Translated from French

ADMINISTRATIVE TRIBUNAL

Judgement No. 835

Case No. 913: DIA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mikuin Leliel Balanda, Vice-President; Mr. Julio Barboza;

Whereas, on 14 March 1996, Saliou Dia, a former United Nations staff member, filed an application requesting the Tribunal, inter alia:

" ...

(f) To declare null and void and without effect the decision of 10 July 1991 of the UNHCR [Office of the United Nations High Commissioner for Refugees] Division of Human Resources Management (...) terminating the Applicant's appointment with effect from 31 August 1991, since the above-mentioned decision is unlawful and tainted by irregularities;

(g) To decide that as a result of the rescission of this decision:

(i) The Applicant's appointment has been a valid contract between the parties without interruption since 31 August 1991, and remains such;

(ii) The Applicant shall receive, after deduction of the compensation paid at the time of the breach of the contract, all the components of his remuneration payable in accordance with the scales in effect during the period referred to in subparagraph (g) (i) above, including all within-grade salary increments to which he is entitled, his pension entitlements and

all allowances;

(iii)The Applicant continued to acquire seniority in grade in the normal manner during the period in question.

...

(i) To decide that, without prejudice to subparagraph (h) above, in the event of failure on the part of the Administration to offer the Applicant a Professional post and functions equivalent to the post and functions to which it had been decided he should be assigned in 1991, the Applicant shall be paid, ..., by way of compensation a sum equivalent to two years of net remuneration, calculated in accordance with the above-mentioned subparagraph (g) on the date of the implementation of the relevant Tribunal judgement;

(j) To order the Secretary-General to pay the Applicant, as compensation for the professional, material and moral injury he has suffered as a result of the rescinded unlawful administrative decision, damages equivalent to two years of salary, calculated in accordance with subparagraph (g) above on the date of the implementation of the relevant Tribunal judgement;

(k) To order the Secretary-General to pay the Applicant, as compensation for the material and moral injury he has suffered as a result of the unusually long delays that occurred in connection with the appeals procedure and as a result of the serious irregularities caused by such delays, damages equivalent to two years of salary, calculated in accordance with subparagraph (g) above on the date of the implementation of the relevant Tribunal judgement."

Whereas, the Respondent filed his answer on 13 August 1996;

Whereas, the Applicant filed written observations on 28 August 1996;

Whereas, at the Tribunal's request, the Respondent transmitted additional information on 25 July 1997;

Whereas, the facts of the case are as follows:

The Applicant entered the service of the Office of the United Nations High Commissioner for Refugees (UNHCR), at the Dakar Regional Office, in Senegal, on

1 March 1979 and was placed against a local post as a finance and supply assistant. He was employed by the United Nations Development Programme from October 1978 to January 1979. At that point he was recruited by UNHCR on the basis of short-term contracts as an administrative/finance assistant, at the G-7 level. On 1 November 1979, the Applicant was given a one-year fixed-term appointment. That appointment was renewed for further fixed-term periods. On 1 August 1982 his appointment was converted to an indefinite appointment, as a senior administrative assistant, in the General Service, at the G-8 level. Subsequently, his post was reclassified but remained in the same category; it was then reclassified at the P-2 level, in the Professional category, on 1 May 1989.

From 1 October 1989 to 1 August 1990 the Applicant was paid a supplementary post allowance, under staff rule 103.11.

Following the recommendation made by the Appointment and Promotion Committee, in May 1989 the Applicant was informed that he had been selected for an Associate Administrative Officer post, a Professional post, at the UNHCR Regional Office in Kinshasa. The Applicant was to have been transferred on 13 August 1990; however, following an audit carried out at the UNHCR Office in Senegal, on 16 July 1990 his reassignment to Kinshasa was put on hold.

The preliminary conclusions of an audit conducted at the Dakar Office indicated that a number of financial and administrative errors that could be attributed to him had been made. Consequently, and since there were similar problems at the UNHCR offices in Kinshasa, his transfer had to be kept on hold pending the issuance of the auditors' final report. The final report, which was issued on 8 August 1990, confirmed the initial suspicion that the Applicant was responsible for a number of irregularities.

Following the issuance of the report, the Regional Representative for West Africa in Dakar and the Director of the Division of Human Resources Management

requested the Applicant to explain the irregularities that had been noted, which he did by means of a memorandum dated 8 November 1990. Moreover, an external consultant was entrusted with reviewing the three operations carried out by the Applicant; the consultant questioned the Applicant about the first such operation (rental advances) and submitted his report on 15 March 1991.

On 26 March 1991, the Director of the Division of Human Resources Management informed the Applicant of the allegations against him contained in the consultant's report. Firstly, the Applicant was accused of having signed on 31 December 1988 a receipt voucher debiting the account of UNHCR and crediting the account of the Regional Representative for West Africa in an amount of 2,430,000 CFA francs, corresponding to the rental advances. The Applicant was also accused of having signed on 9 August 1989 a purchase order for 1,000 litres of petrol from British Petroleum paid for in cash by the Dakar Regional Office, which was not shown in the accounts of UNHCR. The Applicant had no authority to carry out such an operation, which requires the authorization of the UNHCR Regional Office. Lastly, on 12 April 1990, British Petroleum issued petrol coupons for 1,830 litres of petrol, to compensate for a price differential. This credit of 640,500 CFA francs was not shown in the UNHCR accounts either, and the operation was carried out without the prior authorization of the Regional Office.

In a reply dated 17 April 1991, the Applicant indicated with respect to the receipt voucher dated 31 December 1988 that "the voucher had been made out by the accountant on his own initiative, for reasons that [the Applicant was] entirely unaware of". The Applicant acknowledged having "mistakenly signed the voucher, which had been submitted to [him] together with many others". He added that it was "a pity that the Office, the beneficiary of the rental advance and the third signatory of the voucher [had not realized] until later that the transaction [had been] irregular". He said that he regretted that error. With

respect to the order for 1,000 litres of petrol placed with British Petroleum, the Applicant said that he wished to explain that "since there were no clear and precise rules, [he had seen] to it that in 1982 a system was set up whereby an official purchase order, with the seal of the Regional Office and signed by the Regional Representative or one of the officers, including [himself] if other officers were unavailable, was made out in respect of each petrol purchase". The case in question involved an order passed by the organization Médecins sans frontières MSF - Holland, which had concluded a logistics assistance agreement with the UNHCR Regional Office at the time of the emergency operation for Mauritanian refugees. The Applicant said that he had "agreed to sign the purchase order submitted to [him] by the secretariat, in the absence of the Regional Representative and other officers, who were attending a meeting". Lastly, with respect to the request for compensation for the price differential, corresponding to the purchase order dated 12 April 1990, which was signed by the Applicant, he indicated that the aim had been to "get things moving again, because of the petrol shortage. (...) The distribution of food to refugees was going to be suspended for lack of petrol. That was what the petrol was used for". The Applicant added that in the 18-month period in question "about 150 purchase orders had had to be signed by at least 7 staff members. [He had been] called on to sign only twice, in August 1989 and April 1990, with an interval of nine months between the two occasions".

On 1 May 1991, the Deputy Director of the Division of Human Resources Management informed the Deputy Director of the Division of Programmes, Support, Budget and Finance that, in the absence of any comments by the Regional Representative on the Applicant's memorandum of 17 April 1991 in reply to the Director of the Division of Human Resources Management, the Applicant could be given the benefit of the doubt. The Deputy Director of the Division of Human Resources Management added that, although there did not appear to be enough

evidence to substantiate a dismissal procedure, the Applicant had been negligent in signing the receipt voucher for rental advances, as he had himself acknowledged.

On 10 July 1991, the Director of the Division for Human Resources Management informed the Applicant that the High Commissioner had decided to terminate his employment with UNHCR, under staff regulation 9.1 (a), as follows:

> "In May 1989 you were selected to fill an Associate Administrative Officer (Management) post at the UNHCR Office in Kinshasa, Zaire. By that time, the local post that you had occupied in Dakar (No. 613008) had been abolished and replaced by an international post (No. 613027) for an Associate Administrative Officer (Management). However, since your transfer to Kinshasa had been postponed pending the arrival in Dakar on 1 August 1990 of the associate officer selected for post No. 613027, you were placed against that post as from 1 May 1989 and you received a special post allowance at the P-2 level.
>
> The auditors reviewed the Senegal Office's administrative activities, including those carried out in the above-mentioned period. Their preliminary conclusions revealed irregularities that gave rise to doubts as to the quality of your work, your sense of responsibility and your competence as an administrative officer. It was decided that your assignment to Kinshasa should be put on hold, pending the preparation of a more detailed auditor's report (...).
>
> The second report, transmitted on 15 March, simply confirmed the conclusions reached in the first report. The explanations provided by you on 17 April 1991 in response to our request were not satisfactory. We therefore believe that assigning you to a Professional post would not contribute to the efficient management of the Organization.
>
> Consequently, since there are no vacancies in Dakar that could be filled by you, the Organization is obliged to terminate your appointment, with effect from 31 August 1991.
>
> Under your letter of appointment, you are entitled to three months' notice. Your period of notice begins on 1 August 1991 and you will receive

two months' compensation in lieu of notice, calculated on the basis of the salary and family allowances to which you are normally entitled, in accordance with staff rule 109.3. You will also receive 10 months and 22 1/2 days of pensionable remuneration, after deduction of the staff assessment in accordance with annex III to the Staff Rules."

On 9 August 1991, the Applicant submitted the matter to the Coordinator of the UNHCR Mediator Panel, and on 24 June 1992, the Applicant requested the Secretary-General to review his dismissal decision.

On 2 September 1992, having received no reply, the Applicant filed an appeal with the Geneva Joint Appeals Board. The Joint Appeals Board adopted its report on 24 March 1995. It stated the following:

"36. ... the Panel was of the view that the Organization had acted in good faith and that, despite the Applicant's contention, there were valid reasons for postponing and subsequently rescinding the decision to place the Applicant against an international Professional post. The delay in implementing the decision was due to exceptional circumstances beyond the control of UNHCR. Moreover, the Panel considered the UNHCR decision not to change the Applicant's status justified, in view of the conclusions reached in the auditors' report. The opinion of the members of the Panel was reinforced by reading the Applicant's job description, which specified that 50 per cent of the tasks to be performed by the staff member consisted of supervising all financial transactions and budget administration. The audit report made it very clear that this work had not been performed satisfactorily, leading to many irregularities at the Dakar Office. The Panel believed that, whatever the causes of these shortcomings might be, such conclusions justified the UNHCR decision not to promote the Applicant to an international Professional post.

37. The Panel then considered the key issue of the appeal: the Applicant's dismissal; in so doing, it considered the Applicant's contention that his dismissal was a disguised disciplinary measure.

38. The Panel refers to paragraph 36 above concerning the decision not to promote the Applicant to an international Professional post and thus not to change his status. As a result of this decision, the Applicant remained a local staff member recruited in Dakar. He could not remain in the post

that he had been occupying in Dakar because that post had been reclassified as an international Professional post and another staff member had been appointed to it in the meantime. Moreover, the Panel had an opportunity to study the UNHCR staffing table in Senegal and verified that there was no vacancy at the Applicant's level at the UNHCR Office in Dakar.

39. The Panel also took note of the Applicant's contention that there were vacancies at other UNHCR offices in Senegal. However, the Panel was informed that under the relevant administrative texts and rules and regulations, a locally recruited staff member is not entitled to be transferred to another office. Local recruitment corresponds to a limited geographical area, not an entire country.

40. The Panel therefore concluded that the Organization acted in accordance with staff regulation 9.1 (a) when it terminated the Applicant's appointment. Furthermore, the Panel wishes to stress that the Applicant did not provide any proof or prima facie evidence in support of his allegation of misuse of procedure on the part of the Organization."

The Joint Appeals Board reached the following conclusions and recommended as follows:

"40. The Panel concludes that the Administration's decisions to postpone and then cancel the Applicant's transfer and appointment to an international Professional post were based on valid reasons and that, in so doing, the Organization acted in accordance with the Staff Rules and Staff Regulations of the United Nations.

41. The Panel concludes also that the Administrative decision to terminate the Applicant's appointment was not a disciplinary measure and in no way discriminatory, but had been taken in accordance with regulation 9.1 (a) of the Staff Regulations of the United Nations.

42. The Panel therefore makes no recommendation in favour of this appeal."

In a memorandum dated 11 April 1995, the Under-Secretary-General for Administration and Management informed the Secretary of the Joint Appeals Board that he would not consider the Board's report until the Panel had transmitted to

the parties, for their comments, additional information that the parties had as yet not seen.

Both parties having raised objections, the members of the Panel addressed a memorandum, dated 21 June 1995, to the Presiding Officer of the Joint Appeals Board, asking to be taken off the case, under staff rule 111.2, paragraph (e) (iii). In a memorandum dated 23 June 1995, the Presiding Officer acceded to their request. On 23 June 1995, the Presiding Officer informed the two parties of his decision and of the composition of the new panel entrusted with considering the present appeal from the beginning. The parties accepted the composition of the new panel.

On 30 November 1995, the Joint Appeals Board adopted its report. Its conclusions and recommendations are as follows:

> "Conclusions and recommendations
> 45. The Panel concludes unanimously that it is unable to establish that there are exceptional circumstances justifying a waiver of the time limits for receivability.
>
> 46. Consequently, the Panel has decided not to make any recommendation in favour of this appeal.
>
> 47. Having studied the case, the Panel wishes to make a comment of a general nature, since it could not but note a number of disturbing aspects relating to the observance of a fundamental procedural principle, namely, the principle of due process, which appears not to have been respected when the administrative decision contested was taken, given the contradiction between the memorandum dated 1 May 1991 and the letter dated 10 July 1991 terminating the Applicant's fixed-term appointment."

On 10 January 1996 the Under-Secretary-General for Administration and Management transmitted the report to the Applicant, informing him as follows:

> "The Secretary-General has considered your request in the light of the above-mentioned reports, the statements made by the parties and the

documents submitted by them as evidence. Notwithstanding the applicable time limits, at the meeting on 24 March 1995 the Panel [first report of the Joint Appeals Board] declared your appeal receivable rationae temporis, under rule 13 (2) of its rules of procedure, which indicates that time limits under staff rule 111.2, paragraph (e), shall be suspended when conciliation is sought with respect to a dispute. An identical rule of procedure (K) is also followed by the New York Joint Appeals Board, which in addition applies this rule to proceedings before the Panels on Discrimination and Other Grievances. In the present case, it has been established that your request for conciliation was submitted to the UNHCR Mediator Committee in Geneva on 9 August 1991, and the Secretary-General notes that according to the Panel's conclusion contained in the report dated 24 March 1995 your appeal is receivable.

With respect to the substance of the case, the Secretary-General notes that the Panel, in its report of 24 March 1995 does not make any recommendation in favour of your appeal. Likewise, the Secretary-General also took note of the final comment in the report of 30 November 1995, in which the second panel that dealt with the case concluded by drawing attention to a number of irregularities, without drawing any conclusion or making any recommendation in that respect.

In the light of the above-mentioned reports, the Secretary-General has decided not to take any action in connection with your request."

On 14 March 1996, the Applicant filed the application mentioned above with the Tribunal.

Whereas the Applicant's main contentions are as follows:

1. The Applicant's improper dismissal is based on considerations that are extraneous to the case and on contradictions;

2. The dismissal is based on non-observance of regular procedures.

Whereas the Respondent's main contention is as follows:

The Applicant's dismissal was justified because there was no post in keeping with his qualifications at the UNHCR regional Office in Dakar.

The Tribunal, having deliberated from 8 July to 1 August 1997, now pronounces the following judgement:

I. Before turning to the only truly relevant issue, namely, the validity of the UNHCR decision to dismiss the Applicant, a staff member at the UNHCR Office in Dakar, the Tribunal must draw attention to a number of anomalies in the present case.

II. Firstly, it is regrettable that the Joint Appeals Board submitted, after a considerable delay (four years after the decision contested) not one report but two contradictory reports on the same subject. In the first report, dated 24 March 1995, the Joint Appeals Board expressed the view that the application was receivable since the Applicant had initiated conciliation proceedings in August 1991, which had had the effect of suspending the time limit under staff rule 111.3. Indeed, it was only on 24 June 1992 that the Applicant addressed a request to the Secretary-General for review of the dismissal decision of which he had been notified by means of a letter dated 10 July 1991, the intervening nine-month period having clearly exceeded the time limits set in rule 111.3. However, in the second report, dated 30 November 1995, the Joint Appeals Board declared the application not receivable, since there were no exceptional circumstances justifying a waiver of the time limits for receivability under rule 111.3. The Secretary-General, in a letter to the Applicant mistakenly dated 10 January 1995 instead of 10 January 1996, took note that according to the Panel's conclusion contained in the report dated 24 March 1995 the Applicant's appeal was receivable, in contrast to the conclusion drawn in the second report, to which he had himself given rise, having concluded that the Joint Appeals Board's initial proceedings had been flawed.

III. In its first report, the Joint Appeals Board concluded that the Organization [had] acted in accordance with the Staff Rules and Staff Regulations of the United Nations. However, in its second report the Joint Appeals Board, having declared the application not receivable, added that "having studied the case, the Panel [wished] to make a comment of a general nature, since it could not but note a number of disturbing aspects relating to the observance of a fundamental procedural principle, namely, the principle of due process, which [appeared] not to have been respected when the administrative decision contested [had] been taken, given the contradiction between the memorandum dated 1 May 1991 and the letter dated 10 July 1991 terminating the Applicant's fixed-term appointment".

The memorandum dated 1 May 1991 is a document by means of which the UNHCR personnel officer informed the Deputy Director of the Division of Programmes, Support, Budget and Finance that, on the basis of the replies provided by the Applicant, who had been involved in a number of matters that had given rise to an inquiry at the UNHCR Office in Dakar, there was no reason to dismiss him and he should be given the benefit of the doubt.

IV. However, since the Respondent did not call into question before the Tribunal the issue of the receivability of the application, and the argument concerning the suspension of the time limit owing to the conciliation proceedings initially begun by the Applicant is admissible, the Tribunal, wishing to bring the case to an end, will consider the application receivable.

V. The factors that gave rise to the subsequent difficulties are clearly apparent in the letter dated 10 July 1991 informing the Applicant of the

decision to dismiss him. The letter contains contradictory grounds for the Applicant's dismissal. It indicates on the one hand that: "since there are no vacancies in Dakar that could be filled by you, the Organization is obliged to terminate your appointment, with effect from 31 August 1991". This statement suggests that the Applicant's dismissal was the result of the abolition of his post and the lack of a vacancy in Dakar, where he could have pursued his career. However, the same letter refers to the conclusions of an inquiry conducted in Dakar by the auditors and indicates that these preliminary conclusions "revealed irregularities that gave rise to doubts as to the quality of your work, your sense of responsibility and your competence as an administrative officer". Thus, this wording suggests that the dismissal was a penalty. In such a case, it would have been necessary to institute disciplinary proceedings, which was not done. However, the legal basis of the Applicant's dismissal was indicated at the beginning of the letter, which read: "I regret to inform you, by this letter, that under staff regulation 9.1 (a), the High Commissioner has decided to terminate your appointment with effect from 31 August 1991".

The Tribunal examined the facts closely in order to reconcile the apparent contradictions in the letter dated 10 July 1991. The Applicant, who had been employed in Dakar, was to fill a post carrying greater responsibilities in Kinshasa, but just as he was about to take up that new assignment, the inquiry into his activities in Dakar revealed errors and shortcomings that led to his assignment being cancelled. No penalty was imposed and no disciplinary proceedings were instituted since, as mentioned above, it was considered that the accusations against the Applicant did not justify dismissal. However, following that episode, the Applicant's post was abolished and, according to the Respondent, it was only owing to the abolition of his post and to the fact that it was impossible to place the locally recruited Applicant against another post in Dakar that he was dismissed.

The Tribunal asked the Respondent a number of questions so as to be better informed about the true reasons for the Applicant's dismissal. However, the replies received by the Tribunal are not such as to clarify events that occurred some time ago and that have slipped the memory of people who ought to be aware of them. The Tribunal considers this state of affairs regrettable, since the Administration should be in a position to provide replies to questions of an administrative nature. In these unclear circumstances, the Tribunal believes that the Applicant has suffered injury owing to the lack of transparency in the procedure that led to his dismissal.

VI. With respect to the Applicant's request concerning the Tribunal's competence, since the Applicant cannot be paid compensation that is not in keeping with the provisions of article 9 of the Statute of the Tribunal, it is unnecessary for the Tribunal to pronounce on the pleas concerning the statutory limits on the amount of compensation that it may grant.

VII. On these grounds, the Tribunal orders the Respondent to pay the Applicant compensation in an amount equivalent to one year of his net salary at the rate in effect on the date of his separation from service, in addition to the sum that the Applicant received in accordance with the letter dated 10 July 1991.

(Signatures)

Hubert THIERRY
President

Mikuin Leliel BALANDA
Vice-President

Julio BARBOZA
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary
