these respective offices.*

Please be assured that your right to request a management evaluation is preserved during the course of the assessment of your allegations and subsequent investigation as applicable. We will revert to you following the determination by the respective offices and proceed with a review of your request. (Emphasis added.)

9. On 20 March 2014, the UNDP BOM provided Dr. Babiker with a response to her request for management evaluation stating that her request was time-barred as it was not made within 60 days of 4 March 2013, when she was initially advised of the decision not to renew her appointment. Nevertheless, the UNDP BOM also addressed the merits of Dr. Babiker's request, opining that the decision not to renew her fixed-term appointment was supported by valid reasons and fully complied with the requirements of transparency and fairness. Lastly, the UNDP BOM stated that its "decision constitute[d] the final decision in accordance with Staff Rule 11.2 (a). However, should [she] wish to lodge an appeal with the United Nations Dispute Tribunal against this decision, [she could] do so by filing an application within ninety (90) days from the date of receipt of this letter".

10. On 19 June 2014, Dr. Babiker filed an application before the UNDT contesting the decision not to renew her fixed-term appointment. On 24 July 2014, the Secretary-General filed his reply to the application.

11. Subsequently, the UNDT issued Order Nos. 200 (NY/2015) and 255 (NY/2015), directing Dr. Babiker to respond to the Secretary-General's claim that the application was not receivable *ratione materiae* because she had not timely sought management evaluation, and directing the Secretary-General to file a submission addressing the issue of receivability *ratione temporis*, which the UNDT raised *sua sponte*.

12. On 30 October 2015, and 2 November 2015, the Secretary-General and Dr. Babiker filed their respective submissions in response to Order Nos. 200 and 255.

13. On 11 November 2015, the UNDT issued Judgment No. UNDT/2015/108, concluding the application was not receivable *ratione materiae* and *ratione temporis*.

Submissions**Dr. Babiker's Appeal***Receivablility ratione materiae*

14. The UNDT erred in fact and law when it found that the e-mail communication of 15 March 2013 was the communication of a decision; it was the communication of a recommendation, with the promise of a formal communication once a decision was taken. The UNDT's errors resulted, in part, from its failure to understand that: (1) the 15 March 2013 e-mail did not refer to the non-renewal of Dr. Babiker's appointment, but only to the non-extension of her position or post; and (2) Dr. Babiker's supervisor had no authority to make any decision with respect to the renewal of her contract—only the Senior Country Director could make that decision.

15. Further, the 15 March 2013 e-mail referred only to a preliminary proposal or preparatory step before a decision with direct legal consequences on Dr. Babiker's contract terms could be taken or finalized. The 15 March 2013 e-mail must be viewed in the context of the earlier discussion between Dr. Babiker and her supervisor. Thus, her supervisor's suggestion of a possible new position that might interest Dr. Babiker showed the preliminary nature of the e-mail communication. The final decision was communicated when the 18 April 2013 letter was received by Dr. Babiker.

16. The UNDT erred in attaching significance to Dr. Babiker's response to a question on the application asking when the staff member first became aware of the decision. She became aware of the decision not to renew her position before the 18 April 2013 letter, but that is not dispositive of the issue, as the Appeals Tribunal concluded in *Bernadel*.¹ The staff member should be given the benefit of the doubt when to hold otherwise would result in a denial of access to justice.

17. Dr. Babiker deserves a hearing on the merits of her claims.

¹ *Bernandel v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-180, para. 24.

Receivability ratione temporis

18. The UNDT erred in failing to conclude that the Administration should not benefit from its own advice—even if that advice was misplaced. The Administration specifically advised Dr. Babiker that her request for management evaluation was being deferred, and she relied on this advice. Moreover, it was not in the interest of either party or the UNDT to proceed before the investigations were completed.

19. The UNDT has the authority to suspend or waive the filing deadline for a limited period of time and in exceptional cases under Article 8(3) of its Statute. Dr. Babiker requested a waiver in addendum A to her application, in which she referred to the UNDP BOM's suspension of the management evaluation process and its advice that she could file an application within 90 days of receipt of the management evaluation response. The advice that Dr. Babiker received from the UNDP BOM should be viewed as exceptional circumstances requiring waiver of the filing deadline before the UNDT.

20. The UNDT erred in applying the Appeals Tribunal's Judgment in *Neault* retroactively, so as to preclude the UNDP BOM from suspending the management evaluation process.² The statement in the 17 June 2013 e-mail that the management evaluation process was being suspended was interpreted by Dr. Babiker to mean that her request was being held in abeyance, and would not be reviewed until the investigations were concluded.

21. For all these reasons, the Appeals Tribunal should find that the application before the UNDT was timely filed.

The Secretary-General's Answer*Receivability ratione materiae*

22. The UNDT correctly determined that the application was not receivable *ratione materiae*. The e-mail of 15 March 2013 was the first date that Dr. Babiker was notified in writing of the impugned administrative decision. Both the Administration and Dr. Babiker recognized the import of the 15 March 2013 e-mail, i.e., that Dr. Babiker's contract would not be renewed. Dr. Babiker's argument that the 15 March 2013 e-mail

² *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345.

merely relayed a recommendation or proposal, rather than an administrative decision, is without support.

23. Further, Dr. Babiker failed to establish that her supervisor had no authority to abolish her post or to make the decision not to renew her appointment. Whether Dr. Babiker's supervisor had such authority is irrelevant, as the 15 March 2013 e-mail from her supervisor relayed the decision of senior management not to renew her fixed-term appointment.

24. As the 15 March 2013 e-mail notified Dr. Babiker of the decision not to renew her contract, she had 60 days from that date, or until 14 May 2013, to request management evaluation; however, she did not do so until 28 May 2013. Thus, as the UNDT correctly found, Dr. Babiker's request for management evaluation was untimely and her application was not receivable *ratione materiae*.

25. Dr. Babiker has failed to establish that the UNDT committed an error in fact and in law in concluding that 15 March 2013 was the date of notification of the contested administrative decision.

26. Dr. Babiker has not established any errors warranting a reversal of the UNDT Judgment, as required by Article 2(1) of the Appeals Tribunal Statute. Rather, Dr. Babiker merely expresses disagreement with the UNDT Judgment and repeats arguments she made before the UNDT. Thus, the appeal should be dismissed on this ground alone.

27. Dr. Babiker also improperly raises issues on appeal that address the merits of her claims and are outside the scope of the UNDT Judgment. The Appeals Tribunal, of course, should not consider these issues.

Receivability ratione temporis

28. Dr. Babiker failed to establish that the Administration misled her into believing that her claim was being dealt with. The letter of 17 June 2013 from the UNDP BOM does not include an assessment of whether Dr. Babiker had met the deadline for requesting management evaluation. Rather, it merely advised Dr. Babiker that her request for management evaluation would proceed once her allegations of misconduct and harassment had been investigated.

29. The Administration did not defer its response to her request for management evaluation and did not waive any time limit.

30. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment.

Considerations

Receivability ratione materiae

31. Staff Rule 11.2(a) requires a staff member who wishes “to formally contest an administrative decision”, as a first step, to submit a written “request for a management evaluation of the administrative decision”. Pursuant to Staff Rule 11.2(c), the management evaluation request shall not be receivable “unless it is sent within sixty calendar days *from the date on which the staff member received notification of the administrative decision to be contested*”. (Emphasis added.)

32. The Dispute Tribunal determined that the application was not receivable *ratione materiae* based on two significant preliminary factual and legal findings. First, the UNDT found that Dr. Babiker “was notified in writing on 15 March 2013 that her contract would not be renewed and ... she clearly understood on that date the nature and the legal effect of the non-renewal decision”.³ In reaching these conclusions, the UNDT placed considerable weight on Dr. Babiker’s acknowledgement in her request for management evaluation that the contested decision “was announced via e-mail to [her] on 15 March 2013”.⁴ Second, the UNDT concluded that the letter dated 18 April 2013 “was a reiteration of the decision communicated on 15 March 2013 not to renew her contract. Thus, [it] did not reset the time limits for the filing of her management evaluation request”.⁵

33. Based on these mixed factual findings and legal conclusions, the UNDT determined that Dr. Babiker failed to seek management evaluation within 60 days of receipt of notification of the administrative decision on 15 March 2013, as required by

³ Impugned Judgment, para. 41.

⁴ *Ibid.*, para. 43.

⁵ *Ibid.*, para. 44.

Staff Rule 11.2(c); thus, her application was not receivable *ratione materiae*. The Appeals Tribunal does not agree, as discussed below.

34. Initially, the UNDT correctly recognized that determining “the date on which [Dr. Babiker] received notification of the administrative decision to be contested” was its first task. In this regard, the Dispute Tribunal was faced with two possible dates: 15 March 2013, the date on which Dr. Babiker received an e-mail from her supervisor “confirming” that her position would not be renewed; and 18 April 2013, the date on which Dr. Babiker received the letter from the Senior Country Director of UNDP Haiti advising her that her position and fixed-term appointment would not be renewed.

35. To determine on which date Dr. Babiker “received notification of the [contested] administrative decision” within the meaning of Staff Rule 11.2(c), it is vital to examine the language of the 15 March 2013 e-mail and the 18 April 2013 letter. Considering the 15 March 2013 e-mail, the most obvious fact is that it was sent by her supervisor in response to an inquiry from Dr. Babiker about a prior conversation with him over a week earlier. The e-mail was a continuation of the conversation. The supervisor did not originate this communication with Dr. Babiker. By itself, of course, that fact may not be determinative; but it is an important circumstance when considering notification of a decision not to renew a staff member’s contract. A non-renewal decision must be given in writing and must be given with some degree of gravitas.

36. Additionally, although the 15 March 2013 e-mail from Dr. Babiker’s supervisor confirmed “from [her] discussions with the senior management and the GF, [that] it was decided that [Dr. Babiker’s] position will not be renewed”, as he had previously told Dr. Babiker, the e-mail went on to state: “You will be notified in due course [of the decision] by the CO, as per the normal procedures.”

37. On the other hand, the letter dated 18 April 2013, from the Senior Country Director of UNDP Haiti—the person referenced in the 15 March 2013 e-mail—was the “due course” notification. This letter specifically referred to Dr. Babiker’s position, post number and fixed-term appointment, and notified her that, as a fixed-term appointee, her appointment would not be extended and that under Staff Rule 4.13(c), she had no expectancy of renewal.

38. In determining which of the two written communications governed the date that Dr. Babiker “received notification of the administrative decision” within the meaning of Staff Rule 11.2, the UNDT failed to consider the entire circumstances surrounding each communication. One of the most important circumstances to consider, of course, is the nature of the administrative decision. In Dr. Babiker’s case, the administrative decision was not to renew her position and fixed-term appointment. An administrative decision not to renew a staff member’s fixed-term appointment is perhaps the most significant administrative decision affecting a staff member and is not a decision casually communicated.

39. A reviewing Tribunal must also consider the language used in the communications and should not be unduly swayed by either or both parties’ characterization of the communications. Any fair reading of the 15 March 2013 e-mail’s reference to the future “due course” correspondence from the Country Office in Haiti regarding the decision shows that UNDP did not intend the 15 March 2013 e-mail to be the official notification of the administrative decision affecting Dr. Babiker; but that the letter from the Country Office in Haiti would be the official notification. Otherwise, there would be no need for UNDP to send the 18 April 2013 letter.

40. Likewise, the fact that UNDP Haiti sent the 18 April 2013 letter detailing Dr. Babiker’s position and post number, and explaining the nature of a fixed-term appointment and the like shows that, at the time of the events in 2013, UNDP considered the 18 April 2013 letter to be the official notification of the non-renewal decision. Yet, the UNDT did not discuss the language used in either the 15 March 2013 e-mail or the 18 April 2013 letter—and failed to note the significantly different circumstances of the 15 March 2013 e-mail and 18 April 2013 letter—in reaching its erroneous conclusion that the 15 March 2013 e-mail governed when Dr. Babiker received notification of the non-renewal decision.

41. The UNDT also placed undue emphasis on Dr. Babiker’s acknowledgment that she became aware of the non-renewal decision when she received the 15 March 2013 e-mail. A staff member’s knowledge of a decision is not necessarily the same thing as a staff member receiving notification of a decision.⁶ Moreover, a staff member may not necessarily understand the legal significance of receiving notification under Staff Rule 11.2(c).

⁶ *Bernadel v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-180, para. 24.

Dr. Babiker is an example. It is the Dispute Tribunal's role to determine when and if Staff Rule 11.2(c) has been met; not the staff member's role. Lastly, the first written communication is not necessarily controlling, as in this case.⁷

42. For all these reasons, we determine that the UNDT made both factual and legal errors when it concluded that 15 March 2013 was the date on which Dr. Babiker received notification of the administrative decision she contested within the meaning of Staff Rule 11.2(c). To the contrary, 18 April 2013 was the date on which Dr. Babiker received notification of the administrative decision not to renew her fixed-term appointment, and that is the date from which the 60-day period began to run under Staff rule 11.2(c).

43. In light of the fact that the request for management evaluation was made within 60 days of 18 April 2013, the UNDT further erred in law when it concluded that the application was not receivable *ratione materiae*.

Receivability ratione temporis

44. Article 8(1)(d)(i) of the Dispute Tribunal Statute requires that an application may be received by the UNDT if it is filed within 90 calendar days from the date on which the staff member received the outcome of the management evaluation, or, from the date of expiration of the 45-day deadline for the communication of the outcome of the management evaluation for a staff member stationed outside New York. Staff Rule 11.4(a) sets the same deadline for a staff member to file an application with the Dispute Tribunal.

45. The jurisprudence of the Appeals Tribunal authorizes the Dispute Tribunal to consider *sua sponte* whether it has jurisdiction or competence to review a staff member's application.⁸ The Dispute Tribunal, thus, properly raised *sua sponte* the question of the timeliness of the application before it.

46. The Appeals Tribunal's jurisprudence also "mandates that both Tribunals must strictly adhere to statutory filing deadlines as one of the ways to assure the timely hearing of staff members' cases and the prompt rendering of judgments".⁹ In light of this, we have

⁷ *Ibid.*, para. 25.

⁸ *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335, para. 20; *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 25.

⁹ *Eng v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-520, para. 22.

found that there is no “authority for the proposition that the UNDT has the inherent power to suspend or waive the statutory time limits for filing an application”,¹⁰ and a staff member must make a written request to the UNDT to suspend or waive the filing deadline under Article 8(3) of the Dispute Tribunal Statute.¹¹

47. The key facts necessary to determine the timeliness of the application are undisputed. First, on 28 May 2013, Dr. Babiker made a request for management evaluation. Second, on 17 June 2013, the UNDP BOM advised Dr. Babiker:

[T]he Organization will be unable to respond to those aspects of your request that are based on ... allegations [of misconduct and harassment]. *The review of your request will therefore be suspended pending the determination by these respective offices.*

Please be assured that your right to request a management evaluation is preserved during the course of the assessment of your allegations and subsequent investigation as applicable. We will revert to you following the determination by the respective offices and proceed with a review of your request. (Emphases added.)

48. Third, the UNDP BOM did not issue a response to the management evaluation request until 20 March 2014. At that time, the UNDP BOM found that the request was time-barred (erroneously, as determined above), as it was not made within 60 days of 4 March 2013.¹² Nevertheless, the UNDP BOM addressed the merits of the request, finding that the decision not to renew Dr. Babiker’s contract was supported by valid reasons and complied with the requirements of transparency and fairness. Fourth, on 19 June 2014, Dr. Babiker filed an application before the UNDT.

49. In considering the foregoing facts, the UNDT correctly determined that UNDP did not have the authority to suspend the application of any deadlines while it awaited the results of an Ethics Office complaint and a harassment investigation. This conclusion comports with the jurisprudence of the Appeals Tribunal set forth above. As to whether Dr. Babiker may have been misled by the letter of 17 June 2013 from the UNDP BOM, the Appeals Tribunal has repeatedly stated that it is the staff member’s duty to be aware of pertinent rules and

¹⁰ *Ibid.*, para. 24.

¹¹ *Ibid.*; *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, para. 28.

¹² This conclusion does not comply with Staff Rule 11.2(c), which requires written notification of the contested administrative decision.

deadlines, and the UNDT's conclusion correctly applied our jurisprudence.¹³ We find that the circumstances of Dr. Babiker's case are not like those we considered in *Faraj*, where we held that the representations by the United Nations Relief and Works Agency for Palestine Refugees in the Near East supported the staff member being permitted to file what would otherwise be considered a tardy application.¹⁴

50. Lastly, the UNDT found that the deadline for Dr. Babiker "to file her application before the [Dispute] Tribunal expired on 22 October 2013, or 90 days from 22 July 2013".¹⁵ In reaching this conclusion, the UNDT correctly found that the "representation" by the UNDP BOM that an appeal could be filed within 90 days from receipt of the letter dated 20 March 2014 was irrelevant as the representation was "made by the UNDP months after the deadline for the filing of an application before the [Dispute] Tribunal had expired".¹⁶

51. The UNDT also considered whether the application contained an express request for waiver or suspension of the deadline for filing the application, stating:¹⁷

The fact that [Dr. Babiker] may have relied on erroneous advice cannot bring the case within the ambit of an "exceptional case" as provided by art. 8.3 of the Dispute Tribunal's Statute (*Scheepers* 2012-UNAT-211). Therefore, her application to the [Dispute] Tribunal is not receivable *ratione temporis*.

52. The Appeals Tribunal finds that the UNDT did not err when it refused to grant Dr. Babiker's request for waiver of the filing deadline and an extension of the deadline to 90 days from receipt of the 20 March 2014 letter. Dr. Babiker should have known that UNDP had no authority to "suspend" the management evaluation process.¹⁸ Moreover, only circumstances "beyond [a staff member's] control that prevented [him or her] from exercising the right of appeal in a timely manner" may be considered "exceptional circumstances" justifying a waiver of the statutory time limit.¹⁹

¹³ *Diagne et al. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067, para. 22; *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-184, para. 26.

¹⁴ *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-331, paras. 17-20.

¹⁵ Impugned Judgment, para. 55.

¹⁶ *Ibid.*, para. 56.

¹⁷ *Ibid.*, para. 61.

¹⁸ *Eng v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-520, para. 23.

¹⁹ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-478, para. 19, citing *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine*

53. Thus, the UNDT correctly determined that the application was not timely and not receivable *ratione temporis*.

Judgment

54. UNDT Judgment No. UNDT/2015/108 is affirmed and the appeal is dismissed.

Refugees in the Near East, Judgment No. 2010-UNAT-029, para. 14. See also, *Diagne et al. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067, para. 23.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar