UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2024/032
Judgment No.: UNDT/2025/018
Date: 24 April 2025
Original: English

Before: Judge Solomon Areda Waktolla

Registry: New York

Registrar: Isaac Endeley

STOCKHOLDER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jan Schrankel, UNHCR
Sally Jenna Sauer, UNHCR

Introduction

1. The Applicant, a Senior Resettlement and Complimentary Pathways Officer with the United Nations Refugee Agency ("UNHCR"), contests the "[d]ecision to not extend [his fixed-term appointment] for an additional five-year period or shorter".

2. In response, the Respondent contends that the application is not receivable as it was filed after the expiry of the statutory 90-day deadline and that, in any event, it is without merit.

3. For the reasons set out below, the application is rejected as not receivable.

Consideration

The parties' submissions on receivability

4. The Respondent, in essence, submits that the application is "not receivable *ratione temporis* in accordance with Article 8.1(d)(i)a. of the Tribunal's Statute". He argues that the application "was submitted after the expiry of the statutory 90-day deadline on 23 July 2024, and the Applicant did not request a waiver, suspension or an extension of the time limits for filing a late application by that date (or later)". For this reason, the Tribunal has "no jurisdiction to hear and pass judgment on the Application, which should be rejected as not receivable *ratione temporis*.

5. By Order No. 022 (NY/2025) dated 20 February 2025, the Tribunal instructed the Applicant to file a rejoinder to the reply, including on receivability. His contentions thereon may be summarized as follows:

> a. The application "was filed 2 days late, on July 25, 2024". "The Management Evaluation having been received by [him] on the day it was issued, April 24, 2024, the 90-day time limit provided for by article 8. l(d)(i)(a) of the Dispute Tribunal's Statute … ended on July 23, 2024".

Therefore, the Applicant requests that the Tribunal "waive the deadline pursuant to article 8.3 of the Statute".

b. A "careful, concise consideration of the law of receivability relevant to [the Dispute Tribunal's] Statute article 8.l(d)(i)(a) applications such as [the Applicant's] and its application to the facts of [his] case render [his] application on the merits receivable".

c. Article 8.3 of the Dispute Tribunal's Statute sets out a "three prongs … test of receivability" when granting a waiver to the 90-day time limit, namely: (i) "[e]xceptional circumstances beyond [the Applicant's] control", (ii) "[l]ength of delay and prejudice to the Respondent, and (iii) "[t]he interests of justice".

d. Regarding the first prong on "exceptional circumstances beyond [the Applicant's] control", the Appeals Tribunal stated in *Rüger* 2016-UNAT-693, para. 18, that "A waiver of time can be justified under Article 8(3) of the [Dispute Tribunal's] Statute only if the applicant shows that exceptional circumstances beyond his or her control prevented him or her from acting within the statutory time limits".

e. The Applicant highlights that he suffered from "Trauma and Chronic Migraines … beyond [his] control". Due to "the nature of [his] work, the effects it had had on [his] mental and physical health and the circumstances that led [him] to seek an evaluation of the management decision to not renew [his] fixed-term appointment … it took [him] several weeks to decide to pursue [his] case before this Tribunal". He was "under a great deal of psychological, social and structural pressure and remained conflicted in the effort to, on the one hand, 'get it right' where the wider issue of duty of care was concerned and, on the other hand, to 'throw in the towel'". While he "had both ethical and pecuniary interests in making the application, [his] driving concern was ethical in that [he] strongly believe[s] that UNHCR is failing its

employees who regularly undertake life threatening and traumatizing work". He was "re-experiencing and thereby exacerbating past trauma and [post-traumatic stress disorder] from the remembering, recounting and reiterating of the facts that drafting the [management evaluation request] and then the [Dispute Tribunal] application required". Further, he found "it difficult to maintain the objectivity and rationality drafting the arguments required". The "stress involved also meant [his] struggle with chronic, debilitating migraine headaches escalated". Both "the re-traumatizing nature of the work required to draft the application and the ongoing pain from chronic migraines made it impossible to focus on the drafting of the submission and the compilation of materials for days at a time". In addition, "the medication for [his] migraines had an exhausting and stupefying effect on [him], making it impossible to focus sufficiently to meet the deadline".

f. From "a social standpoint, many of [his] family members and closest friends felt it was time for [him] to break with UNHCR, including the [Dispute Tribunal] application process as they watched the retraumatizing and harmful effects the process was having on [his] mental and physical health".

g. From "a structural standpoint, the outcome of the [management evaluation] process was utterly discouraging inasmuch as UNHCR's Deputy High Commissioner, who conducted the management evaluation, failed to meaningfully engage the central issue of duty of care, reinforcing the sense the organization had closed ranks and there would be no possibility of fairness, let alone justice". All of this "contributed to a sense that the application had to be perfect". When "it had not reached that point at midnight New York time, [he] simply carried on into the night, [his] judgement doubtless clouded by anxiety and tiredness. The "timeframe of 22 hours by which [he] missed the deadline, if one considers [his] first attempt to file both the application and the annexes was at 10:10 PM on July 24, 2024 … is evidence that [he] was trying by all means to meet the deadline". This

"technical issue is taken up in the next section below headed 'length of delay in filing'".

h. Under these circumstances, the "magnitude of the task of assembling the facts, the documentary evidence in support of those facts and, with respect to policy and law, the task of assembling and making sense of the applicable [United Nations] and UNHCR rules, policy and case law was enormous". Although he had "worked steadily on the application over the course of 2 months, [he] did not sleep for the 36 hours preceding the deadline of July 23, 2024 and worked through that night and the next to provide as complete and coherent a document as [he] possibly could".

i. The "[t]echnical machinations related to filing [his] application were beyond [his] control". The Tribunal's "Guidelines on The Filing Of [a Submission] Through the E-filing Portal" required that the 51 annexes to [his] application be filed as a single document with page numbers for the entire book of annexes". The "ability to combine a large number of Microsoft Word and PDF documents into a single PDF required technical knowledge and tools that [he] did not have and which most unrepresented applicants would not have". The "time required to figure out what tools to get and to acquire them in order to be able to merge such a large number of disparate documents was enormous and difficult".

j. In *Gelsei* 2020-UNAT-1035, as in the present case, the Secretary-General submitted that the Dispute Tribunal cannot "exercise its powers under Article 8(3) if a written application for extension or waiver is filed after the statutory time limit has elapsed". The Appeals Tribunal, however, found that this "could not be the case given that, as happened in [the Applicant's] case, technological failure happens, but more fundamentally, except in the case of a management review filed under article 8.l(d)(ii) … [of the Dispute Tribunal's] rules of procedure 'make no reference for such a restriction on the power

expressly provided'". As such, the Appeals Tribunal held that "the relevant circumstances in which such an extension or waiver should be allowed by [the Dispute Tribunal] are variable and highly fact-dependent, so long as they are 'exceptional'".

k. In *Rüger*, the Appeals Tribunal found that "only circumstances beyond the applicant's control preventing a party from exercising a right of appeal in a timely manner could constitute exceptional circumstances". Regarding the "length of the delay, the Appeals Tribunal held [that] 'whether a deadline is missed by several minutes, several hours or several days is irrelevant' to the Tribunal's finding of whether there were exceptional circumstances". It is "this latter quote from *Ruger*, disengaged from the context in which the [Appeals Tribunal] made it that the Respondent relied on to argue that [the Applicant's] late-filed application is non-receivable". As the Appeals Tribunal points out in *Gelsei*, "this 'pithy quote' is often extracted for irrelevancy of the duration of the delay to the preliminary question [and] exceptional ironically, the quote is deployed to argue for the delay in time being not only the question of receivability, but any delay being an absolute bar to receivability". The "latter is the approach taken by the Respondent, and is … unfounded in law".

l. Concerning the second prong of receivability on "length of delay and prejudice to the Respondent", in *Gelsei*, the Appeals Tribunal held that "the power under Article 8(3), after the establishment of exceptional circumstances, is discretionary". The Appeals Tribunal stated that "the degree of' lateness may be relevant to the Tribunal's discretion to waive the breach, the question of prejudice, for example, 'A short delay will probably mean that any prejudice to the other party will be minimized, while a very long delay (bearing in mind that such can be up to three years) is likely to mean that others have altered their positions in reliance on the absence of an appeal being brought'". In the present case, as in *Gelsei*, the "delay in filing my

application was short, and indeed … the Respondent did not argue he was prejudiced by the delay".

m. In addition, the Appeals Tribunal "reasoned" in *Gelsei* that, "Article 8(3) uses the alternative words 'suspend' and 'waive' in relation to allowing an out-of-time application. Suspension contemplates an expiry that is to happen in the future while a waiver contemplates an expiry that has already occurred" contemplating a broader range of circumstances and times in which an application can be brought. The Appeals Tribunal notes that "despite the aspiration of certainty and finality that underpin adherence to time limits, deadlines are missed by even the most assiduous of practitioners". The Dispute Tribunal's "Statute and its Rules are sufficiently flexible to ensure justice is able to be done between the parties".

n. Finally, "article 8.4 allows a period of up to three years from receipt of an administrative decision in which an application can be filed and such an extension or waiver can be made before no further extension is permissible". Having "exceeded the deadline for filing [his] application by two days brings [the Applicant's] application well within that limit, as does the delay of less than a year in requesting this waiver, permitting this honourable Tribunal to exercise its discretion to waive the filing deadline".

o. As for the third prong of receivability on "[t]he interests of justice", in *Gelsei*, the Appeals Tribunal held that "the interests of justice are the paramount factor in the exercise of this discretion and that involves a balancing of the rights and interests of the parties". "Accordingly, of concern in the exercise of a judicial discretion would be 'denying a party consideration of his or her grievance on its merits'", referring to *Gelsei*. Therefore, "in the absence of prejudice to the Respondent relating to the late-filing of this application, the significance [of?] the principle of duty of care to UNHCR's front-line workforce in general and [the Applicant] in particular … the

interests of justice would be served by this honourable Tribunal finding [his] application on the merits is receivable".

p. The Respondent has "failed to make his case for the non-receivability of [the Applicant's] application on the merits". The "majority of the cases cited by the Respondent are distinguishable from the facts of [the present] case" as they concern "article 8.1(d)(ii)—not 8.1(d)(i)(a) pursuant to which [his] application is made—and to which the stricter article 8.3 receivability provision applies". Specifically, the second part of article 8.3 stipulates that the "Dispute Tribunal shall not suspend or waive the deadlines for management evaluation", that is applications made to this Tribunal pursuant to 8.l(d)(ii) for which management evaluation is not required".

q. Second, in citing *Kataye* 2018-UNAT-835, the Respondent "has selected only a part of the findings, but as in the *Ruger* case … paragraph 18 of … *Kataye* cannot be read in isolation from the [Appeals Tribunal's] findings in paragraphs 19 and the statement of the law in paragraph 20, 'The Appeals Tribunal has repeatedly emphasized the need for statutory time limits to be observed, except where there is evidence of exceptional circumstances which may dictate otherwise'".

6. On 2 April 2025, the Respondent filed a "response to the Applicant's request for a waiver of the deadline to file his application".

Relevant legal framework on receivability and the timeliness of an application before the Dispute Tribunal

7. Under art. 8(d)(i)(a) of the Statute of the Dispute Tribunal, "[a]n application shall be receivable if … [t]he application is filed within the following deadlines …[i]n cases where a management evaluation of the contested decision is required … [w]ithin 90 calendar days of the applicant's receipt of the response by management to his or her submission". This is what is also regularly referred to as the 90-day

deadline.

8. The Dispute Tribunal may, however, "decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases". The statutory requirements for the Dispute Tribunal to grant a suspension or waiver of the 90-day deadline is therefore that: (a) it has been requested by the applicant, and (b) his or her case is exceptional.

The central issue of the present case

9. The parties agree that the Applicant filed the application two days after the expiry of the 90-day deadline. While the Respondent argues that this renders the application not receivable under art. 8(d)(i)(a) of the Statute of the Dispute Tribunal, the Applicant contends that he had timely filed a request for a waiver of the 90-day deadline in accordance with art. 8.3 of Dispute Tribunal's Statute.

Should the Applicant be granted a waiver of the 90-day deadline under art. 8.3?

10. The Appeals Tribunal has in various cases had the chance to pronounce itself on the requirements for granting a waiver of the 90-day deadline pursuant to art. 8.3 of the Dispute Tribunal's Statute.

11. Initially, the jurisprudence maintained that that a request for a waiver of the 90-day deadline was to be filed before the expiry of the 90-day deadline (see, for instance, *Czaran* 2013-UNAT-373, para. 26) and not be part of a belated application (see, for instance, *Nikwigize* 2017-UNAT-731, para. 19). Further, the Appeals Tribunal held that time limits were to be "strictly enforced" (see, for instance, *Shehadeh* 2016-UNAT-689, para. 19) and that it was "irrelevant whether a deadline is missed by several minutes, several hours or several days" (see, for instance, *Ali* 2017-UNAT-773, para. 13).

12. In *Gelsei* 2020-UNAT-1035, the Appeals Tribunal, however, softened its stand when, with reference to the above quoted caselaw of *Ali*, holding that "[w]hile

the essential principles expressed there are undoubted, they cannot be, and are not, as absolute and irremediable as the passage relied upon by the [Dispute Tribunal] might suggest" (para. 21).

13. The Appeals Tribunal in *Gelsei* further modified its previous jurisprudence as follows:

> … Lateness is lateness because a specified deadline has been passed. But the degree of lateness is not irrelevant for the purpose of determining an application to suspend or waive (or extend) that time limit. For example, a short delay will probably mean that any prejudice to the other party will be minimised, while a very long delay (bearing in mind that such can be up to three years) is likely to mean that others have altered their positions in reliance on the absence of an appeal being brought. Those are relevant factors to the exercise of a discretion under Article 8(3). Here the delay was about as short as is likely to occur after expiry of the time limit. We agree also that, generally, certainty in litigation requires adherence to time limits. But the existence of a statutory mechanism to suspend or waive or extend them recognises that this aspiration cannot be absolute. Anyone with experience of these things knows that however well one plans, events sometimes conspire or come unseen from the proverbial "left field", to mean that deadlines are missed by even the most experienced and assiduous practitioners. Despite the aspiration of certainty and finality that underpin adherence to time limits, the law is sufficiently flexible to ensure justice is able to be done between parties in appropriate cases.
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> … The relevant circumstances in which such an extension or waiver should be allowed by the UNDT are variable and highly fact-dependent, so long as they are "exceptional". Only limited advantage and guidance are to be gained by comparing the facts of other past cases in which the particular circumstances in which time ran out, are quite different.
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> … There is a further consideration that must be taken into account. The power under Article 8(3), after the establishment of exceptional circumstances, is discretionary. We consider that the interests of justice are the paramount factor in the exercise of this discretion and that involves a balancing of the rights and interests of the parties. Considerations of whether either will be prejudiced by the grant or refusal of an order, and if so the extent and effect of such prejudice, will be a relevant consideration. So too is the length of any delay relevant, and where the responsibility for the delay lies. There

> may be other similar considerations applicable to the exercise of a judicial discretion, especially one that can have the effect of denying a party consideration of his or her grievance on its merits.

14. When defining the meaning of an exceptional case under art. 8.3 of the Dispute Tribunal's Statute, the Appeals Tribunal in *Gelsei,* para. 28, referred to *Rüger* in which it was explained that "only circumstances beyond a party's control preventing that party from exercising a right of appeal in a timely manner could constitute exceptional circumstances for the purpose of extending time limits to appeal". The question of "the duration of any delay" is only relevant insofar as "exceptional circumstances are established" as "the length of a delay may then become a relevant factor, among others, in deciding whether to exercise the Tribunal's discretion to waive the breach and the particular nature of that waiver, for example how long the party has then to file".

15. The Tribunal therefore agrees with the Applicant that, in accordance with *Gelsei*, a waiver filed after the expiry of the 90-day deadline is not an absolute bar to receivability. Before anything else, the Applicant must, however, first establish that his case is indeed exceptional as per art. 8.3 on the Tribunal's Statute. In exercising its discretion on this matter, the Dispute Tribunal may take into consideration (a) possible prejudice to other party and (b) the interests of justice. Unlike what the Applicant appears to submit, the duration of the delay is, however, only to be considered if the Applicant succeeds in demonstrating this exceptionality.

16. In *Karki* 2023-UNAT-1406, para. 55, the Appeals Tribunal further elaborated on the question of exceptional circumstances under art. 8.3 of the Dispute Tribunal's Statute. It held that "[t]his construction must be rigorously interpreted, as strict adherence to time limits is one of the cornerstones of the internal justice system". This meant that "there will be exceptional circumstances when there is *an absolute impossibility* for the filing party to file within the statutory time limits" (emphasis added).

17. In *Temu* 2021-UNAT-1174, the Appeals Tribunal gave two examples of

acceptable justifications for filing a waiver request after the expiry of the 90-day deadline, namely "a technical failing of the Court Case Management System rendering it impossible to file before the deadline or a medical incapacity on the part of the staff member to file an application" (para. 40).

18. In the present case, according to the Applicant's own submissions, he was, however, not in a situation of "an absolute impossibility" of filing a timely waiver as per *Karki*. Instead, while apparently being aware of expiry of the deadline, he continued to work intensely on preparing the application, and rather than giving priority to filing it in time, he instead wanted it "to be perfect". When then filing the application, the Applicant, however, made no reference to it being filed too late or indicating that he requested a waiver of the 90-day deadline under art. 8.3 of the Statute. He only requested a waiver when he filed his rejoinder in response to Order No. 022 (NY/2025) in which he stated that "[a]s such, I request that this Honourable Tribunal waive the deadline pursuant to article 8.3 of the Statute".

19. Also, the Tribunal finds that none of the technical or medical circumstances to which he refers in his rejoinder compares to the examples provided by the Appeals Tribunal in *Temu*: (a) the Dispute Tribunal's Court Case Management System was apparently fully functioning in the Applicant's case; the issue was rather that he had problems in figuring out how to use it, and (b) he was not medically incapacitated in filing the application—instead, as he states himself, he was actually very busy working on finalizing it.

20. The Tribunal therefore sees no reason to grant him any particular latitude as a self-represented applicant (in line herewith, see the Appeal Tribunal in *Hammad* 2024-UNAT-143, para. 15).

21. Consequently, the Tribunal concludes that the Applicant has not been able to establish that his case was exceptional within the meaning of art. 8.3 of its Statute.

Conclusion

22. The application is rejected on receivability.

(Signed)

Judge Solomon Areda Waktolla

Dated this 24th day of April 2025

Entered in the Register on this 24th day of April 2025

(Signed)

Isaac Endeley, Registrar, New York