



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/15/  
UNAT/1614  
Judgment No.: UNDT/2010/202  
Date: 19 November 2010  
Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

MENSAH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Andreas Ruckriegel, UNFPA

## **Introduction**

1. By decision dated 1 June 1999, the Applicant, a G-5 level locally-recruited Financial and Administrative Assistant at the United Nations Population Fund Office (UNFPA) in Cotonou (Benin), was informed that her fixed-term contract would not be extended beyond its expiry date on 30 June 1999.

2. On 25 December 2000, the Applicant filed her statement of appeal before the Joint Appeals Board (JAB) in New York, well outside the statutory time limits of the then applicable staff rule 111.2 (a)<sup>1</sup>. Strange as it may seem, six years later, the JAB Presiding Officer constituted a panel to consider whether the appeal was receivable and concluded that the appeal was not receivable *ratione temporis*.

3. On 25 February 2008, the Applicant filed an appeal before the former United Nations Administrative Tribunal. The case was transferred to the United Nations Dispute Tribunal (“UNDT”) on 1 January 2010, in accordance with the United Nations General Assembly Resolution 63/253 and ST/SGB/2009/11 on the *Transitional measures related to the introduction of the new system of administration of justice*.

4. The Applicant submits now that her case is receivable and should be determined by the Tribunal. She is praying for compensation in the amount of USD183,966 for moral damages. The Respondent objects to the case being heard as it was filed well outside the permissible delay.

## **Employment History**

5. The Applicant was working for UNFPA since 1<sup>st</sup> September 1990 as a locally recruited Financial and Administrative Assistant, appointed on a series of temporary fixed-term contracts. On 1 January 1999, her appointment was renewed for a period

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<sup>1</sup> ST/SGB/1999/5 of 3 June 1999.

of six months. On 1 June 1999, the Applicant was informed that her contract would not be renewed beyond its expiry date, on 30 June 1999.

## **Facts**

6. By letter dated 25 June 1999, the Applicant wrote to the Secretary-General to request review of the Administration's decision dated 1 June 1999.

7. By letters dated 22 July 1999, 28 July 1999, 9 August 1999 and 10 September 2009, the Applicant wrote to the UNFPA Chief of Personnel at Headquarters, requesting payment of indemnities for dismissal, severance pay and an award of damages.

8. On 18 November 1999, the Applicant was paid an indemnity of three months, "in accordance with the provisions of Section 10800, paragraph 2.3.4 of the [UNFPA] Personnel Manual"<sup>2</sup>.

9. By letter dated 28 July 2000, the Applicant, through the assistance of a counsel, wrote to the former UN Administrative Tribunal to challenge the contested decision.

10. By letter dated 25 December 2000, the Applicant submitted, through the assistance of a counsel, a statement of appeal to the JAB in New York.

11. On 22 May 2001, the then Secretary of the JAB advised the Applicant of the requirements to file an appeal before the JAB. He also transmitted an Appeals Form for completion.

12. On 1 June 2001, the Applicant returned the Appeals Form duly completed to the JAB Secretariat.

13. By email dated 5 November 2001, the JAB Secretariat informed the Applicant that her case was time-barred. She was further advised that she could provide

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<sup>2</sup> Letter from UNFPA Representative dated 18 November 1999.

information as to whether there were exceptional circumstances warranting a waiver of the time limits.

14. On 20 November 2001, the Applicant contacted the then Coordinator of the Panel of Counsel (PoC) to seek legal assistance. The Coordinator replied on the same day, requesting her to select five counsel from the list of PoC and to provide complete documentation relevant to her case. By letter dated 26 November 2001, the Applicant communicated the selection she had made to the Coordinator.

15. On 11 and 30 January 2002, the Applicant contacted the Coordinator of the PoC to find out whether a counsel from the list had been assigned to her. By email dated 14 February 2002, the Coordinator of the PoC replied that she had sent the Applicant a letter concerning the appointment of a counsel from the PoC list. She further informed her that the JAB had no record of her appeal.

16. By letter dated 17 September 2002, the Applicant replied that she had never received any communication from the PoC prior to the email dated 14 February 2002. Furthermore, in a registered letter dated 23 September 2002, the Applicant stated that

“[She was] surprised and shocked [...] that the JAB had no record of her appeal as [her] lawyer ha[d] been engaged in several e-mail messages and telephone calls with [the then Secretary of the JAB]”.

17. By email dated 29 December 2003, the Coordinator of the PoC wrote to the JAB Presiding Officer, requesting her to constitute a panel, on the ground that “since the rules had changed, they were hoping that the JAB would invoke staff rule 111.2 [f] (*sic*)<sup>3</sup> to find the matter receivable and review the case on the merits”. The Coordinator further stated,

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<sup>3</sup> ST/SGB/2002/1 of 1 January 2002, staff rule 111.2 (f) : “An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.”

“[The Applicant] has been writing to us and I regret that because much of the correspondence has been in French we were not that quick to respond. The delays from when she initially filed the appeal to now, therefore, are essentially due to the volume in our office and competing demands.”

18. By email dated 10 May 2004, the JAB Presiding Officer replied to the PoC Coordinator that, though the matter was time-barred, she agreed to constitute a panel to examine the issue of the appeal’s receivability.

19. On 9 June 2004, the Respondent submitted his reply to the Applicant’s statement of appeal.

20. By memorandum dated 21 July 2004, the JAB Secretariat transmitted the Respondent’s reply to the PoC Coordinator, stating,

“You are invited to submit to this Office, within one month, your written observations on the Respondent’s reply in six duplicates [...]”.

21. By email dated 18 July 2006, the JAB Secretariat informed the PoC Coordinator, that it had not received any correspondence either from the Coordinator or the application since 21 July 2004, and therefore concluded that the Applicant had abandoned her appeal.

22. On 20 October 2006, the Applicant submitted her observations to the Respondent’s reply.

23. On 26 October 2006, the JAB Panel was constituted to consider the receivability issue. In its report dated 27 October 2006, the panel recommended unanimously that the appeal was time-barred and it could not find any exceptional circumstances beyond the Applicant’s control warranting a waiver of the receivability requirements set out in the then applicable Staff Rules.

24. On 25 February 2008, the former UN Administrative Tribunal acknowledged receipt of the Applicant's appeal, submitted in French. The Applicant's pleading was translated into English. On 5 February 2009, the Respondent submitted his reply.

### **UNDT Proceedings**

25. On 19 July 2010, the parties were directed to submit their reply to case management Order 199 (NBI/2010) of the Tribunal by 30 August 2010. The Respondent filed his reply on 17 August 2010 followed by the Applicant on 27 August 2010. The Applicant requested a hearing.

26. On 5 October 2010, a hearing was held via audio-conference in Nairobi, with the Applicant participating from Cotonou (Benin) and the Respondent from New York City (United States of America). However, due to technical difficulties, the Tribunal was unable to properly hear the Applicant. Therefore, in order to avoid any further delay in the consideration of the case, the Tribunal allowed the Respondent to make his submissions. On the next day, i.e. 6 October 2010, the Tribunal issued an order summarizing the Respondent's submissions and requested the Applicant to formulate her comments by 15 October 2010. In her reply dated 11 October 2010, the Applicant contested the Respondent's submissions and requested the Tribunal to reschedule the hearing.

### **Applicant's contentions**

27. The Applicant submits that her appeal is receivable *ratione materiae and ratione temporis* and requests the Tribunal to examine the matter on the merits.

28. On the issue of receivability *ratione materiae*, the Applicant argues that she wrote to the Secretary-General on 25 June 1999 to request review of the contested decision. Her request is therefore receivable.

29. On the appeal's receivability *ratione temporis*, the Applicant avers that there were exceptional circumstances which prevented her from filing her appeal within the

statutory time limits. Firstly, she argues that she sought guidance from several officers in UNFPA who never responded to her requests. She was not offered guidance on how to proceed with her appeal because she was a local staff. Furthermore, she submits that she suffered from poor health conditions between August and October 1999 as well as from January to June 2000.

30. On the merits, the Applicant submits that the decision not to renew her contract was taken on the basis of extraneous factors. She also makes claims of harassment and abuse of authority against her hierarchy.

31. Finally, the Applicant argues that the delay in the disposal of her case was primarily caused by the JAB who sat on her case for six years, from 25 December 2000 to 26 October 2006. She argues that had the JAB dealt with the case diligently, this case would not be still pending eleven years later. She also stated that she did not receive proper legal assistance from the PoC, a factor that belated the appointment of a counsel. In her view, the Administration has not shown the kind of diligence that an institution such as the United Nations should as a rule exercise.

32. The Applicant therefore requests the Tribunal to rule in her favour and to determine the case on its merits.

### **Respondent's submissions**

33. The Respondent submits that, as a matter of law, the application is not receivable *ratione materiae* and *ratione temporis*, pursuant to staff rule 111.2 (a). He further argues that, should the Tribunal find the application receivable, the Applicant was holder of a fixed-term contract, which did not carry any expectancy of renewal or of conversion to any other type of appointment.

34. On the issue of receivability *ratione materiae*, the Respondent argues that the Applicant's letter to the Secretary-General dated 25 June 1999 did not seek the review of the contested decision but addressed for the most part alleged dysfunctions within the UNFPA office at Cotonou. In addition, some other communications were

dispatched by the Applicant to recipients other than the Secretary-General. One of those communications appears to have been addressed to her national Government, the latter which clearly does not have the authority to review an administrative decision of the UN. Another was addressed to the then Chief of the Division of Personnel and Training in UNFPA which only requested payment of dismissal benefits and severance pay. Finally, the Applicant wrote to the Administrator of the United Nations Development Programme, conveying the message that she had submitted an application before the former UN Administrative Tribunal. In the light of the above, the Respondent argues that the Applicant has at no time formally and clearly requested review of the contested decision in accordance with the procedural requirements set out in staff rule 111.2 (a) and recalls that the former UN Administrative Tribunal has consistently held that the request for review is a procedural requirement that must be strictly enforced ( Judgments No. 1196, *Maia-Sampaio* (2004) and No. 878, *Orfali* (1998)).

35. On the issue of receivability *ratione temporis*, the Respondent submits that even if the Applicant's letter of 25 June 1999 was a proper request for review, the application is not receivable *ratione temporis* pursuant to staff rule 111.2 (a) (i) and (ii). The Respondent argues that the Applicant should have appealed the contested administrative decision within one month following receipt of the Secretary-General's answer or, if the Secretary-General did not reply, within two months from when the reply was due, the Applicant being away from Headquarters. Since the Applicant did not receive a reply within two months, the appeal before the JAB should have been submitted before or on 25 September 1999. Yet, the Applicant submitted her appeal fifteen months after the statutory time limits, on 25 December 2000.

36. On the issue whether there were exceptional circumstances warranting a waiver of the receivability requirement, the Respondent rejects the Applicant's arguments that her physical location prevented her from pursuing her case in a timely manner. The Respondent argues that, on the contrary, the Applicant did dispatch



communications for severance payments. Her delay in taking the appropriate action was considerable and cannot be excused by any exceptional circumstances, which are defined by the former UN Administrative Tribunal as being circumstances outside the control of the Applicant (see judgments No. 372, *Kayigamba* (1986), No. 713, *Piquilloud* (1995) and No. 1021, *Lascu* (2001)).

37. Finally, the Respondent argues that the Applicant did not pursue her case diligently. On 22 May 2001, the Secretary of the JAB informed the Applicant that her appeal did not meet the requirements set out in the JAB Rules of Procedure. Yet, the Applicant replied to the JAB on 29 December 2003, by submitting a compliant statement of appeal. The record shows that, on 10 May 2004, the JAB agreed to address the issue of receivability and, on that basis, the Respondent was invited to submit his reply. He did so without delay on 9 June 2004. The Respondent's reply was forwarded to the Applicant on 21 July 2004 for observations to be submitted within one month. However, another 24 months went by without any communication from the Applicant. On 18 July 2006, the JAB therefore inquired whether the Applicant had abandoned her appeal. Three months later, on 20 October 2006, the Applicant submitted her observations to the Respondent's reply.

38. On the merits, the Respondent submits that, should the Tribunal decide to find the matter receivable, the Applicant was holder of a fixed-term appointment which did not carry expectancy of renewal or of conversion to any other type of appointment.

39. The Respondent therefore requests the Tribunal to dismiss the application in its entirety.

### **Considerations and Findings**

#### ***Issue of receivability ratione materiae***

40. With regards to the issue of receivability *ratione materiae*, staff rule 111.2 (a) of ST/SGB/1999/5 provides that,

(a) A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing.

41. The above staff rule establishes two requirements: (i) the letter must be sent within two months from the date the staff member received notification of the decision in writing, and (ii) the staff member must explicitly refer to the decision he or she is appealing.

42. In the present case, the Tribunal observes that the Applicant received notification of the contested decision on 1 June 1999 and that she sent her letter to the Secretary-General on 25 June 1999. The Tribunal is therefore satisfied that the letter was sent within the required two months from the date she received notification of the decision in writing. Nevertheless, the Respondent contends that the Applicant's letter did not explicitly appeal the decision of 1 June 1999.

43. The Tribunal has carefully reviewed the letter in question, which was written in French. First, its subject-matter reads as follows: "*Mon licenciement abusif, non renouvellement de mon contrat*" (Unfair dismissal, non-renewal of contract<sup>4</sup>). The Applicant then relates her own statement of facts and concludes her letter by stating clearly that she challenges the decision of 1 June 1999. In the view of the Tribunal, the Applicant has complied with staff rule 111.2 (a) of ST/SGB/1999/5. The application is therefore receivable *ratione materiae*.

***Issue of receivability ratione temporis***

44. On the issue of receivability *ratione temporis*, the Tribunal takes note of staff rule 111.2 (a) (i) and (ii) which reads as follows:

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<sup>4</sup> Unofficial translation

- i. If the Secretary-General replies to the staff member's letter, he or she may appeal against the answer within one month of the receipt of such reply;
- ii. If the Secretary-General does not reply to the letter within one month in respect of a staff member stationed in New York, or within two months in respect of a staff member stationed elsewhere, the staff member may appeal against the original administrative decision within one month of the expiration of the time limit specified in this subparagraph for the Secretary-General's reply.

45. As an exception to the rule, the Tribunal notes that in the former system of administration of justice staff rule 111.2 (f) provided that the JAB had the power to waive the time-limit on the ground of 'exceptional circumstances':

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

46. The Tribunal further takes note that the onus of proving exceptional circumstances lies with the appellant, pursuant to the then applicable paragraph G.1 of the Rules of Procedure and Guidelines of the JAB on waiver of time limits for late filing of cases:

"The Panel constituted to consider the appeal shall decide, at its own discretion, whether to consider receivability as a preliminary issue or in conjunction with the whole appeal. In either situation the Panel may request statements, supporting evidence and comments relating specifically to this issue and shall decide, on the basis thereof, if 'exceptional circumstances' justify a waiver of time limits under staff rules 111.2 (f), bearing in mind that the onus of proving exceptional circumstances lies with the Appellant."

### **The JAB's interpretation of exceptional circumstances**

47. In the present matter, the JAB Panel adopted a narrow interpretation of exceptional circumstances. The Applicant argued before the JAB that she was unable

to file her appeal within the statutory time limits owing to her remote location from Headquarters. Specifically, she stated that,

“[...] serving at a remote duty station is, as acknowledged by the Redesign Panel, by definition exceptional, insofar as staff members are deprived of equal access to information, communication and process”.

48. Having reviewed her matter, the JAB concluded that it could not find any exceptional circumstances. In its view, the Applicant’s location could not be considered as an “exceptional circumstance” warranting a waiver of time limits within the purview of staff rule 111.2 (f). It explained as follows,

“The Panel agrees that a staff member’s service at remote duty station such as Appellant’s could pose significant challenges to timely filing of an appeal, including access to counsel. However, the lapse of five years between the time the appeal was first submitted to the present deserves particular scrutiny, and specifically seems to require some showing by Appellant that, confronted by those challenges, she was nevertheless attempting to diligently pursue her appeal. ... Even assuming the exceptional circumstances she claims, more than two years passed from the filing by her outside counsel and the email exchange between the Coordinator of the PoC and the JAB Presiding Officer. There is no documentation showing that Appellant herself was diligently following up with her submission, either inquiring as to the status .... There is no evidence that Appellant herself or through her counsel ever requested an extension of time before the JAB Secretariat. ... The Panel finds no evidence that her counsel was proactively engaged in the case, either with Appellant or with the JAB, at all prior to the JAB Secretariat’s communication in July 2006. The Panel additionally finds no evidence that Appellant was proactive in pursuing the status of her appeal or was seeking to surmount the challenges from her place of residence in any way, either by contacting her counsel or the JAB Secretariat directly.”

**Case law on the definition of ‘exceptional circumstances’**

49. On this issue, the Tribunal has carefully reviewed the jurisprudence of the former UN Administrative Tribunal, the UNDT and the UN Appeals Tribunal and

found that these jurisdictions have generally strictly enforced the time limits requirements. The Tribunal have also consistently defined ‘exceptional circumstances’ as those circumstances beyond the control of the Applicant.

50. The former UN Administrative Tribunal has consistently held that exceptional circumstances are circumstances that must be strictly construed (Judgement No. 1301, (Anonymous) (2006)). More specifically, the former UN Administrative Tribunal provided a definition of exceptional circumstances in its Judgment No. 913, *Midaya* (1999) as follows:

“[They] must consist of events beyond the Applicant’s control that prevent the Applicant from timely pursuing his or her appeal”.

51. Further, in its judgment No. 1335, (Anonymous) (2007) the former UN Administrative Tribunal reiterated that exceptional circumstances are viewed as serious and beyond the Applicant’s control:

“Generally, though, the Tribunal, which recognizes the importance of complying with procedural rules, finding them to be “of the utmost importance for the well functioning of the Organization” (see Judgement No. 1106, *Iqbal* (2003)), will not waive or suspend such time limits unless there are extraordinary circumstances, including “serious reasons which prevented the Applicant from acting”. (See Judgement No. 359, *Gbikpi* (1985).)”

52. The UNDT too has held that time limits must be strictly enforced and endorses the former UN Administrative Tribunal’s interpretation of “exceptional circumstances”. In its judgment *Diagne et Al.*, (UNDT/2009/057), the Tribunal stressed that,

“It adheres to the definition provided by the [former UN Administrative Tribunal] for exceptional circumstances under former staff rules 111.2 (f) as circumstances beyond the control of the Applicant”.

It must be noted that the UN Appeals Tribunal affirmed this ruling in its Judgment No. 2010-UNAT-067.

53. In Judgment *Costa* UNDT/2009/51, the Dispute Tribunal further characterised the term “exceptional” as follows:

“To adopt the test of "exceptional" as enunciated by Ebrahim-Carstens J in [UNDT Judgment] *Morsy* , exceptional means, in substance, something out of the ordinary, quite unusual, special, or uncommon, rather than regular or routine or normally encountered but it need not be unique, unprecedented or very rare. Perhaps it is worth adding that the descriptions are, in substance, synonymous rather than differentiating, though each might differ in nuance: they should not be parsed as logically distinct entities.”

### **Findings**

54. In the present matter, the Tribunal notes that the Applicant should have filed her statement of appeal before the JAB by 25 September 1999. The evidence shows that the Applicant filed her appeal on 25 December 2000, i.e. fifteen months after the statutory time limits.

55. In the light of the case law referred to above, the Tribunal agrees with the JAB’s findings that the Applicant’s remote location cannot be considered as an exceptional circumstance within the meaning of staff rule 111.2 (f). Besides, the Tribunal notes that the Applicant did contact UNFPA Headquarters, as indicated by her letters of 22 July 1999, 28 July 1999, 9 August 1999 and 10 September 1999. There is no evidence on file to explain why she could have contacted UNFPA Headquarters but not file her appeal with the JAB within the statutory time limits.

56. The Applicant now pursues her matter before this court. The Tribunal notes that the Applicant no longer refers to her location as an exceptional circumstance. Instead, she alleges that she has been through a long and painful illness from August to October 1999 as well as from January to June 2000 and moves the Tribunal to consider these two elements as the basis for waiver of the time limits pursuant to staff rule 111.2 (f). The Tribunal notes that the illness of the Applicant is a new element that was never canvassed before the JAB or the former UN Administrative Tribunal.

57. With regards to new evidence, the UNAT held in its judgment *Shakir* 2010-UNAT-56, that evidence of exceptional circumstances should be presented at the first instance. Specifically, it stated that,

“After a late appeal to the JAB, the Applicant appealed to the United Nations Dispute Tribunal (UNDT), which found her appeal time-barred. She then presented—as a reason why the time limit should be waived—evidence of her lengthy hospitalization. But she presented this evidence for the first time before this court; the UNDT had no opportunity to consider it. All evidence is to be submitted to the UNDT. Under Article 2(5) of the Appeals Tribunal’s Statute, we can, in exceptional circumstances, admit further evidence. But we will not admit evidence which was known to the party and could have, with due diligence, been presented to the UNDT. The UNDT is not a dress rehearsal. We affirm the UNDT’s decision that the case is time-barred.”

58. The Tribunal endorses the above reasoning. It cannot admit evidence which was known to the Applicant and could have been presented to the JAB. Further, the Tribunal does not find any evidence in the file, such as a medical certificate, to support the Applicant’s allegation. On the contrary, the Tribunal finds that, during that same period of alleged illness, the Applicant had sent letters to UNFPA requesting payment of dismissal indemnities. The Tribunal therefore considers that the Applicant has failed to establish that her illness prevented her from filing her appeal before the JAB.

59. As much as the Tribunal sympathizes with the Applicant, it must recall that the strict enforcement of time limits are of utmost importance as stated by the former UN Administrative Tribunal in its Judgment No. 1046, *Diaz de Wessely* (2002):

“In the Tribunal’s view, it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations. Any other approach would endanger the mission of the international organizations, as the Tribunal has pointed out in the past: “Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative

protection against stale claims that is of vital importance to its proper functioning” (see Judgement No. 631 [sic]<sup>5</sup>, *Tarjouman* (1992), para. XVII)”.

60. The Tribunal therefore considers that even if the letter to the Secretary-General met the requirements of staff rule 111.2, *ratione materiae*, the Tribunal does not find any persuasive evidence to establish exceptional circumstances.

61. It is a matter of great concern and regret that the JAB took over six years to decide the issue of *ratione temporis*. This is the irony of the situation in a case dealing with time limits.

### **Applicant’s request for the rescheduling of hearing**

62. The Tribunal notes that the Applicant requested the rescheduling of the hearing which was interrupted due to technical constraints. Pursuant to article 16 of the Tribunal’s Rules of Procedure, the Tribunal takes the view that on the issues of receivability *ratione materiae* and *ratione temporis* there was sufficient evidence on file to determine the issues. Had the Tribunal concluded that the matter should have been pursued on its substantive merits the matter would have been rescheduled for a hearing in strict accordance with the principle of due process.

### **Judgment**

63. The application must fail on the ground that the appeal to the JAB was time-barred. The application is therefore dismissed for non-receivability *ratione temporis*.

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<sup>5</sup> No. 631 referred to the case number as registered by the former UN Administration Tribunal. The actual judgement number was No. 579.





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Judge Vinod Boolell

Dated this 19<sup>th</sup> day of November 2010

Entered in the Register on this 19<sup>th</sup> day of November 2010



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Jean-Pelé Fomété, Registrar, UNDT, Nairobi