



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

GEBRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Bart Willemsen, OSLA

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. In his Statement of Appeal dated 13 August 2008 to the Joint Appeals Board (JAB), the Applicant is contesting the administrative decisions dated 8 April 2008 not allowing him an extension of his appointment beyond the mandatory age of retirement and denial of the opportunity to compete for a substantive FS-5 Level position. He is also contesting the subsequent review of his case by the Administrative Law Unit.

2. On 18 November 2010, the Tribunal issued a case management Order No. 225 (NBI/2010) which required, among other directions, that the Parties file their concise statement of facts and identify the legal issues and the remedies sought. The Respondent replied to the Order on 17 December 2010, contending that the Application was time-barred and not receivable. On 1 March 2011, a hearing was held to determine the receivability of the Application.

Facts

3. On 5 April 2003, the Applicant joined the ICTR as a Procurement Assistant at the FS-3 Level. He was promoted on 1 October 2004, to the FS-4 Level. Due to the vacancy of an FS-5 Level position and the fact that the Applicant was the only staff member in the section with the relevant experience and work capacity to cover the portfolio, he was recommended for and received a special post allowance (SPA) on that level during the period of 1 November 2004 to 31 January 2007.

4. On 12 January 2006, the post of Procurement Assistant at the FS-5 Level was advertised. This was the same post that the Applicant had encumbered on an SPA for more than two years. The Applicant applied for the vacancy and was invited for an interview but the recruitment process was not completed at the time of his retirement. It is the explanation of the Respondent that the Central Review Panel found that the post number ascribed to the vacancy announcement was wrong. Accordingly, the post was re-advertised on 20 December 2006 with a

closing date of 19 February 2007 for submitting applications. Because the Applicant was due to retire on 31 January 2007, he did not apply for this second vacancy announcement.

5. By a memorandum dated 22 June 2006 from the Chief of Procurement, Carl-Gunner, to the Registrar of the ICTR, Adama Dieng, a request was made to grant the Applicant an extension of contract beyond his retirement age owing to the Applicant's excellent performance, his experience and the staff constraints that the Procurement Section was experiencing. The Registrar did not respond to the said memorandum. In certain instances, as a matter of practice, the ICTR had sometimes extended the service of staff members beyond their retirement age upon request.

6. On 21 January 2007, the Applicant wrote to the Registrar of the ICTR, 'appealing' the decision on his promotion from FS-4 to FS-5 and requesting a reconsideration by the administration on the decisions not to select him for the post of Procurement Assistant at the FS-5 Level and not retaining his service beyond his retirement age.

7. After the Applicant's retirement, the Registrar on 7 February 2007, replied to the Applicant's communication stating that the recruitment process mentioned against the vacancy announcement had not been finalized at the time of his separation from service and that he would not be awarded the extension of service beyond the retirement age.

8. On 12 February 2007, the Applicant again wrote to the Registrar asking for a reconsideration of the matters, particularly the issue of promotion. On 8 March 2007, the Registrar responded by email informing him that his request for promotion could not be entertained.

9. On 30 March 2007, the Vice President of the ICTR Staff Association, Nchimbi, wrote to the Registrar submitting the Applicant's case and asking for a reconsideration of the decisions on the matters of promotion and extension of service. On 8 April 2008, the Registrar sent his response directly to the Applicant informing him that his request for promotion could not be entertained.

10. By an email dated 6 November 2007, the Applicant wrote to Nchimbi, who was then the President of the ICTR Staff Association, explaining the circumstances and the urgency of his case. Nchimbi advised the Applicant by an email dated 5 May 2008 on the necessary actions that he should take, including writing a letter to the Secretary-General of the United Nations.

11. On 5 May 2008, the Applicant requested for an administrative review and on 16 July 2008, the Administrative Law Unit was of the view that the matter was time-barred. On 19 August 2008, the Applicant's Statement of Appeal to the former JAB was filed. On 20 July 2009, the Applicant was informed that the matter had been transferred to the United Nations Dispute Tribunal.

Respondent's Case

12. The Respondent submits his case as follows:

- a. The Appeal is time barred under the former staff rule 111.2 (a).
- b. The email dated 8 April 2008 was a reiteration of the Registrar's response to the Applicant and could not constitute a new administrative decision.
- c. The Registrar's first correspondence of 7 February 2007 which addressed the twin issues of non-selection and non-extension of service was the principal administrative decision in this case and time started to run from the date the Applicant received that correspondence.
- d. In *Sethia*¹, the Tribunal held that "a repeated submission of an original claim does not stop the running of the deadline or give rise to a new administrative decision there by restarting the time period of filing a claim."
- e. The applicant in *Sethia*, like the present Applicant, had made several requests to the ICTR for reconsideration of the impugned decision rather than filing a request for an administrative review within the

¹ UNDT/NBI/2009/062.

applicable time limits. He argued that the last correspondence from the ICTR administration which merely restated the decision that was made seven years earlier was the principal decision and as such time should have begun to run from the date of the last correspondence. The Tribunal rejected those arguments when it ruled that the matter was not receivable.

f. The applicant in *Costa*² had restated her original claim several times rather than filing for a request for administrative review. The Tribunal in *Costa* found the matter non-receivable.

g. In affirming the Dispute Tribunal Judgment in *Costa*, UNAT affirmed that the Dispute Tribunal has no power to waive any deadline for filing for an administrative review but only in exceptional circumstance, and in that case the applicant had not shown the exceptional circumstances.

h. The Applicant failed to raise the matter at the earliest opportunity.

i. The Respondent had made it clear by implication that since the Applicant was set to retire, his application would not have been favorably upon after his retirement.

j. The Applicant should have simply sought the guidance from the Staff Union who would have advised him of the applicable time limits.

k. The Applicant's reason or justification for not filing within the time limits have not satisfied or met the high criteria for the existence of an exceptional circumstance as set out by the Tribunal.

Applicant's Case

13. The Applicant submits his case as follows:

a. His case is receivable.

² UNDT/NY/2009/096.

- b. He was not informed of the decision of the cancelation of the first vacancy announcement in writing as he was entitled to.
- c. Although he received notice that the position had been re-advertised, this was insufficient since it did not deal with his right to be informed of the outcome of the recruitment process for which he had attended an interview. The notice did not satisfy the requirement to be properly informed under former Staff Rule 111.2 (a).
- d. The Registrar's writing of 7 February 2007 did not refer to the vacancy announcement that the Applicant had applied for, but instead referred to the later vacancy announcement.
- e. The Appeals Tribunal in *Schook*³ emphasized that under former staff rule 111.2(a), a notice must be given in writing. It stated that where there was no formal notification in writing, it could not be said that the Application was time-barred.
- f. Former staff rule 111.2(a) does not adequately guide a staff member in case he wants to request for administrative review. It did not give the address for which a letter or an email should be sent.
- g. It would not be unreasonable for a staff member to presume that writing a letter to the author of the administrative decision would be sufficient since the individual was acting on behalf of the Secretary-General.
- h. Former staff rule 111.2 (a) had often been subjected to too much formalistic interpretation.
- i. When a staff member clearly signaled to the Secretary-General or his agent acting with delegated authority that he or she would like to appeal an administrative decision, then it is incumbent upon that agent to properly and in good faith proceed under that signal.

³ UNDT/GVA/2009/47.

j. The Registrar, being a highly experienced legal professional with the title of Chief Administrative Officer of the ICTR, knew exactly what the Applicant wanted to achieve when he drafted the memorandum that had the title of an ‘appeal’ dated 21 January 2007. He knew that the Applicant wanted a judicial review or an appeal of the administrative decision.

k. The Registrar acted *ultra vires* when he responded to the letter that had the title of an appeal since he did not have the authority to respond to it.

l. The Registrar ought to have advised the Applicant as to who would have been competent to look at his appeal.

m. The Applicant was not aware of former Staff Rule 111.2 (a) and this was clear in his correspondence to the Registrar.

n. The Registrar failed to advise the Applicant on the proper steps to follow when he received the Applicant’s letters. He did not offer proper advice in order to shield his decision from judicial review so that while he continued to correspond unnecessarily with the Applicant, the matter would become time-barred.

o. An appeal directed to the ICTR Registrar as in this case, was properly before the Secretary-General since the said Registrar is the proper agent/representative of the Secretary-General. It was the duty of the Registrar to transmit the said appeal to the proper arm of the Administration that ought to receive and act on it.

Consideration

14. In determining this Application, the main issues for examination are:

a. Considering his terms of reference, whether the ICTR Registrar stands in the position of the Secretary-General and is his lawful agent in carrying out his administrative functions.

- b. Whether an application for administrative review, as in this case, addressed to the said Registrar could be adjudged to have complied with the requirements of former Staff Rule 111.2 (a).

The position of Registrar of the ICTR

15. The ICTR was established by the United Nations pursuant to Resolution 955 (1994)⁴ of 8 November 1994, having received the request of the Government of Rwanda⁵ to establish an International Tribunal for the sole purpose of prosecuting persons responsible for the genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda. The ICTR Statute provides for the mandate of the Tribunal.

16. Article 10 of the said Statute provides that the Tribunal shall consist of the following organs:

- a. The Chambers, comprising three Trial Chambers and an Appeals Chamber;
- b. The Prosecutor;
- c. A registry

17. Under arts. 16(1) and (3),⁶ the Registrar is the head of administration of the ICTR at the level of Assistant Secretary-General:

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda...
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for reappointment. **The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.**

18. The Secretary-General's Bulletin of 20 July 2011⁷ in its section 3.2 describes the functions of an Assistant Secretary-General as follows:

⁴ Security Council Resolution 955(1994) of 8 November 1994.

⁵ (S/1994/1115).

⁶ ICTR Statute.

⁷ (ST/SGB/2011/4).

(a) The Assistant Secretary-General provides leadership, direction and advice on matters that relate to the development, implementation, coordination, monitoring and communication of human resource strategy and policies and the implementation of related programmes through out the Secretariat.

(b) On matters pertaining to human resource management, represents the Secretary-General in dealings with the representatives of Members and observer States, intergovernmental bodies, international organizations, governmental and non governmental organizations the International Civil Service Commission and other programmes and organizations of the United Nations system through the United Nations System Chief Executives Board Coordination and its subsidiary bodies and the media...

(d) Represents the Secretary-General in the conduct of Staff management consultations, as envisaged in article VIII of the Staff Regulations...

(g) Carries out managerial activities and makes managerial decisions to ensure the effective, efficient and economic operations of the programme.

19. Information posted on the official website of the ICTR⁸, states that **“the Registry is headed by the Registrar who is the representative of the Secretary-General of the United Nations.”**

20. The Respondent has submitted and it is accepted by the Applicant and the Tribunal, that in the Registrar’s letter of 7 February 2007, two administrative decisions were conveyed to the Applicant. One of these was with regard to the rejection of the recommendation to extend the Applicant’s contract after his retirement and the other was the matter of the vacancy announcement published a year earlier in which the Applicant was interested.

21. There is no gainsaying that under art. 16(3) of the ICTR Statute, the Registrar of the ICTR is an Assistant Secretary-General. In his position as head of administration, he has the authority to make decisions on behalf of the Secretary-General in relation to the administration and operations of the ICTR. In other words, in administering the Arusha Tribunal, the Registrar stands in the shoes of the Secretary-General and is his lawful agent.

⁸ <http://www.unictr.org>

Did the Applicant comply with staff rule 111.2(a)?

22. The core of the Respondent's case in this Application is that the Applicant did not follow the correct procedure as required by former staff rule 111.2 (a) and is therefore out of time rendering his application non-receivable and this Tribunal incompetent to entertain it.

23. The Applicant, on the other hand, has submitted, *inter alia*, that when a staff member clearly signaled to the Secretary-General or his agent, acting with delegated authority, that he or she would like to appeal an administrative decision, it is incumbent on the said agent to properly and in good faith proceed under that signal. The Registrar knew upon receiving the Applicant's "appeal" that he was seeking a review of the administrative decision and that former staff rule 111.2(a) in issue here did not adequately guide a staff member who sought an administrative review as to how to channel his request.

The said staff rule provides as follows:

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 letter must be sent within two months from the date the staff member received notification of the decision in writing.

24. This Tribunal has given considerable thought to the matter of the process to be followed as required by the former Staff Rule reproduced above. It is the Tribunal's finding that the Applicant had made several efforts in seeking a review of the impugned decision. Could it be said that his many efforts directed to the ICTR Registrar in this case were like seeds which fell on the roadside or on infertile soil and would therefore not germinate and yield fruit? Were his requests to the Registrar misdirected, sent to a person other than the Secretary-General to whom they ought to have been sent?

25. It is well established that a request for the administrative review of a decision already taken is meant to provide the administrator an opportunity to reconsider the impugned decision. This requirement in the Staff Rules was not intended to act as a landmine along the way for the aggrieved staff member. In the

due application of this rule therefore, it is not expected that the relationship of agent and principal between the Secretary-General and the ICTR Registrar should take flight or be denied where a request for administrative review is made to the Registrar by the staff or former staff of the ICTR. Moreover, this Tribunal has not been referred to any document which limits the agency of the Registrar in this regard. In this instance, the requirement of fulfilling former staff rule 111.2 (a) in substance has been met.

26. The Applicant has in essence fulfilled the requirements of the former Staff Rule by writing to the Registrar who is the head of administration and the lawful agent of the Secretary-General at the ICTR where he was employed, asking for a second look at the impugned decision. The request was made within the time limits set by the former Staff Rule.

27. It is the Tribunal's finding that the Applicant had addressed his request for an administrative review to the ICTR Registrar, who was the person with the power to either review it on behalf of the Secretary-General or to forward it to the appropriate officer, within the applicable time limits. The Applicant had in essence complied with former staff rule 111.2(a).

Conclusion

28. The Application is receivable. In the circumstances, this Tribunal has jurisdiction to entertain it.

Case Management Directions

29. Counsel are required to provide the Registry, by or before **Thursday, 25 August 2011**, with the following information:

- a. Whether they intend to call any witnesses and should also indicate clearly the relevance of the evidence of each witness. Counsel should also indicate the approximate time they may need for examination-in-chief of their witnesses.
- b. The names and location of their witnesses.

30. It is the responsibility of the Parties to ensure the availability of their witnesses.

31. A Notice of Hearing and scheduling Order shall be transmitted by the Tribunal in due course. The case will be heard on the merits.

(Signed)

Judge Nkemdilim Izuako

Dated this 11th day of August 2011

Entered in the Register on this 11th day of August 2011

Legal Officer, for: *(Signed)*

Jean-Pelé Fomété, Registrar, UNDT Nairobi