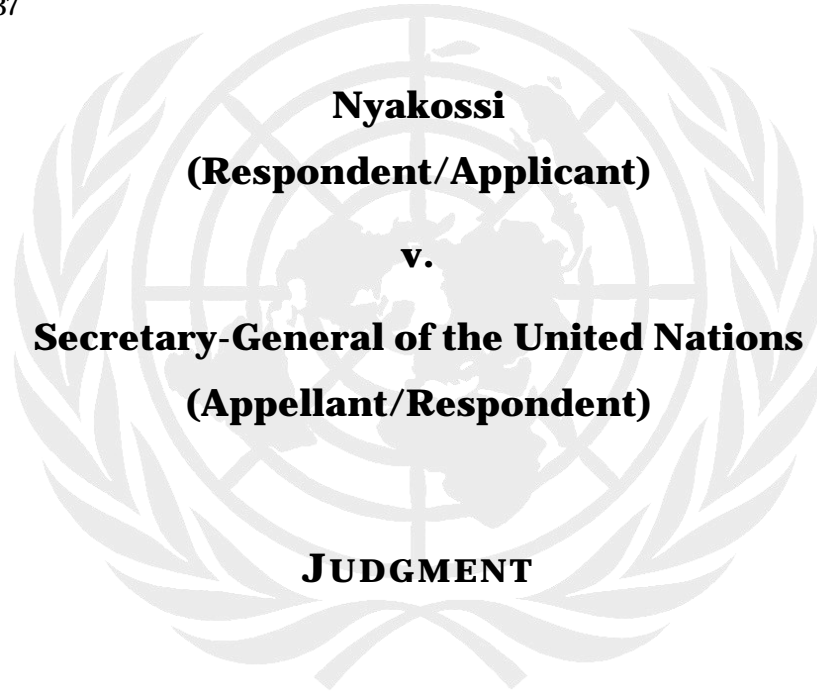




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-237



**Nyakossi
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Luis María Simón
Judge Inés Weinberg de Roca

Judgment No.: 2012-UNAT-254

Date: 1 November 2012

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Alexandre Tavadian

Counsel for Appellant/Respondent: Rupa Mitra

JUDGE ROSALYN CHAPMAN, Presiding.

1. On 16 June 2011, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva issued Judgment No. UNDT/2011/101 in the case of *Nyakossi v. Secretary-General of the United Nations*.

Synopsis

2. The Secretary-General appeals the portion of Judgment No. UNDT/2011/101 of the UNDT awarding damages to Mr. Kwami Eleda Nyakossi (Appellant) as compensation for a procedural irregularity by the United Nations High Commissioner for Refugees (UNHCR or Agency) in evaluating Mr. Nyakossi's application for placement in a pool of candidates. This Tribunal finds the UNDT made an error of law in awarding damages to Mr. Nyakossi, who was not prejudiced or damaged by the procedural irregularity, and reverses the portion of the Judgment awarding damages to him.

Facts and Procedure

3. On 21 October 2009, Mr. Nyakossi submitted his application to UNHCR in response to an advertisement by the Agency seeking applications for placement in a pool of candidates for P-3 and P-4 Field Safety Adviser (FSA) posts in various countries. At the time, Mr. Nyakossi was a G-3 Security and Safety Officer with the United Nations Office at Geneva.

4. On 19 November 2009, the Agency forwarded Mr. Nyakossi's application to the Department of Safety and Security (DSS) for clearance. On the same day, DSS denied Mr. Nyakossi clearance. Subsequently, the Agency asked DSS the reasons for its denial of clearance and, on 24 November 2009, DSS advised UNHCR that Mr. Nyakossi lacked relevant security experience, especially at the managerial level, and was not fluent in English. DSS further advised UNHCR it had twice previously reviewed Mr. Nyakossi's profile and denied him clearance.

5. On 1 December 2009, the Agency advised Mr. Nyakossi in writing that he would not be retained as a possible candidate for the FSA posts "as clearance was not granted by UNDSS". The Agency further advised Mr. Nyakossi that the DSS decision "was based primarily on a lack of relevant security experience" and "concern over [his] language skills".

6. On 27 January 2010, Mr. Nyakossi requested management evaluation of the Agency's decision not to retain his candidacy. On 12 March 2010, the Deputy High Commissioner for UNHCR sent Mr. Nyakossi the results of the management evaluation, which confirmed the Agency's decision not to retain him in a pool of potential future candidates for an FSA post. He advised Mr. Nyakossi that his profile was "not suitable to be retained for future [FSA] job openings with UNHCR".

7. On 9 June 2010, Mr. Nyakossi, represented by counsel, filed an application before the UNDT for review of UNHCR's decision. On 12 July 2010, the Secretary-General filed his reply. Subsequently, Mr. Nyakossi filed observations, without obtaining permission from the UNDT to do so.

8. On 27 May 2011, the Dispute Tribunal held a hearing at which Mr. Nyakossi and his counsel were present, as was counsel for the Secretary-General.

9. On 16 June 2011, the Dispute Tribunal issued Judgment No. UNDT/2011/101. The UNDT determined: Mr. Nyakossi's appeal of UNHCR's decision was receivable; UNHCR rejected Mr. Nyakossi's application solely because DSS denied him clearance; UNHCR was not compelled to follow the DSS decision in evaluating Mr. Nyakossi's qualifications for candidacy for the pool of FSA posts, and it was a procedural irregularity for it to do so; but that it was "highly unlikely" Mr. Nyakossi would have been placed in the pool of candidates for FSA posts even if UNHCR's procedure were regular due to the insufficiency of his managerial experience in the security field and his fluency only in French. It then awarded Mr. Nyakossi 1,500 Swiss Francs as compensation for the procedural irregularity.

10. On 28 July 2011, the Secretary-General appealed the portion of the UNDT's Judgment awarding compensation to Mr. Nyakossi.

11. On 11 October 2011, Mr. Nyakossi, proceeding through counsel, filed a motion for waiver of the time limit for filing an answer. On 3 November 2011, Judge Adinyira granted Mr. Nyakossi's motion and ordered him to file his answer no later than ten days after receipt of her Order. On 8 November 2011, Mr. Nyakossi filed his answer.

Submissions

Secretary-General's Appeal

12. Pursuant to Article 2(1) of the Dispute Tribunal Statute (Statute), the Dispute Tribunal erred on a question of law and exceeded its jurisdiction by awarding damages to Mr. Nyakossi, who had a very weak chance of promotion even if there had not been any procedural irregularity and who suffered no damages.

13. The Dispute Tribunal must consider two things in determining damages: the nature of the irregularity; and the assessment of the staff member's genuine prospects for promotion if the procedure had been regular. In this case, the procedural irregularity was minor and had a negligible impact on the selection process. To the contrary, UNHCR had the right to consult with DSS during its selection process. Even without any procedural irregularity, Mr. Nyakossi's chances of being selected were very weak.

14. Compensation is to make an injured staff member whole, and should be awarded only if the staff member actually suffered damages. Not every violation of due process necessarily leads to an award of compensation.

Mr. Nyakossi's Answer

15. The Dispute Tribunal did not err on a question of law or exceed its jurisdiction in awarding compensation to Appellant, who had suffered a "loss of chance" from the irregular procedure used by UNHCR in evaluating his candidacy.

16. The procedural irregularity was not minor. To the contrary, UNHCR refused to exercise its discretion in evaluating Appellant's candidacy and instead illegally delegated its discretion to DSS. Under these circumstances, the UNDT awarded compensation to Appellant and the Appeals Tribunal should defer to the UNDT's decision.

17. Compensation for a "loss of chance" can be calculated on a percentage basis, wherein less than 10% is too speculative for an award, or by the trial court based on the circumstances of the case. In this case, the UNDT did not find Appellant's chances were less than 10% and it properly exercised its discretion under the circumstances of the case.

Considerations

18. It is established jurisprudence that the Dispute Tribunal has authority to order compensation to a staff member for violation of the staff member's legal rights under Article 10(5)(b) of the Statute.¹ Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury.²

19. Not every violation of a staff member's legal rights or due process rights will necessarily lead to an award of compensation.³ Where the staff member does not show the procedural defect "had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences" or harm from the procedural defect, compensation should not be awarded.⁴

20. This Tribunal reviews the legal conclusions by the UNDT in light of the foregoing legal principles. Initially, the UNDT considered whether the DSS opinion denying clearance to Mr. Nyakossi contained any factual error or obvious errors of judgment. It determined DSS did not err.

21. Next, the UNDT considered whether UNHCR would have reached the same opinion as DSS if not compelled to do so. It determined it would have. The UNDT noted the Agency's "call for applications announcement specified that fluency in English or French was required, fluency in a second United Nations language was an asset and fluency in Arabic, Russian or Spanish was highly desirable". Regarding Mr. Nyakossi's language skills, the UNDT found Mr. Nyakossi was fluent only in French and "it is likely that UNHCR, like DSS, would have taken this factor into account".

22. The UNDT noted the experience requirements in the Agency's call for applications were "to standardize the conditions for recruitment of staff" in the area of field security. Despite his years of service and theoretical training, the UNDT found Mr. Nyakossi's experience in the security field was "insufficient" and "it was highly likely that UNHCR would

¹ *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095; *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

² *Antaki*, 2010-UNAT-095.

³ *Antaki*, 2010-UNAT-095; *Wu*, 2010-UNAT-042.

⁴ *Sina v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-094.

endorse the opinion of DSS” that Mr. Nyakossi had insufficient security experience and no management experience.

23. The UNDT determined that, even if UNHCR had not procedurally erred, “it is highly unlikely that the Applicant would have been selected” for the pool of candidates cleared for P-3 and P-4 FSA posts. The UNDT did not find Mr. Nyakossi was distressed by UNHCR’s illegal conduct⁵ or that he suffered any adverse consequences or harm from UNHCR’s procedural error in following the opinion of DSS.⁶

24. Nevertheless, the UNDT awarded Mr. Nyakossi 1,500 Swiss Francs as “compensation for the damage arising out of th[e] illegality.” In awarding compensation to Mr. Nyakossi, the Dispute Tribunal exceeded its competence and made an error of law since Mr. Nyakossi suffered no pecuniary loss or distress and was not harmed by UNHCR’s “illegality”.⁷ This Tribunal reverses the UNDT’s award of compensation to Mr. Nyakossi.

⁵ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201; *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

⁶ *Sina*, 2010-UNAT-094.

⁷ *Sina*, 2010-UNAT-094.

Judgment

25. The appeal is granted and the portion of the Judgment awarding damages to Mr. Nyakossi is reversed.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Simón

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar