UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/029/ JAB/2008/067
Judgment No.: UNDT/2009/022
Date: 23 September 2009
Original: English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

KASYANOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Stephen Margetts, OHRM/ALU
Josianne Muc, OHRM/ALU

Introduction

1. The Applicant is contesting the Administration's decision not to select him for a vacant post of a P-4 interpreter.

2. The vacancy was advertised on 31 December 2007. The Applicant submitted his application on 4 January 2008, and his application met the criteria for eligibility for a lateral move under section 5.4 of Administrative Instruction ST/AI/2006/3. The Applicant's documents were provided to the programme case officer 15 days after the vacancy announcement. He was the only staff member eligible for consideration at the 15-day mark.

3. Although the Applicant's documents were provided to the case officer before the expiration of 15 days after the vacancy announcement, his suitability for appointment was not assessed until the applications of 30-day candidates were also considered. As it happened there was another candidate – also unsuccessful – who was eligible to be considered as a 15-day candidate but did not submit his application within the prescribed period. The pool of applicants considered for appointment contained both 15-day candidates and 30-day candidates and, in the result, the Applicant, the other 15-day eligible candidate and three 30-day candidates were assessed as suitable for appointment but the successful applicant was one of the 30-day candidates.

4. The Applicant's case is that, because he was a 15-day mark candidate who was assessed as suitable for appointment, the other candidates should not have been considered and he must have been appointed.

The applicable instruments

5. The relevant governing instrumental provisions are as follows —

Article 101.3 of the Charter of the United Nations —

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

Staff Regulations —

> "4.2 The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity….
>
> 4.3 In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.
>
> 4.4 Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations…."

Administrative Instruction ST/AI/2006/3 —

> "2.2 All staff, up to and including those at the D-2 level, are expected to move periodically to new functions throughout their careers. To facilitate and regulate mobility, the system provides for the circulation of all vacancies and anticipated mission needs through a compendium, defines maximum periods of occupancy of posts, requires that vacancies be made available in the first instance for lateral moves of eligible staff before other candidates may be considered for selection and specifies the lateral mobility requirement applicable before a staff member may be promoted to the P-5 level. [Footnotes omitted.]
>
> 4.5 Each vacancy shall indicate the date of posting and specify a deadline by which all applications must be received. The deadline for vacancies at the Professional level and above shall normally be 60 calendar days after posting, unless, as may be done for particular cases of unanticipated vacancies, OHRM [Office of Human Resources Management] has exceptionally approved a 30-day deadline. The deadline for vacancies in the General Service and related categories shall normally be 30 calendar days after posting, unless it has been established to the satisfaction of OHRM or the local personnel office that there are no suitable internal candidates at the duty station, in

> which case the deadline shall be 60 calendar days after posting. Staff members are encouraged to submit their applications as early as possible, because staff fulfilling the eligibility requirements set out in section 5.4 shall be considered 15 calendar days after posting, and those fulfilling the eligibility requirements set out in section 5.5 shall be considered 30 calendar days after posting.
>
> 6.2 Applications of candidates eligible to be considered at the 15-day mark but received before the 30-day mark shall nevertheless be transmitted for consideration to the department/office, provided that the head of department/office has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15-day mark. Applications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline.
>
> 6.7 Applications shall be submitted to OHRM or the local personnel office, as indicated in the vacancy announcement. OHRM or the local personnel office shall transmit electronically to the department/office concerned at the 15-, 30- and 60-day marks the applications of candidates eligible to be considered at each of those dates….
>
> 7.1 In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.
>
> 7.5 For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency-based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement."

Evaluation and Selection Guidelines for Action by Programme Case Officers and Heads of Department under ST/AI/2006/3 (the "Guidelines") —

> "1. Human Resources Case Officers (HRCO) in OHRM or Local Personnel Offices…will release the applications of eligible applicants at the relevant marks, e.g. 15-day, 30-day and 60-day marks. 15 days after the posting of the vacancy, the PCO [Programme Case Officer] will receive the list of eligible candidates applying for a lateral move,

> i.e., the 15-day mark candidates who meet the criteria described under sections 5.1 and 5.4 of ST/AI/2006/3…. After the 30-day mark, the HRCO will release the 30-day candidates unless the PCO and HOD [Head of Department] have identified one or more suitable candidates from the 15-day list *and* the HOD has submitted a proposal to the Central Review bodies or the submission of the proposal to the Central Review bodies is imminent…
>
> 7. After receiving applications at each stage of the process (15-, 30- or 60-day mark), the PCO proceeds with the evaluation of the candidates. PCOs are required to conduct competency-based interviews and/or apply other appropriate evaluation mechanisms, such as written tests or other assessment techniques, for candidates who are identified by the PCO as meeting all or most of the requirements of the post and who are applying for appointment or promotion at the 30- and 60-day marks. Competency-based interviews are encouraged for applicants applying for a lateral move at the 15-day mark. The competencies can be found in ST/SGB/1999/15 and the booklet *United Nations Competencies for the Future*."

The Applicant's case

6. The Applicant contends that the language of sec 7.1 of ST/AI/2006/3 is specific and binding: lateral candidates must be given first priority, and 30-day and 60-day candidates can be considered only if no suitable 15-day candidates are identified. According to the Applicant, had the Administration applied the proper procedure, he would have been the only candidate, and, because he was found suitable for the post, there was no occasion for considering the other candidates and he would have been selected. Although, of course, the other instrumental requirements are relevant and provide the context in which ST/AI/2006/3 is placed, the very generality of their language does not permit the argument that the plain language of ST/AI/2006/3 should be read down or qualified; indeed, that meaning is entirely consistent with the more general language of the Charter and the Staff Rules. The Guidelines are subordinate to the Administrative Instruction, cannot qualify it and must be interpreted consistently with it. The Applicant submits that, in failing to select him for the vacancy, the Administration was in breach of its own rules concerning the priority given to lateral moves.

7. A secondary argument advanced by the Applicant is that the selection of a P-3 candidate over the Applicant, who was a P-4 staff member, demonstrates that the Applicant was not afforded fair and due consideration for the position. He contended that it would be reasonable to infer that a person of the higher level has a degree of superiority in a selection exercise over a person of a lower level unless information to the contrary was provided. The conclusion drawn by the Applicant from the fact that a P-3 candidate was selected is a *non sequitur*. Not surprisingly, this argument was not seriously pressed at the hearing. It is, of course, quite possible that an eligible P-3 applicant will be more suitable for a particular position than a P-4 applicant. Suitability for appointment depends upon individual attributes and mere professional level and grade do not give significant information about the comparative attributes of any two or more candidates. The mere fact that a P-3 candidate was preferred to the Applicant is not sufficient to suggest, let alone establish, that the selection process was unfair. In light of my decision on the primary issues in this case, it is not necessary to analyze this part of the Applicant's submission further.

The Respondent's case

8. The crux of the Respondent's argument is that in matters of promotion and appointment the paramount consideration is the necessity of securing the highest standards of efficiency, competence and integrity, and this paramount consideration cannot be overridden by any other factors. The Respondent submits that the interpretation of ST/AI/2006/3 for which the applicant contends would undermine the Charter and the Staff Rules, in short, the duty of the Secretary-General to employ the best person in every position.

9. It is submitted by the Respondent that the priority consideration requirement is satisfied where any advantage provided to the 15-day candidates can be identified. In the present case, claims the Respondent, the specific advantage is the chance provided to the 15-day candidates to be considered ahead of the 30-day and 60-day candidates. This gives 15-day candidates the opportunity to be first appraised against

a smaller pool of applicants, but does not preclude the consideration of other eligible candidates later in the process.

10. The Respondent contends that the word "shall" in the last sentence of sec 4.5 of the Administrative Instruction means "may" and does not oblige the Administration to obey the specified requirement to consider the 15-day candidates 15 calendar days after posting. It is submitted that the resources to do so are only rarely if ever available. Indeed, counsel for the Secretary-General argued that the relevant officer was entitled to disregard the requirement even if he or she could comply and simply decide that the 15-day candidates would simply be added to the same pool as the 30-day candidates and the best of the total number of candidates should then be appointed, even if one of the 15-day candidates is suitable for appointment. It was submitted that the officer is entitled to take this course of action to increase the size of the total pool and hence the chance that a more suitable candidate might be found than the suitable 15-day candidate.

The scheme of ST/AI/2006/3

11. Before turning to the terms of these paragraphs, it is useful to set out briefly the context in which they appear. ST/AI/2006/3 is a comprehensive instrument dealing with the system of staff selection which, as para 2.1 says, "integrates the recruitment, placement, promotion and mobility of staff". Para 2.2 states that it is an expectation that the staff "up to and including those at the D-2 level…[will] move periodically to new functions throughout their careers". The paragraph goes on to state —

> "To facilitate and regulate mobility, the system provides for the circulation of all vacancies and anticipated mission needs…, defines maximum periods of occupancy of posts, *requires that vacancies be made available in the first instance for lateral moves of eligible staff before other candidates may be considered for selection* and specifies the lateral mobility requirement applicable before a staff member may be promoted to the P-5 level." (Italics added.)

The italicized words are footnoted with a cross-reference to section 7.1. Thus it is clear that the provisions governing lateral moves are an important part of an integrated scheme of which an essential element is the priority given to eligible staff. (I note that the Secretary-General reiterated the significance of mobility in his Bulletin ST/SGB/2002/5, introducing the new staff selection system. The Secretary-General described the new system as designed, amongst other things, "to promote greater mobility of staff…; …provide more career opportunities and career development for staff…; [and] …introduce a speedier, more transparent process for filing vacancies".) The nature of the priority given to eligible staff is stated expressly: an eligible and suitable staff member is to be moved into a vacancy before other candidates may even be considered and the mode by which this requirement is to be effected is that prescribed in section 7.1.

12. Eligibility requirements are prescribed in sec 5 in a precise and carefully organized way. Sec 5.3 provides that professional staff members cannot be considered for promotion to P-5 unless they have previously had at least two lateral moves, subject to various exceptions depending on geographical factors, whether the staff member is a P-4, and whether a certain period has been spent on temporary assignment. The key importance of the notion of lateral movement is underlined by these provisions: it is not a merely desirable aspect of staff management but is a critical element of a complex and carefully elaborated system of selection and deployment of the human resources available to the Organization.

13. The Applicant was a so-called 15-day candidate. What does this mean and how does this category fit into the integrated scheme? Sections 5.4 and 5.5 deal respectively with eligibility for lateral moves at what is called the 15-day mark and the 30-day mark by specifying particular attributes that vary according to the level of the position being sought, the office in which the applicant is serving and in which the position is placed and, importantly, the applicant's field mission history. In the last case, internal candidates (ie staff members eligible to submit their applications under sec 5.4) and Field Service Officers who have been on mission detail for

specified periods are made eligible to be considered at the 15-day mark "in order to recognize and encourage mission service". It is obvious that any significant watering down of the advantage of being a 15-day candidate as distinct from being treated as, say, a 30-day candidate would have an adverse impact – potentially considerable – on this important policy objective.

14. The third class of candidate comprises those persons whose applications are considered at the 60-day mark or other specified period. It is unnecessary for present purposes to consider this class except to note that it is potentially very large, since it includes all external candidates and staff whose appointment is limited to service with a particular office or who do not have geographic status, subject to certain narrow restrictions.

The meaning of sec 4.5 of ST/AI/2006/3

15. (In this paragraph the italicization is added.) Section 4 deals with the compendium of vacancies and the preparation of evaluation criteria. Section 4.1 says the compendium "*shall* be issued to encourage mobility of staff [another reference to this key notion] and to inform staff members and outside candidates of…vacancies…", sec 4.2 relates to the inclusion of certain posts that have been approved for a year or more. Section 4.3 provides that "the programme manager *shall* be responsible for promptly requesting the inclusion of immediate or anticipated vacancies…" and the "vacancy announcement *shall* include" certain specified information. Where "no generic job profile is available" a previous job description "may be used…" unless the functions of the job have significantly changed, "in which case the programme manager *must* obtain a new classification…". Section 4.4 says that the programme manager "*shall* prepare…the criteria to be used in evaluating candidates…". Section 4.5 is of particular importance. It deals with deadlines which "*shall*" be included in the vacancy notifications and separate considerations that determine 60- and 30-day deadlines. It is interesting to note the drafting technique

adopted to distinguish between the mandatory and the indicative requirements. Thus, the second sentence and following read —

> "The deadline for vacancies at the Professional level and above *shall normally* be 60 calendar days after posting, *unless*, as may be done for particular cases of unanticipated vacancies, OHRM has exceptionally approved a 30-day deadline. The deadline for vacancies in the General Service and related categories *shall normally* be 30 calendar days after posting, *unless* it has been established to the satisfaction of OHRM or the local personnel office that there are no suitable internal candidates at the duty station, in which case the deadline *shall* be 60 calendar days after posting. Staff members are encouraged to submit their applications as early as possible, because staff fulfilling the eligibility requirements set out in section 5.4 *shall be considered* 15 calendar days after posting, and those fulfilling the eligibility requirements set out in section 5.5 *shall be considered* 30 calendar days after posting."

The use of the phrase "shall normally" is a plain indication that the rule is not absolute. There is a residual ambiguity, however, since it is clear that the 60-day and 30-day deadlines not only may but must be departed from in the specified circumstances and that leaves the question open whether those are the only exceptions to the specification of the 60-day and 30-day deadlines or whether, in every case, they are merely the normal deadlines but are not to be used in the specified cases. This is not a question that needs to be answered in the present case. I mention it only because it demonstrates that the draftsperson was plainly capable of using qualified language when a rule otherwise expressed to be absolute was not intended in that way.

16. I now come to an important requirement in sec 4.5, namely that expressed in the last sentence. The form of the sentence is unusual, since it is an exhortation to eligible staff members to submit their applications in a timely way since, otherwise, they might miss out on their priority because the 15-day mark and 30-day mark candidates "*shall be considered*" respectively 15 and 30 calendar days after posting. The italicized phrase has three possible meanings in this context: first, it is a prediction of the procedural timetable; or, secondly, it is a mandatory direction to the responsible manager to undertake the consideration at that point; or, thirdly, it is both.

What is very clear when the rest of the paragraph is considered, is that this is not either describing or prescribing merely the *normal or usual* case. If it were understood that the consideration of applications might be delayed beyond the 15 or 30 calendar day timeframe, then it would have been easy to phrase the exhortation in language that suggested timely submission because of the risk that applications could be considered from the 15th or 30th day and thus that a late applicant might miss out on the priority. In this event, the draftsperson could have used the phrase "shall normally" or even "may" or "could be". Having regard to the use in the immediately preceding sentence of the first of these phrases earlier in the paragraph, it seems clear, though perhaps surprising, that no such possibility was considered if the requirement was intended to be merely indicative.

17. It is true that, on rare occasions, "shall" is interpreted as "may", though more often "may" is interpreted as "shall". It is not necessary here to undertake a lengthy discussion on the use of "shall" in legislative or regulatory instruments. By and large, its use is deprecated because it does not have a single meaning in ordinary usage. However, its use will almost always indicate a mandatory and unqualified direction or command or requirement. It has been held to mean "may" when an exception is specified or necessarily implied but those are cases where the exception gives the meaning. In the well known text *Black's Law Dictionary* (West Publishing Co, 1990, 6th ed), under "Shall" the authors write (citing US authority) —

> "As used in statutes, contracts or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the word "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion…"

The authors note that, on occasions, "shall" may be interpreted as "may" but cite exceptional cases which are not analogous to the present. Of course, the interpretation of any word in a legal instrument must take into account the instrument as a whole and anything in it that might suggest a qualification or exception to the

primary meaning or ordinary usage. (See also the useful discussion in Garner, *A Dictionary of Modern Legal Usage* 2nd ed, OUP.)

18. It was submitted by Mr Margetts on behalf of the Secretary-General that management resources do not or usually do not or sometimes do not permit compliance with the time limit. In this case, it is clear that the time limit was not complied with, but there is no evidence at all that suggests that it was not practicable or possible to comply with it. Indeed, the thrust of Mr Margetts' submission was that management took the view that it was not necessary to comply with any timeframe, let alone that which is contained in sec 4.5. As I understand it, the decision to include the 30-day candidates in the pool of internal candidates was a deliberate one, arising from what seems to have been management's interpretation of the Administrative Instruction and the application of the Guidelines set out above and did not depend upon the actual ability of management to comply. The effect of this decision was, in substance, to ignore altogether the stipulated 15 calendar day timeframe which is a surprising and, indeed, disconcerting result.

19. The first iteration of this new, integrated, selection and appointment procedure was ST/AI/2002/4 (promulgated 23 April 2002). Since that time many changes have been made, some largely editorial and some substantial, reflecting policy changes over time. However, the crucial provisions which are discussed in this judgment have not significantly changed (with the possible exception of sec 7.5, which is discussed below). If, as Mr Margetts in substance contended, the sec 4.5 timetable should be seen as only aspirational since the adequate management resources were and are not available to enable compliance, it is strange that the time frame expressed in 2002 was repeated in all versions up to and including the 2006 version.

20. (I note, in passing, that the Fifth Committee and then the General Assembly has on a number of occasions over recent years needed to consider the difficult question of staffing, with particular reference to the need for staff mobility and the requisite administrative arrangements for timely and appropriate evaluation and decision making: see, for example, Resolution A/RES/55/258, *Human resources*

management (27 June 2001), Resolution A/RES/59/266, *Human resources management* (15 March 2005), Resolution A/RES/61/244, *Human resources management* (30 January 2007) and the useful history contained in the Secretary-General's Report A/62/215, *Implementation of the mobility policy* (8 August 2007). The fact that both the mandatory language and the timeframe in sec 4.5 of the Administrative Instruction have remained the same over this period could scarcely be regarded as an oversight by either the Secretary-General or the General Assembly.)

21. My attention was brought by Mr Margetts to sec 5.4 of ST/AI/2006/3, which uses "shall" and "may" with apparent inconsistency. It is not necessary to analyse the provision in detail. It is enough to point out that "shall" is used to designate a class to which the relevant staff member belongs in certain events and those events "may" occur. The use of "may" designates actions to be taken which might or might not be necessary, depending on whether an application is made by the staff member. There is no inconsistent use. This clause does not provide assistance in the interpretation of sec 4.5.

The meaning of sec 6.2 of ST/AI/2006/3

22. The expectation that internal candidates would (or at least could) actually be considered at the 15-day and 30-day marks is repeated in sec 6.2. Where an eligible 15-day candidate has put in his or her application after the 15-day period has expired but before 30 days have expired, it must still be transmitted for consideration *but only if* the relevant manager "has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15 day mark". This provision therefore envisages the possibility that the process of selection would end with the identification of a suitable 15-day candidate. Thus, if the Respondent's arguments were accepted, some 15-day candidates would be treated in one way and others differently depending merely on timetable rather than on the eligibility which is accorded to them in sec 5.4.

The meaning of sec 7.1 of ST/AI/2006/3

23. I now move to sec 7.1 of ST/AI/2006/3. That provision requires "first priority" to be given by programme managers considering candidates for a vacancy "to lateral moves of candidates eligible to be considered at the 15-day mark". In terms, this provision does not refer to or depend upon any temporal fact, in the sense that it applies – so far as its language goes – whatever is the date upon which the consideration occurs. The class is defined by *eligibility* for consideration at the 15-day mark. Even if such a candidate is considered after the 15-day period has expired or, for that matter, after the 30-day period has expired, the fact that he or she is still *eligible* to be considered at the 15-day mark has not changed. Quite apart from the ordinary sense of the phrase, this must be so since that eligibility is defined precisely in sec 5.4. In short, sec 7.1 is concerned with what is to happen to a particular *class* of lateral moves, namely those of the 15-day mark candidates, rather than what is to happen at a particular *date*.

24. What is the nature of the "first priority" to be accorded to these moves? This is made clear in the following sentence. It is only if "no suitable candidate can be identified at this stage", namely the stage of considering the 15-day mark candidates, that the 30-day mark candidates are to be considered. The section clearly and unambiguously requires two stages in which the candidates are considered, the second stage of which will only arise if the specified prerequisite occurs – the non-identification of a suitable candidate at the first stage. Accordingly, the order of consideration and the effect of consideration is not lost simply because of the date of consideration. If, as it happened – and whether it was because a decision was made not to consider the 15-day candidates on the 15th day after notification of the vacancy or before the 30th day after notification, or because, despite the best efforts to do so, this was not practicably possible – the 15-day candidates have not been considered within the timeframe stipulated by sec 4.5, they nevertheless retain the attribute accorded to them by sec 5.4 and they must be considered first, so that if one or more is found to be suitable, the 30-day candidates are no longer to be considered.

25. It was first submitted by Mr Margetts that it is an appropriate compliance with sec 7.1 to create a joint pool of 15- and 30-day candidates, and in that event, the "priority" given to the 15-day candidates is that they would still be considered first, before the 30-day candidates *in the sense only of chronological order* but that this "priority in consideration" nevertheless required them to be considered also relative to the suitability of the 30-day candidates. However, after questioning from the Bench, he accepted that the order of consideration could not give any advantage to one candidate over another – those considered last had to be subjected to the same criteria and the same assessments as those considered first. The entire system, he rightly conceded, was devised to attempt to ensure, so far as humanly possible, that there would be no advantage enjoyed by those who were first in line over those who followed. It is impossible that such a "priority" was envisaged by the section. It seems to me to be clear that the "priority" is precisely that which the section itself specifies, namely that no other candidates will be considered if a suitable candidate is found amongst the 15-day mark class. The submission that sec 7.1 required merely "priority in consideration" in terms of their position in the queue with 30-day candidates and did not preclude 30- or 60-day candidates from also being considered for the relevant vacancy if a suitable 15-day candidate is identified has a certain glib attraction but, on analysis, is meaningless.

26. Another way in which Mr Margetts appears to have put the Respondent's contention is this. Even if, for whatever reason, the 15-day candidates have not been considered in time for sec 7.1 to exclude the 30-day candidates from consideration (because no suitable 15-day candidate would have been identified before 30 days after notification of the vacancy so that a joint pool of 15- and 30-day candidates was created), the *chance* that the 15-day candidates could have been considered before the 30-day candidates joined the pool and, if one was found to be suitable, would not have had to compete with the 30-day candidates, constitutes the priority to which sec 7.1 refers. Of course, a decision by management not to consider, in respect of any vacancy, 15-day candidates before bringing in the 30-day candidates, would have removed that "chance", as would not providing the resources to make the assessments

in time. Such a "chance" in these circumstances is plainly illusory. Furthermore, it would reduce the entitlements of 15-day staff members in respect of lateral moves to a lottery in which the management could, if it chose, ensure that the winning ticket was not in the barrel.

27. The Respondent's contentions require the words "If no suitable candidate can be identified at this first stage" in the second sentence to mean, in effect, "If no suitable candidate can be identified at this first stage *because the PCO has not yet assessed the 15-day candidates*, candidates eligible at the 30-day mark under section 5.5 shall be considered". I have already explained that one fundamental objection to this interpretation is that the position of the 15-day candidates would then vary according to whether the PCO had – for whatever reason – assessed them, perhaps because there was insufficient time and resources available or because it was decided that it would be preferable to assess 15- and 30-day candidates in the one pool, and that is arbitrary and capricious. It means, amongst other things, that a 15-day candidate seeking to make a lateral move would never know if he or she were to be selected from a pool comprising only 15-day candidates or one which would include 30-day candidates. The Respondent's submission also ignores the true meaning of the phrase "at this first stage". The stage in question must be that *both* when the PCO has given "first priority to lateral moves of candidates eligible to be considered at the 15-day mark" *and* "no suitable candidate can be identified", the process then, but only then, goes onto the next stage, namely the consideration of 30-day candidates. If the Respondent's contentions be correct, there might not be a "first stage" because it has not occurred until the 30-day period has passed. It is important to note, as I have already mentioned, that the "candidates eligible to be considered at the 15-day mark" are a *class* and the reference to "the 15-day mark" is a reference to their *eligibility*: it is not, for the purposes of sec 7.1, a reference to the *date* upon which they are to be assessed. This clause is not concerned with *dates*, it is concerned with what happens to the three *classes* of candidates.

28. If, then, 15-day candidates can sometimes be considered before the 30-day candidates are considered but sometimes not (upon the case contended for by the Respondent), upon what principle would management decide which course to undertake? If the issue were practicability, so that 15-day candidates would be considered on the 15th day or, at all events, before the 30th day, if it were practicable to do so, but otherwise compete with the 30-day candidates, then the outcome would depend on the staffing and priorities at any particular time and place: at one time and place the 15-day candidates would be considered before the 30-day candidates and, if suitable, one of them would be appointed; on the following week or in a different country, the 15-day candidates would join the 30-day candidates in the same pool and, even if suitable, would not be appointed if a more suitable 30-day candidate were found. If practicability were not the touchstone, what else might guide the management's decision? Perhaps the supposition that amongst the likely 30-day candidates there would be one plainly superior in attributes to a 15-day candidate who, though suitable, was not as good. Permitting an assessment of this kind to determine the matter would obviously lead to uncertainty and unpredictability. The essential vice is that there would be, in the hypothesized situation, no guiding principle, clear both to potential and serving staff and management and capable of yielding consistent results that could be applied to lateral transfers by internal candidates.

29. It is no answer to this problem to point to the general language of the Charter or the Staff Regulations, as was attempted by the Respondent here. That language affords no real guidance in the particular situation being considered here. The very necessity for ST/AI/2006/3 is predicated upon the understanding – which cannot be gainsaid – that it is necessary to create a *system* or *structure* designed to deliver the outcomes those instruments mandate and the aspirations they express. It is not appropriate to identify one particular provision in isolation and question its appropriateness. The question must be whether, taken with the other parts of the scheme, the impugned provision serves an appropriate policy objective and whether,

considered together with those other provisions, it should fairly be regarded as inconsistent with the governing principles of the Charter and the Staff Rules.

30. Elementary fairness, as well as good sense, require the formulation of transparent rules capable of yielding predictable, rational and understandable results, binding on both management and staff. The absence in this particular context of a useful guiding principle clearly stated and understood and capable of actual application must result in outcomes that can justifiably be seen as arbitrary, capricious, inconsistent and unpredictable – the employment equivalent of John Selden's celebrated rebuke (in his *Table Talk*) of the law of equity, that it varied with the length of the Chancellor's foot.

31. It is indeed difficult to accept that the policy considerations underlying the creation of the class of internal candidates would be served by such an approach. It will be remembered that one of the specific reasons for creating the category of 15 day eligibility was to "recognize and encourage mission service". If the argument proposed on behalf of the Secretary-General were accepted, that recognition and encouragement would vary unpredictably from substantial to almost inconsequential and the staff member would not know even at the end of the process what rule had been applied unless, as the Applicant did here, he or she made enquiries about it.

32. This can be tested by supposing that the vacancy notice stated that 15-day candidates would not be considered until sufficient time had elapsed for the pool of applicants to include also 30-day candidates and that both classes of candidates would compete and be given equal consideration for the notified position. It is obvious, as it seems to me, that this would effectively destroy the scheme constructed for dealing with lateral moves. To interpret the Administrative Instruction in such a way is contrary to its language, would significantly undermine its clear purpose and be contrary to the canons of instrumental interpretation.

33. Accordingly, I reject the Respondent's submission as to the meaning of sec 7.1, essentially for three reasons: first, the plain language of the clause itself;

secondly, because that interpretation would lead to arbitrary and capricious results; thirdly, because it cannot sit with the other sections of the Administrative Instruction, particularly sec 4.5 and sec 7.5 (to which latter provision I now move).

The significance of different evaluation methods

34. The 2002 Instruction provided —

> "7.5 Interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required for appointment and promotion at the 30- and 60-day marks of the candidates identified by the programme manager as meeting all or most of the requirements of the post, and are encouraged for lateral moves at the 15-day mark. Whenever possible, interviews should be competency-based and conducted by an ad hoc panel."

It will be seen that this provision distinguishes between 30- and 60-day candidates on the one hand and 15-day candidates on the other in respect of the nature of the assessment and evaluation procedures necessary to be used in each class, with those applying to the 15-day candidates permitted to be markedly truncated. This reflects two possible considerations: first, the perception that lateral transfers did not, in principle, require the same level of investigation of suitability; and secondly, that the time frame would be easier to comply with if the process were abbreviated. Whatever were the subjective ideas of those responsible for this provision, it is certain that permitting the omission of the specified evaluation methods would have enabled the assessment to have been completed more quickly than otherwise. In the Administrative Instruction's present form, this clause has been changed to the following —

> "7.5 For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency-based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement."

This provision requires the processes that are listed in the first sentence, though *not necessarily* interviews, to be applied to all candidates. Competency-based interviews are, however, mandatory for recruitment or promotion. The specification of this requirement would not be necessary if all classes of candidate were required to be interviewed. A lateral transfer at the 15-day mark, of course, is not a promotion (as distinct from a lateral transfer at the 30-day mark), nor, in ordinary parlance, is it a recruitment, which implies a movement from outside the particular office, if not from outside the Organization. As used in this Administrative Instruction, the lateral transfer of a 15-day candidate is neither a recruitment nor a promotion and therefore such a candidate need not necessarily be interviewed. (I have assumed that all interviews are competency-based. Even if this assumption is mistaken, the logic is unchanged.)

35. This provision places a further obstacle in the path of the argument advanced on behalf of the Secretary-General. (As has been seen, sec 7.5 envisaged in its first iteration in 2002 that the modes of assessing 30- and 60-day candidates could differ from those applying to 15-day candidates.) If the 15- and 30-day candidates fell into the same pool so that the most suitable of them would be appropriately appointed, then it would be very difficult to compare them since each class might well have been subjected to different methods of evaluation. It matters not that they *might* have been – because of the encouragement mentioned – subjected to the same process. The point is that the clause unmistakably envisages that different processes might be applied to each class. It must follow that it could not be appropriate to place both classes in the same pool. It is no answer to say that it would be appropriate to do so where, as it happened, both classes were subjected to identical methods of evaluation, since we are dealing with the proper interpretation of sec 7.1. It is an impossible interpretation to say that that clause mandates *both* processes, namely on the one hand one in which the 15-day candidates are considered first and only if none are found suitable are the 30-day candidates considered, and on the other hand one in which the 15- and 30-day candidates are placed in the same pool, the suitable candidates then identified and ultimately the most suitable being appointed. It would be contrary to

the whole system of equal treatment if the choice of the most suitable candidate was from a group some of whom had been evaluated by one process and others by another process. Both 15- and 30-day candidates *must*, in principle, be subjected to the same evaluation procedures if they are to be compared to each other. The provision in sec 7.5 that they might not be demonstrates that this interpretation cannot be correct.

36. There cannot be a pool of suitable candidates identified for the purpose of selecting the most suitable which contains candidates from both these classes, since this could require comparison between candidates whose suitability was assessed by different methods, in one case without a competency-based interview and in the other with such an interview. That this might be the case (which the logic of the language itself compels) is reinforced by the Guidelines (which, however, must be used with caution as they constitute a subordinate instrument; this issue is discussed further below) —

> "7. After receiving applications at each stage of the process (15-, 30- or 60-day mark), the PCO proceeds with the evaluation of the candidates. PCOs are required to conduct competency-based interviews and/or apply other appropriate evaluation mechanisms, such as written tests or other assessment techniques, for candidates who are identified by the PCO as meeting all or most of the requirements of the post and who are applying for appointment or promotion at the 30- and 60-day marks. Competency-based interviews are encouraged for applicants applying for a lateral move at the 15-day mark. The competencies can be found in ST/SGB/1999/15 and the booklet United Nations Competencies for the Future."

The obligations of the Programme Case Officer are differentiated between the applications of 30- and 60-day candidates on the one hand and 15-day candidates on the other. The former group must be subjected to competency-based interviews and the latter need not be, although PCOs are encouraged to require them. Thus the Guidelines envisage two different evaluation processes. Where this occurs suitable candidates from the one group cannot be compared to suitable candidates from the other. The Guidelines are therefore drafted on the assumption that such a comparison will not occur. As I have already explained, it is irrelevant to consider the possibility

that, as it might have happened, these candidates might have been subjected to the same process.

37. It might be helpful if this point were made in another way. If the 15- and 30-day candidates are placed in the same pool and the most suitable of them is to be selected, each must be given equal treatment. It follows that 15-day candidates cannot have any "priority" and the distinction between them and 30- day or other candidates is removed. This must destroy the elaborate and carefully constructed scheme designed specifically to encourage mobility by giving preferential consideration to 15-day and, for that matter, in their turn, 30-day candidates.

38. This also follows from para 1(e) of the *Responsibilities of the Programme Manager* as listed in Annex II of the Instruction, which clearly assumes that there may be some candidates who are not interviewed; by elimination, these can only be 15-day candidates.

Is ST/AI/2006/3 inconsistent with the Charter?

39. Mr Margetts then proposed a fundamentally different argument that, in part, followed from Art 101.3 of the Charter and Staff Regulation 4. He submitted that it was proper to consider all the applications and, then, because of the overriding necessity to select the best candidate, to appoint that candidate even if he or she were a 30-day mark candidate and there was a suitable 15-day mark candidate. If such an appointment were prohibited by sec 7.1, then, he contended, the provision was *ultra vires* as inconsistent with the Charter and the Staff Rules.

40. It is self-evident that it may well be appropriate to apply different rules to the varying circumstances in which staff selection takes place and to the imperatives to which it is directed. Thus, for example, the opening of positions to the outside world in order to enable selection from a wide range of potentially suitable candidates is clearly desirable; on the other hand, it is necessary to impose time limits on the selection process, even though that might exclude excellent candidates who applied

too late, so that appointments can be made in a timely way. It is also essential to guarantee a certain level of employment security or else excellent potential candidates will be discouraged from seeking employment or excellent employees will move to other jobs because they are concerned that perhaps they will be without a job next week or next month, so that periodically throwing open every job to open competition could well be counter-productive. Giving employees or would-be employees certain advantages in seeking other jobs within the Organization which can widen their experience and enable cross-fertilization of experience encourages not only employees and would-be employees but is good for the Organization: mobility has obvious advantages not only for the employee but also for the United Nations. An organization as large and multifarious as the UN obviously must use these and many other methods of employee selection and deployment as part of its approach to the complex and changing demands placed upon it.

41. Another extremely important aspect of employment policy must be the creation of and adherence to clear rules to be followed in all these situations so that both staff and management understand what their respective rights and obligations are. This means that, although there must inevitably be permitted – indeed, required – a discretionary judgment as to the suitability of the various candidates for any particular selection, the possibility that the rules will have arbitrary or capricious application, especially with unequal effect, for reasons that are unexaminable or, perhaps, just accidental, must be assiduously guarded against. Accordingly, where an Administrative Instruction is clear, unambiguous and unqualified, it will only be in the clearest case that it will be held to have a different meaning because of words of general policy drawn from another, albeit superior instrument: the maxim *generalia specialibus non derogant* (the general does not qualify the particular) is not only a sensible canon of construction, it is also a common sense expression of just and fair dealing. Here, if the argument for the Respondent be accepted, the specific right to appointment on the plain text apparently given to the Applicant was taken from him because the particular manager decided that a better candidate might be found in the 30-day pool. The case is not improved by the apparent fact – as I was informed by

Mr Margetts from the bar table – that this has been widely done and apparently approved by the Secretary-General himself. If the Instruction was not to be applied according to its plain terms, why was the Instruction not either amended or staff members informed that they should not rely on its terms?

42. It is not surprising that the injunction of the Charter is the securing of "the highest standards of efficiency, competence, and integrity…." nor that this standard applies not only to the selection of staff but also to the conditions of service: these two elements are inextricably bound together. It is obvious, moreover, that there are any number of ways by which achievement of these goals may be approached which could well be inconsistent. The balancing of competing or contradictory policy objectives is not only difficult but it is dynamic, as the Organization changes and it responds to changing demands. It is inevitable that there will be legitimate areas of debate and reasonable difference, in which some will say that too much emphasis is given to one aspect or other and others will disagree. This is all a question of judgment and difficult judgment at that. Fundamentally, of course, the role of the Secretary-General is to make that judgment. He or she does not act alone but within the very structure of the Organization itself, of which the other organs of the Organization are also a critically important part. It may be that, in individual cases, the Tribunal will find it necessary to correct administrative decisions made by the Secretary-General – though it will do so, almost certainly, by reference to the very rules of the Organization which the General Assembly adopted under Art 101.1 of the Charter and he or his predecessors have promulgated – but it would be only in the most unlikely case that an Administrative Instruction would be held to be outside the authority vested by Chapter XV of the Charter in him as the chief administrative officer. Accordingly an argument – such made here by Mr Margetts – that the plain language of the Administrative Instruction, if unqualified, is contrary to the requirements of the Charter must be examined with great care before it is accepted.

43. Here, the Respondent's argument amounts to saying that considering only 15-day candidates first and then moving onto considering the 30-day candidates only if

there is no suitable 15-day candidate would be so inconsistent with the requirement to comply with the "highest standards of efficiency, competence, and integrity" that such an approach would be inconsistent with the Charter. The argument seems to accept, however, that selecting from amongst the 15- and 30-day candidates and disregarding the 60- candidates would comply with the Charter's requirements. This betrays its essentially capricious character. Why close the door at 30 days? And why assume that admitting the 30-day candidates is likely to produce a better appointment than would have been made had the suitable 15-day candidate been selected? The mere fact that, in the present case, it appears that a better candidate than the Applicant was available does not at all assist in interpreting either the Charter or the Administrative Instruction. After all, perhaps a better candidate still was in the 60-day list. The 15 day mark obviously is a line drawn for practical purposes with the expectation that it will identify a pool of adequately qualified candidates and at the same time give a desirable level of priority to employees who are suitably qualified and whose lateral deployment is desirable in the interests of the Organization, at the risk that the appointment of a possibly better candidate from a wider pool will not be made. I am very far from convinced that ending the search for other possibly superior staff when a suitable employee has been identified from amongst those eligible to be considered at the 15-day mark is such a fundamental contradiction of the requirements of the Charter and the Staff Rules as to render *ultra vires* a provision that has that effect.

44. Mr Margetts relied on Judgment 310 (10 June 1983) of the United Nations Administrative Tribunal. In that case a vacancy arose for the post of Director of the Division of Recruitment. The Secretary-General had decided that only candidates from francophone African countries would be considered and this condition was part of the advertised requirements for selection. The Appellant submitted an application, but it was not considered because he could not satisfy this requirement. The Tribunal held that the Secretary-General was prohibited by Art 101.3 of the Charter and Staff Regulation 4.2 (the paramountcy provisions) from establishing in the particular case the limitation to francophone African nationals, holding that the "paramount

consideration" was "the necessity of securing the highest standards of efficiency, competence, and integrity" and that the Secretary-General was in breach of this requirement by "establishing as a 'paramount' condition the search, however legitimate, for 'as wide a geographical basis as possible'" (*vide* the concluding sentence of Art 101.3) which involved, in this case, the appointment of a national from a francophone African country. The Administrative Tribunal held that this requirement had the effect of "eliminating the paramount consideration set by the Charter in the interests of the service" and, accordingly, was in breach of the paramountcy provisions and unauthorized.

45. It is, of course, appropriate that the Tribunal should accord every respect to the decisions of the Administrative Tribunal but they are not binding authority. The decision in Judgment 310 concerns a case, however, rather different to the present. The Secretary-General in that case had made an *ad hoc* decision that cut across the provisions of the Staff Rules that related to appointments of the kind being considered, Rules which gave the Appellant certain legal rights permitting him to apply for the post in question. It was not consistent with the Staff Rules that the Secretary-General, in effect, prevented the Appellant from applying for the post in question and his decision could have been nullified on that ground alone: the Secretary-General attempted, it seems, to make an exception but the power to do so contained in Rule 112.2 did not permit this to be done in these circumstances and in this manner. Here, the question concerns the proper interpretation of the relevant Administrative Instruction and not an *ad hoc* decision.

46. However, the Administrative Tribunal dealt with the case upon a quite different and more fundamental basis by concluding that the impugned decision was inconsistent with the paramountcy provisions. One difficulty in applying this decision is that there is no process of reasoning disclosed that leads to it: it is merely stated as a conclusion. I regretfully find myself in disagreement with the Tribunal's conclusion about this inconsistency. I am, with unfeigned respect, unable to see how the limitation of candidates to francophone African nationals is inconsistent with the

paramountcy provisions. It is self evidently wrong to suggest that the appointment of a francophone African national of itself could constitute a breach of the requirement for efficiency, competence and integrity. With respect, I find it impossible to understand why limiting the choice to a francophone African national candidate breaches that requirement. Put obversely, the mere fact that others than francophone African nationals could not compete does not as a matter of reason or logic mean, *ipso facto*, that the mandated standards were breached and, in its judgment, the Administrative Tribunal does not seek to explain why it held the opposite opinion. In short, it is not and, *in principle*, cannot be inconsistent with the "paramount necessity of securing the highest standards of efficiency, competence, and integrity" that the class of candidates was limited to francophone African nationals. Furthermore, there is nothing mentioned in the judgment that suggests that the successful candidate was not in every way entirely and sufficiently efficient etc, nor that the Appellant would have been a more suitable appointment though, of course, the complaint is that the class of appointees was illegally limited. There was no evidence at all (and plainly it could not be assumed) that the class of permitted candidates would not or would not be likely to produce an applicant in every way qualified to fulfill the requirements of the post consistently with the "highest standards of efficiency, competence, and integrity". Furthermore, the paramountcy provisions cannot be considered in isolation, in particular as independent, stand alone requirements separate from the overall obligation of the Organization to serve the objects of the Charter. It could well be necessary or desirable in terms of the overall task to be undertaken by the Organization, an international body, to employ a person of a particular class specified by the Secretary-General who also meets the highest standards of efficiency, competence and integrity. There is nothing in the paramountcy provisions that, as it seems to me, prohibits such an approach. Whether, in the context of Judgment 310, the circumstances of the particular office to be filled or the structure of the Organization at that level justified limiting the class of applicants to francophone African nationals was, of course, another and difficult policy question, but that has nothing logically to do with satisfying the "paramount…necessity of securing the

highest standards of efficiency, competence, and integrity". Those standards are, after all, capable of objective description in the context of particular positions and whether an individual can meet those standards is the task of the evaluating bodies. One accepts, of course, that individual capacities vary and it is in general desirable to subject candidates to a process in which their relative capacities can be assessed. Such a process is also aimed at providing staff with a fair opportunity of obtaining promotion or appointment to particular posts. But merely to limit a class of candidates to those who satisfy other desirable criteria is not legally inconsistent with the necessity mandated by the Charter or the Staff Rules. The rules preventing discrimination on the grounds of race, sex or religion (eg as provided in Staff Regulation 4.3) are independently driven and have nothing to do with the efficiency, competency and integrity requirements of Art 101.3 and Staff Rule 4.2. Thus, eg, the requirement that a particular post should be filled by a woman – or for that matter by a man – would not be inconsistent with that necessity though it might well be contrary to Staff Regulation 4.3 prohibiting discrimination on the grounds of race, sex and religion.

47. The requirements for geographical and gender diversity reflect important values of the Organization and there is more than one technique of selection that enables them to be also reflected in appointments, of which the most common appears to provide for open candidatures but then appointing, from amongst equally suitable candidates, the one who in the circumstances and context reflects the attribute needed to correct a perceived imbalance. However, there is nothing in the Charter that requires this, as a matter of law, to be the sole correcting or balancing method. This is a difficult and dynamic policy question which the General Assembly and the Secretary-General have from time to time dealt with and which it is not the business of the Tribunal to determine.

48. In short, the decision of the Administrative Tribunal in Judgment 310 does not deal with the same issue as the present case and, at all events, insofar as it expresses a rule capable of being applied, it is wrongly decided.

49. In the present case, I am unable to see how giving priority to 15-day candidates of the kind that the Administrative Instruction accorded the Applicant is an inappropriate exercise of the managerial authority reposed in the Secretary-General, let alone that it is inconsistent with the paramountcy provisions of the Charter and the Staff Rules.

The Guidelines

50. The Respondent relied on the Evaluation and Selection Guidelines, in particular cl 1, as supporting his contention that the relevant sections of the Administrative Instruction authorize (if they do not require) the pooling of 15-and 30-day candidates, the identification of suitable applicants and then the selection of the most suitable, regardless whether that person is a 15- or 30-day candidate. The Guidelines are promulgated under the authority given to OHRM in Annex IV of ST/AI/2006/3, which is as follows —

> "1. The Office of Human Resources Management (OHRM) is responsible and accountable for:
>
> > (a) Establishing policies, rules and guidelines for the system and providing authoritative interpretations…"

Regrettably, the provision does not state the subject matter in respect of which the Guidelines are "authoritative". On general principles, I do not think that the OHRM can give authoritative interpretations of the Administrative Instruction, which is a dominant or superior instrument, still less could the OHRM give an interpretation that contradicted or even qualified the provisions of the Instruction. The only way in which this can be done is by the Secretary-General and then by formally amending the Instruction: see, generally, Secretary-General's Bulletin ST/SGB/1997/1, *Procedures for the promulgation of administrative issuances* (28 May 1997). Applying ordinary principles of interpretation to the language of this provision, it seems to me that the authoritative interpretations involved here are those concerning the "policies, rules and guidelines" which it is the role of OHRM to establish. It

follows that, if the Guidelines are inconsistent with the Administrative Instruction, the Guidelines must be read down.

51. At all events, when properly considered, cl 1 is consistent with rather than contradictory of the interpretation of ST/AI/2006/3 which I have proposed. The first sentence sets out the responsibility of the Human Resources Case Officers to post vacancy announcements after the Central Review Body has approved the evaluation criteria. Then the HRCOs are to "release" the applications at particular "marks", which is a reference it seems to the timetable of 15, 30, and 60 days after posting of the vacancy. I was informed by Mr Margetts, and it was agreed by Mr Gorlick for the Applicant, that "release" simply meant passing the applications on to the PCO. The next sentence states that 15 days after the posting the PCO will receive the applications of the eligible 15-day mark candidates together with the rostered candidates also eligible to be considered for lateral moves. Then the Guidelines provide that, after the 30-day mark, ie after the period of 30 days has expired from the posting date, the HRCO will "release" (ie deliver) the applications of the 30-day candidates *unless* the PCO and the Head of Department have identified one or more suitable candidates from the 15-day list and submission to the Central Review Body has occurred or is imminent. Thus, it will be seen that the Guidelines envisage at least the possibility that the 15-day candidates will be or might have been assessed for suitability before the period of 30 days has expired, in which event 30-day candidates will not be considered since their applications will not be released. The Guidelines say nothing about considering the suitability of 15-day candidates after the 30-day mark, nor that where that is yet to be done at the 30-day mark, the 15- and 30-day candidates are to be placed in the same pool.

52. Clause 3 of the Guidelines, however, does imply that the 15- and 30-day candidates might be considered in the same pool. This implication arises from the italicized phrase in the clause —

> "3. In the event that the Department has not submitted the proposal to the Central Review bodies or if such submission is not imminent, and

> the PCO asks the HRCO not to release the 60-day eligible candidates *since he/she intends to recommend candidates from the 15- and/or 30-day list*, the HRCO will nevertheless release applications of candidates eligible to be considered at the 30-day mark and staff members eligible to be considered at the 60-day mark, e.g., staff who are at the same level of the post but who have applied after the 30-day mark; staff applying for promotion to posts on level higher but have applied after the 30-day mark; staff applying for promotion two levels or more above their own level; staff whose appointment is limited to service with a particular office; and other staff members serving in entities which are administered by the UN and apply the new staff selection system (e.g., UNEP, Habitat, ODC, ICTR, ICTY)." (Italics added.)

It will be seen that the clause assumes that it is possible that the PCO might have decided to recommend applicants from a pool that contains only 15-day candidates, or a pool that contains only 30-day candidates or a pool that contains both 15- and 30-day candidates. If the correct procedure is that the identification of a suitable 15-day candidate precludes appointment of a 30-day candidate, there could not be a pool of candidates suitable for recommendation that included both 15- and 30-day candidates. This consequence arises from the use of the conjoint expression "and/or".

53. I have already stated why, in my opinion, ST/AI/2006/3 does not permit consideration of 30-day candidates where a suitable 15-day candidate has been identified. In my view the mere fact that the Guidelines appear to assume that the procedure is different does not affect the interpretation of the Administrative Instruction: first, the Guidelines are subordinate to the Administrative Instruction; secondly, even allowing (which, for reasons already given, I do not think is correct) that the Guidelines can be used to authoritatively interpret the Administrative Instruction, an assumption is scarcely an interpretation; and, thirdly, an interpretation that directly contradicts the language of the Administrative Instruction cannot qualify as an interpretation, let alone an authoritative one.

54. The use of the conjoint "and/or" should be regarded as a drafting error and the word "and" omitted to bring the Guidelines into conformity with the Administrative Instruction.

Conclusion

55. In my view management should take seriously the mandatory language in sec 4.5 of the Administrative Instruction and make genuine attempts to comply with its timetable, shortcutting if necessary, in respect of the 15-day candidates, the evaluation process by omitting the optional competency-based interview. When the timetable is complied with, sec 7.1 will ensure appropriate priority is given to the 15-day mark candidates. However, if despite its best endeavours, it has not been possible to evaluate the 15-day candidates by the 30-day mark, they should be placed in a separate pool and evaluated before the 30-day candidates. If a suitable 15-day candidate is identified at that stage, then it is unnecessary to consider the applications of the 30-day candidates. This is the clear meaning of sec 7.1 of ST/AI/2006/3 and is binding on the Administration.

56. It follows that the Applicant was not considered in accordance with ST/AI/2006/3 as was his legal right.

Remedy

57. The parties are directed to provide written submissions as to the appropriate relief that should be ordered.

(*Signed*)

Judge Adams

Dated this 23rd day of September 2009

Entered in the Register on this 23rd day of September 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York