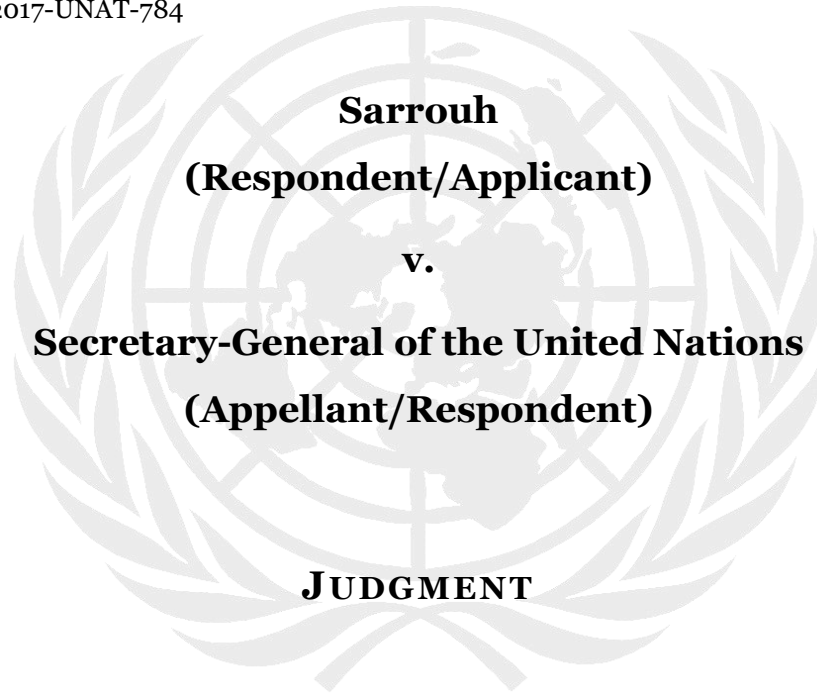




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-784



**Sarrouh
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Deborah Thomas-Felix Judge Dimitrios Raikos
Case No.:	2017-1066
Date:	27 October 2017
Registrar:	Weicheng Lin

Counsel for Ms. Sarrouh: George G. Irving

Counsel for Secretary-General: Amy Wood

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/219, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 21 December 2016, in the case of *Sarrouh v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 20 February 2017, and Ms. Elissar Sarrouh filed her answer on 13 April 2017.

Facts and Procedure

2. Ms. Sarrouh joined the Organization on 16 September 2002 on a project post under the former Staff Rules with the United Nations Development Programme (UNDP) Lebanon at the L-4 level.

3. She was reassigned on 1 January 2004 as a Policy Advisor to the Regional Bureau for Arab States (RBAS) at UNDP's Headquarters on a fixed-term appointment at the P-4 level.

4. On 1 August 2005, she was appointed as a Deputy Resident Representative at the UNDP Egypt Country Office at the P-5 level.

5. On 1 January 2007, she was reassigned as Policy Advisor to the Democratic Governance Group of the Bureau for Development Policy (BDP/DGG) at the P-5 level.

6. In 2007, she successfully passed the United Nations Resident Coordinator Assessment test and qualified for inclusion in the inter-agency roster of candidates for appointment as Resident Coordinator/Resident Representative/Humanitarian Coordinator (RC/RR/HC).

7. From May 2008 to January 2009, Ms. Sarrouh led a programme on Democratic Governance and Political Economy as Senior Specialist for the International Development and Research Centre in Ottawa, Canada.

8. In October 2009, Ms. Sarrouh was appointed Director of the Brussels Liaison Office of the United Nations Development Fund for Women at the P-5 level.

9. On 1 June 2010, she was selected and accepted the fixed-term appointment of RC/RR at the D-1 level at the UNDP Country Office in the United Arab Emirates (UAE).

10. In January 2012, the then-UNDP Associate Administrator and the then-Assistant Administrator and Regional Director of RBAS visited the UAE Country Office, followed by the Ombudsman for the Funds and Programmes. Prompted by staff complaints, they held discussions with Ms. Sarrouh and suggested a number of measures to improve the working environment of the office. On 27 April 2012, the then-Assistant Administrator and Regional Director of RBAS wrote a letter to Ms. Sarrouh referring to “very disturbing reports and complaints about the management situation in the Country Office in the [UAE]”, indicating that the “situation continue[d] to deteriorate” and instructing her to undertake a mission to UNDP’s Headquarters in New York in order to engage in consultations with UNDP senior management. In the context of this mission, it was mutually agreed to move Ms. Sarrouh to UNDP’s Headquarters in New York as Special Advisor at the D-1 level with BDP/DGG. Following discussions about the applicable terms of reference, she was reassigned to this position on 30 August 2012, starting 1 September 2012.

11. On 25 May 2012, the Regional United Nations Development Group (UNDG) Team for the Arab States rated Ms. Sarrouh’s 2011 performance as RC in the UAE with a rating of “4 = needs development”. On 30 June 2012, Ms. Sarrouh rebutted the 2011 performance appraisal (PA). Following Ms. Sarrouh’s request for reconsideration, the UNDG Team further considered its rating. On 12 September 2012, the UNDG decided to change the contested rating for Ms. Sarrouh’s performance in 2011 of “4” to “3 = fully satisfactory” but to keep the comments with no change.

12. On 18 June 2013, i.e. after her transfer to UNDP’s Headquarters, the UNDG Team conducted its review of Ms. Sarrouh’s 2012 performance as RC in the UAE giving her a rating of “4” stating that she “need[ed] development in nearly all respects in achieving (...) her planned results” and that she had “not demonstrated the expected management and leadership skills that would have allowed her to position the work of the [United Nations] Country Team within the country context”. In addition, the UNDG Team noted in the performance evaluation “that, based on the performance in [the] UAE, [Ms.] Sarrouh [was] not recommended for future [RC] positions within the [O]rganization”. Ms. Sarrouh challenged the 2012 PA and requested a comprehensive reassessment of the report. On 4 September 2013, the Regional UNDG Chair concluded the reconsideration of the rating and comments in the 2012 PA, removing the reference to not being “recommended for future [RC] positions within the [O]rganization” but maintaining the rating. On 17 September 2013, Ms. Sarrouh submitted a request for rebuttal of

her 2012 PA to the UNDG Advisory Group through the United Nations Operations Coordination Office. The rebuttal process was initiated on 21 November 2013 and completed on 13 August 2014. The UNDG Advisory Group upheld the rating of “4” indicating “partially met expectations”.

13. On 26 April 2013, Ms. Sarrouh applied for three RC/RR positions in Macedonia, Georgia and Uruguay and for a Development Coordinator post in Kosovo for which she was not selected. On 29 July 2013, Ms. Sarrouh requested management evaluation of the purported administrative decision to “exclude” her from consideration for vacant RC/RR positions. In a letter dated 29 August 2013, UNDP responded to Ms. Sarrouh’s request for management evaluation, rejecting her claims on the premise that the record did not show unfair treatment and that there was no evidence indicating that a decision had been taken to exclude her from RC positions.

14. In August and November 2013, Ms. Sarrouh applied for six other RC/RR positions: three RC/RR positions which were vacant at the UNDP Country Offices in Jordan, Benin and Nigeria and three RC/RR positions that were vacant at the UNDP Country Offices in Zambia, Saudi Arabia and Laos. During its meetings on 5 September and 12 November 2013, the UNDP Executive Group (EG) decided not to nominate Ms. Sarrouh to the posts which she had applied for in August and November 2013. Therefore, she was not among the UNDP candidates that were put forward by the EG to the Inter-Agency Advisory Panel (IAAP) to be further considered for selection.

15. On 2 December 2013, Ms. Sarrouh submitted a second request for management evaluation contesting the decision to “reject [her] candidacy for the positions ... to which [she]... applied in August and November 2013”. By letter dated 31 December 2013, her second request for management evaluation was rejected on grounds that her applications of August and November 2013 had been reviewed by the Administration and that in each of the six selection processes a matrix of all applicants, which had included Ms. Sarrouh’s name, was provided to and then considered by the EG during its meetings on 5 September and 12 November 2013. The answer to her management evaluation request further stated that there had been no automatic dismissal of her candidacy by the EG which had given proper and fair consideration to all of her candidacies on both occasions and whose decision had not been tainted by “extraneous and improper considerations”. The answer underscored, however, that consideration did not guarantee selection and that no staff member had an automatic entitlement to a particular post.

16. On 11 February 2014, Ms. Sarrouh applied for five RC/RR positions at the UNDP Country Offices in Benin, Tanzania, Zimbabwe, Ghana and Saudi Arabia.

17. On 26 March 2014, Ms. Sarrouh filed an application with the UNDT. In response to UNDT Order No. 201 (NY/2015) dated 28 August 2015, Ms. Sarrouh informed the Dispute Tribunal that she had been separated from the Organization effective 31 July 2015. She further requested the case to be joined with another application before the UNDT in which she contested her separation from service with UNDP.¹ The UNDT decided by Order No. 72 (NY/2016) dated 9 March 2016, that the two cases would be heard together but that they would not be joined.

18. The UNDT rendered its Judgment on 21 December 2016 granting the application in part. It rejected all claims regarding Ms. Sarrouh's non-selection for the posts for which she had applied in April, September and October 2013 as non-receivable *ratione materiae* as she had failed to request management evaluation of these decisions. The UNDT further found that "UNDP/the EG did not fully and fairly consider [Ms. Sarrouh's] suitability for the relevant RC posts as the information presented to the EG was incomplete and incorrect as it primarily related to her 2012 [PA], which had not been finalized at the given time, and thus the EG decisions were not based on all three relevant [PA]s".² Therefore, "the decisions not to formally nominate [Ms. Sarrouh] for the IAAP's further consideration for the RC positions for which she had applied in her August and November 2013 applications [were] unlawful".³ In terms of relief, the UNDT rejected Ms. Sarrouh's requests for priority placement, pecuniary damages and costs but granted the request for moral damages in part, ordering the Secretary-General to pay Ms. Sarrouh "a total of USD 18,000 (USD 3,000 for each of the six RC position[s] for which she applied in her August and November 2013 applications)".⁴

¹ The UNDT in *Sarrouh v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/220 found the separation decision to be unlawful and ordered compensation. The Judgment was affirmed on appeal by Judgment No. 2017-UNAT-783, also rendered during the 2017 Fall Session.

² Impugned Judgment, para. 89.

³ *Ibid.*, para. 90.

⁴ *Ibid.*, para. 105.

Submissions

The Secretary-General's Appeal

19. The Secretary-General submits that the UNDT exceeded its competence and erred in law by finding that the EG's decision not to nominate Ms. Sarrouh for further consideration by the IAAP for the August and November 2013 RC positions was unlawful.

20. First, the UNDT erred in law and exceeded its competence by conducting a *de novo* review of Ms. Sarrouh's performance—contrary to the established jurisprudence on the proper scope of judicial review—thereby improperly intruding into the Administration's managerial discretion to assess the performance of staff. The *de novo* nature of the UNDT's review is evident from the reasoning underlying the UNDT's findings. It relied, for instance, on statements that were undated and/or attributed to non-United Nations sources to refute findings in Ms. Sarrouh's 2012 PA. The UNDT further erred in its “unduly speculative” and not evidence-backed finding that the 2012 PA had a decisive and disproportionate influence on the decision not to nominate Ms. Sarrouh while in fact the evidence suggests that the EG's decision was based on an assessment of the “totality” of the evidence before it, which, *inter alia*, demonstrated “serious concerns” about Ms. Sarrouh's performance. In violation of the principle of “presumption of regularity”, the UNDT found on the basis of “unsubstantiated and speculative assertions” that Ms. Sarrouh's candidacy had not been granted full and fair consideration. In fact, the Administration had reasonably exercised its discretion when it decided not to nominate her, considering in particular, the high standards to be expected from candidates for RC/RR posts as such positions involve “significant duties and responsibilities” and are “extremely visible”.

21. Secondly, the UNDT erred in law by finding that there were procedural irregularities that materially affected the decision of the EG not to nominate Ms. Sarrouh for further consideration by the IAAP. It was “unduly speculative” for the UNDT to find that the information provided to the EG was “primarily” based on the 2012 PA which had not been finalized and was under rebuttal. In fact, the EG based its decision on the totality of the evidence before it. Moreover, there is no legal basis preventing a PA that is under rebuttal from being submitted and at the time the contested decision was taken, the regional recourse process had been completed. Even if the Appeals Tribunal concludes that the UNDT correctly found that the EG erred on a procedural matter by considering Ms. Sarrouh's 2012 PA, such an error does not automatically render the

contested decision unlawful. There would not be a sufficient causal link between the irregularity and the decision since other evidence on the record also established the serious concerns regarding Ms. Sarrouh's performance and the overall unsatisfactory performance rating in her 2012 PA was ultimately maintained.

22. Finally, the Secretary-General submits that the UNDT erred in law when awarding compensation for moral harm. As the contested decision was lawful, it was not legally supportable for the UNDT to award damages on this ground. Moreover, the mere assertion by Ms. Sarrouh in her testimony that she suffered "stress" is not a sufficient evidentiary basis for an award of moral damages.

23. Based on the foregoing, the Secretary-General requests the Appeals Tribunal to vacate the Judgment in its entirety.

Ms. Sarrouh's Answer

24. Ms. Sarrouh first points to several "misrepresentations" and "omissions" by the Secretary-General of the facts set forth in the UNDT Judgment. In particular, the Secretary-General incorrectly equates a rating of "4" in a PA to a non-satisfactory performance while it is actually defined as "partially met expectations" or "needs development". The UNDT correctly identified the Secretary-General's misleading description of Ms. Sarrouh's performance in the UAE throughout her tenure as "poor" and "weak", contrary to all evidence in this case. The Secretary-General also misstated that Ms. Sarrouh had not challenged the 2012 final performance rating while in fact she had exhausted all available rebuttal stages.

25. By arguing that the UNDT exceeded its competence and erred in law when it found that the decision not to nominate Ms. Sarrouh for the August and November 2013 RC positions was unlawful, the Secretary-General misrepresents the basis of the Judgment. In fact, Ms. Sarrouh never claimed to have a right to be nominated or selected but merely to be fully and fairly considered for the positions which the UNDT correctly found did not occur in her case. Regarding the UNDT's finding on the disproportionate weight given to Ms. Sarrouh's 2012 PA, the Secretary-General fails to illustrate what he means by the "totality" of the information allegedly taken into consideration by the EG or what evidence qualified the EG's assessment as accurate and factual and he fails to specify in what way the UNDT's conclusions are speculative. The UNDT based its reasoning on a careful analysis of the applicable guidelines and policies

as well as the documentation provided by both parties and the Dispute Tribunal clearly showed the evidentiary basis for its findings.

26. Ms. Sarrouh further asserts that the UNDT correctly identified the scope of its review by limiting it to the issues of fairness and procedural regularity and thus did not conduct a *de novo* review of Ms. Sarrouh's performance. The UNDT's review was strictly limited to UNDP's own procedural guidelines and it, *inter alia*, examined whether the UNDP team met the obligation to review Ms. Sarrouh's three latest PAs and it evaluated their status to that effect. It took into consideration the examples of positive feedback from a number of witnesses in order to call into question the unsupported conclusions of the EG at the time. The UNDT also correctly found that the 2012 PA was given disproportionate weight and the appeal has not demonstrated any mistake of law or fact in the UNDT's analysis which concluded that Ms. Sarrouh was not afforded full and fair consideration. The perception that her performance in the UAE had been unsatisfactory is not justified by the evidence on the record. Further, the Secretary-General's argument that only the best candidates should be selected to serve as RC/RR is not pertinent to the issue of whether a candidate was fairly treated.

27. With respect to the UNDT's findings of procedural irregularities, the Secretary-General essentially summarizes the arguments already made before the UNDT and engages in a "purely speculative analysis of the evidence as proof of what he is asserting". The Secretary-General—without citing any authority and contrary to his own earlier contentions—also incorrectly asserts that a performance report may be used before it is finalized and even if it is still under rebuttal. The appraisal was not finalized until a year after the contested decision had been taken and the completion of the review by the UNDG Regional Team is irrelevant since it is not a final process. Finally, the argument that this was an inconsequential oversight with no harm is contradicted by the circumstances in Ms. Sarrouh's case.

28. Further, the UNDT did not err in awarding compensation for moral harm. The Appeals Tribunal has repeatedly stated that it gives deference to the UNDT in the exercise of its discretion in this regard. Moreover, the award of moral damages was not based on mere assertions but on Ms. Sarrouh's "sworn testimony corroborating the circumstances surrounding her rejection for all the posts she applied for and the effects on her health and reputation, including her extended certified medical leave".

29. Ms. Sarrouh requests that the appeal be dismissed. In addition, she asks for an award of costs for abuse of process in the amount of USD 10,000 in view of the Secretary-General's "repeated self-serving misrepresentation of the official record of the [Dispute] Tribunal's deliberations along with other deliberate misrepresentations".

Considerations

30. We find that the UNDT committed an error of law in deciding that the decisions not to nominate Ms. Sarrouh for the IAAP's further consideration for the RC positions for which she applied in August and November 2013 were unlawful.⁵

31. The Appeals Tribunal has consistently stated that in matters of staff selection, the Secretary-General has broad discretion. We have clarified that this discretion is not unfettered and is subject to judicial review.

32. In *Ljungdell*, we referred to the discretion which vests in the Administration in the following terms:⁶

... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and nondiscriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

33. In *Abbassi*, we emphasized that:⁷

... In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

⁵ The UNDT found that Ms. Sarrouh's application was receivable in part, with regard to her claims regarding her non-selection for three posts for which she had applied in August 2013 and three posts for which she had applied in November 2013. It rejected as not receivable *ratione materiae* that part of her application which concerned other positions for which she did not request management evaluation.

⁶ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, citing *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216, para. 34, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40 (internal footnotes omitted).

⁷ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23-24.

... The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

34. In *Rolland*, we stated:⁸

... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.

... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of a promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

...

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttal one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

35. In *Aliko*, regarding the role of the UNDT in reviewing the selection process, we stressed:⁹

... “[I]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged.”^[10] Rather, the Dispute Tribunal reviews the challenged selection process to determine whether a “candidate[] ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration”.^[11] The burden is on the candidate challenging the selection process to “prove through clear and convincing evidence” that he or she did not receive full and fair consideration of his or her candidacy, the applicable procedures were not followed, the

⁸ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26.

⁹ *Aliko v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, para. 30.

^[10] *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141, para. 32.

^[11] *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20 and 21.

members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored.

36. The UNDT's Judgment indicates that it was aware of this jurisprudence, yet we find that it failed to correctly apply the law when considering Ms. Sarrouh's challenge to the selection process.

37. For the reasons which follow, we agree with the Secretary-General's submission that the UNDT erred by conducting a *de novo* assessment of Ms. Sarrouh's performance and thereby exceeded its competence and "improperly intruded into the Administration's managerial discretion to assess the performance of staff". Our reasons demonstrate that the UNDT erred in law and exceeded its competence by substituting its own decision for that of the Administration regarding the outcome of the selection process. We held in *Nikolarakis* that the same principle applies insofar as substituting the Tribunal's own views as to the pertinent job criteria for a given post.¹²

38. In its 2012 PA, the undg Team gave Ms. Sarrouh a rating of "4". She filed a rebuttal against this but, ultimately, on 13 August 2014, the Advisory Group maintained as final the rating of "4". A rating of "4" indicates that her performance was not satisfactory in that she only partially met expectations and needed development. The UNDT, considering that she did not request a management evaluation of the final decision, which was not part of the application before it, felt obliged to consider that, for the purpose of the present application, her final rating for her 2012 PA was "4".¹³ However, the UNDT noted that "solid evidence produced to the [Dispute] Tribunal in the present case, which existed and was available but was not reviewed and/or requested by the Advisory Group indicates that [Ms. Sarrouh's] performance as RC in the UAE in the time period from 2010 to 2012 was highly appreciated by high-ranking officials from the United Nations and others".¹⁴ The "solid evidence" referred to by the UNDT was comprised of letters and statements from various people.¹⁵ It is not necessary to set out the contents here. The point is that the UNDT erred in law and exceeded its competence by substituting its own views as to the pertinent criteria for the post in question.

¹² *Nikolarakis v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-652, para. 30.

¹³ Impugned Judgment, para. 81.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

39. On the question of the 2012 PA, the UNDT held as follows:¹⁶

... [A]s results from the evidence, the revised but not finalized 2012 [PA] had a decisive and disproportionate weight on [Ms. Sarrouh] not being nominated by the EG for any of the relevant RC/RR positions. (...) The fact that the 2012 [PA] was under rebuttal was not taken into consideration when the EG reviewed her as a potential nominee for the relevant RC/RR positions.

We find that this was not an accurate conclusion from the evidence in the case. The 2012 PA was not the only consideration which the EG took into account. It was clear on the evidence that the circumstances surrounding Ms. Sarrouh's move to New York following her weak performance in the UAE were a more important consideration in the decision not to nominate her.

40. On 18 June 2013, the UNDG Team conducted its review of her 2012 performance as RC for the UAE and again gave her an overall rating of "4", noting that she "need[ed] development in nearly all respects in achieving (...) her planned results" and that she had "not demonstrated the expected management and leadership skills that would have allowed her to position the work of the [United Nations] Country Team within the country context". The UNDG Team further noted that in view of its assessment based on her performance in the UAE, she was not recommended for future RC positions within the Organization. Upon her request for reconsideration, the UNDG Team removed its non-recommendation for future RC positions, but maintained its overall performance rating at level "4". She submitted a request for rebuttal of her 2012 PA and, ultimately, on 13 August 2014, the UNDG Advisory Group maintained the rating of "4" as final.

41. The Management Bureau Director, in his written statement to the UNDT, confirmed that he had personally participated in the meetings of the EG on 5 September and 12 November 2013, in which Ms. Sarrouh's nomination to the IAAP was discussed. During the EG's discussion,

the fact[] that [she] was (...) based in New York [at that time], and the circumstances surrounding her reassignment to New York, including her weak performance in the UAE, were brought to the EG's attention. The EG members agreed that given [her] poor performance as RC/RR in the UAE, she made a very weak candidate for future

¹⁶ *Ibid.*, para. 86.

RC/RR positions and that she should not be among UNDP's nominees to the IAAP for the [relevant positions].

The Management Bureau Director confirmed these statements in his oral testimony before the UNDT.

42. Regarding Ms. Sarrrouh's performance in the UAE, there was evidence that on 27 April 2012, the Director of the UNDP Regional Bureau of Arab States wrote to her informing her of the "very disturbing reports and complaints about the management situation in the Country Office in the [UAE]" and instructed her that, "[i]n view of the gravity of the situation", she was to go to New York to consult with Headquarters in order to arrive at "a sustainable solution to the management issues in the UAE Country Office".

43. The communication from the Director stated specifically:¹⁷

During the recent months we have received very disturbing reports and complaints about the management situation in the Country Office in the [UAE]. We are informed that the staff continue to be seriously demotivated and feeling under considerable stress owing to the state of relations between groups of staff and senior management of the Country Office. I am gravely concerned of this state of affairs, including for the wellbeing of all those concerned, and for the reputation of the Country Office and UNDP as a whole in [the] UAE.

I discussed these issues with you (...) during my mission to the UAE in January 2012 (...). You will recall that, we agreed then that you, as the person ultimately responsible for the proper functioning of the Country Office and the well-being of staff, would take a number of actions to ensure that the working environment in the office improved and to mitigate any reputational risks.

...

Despite these efforts, we have received indications that the situation continues to deteriorate and that relations within the office, rather than improve, have seriously worsened (...).

It is my understanding that the programme has not grown to the extent expected at the time of your assignment to the UAE. I understand that this fact may be attributed to a number of circumstances, but I cannot but reflect that the negative atmosphere within the Country Office and the serious demotivation of staff is an important contributing factor. The consequence is a critical financial situation in the country office, which it has not been possible to remedy (...).

¹⁷ Emphasis in original omitted.

In view of the gravity of the situation in the country office, you are hereby instructed to undertake a mission to New York in order to conduct consultations with relevant parts of Headquarters with the objective at arriving at a sustainable solution to the management issues in the UAE Country Office. (...)

...

Finally, you are instructed to cease all decisions of personnel action within the Country Office until further notice. Should any personnel actions be required to be taken, you must obtain the approval of the Regional Bureau (...).

Thus, there was a report of very serious problems in the Country Office which fell within the responsibility of Ms. Sarrouh as RC for the UAE. The Secretary-General was entitled to take this into account when considering her applications for very important posts in other countries. The UNDT was not competent to hold that the Secretary-General should have given precedence to different criteria.

44. In the light of Ms. Sarrouh's performance in the UAE, it cannot be said that the decision of the EG not to nominate her was unreasonable or unlawful. It was a decision which, in the circumstances of the case, fell squarely within the discretion of the Administration. The fact that the EG did not consider that her 2012 PA (which was confirmed as being correct on 13 August 2014) was under rebuttal does not constitute an abuse of this discretion, nor does it constitute an error in procedure such as to affect the decision of the case.

45. The UNDT held that the Management Bureau Director's sworn evidence contradicted what the UNDT considered to be his more favourable statements regarding Ms. Sarrouh's performance in 2012 made on 10 September 2012 and 31 December 2012.¹⁸

46. Although the Dispute Tribunal did not specify the terms of the "more favourable statements" it was referring to, we note that in his message of 10 September 2012 to Ms. Sarrouh, the Management Bureau Director, referring to her movement to BDP in New York, stated that:

... The position to which you have been reassigned is at the D-1 level. Therefore, your reassignment neither constitutes a demotion, nor a disciplinary sanction. On the contrary, this reassignment seeks to leverage your extensive experience in public administration at a time when the Organization is embarking on exciting new programmes in this area. We very much count on your support in this endeavor.

¹⁸ *Ibid.*, para. 87.

The UNDT interpreted the meaning of this statement as being that it “appears to recognize that [Ms. Sarrouh’s] entire performance with UNDP, including as RC in 2011, was satisfactory”.¹⁹

47. We find that the UNDT erred in coming to this conclusion. The Management Bureau Director was clearly referring to her experience, not to her suitability for RC/RR positions. The UNDT was wrong to conclude that such a statement contradicted his sworn evidence.

48. The other statement referred to by the UNDT dated 31 December 2012 does not appear on the record. We think that the UNDT was referring to the Management Bureau Director’s reply dated 31 December 2013 to Ms. Sarrouh’s request for management evaluation. Again, the UNDT did not specify the “more favourable statements” it was referring to. Nevertheless, again, we find that the UNDT erred in law and exceeded its competence by substituting its own decision for that of the Administration by prescribing the criteria which the EG should have applied.

49. The UNDT Judgment sets out the UNDP Guidelines for the Selection and Appointment of Resident Coordinators of November 2009.²⁰ One of the principles guiding the RC selection and appointment is for “[n]ominations for RC positions that reflect the ‘best and brightest’ candidates”. The stated overall goal of the IAAP is “to nominate the most suitable candidates for RC positions”. Ms. Sarrouh’s performance in the UAE hardly puts her in that category. The evidence before the UNDT establishes that the Secretary-General was justified to decide, in the exercise of his broad discretion, not to nominate her for any of those positions.

50. For the above reasons, we allow the appeal.

51. Since the UNDT based its award of moral damages on the erroneous conclusion that the Administration’s decision not to nominate Ms. Sarrouh was unlawful, that award must be vacated.

52. We reject Ms. Sarrouh’s application for costs for the reason that it has not been established that the Secretary-General has manifestly abused the appeals process.²¹

¹⁹ *Ibid.*, para. 76.

²⁰ *Ibid.*, para. 39.

²¹ *Vide* Article 9(2) of the Statute of the Appeals Tribunal.

Judgment

53. The appeal is allowed and Judgment No. UNDT/2016/219 is vacated.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Raikos

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar