



Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Marisa MacLennan, UNHCR

Zuzana Kovalova, UNHCR

Introduction

1. The Applicant, serves as a Senior Protection Officer at the United Nations High Commissioner for Refugees (“UNHCR”), stationed in Khartoum, Sudan.
2. This Judgment determines his application filed on 7 September 2020, to contest the following decisions: (i) non-authorization by the UNHCR Medical Section of his medical evacuation when he was acutely ill; (ii) non-authorization by the Medical Section for an escort to accompany him during his medical travel; (iii) the UNHCR Personnel Administration Section’s (“PAS”) denial of security evacuation allowance for his family; and (iv) PAS’ failure to convert his administrative status to security evacuation following his medical travel.
3. The Respondent filed his reply to the application on 12 October 2020 moving the Tribunal to dismiss the application on jurisdictional grounds as it was not timely and in any event the decision was lawful and justified on the merits.
4. The Applicant filed comments in response to the Respondent’s reply on 18 October 2020.
5. On 21 September 2021, after a scheduled case management discussion (“CMD”), the Tribunal issued Order No. 200 (NBI/2021) for management of these proceedings. The parties had previously engaged in *inter partes* discussions which yielded partial resolution. Further efforts were encouraged.
6. Counsel for the Respondent was directed to effect relevant disclosures to the Applicant and to seek instructions from her client on further efforts towards alternate dispute resolution.
7. On 1 October 2021, the Respondent filed a submission informing the Tribunal that he respectfully declines to resolve this matter *inter partes* or with the assistance of the Ombudsman. The matter therefore proceeded for determination in the litigation context.
8. The Tribunal, by Order No. 210 (NBI/2021), indicated that having reviewed the submissions in the application, the Respondent’s reply and the Applicant’s

comments included in his motion filed on 18 October 2020, it finds that the issue of receivability is comprehensively addressed by both parties. The parties were informed that the case would be determined by Judgment on Receivability based on the documents on record.

9. For the reasons further explained in this Judgment, the Tribunal considers that the application fails on jurisdictional grounds relating to the Applicant's delay in filing a request for management evaluation. These circumstances may have been amenable to compromise had the parties proceeded with alternate dispute resolution, but the jurisdictional bar cannot be disregarded by the Tribunal in the litigation context. The application is not receivable and must therefore be dismissed without consideration of the merits.

Background Facts and Procedural History

10. On 4 May 2019, the Applicant experienced severe symptoms of illness which was investigated; the severity of his condition was eventually diagnosed on 16 May 2019 after a Magnetic Resonance Imaging (MRI) test was conducted.

11. The consultant neurologist advised on management/treatment as well as advanced investigation of the cause of the "[severe diagnosed illness] at a young age". It was recommended that this medical investigation be done abroad, away from Sudan, due to the prevailing security situation there and the unavailability of medical services. The Applicant suggested Pakistan where he had family support.

12. Senior UNHCR management assisted the Applicant by requesting that the Medical Section authorise medical evacuation pursuant to section 8 of UNHCR/AI/2017/4 on Medical Evacuation. According to the Applicant, UNHCR also arranged for a colleague whose brother was a doctor in Pakistan to accompany him there.

13. A United Nations Physician examined the Applicant. Based on their findings, the Medical Section granted him Other Medical Travel ("OMT"), pursuant to section 12 of UNHCR/AI/2017/4, instead of medical evacuation. This decision was made on 20 May 2019.

14. Additionally, the said decision made clear that no accompaniment for the Applicant's travel was approved. This was reiterated in an emailed response to UNHCR's human resource officer, who had tried to persuade the Medical Section to reconsider the non-accompaniment decision.

15. Thereafter, the Applicant found it necessary, due to his acute ill health and difficulty walking, to make his own arrangements for his wife to accompany him. She could not leave their minor children in Sudan, so they too would travel. He wrote to inform UNHCR and the Medical Section of these arrangements and then they all travelled to Pakistan on 24 May 2019 with a view to the family returning to Khartoum, Sudan on 2 June 2019.

16. There was a turn for the worse in security conditions in Sudan just prior to the expected return date of the Applicant's family. UNHCR recommended voluntary removal of international staff dependents from Khartoum on 30 May 2019. The Applicant was advised by UNHCR that his family should not return. Thereafter, from 3 June 2019, security evacuation was approved with priority for, *inter alia*, dependants of international staff.

17. The Applicant's medical treatment and investigations continued while he and the family remained outside Sudan. He obtained a medical recommendation for partial return to work with continued treatment, as from 1 July 2019.

18. After several weeks of communication attempts by the Applicant with UNHCR Management, approval by the Medical Section of arrangements for the Applicant's return to work and the administrative status of both himself and his dependents remained unresolved. Essentially, they were all treated as not being on security evacuation status and thereby denied the benefit of Security Evacuation Allowances ("SEA").

19. This decision, as it relates to the Applicant's family, was conveyed to the Applicant on 5 August 2019 and he had been notified of the denial of his own SEA entitlement on 23 July 2019.

20. On 24 September 2019, UNHCR Management appealed to PAS and the Department of Human Resources (“DHR”) to consider the eligibility of the Applicant and his family for SEA between 3 June and 31 August 2019 favourably, because they had to leave Sudan due to the Applicant’s acute illness. They were thereafter restricted from returning due to the security emergency, despite their clear intention to do so on 2 June 2019. This reiterated request for SEA entitlements was rejected by email from the Chief of PAS dated 29 September 2019.

21. There were subsequent reiterations of the decisions but no change from the substance notified initially, with one exception. On 28 January 2020, the Deputy Director of DHR notified the Applicant that, upon review, a decision was made to overturn the prior non-approval of accompaniment for the Applicant’s medical travel. Reimbursement of the cost of one flight ticket for an accompanying family member was then authorised.

22. The Applicant filed his request for management evaluation on 11 March 2020 which was around 10 months after he was notified of the first two impugned decisions concerning medical travel. As to the other two decisions denying SEA entitlements, the request was made approximately eight months after the initial notifications.

23. On 12 June 2020, the Applicant received the UNHCR Deputy High Commissioner’s response indicating that the decisions made were lawful and that in any event the request for management evaluation was time barred. Further, it was noted that the UNHCR had made many accommodations in favour of the Applicant recognising the difficult circumstances.

24. In his application the Applicant acknowledges that his request for management evaluation was not submitted within the statutory 60 days. However, he submits that there are compelling circumstances, including his incapacitation due to illness, that may be considered for granting an exception to the rule. The Tribunal’s intervention is sought to “put justice ahead of legal procedures.” The Applicant was, in effect, begging the Tribunal’s indulgence and consideration of his circumstances as a whole.

Consideration

25. Staff rule 11.2 (c) provides that:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. The deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

26. The circumstances of severe illness, travel difficulties and the security issues in Sudan were all worthy considerations duly taken into account by the Organization during efforts made to accommodate the Applicant and achieve partial resolution as aforementioned.

27. On receipt of the Applicant's management evaluation request, it was also within the discretion of the Respondent based on staff rule 11.2(c) to extend the 60-day deadline.

28. That discretion, however, does not extend to the Tribunal. The Tribunal has no jurisdiction to waive the management evaluation request deadlines missed by the Applicant.

29. Article 8.3 of the UNDT Statute unequivocally states that the Tribunal "shall not suspend or waive the deadlines for management evaluation."

30. It is established by Appeals Tribunal jurisprudence, including *Babiker* 2016-UNAT-672, that the Dispute Tribunal may only review decisions that have been the subject of a proper and timely request for management evaluation. UNAT affirmed that in so doing

34. ... the UNDT correctly recognized that determining "the date on which [the Applicant] received notification of the administrative decision to be contested" was its first task.

31. In the present application, *stricto sensu*, the Applicant received notification of all four decisions contested prior to 5 August 2019.

32. The Applicant only requested management evaluation on 11 March 2020, several months beyond the 60-day deadline. The fact that the Applicant made a number of requests for clarification after August 2019 and these were responded to does not bring forward the effective notification date of the decisions. The Tribunal's jurisprudence, upheld by UNAT makes clear that

... the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather, the time starts to run from the date on which the original decision was made.¹

33. The sole correspondence sent to the Applicant after August 2019 that makes any change to the prior decisions is the email dated 28 January 2020. That email only changed one of the decisions, namely the decision not to approve accompaniment for the OMT. There was no admission that the initial decision was unlawful. The decision to reimburse travel expenses for one family member was the partial *inter partes* resolution which accommodated the Applicant's concerns. The change was made in favour of the Applicant, so the challenge to that decision was rendered moot. All other aspects of the challenged decisions were merely reiterated in the 28 January 2020 email.

34. The Tribunal has no jurisdiction to determine this application on the merits as it challenges decisions that were not submitted for management evaluation in a timely manner. The Tribunal's determination, in the circumstances, is that the application was filed without being preceded by timely filing of a request for management evaluation.

35. The application is not receivable *ratione temporis*.

Tribunal's Observations

36. The circumstances surrounding this case must unfortunately draw the following *obiter* by the Tribunal.

¹ *Mbok* UNDT/2017/061, at paragraphs 43-46; *Mbok* 2018-UNAT-824, at paragraph 42.

37. The Staff Rules, the Statute and the Rules of Procedure of the Tribunal as currently drafted required this self-represented staff member to know of and adhere to strict time limits while he was being treated for a recent severe diagnosed illness. There is no exception to these provisions, and no room for a staff member to demonstrate that the delay was the result of incapacity.

38. This position would be onerous for any staff member who is incapacitated and is that much worse for the staff member who is self-represented.

39. In such situations, the good faith responsibility rests with the Respondent in exercising any applicable discretion within the relevant rules so that the decisions taken are in the best interest of the Organization and the staff member. It is notable that there is provision at staff rule 11.2(c) for the Respondent to extend the 60-day deadline for a staff member to submit a management evaluation request pending efforts for informal resolution conducted by the Office of the Ombudsman.

40. Additionally, the Tribunal notes that elsewhere in the Staff Rules² there is express provision for the accommodation of extended time to be given to staff members in cases of illness.

41. In this case, the staff member had a potentially viable case on the merits. However, during his time of illness he failed to adhere to filing deadlines for management evaluation. His case fails on the technicality of receivability. He deserved much better.

Conclusion

42. The application is dismissed as not receivable.

² Appendix D, article 2.1(e)

Case No. UNDT/NBI/2020/073

Judgment No. UNDT/2021/117

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 13th day of October 2021

Entered in the Register on this 13th day of October 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi