Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

SEFRAOUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. The applicant has appealed the decision of the respondent not to shortlist him for two P-4 positions as an Arabic reviser. Nine candidates were interviewed by the selection panel. It appears that the two successful candidates, as it happened, were interviewed in person whilst the applicant was interviewed by telephone. The records tendered do not show how the other unsuccessful candidates were interviewed. Broadly speaking, the applicant submits that he was not given full and fair consideration and has made a number of criticisms of the process undertaken by the selection panel. Neither party called any oral evidence and it was agreed that the issues were sufficiently informed by the documentary material tendered. These documents included the redacted minutes of the selection panel concerning the successful candidates and the applicant, documents attesting to the applicant's experience, and his electronic performance appraisal system (e-PAS) report for the two years prior to the application, together with statements from two members of the selection panel. The applicant was informed of his right to cross-examine the witnesses and test their evidence but he did not require them to be called.

2. The respondent raised the question of receivability at the outset of the proceedings. On 25 August 2009 Shaw J, for reasons not presently relevant, held that the applicant's appeal was within time.

Issues

3. The question in the case is whether the applicant's candidacy for the positions in question was properly and fairly considered. Also relevant is the nature of the burden of proof and its application to the evidence.

Facts

4. The applicant has many years of experience as a translator. In addition to his experience within the United Nations he was sworn in as a certified translator in

Morocco in 1992 and in Geneva in 1998, working also as a translator for a Swiss governmental body assisting refugees from 1990 to 1992. In April 1996 the applicant started working as a translator for the International Telecommunication Union at the T-1 level. On 25 May 1999 he was promoted to the T-2 level, which according to the applicant is equivalent to a P-3 position. In July 2000 he received a permanent contract as a translator with the Universal Postal Union at this level. In October 2004 he was transferred to the UN Secretariat in New York in accordance with the Inter-Organizational Mobility Accord of 15 September 2004. Presently he is employed by the UN in Geneva at the P-3 level. His e-PAS performance record for 2006/2007 stated that he had met the goals in his work plan and continued to produce "high-quality translation and meet the quantity standards…". In respect of core values his professionalism was evaluated as fully competent whilst his integrity and respect for diversity/gender were said to be outstanding; so far as core competencies were concerned his communication, teamwork, creativity and commitment to continuous learning were evaluated as fully competent whilst his accountability and technological awareness were assessed as outstanding. He was rated overall as having frequently exceeded performance expectations. Other favourable observations were made. The previous appraisal in 2005/2006 was not quite as favourable but nevertheless his performance rating was assessed as fully successful.

5. On 10 August 2007 the two posts in question with United Nations Office in Geneva (UNOG), Arabic Translation Section (ATS), Language Services, Conference Services Division, were advertised in Galaxy with a closing date on 9 October 2007. The vacancy announcements required "[A]t least five years of translation experience, preferably including three years within the United Nations and some experience of self-revision…".

6. The applicant applied and was considered at the 30-day mark. The applicant was found to meet all or almost all of the criteria and was invited to participate in a competency-based interview. The applicant was interviewed by telephone and the two successful candidates were interviewed in person. Redacted copies of the overall

evaluations were tendered in evidence. The description of the applicant's experience is in point form rather than narrative and hence somewhat less informative than the descriptions of the experience of the other candidates. Otherwise there are no significant differences in styles. As to the applicant's professionalism, the selection panel noted that "[h]e has not yet reached a level of warranting assignment of self-revision/revision work at the UNHQ, even under monitoring as common practice". The panel also noted that the applicant "seems to maintain good relations with colleagues (we don't have direct experience on that as he is not working at UNOG)". So far as the other candidates are concerned the panel stated positively that they had "very good relations with colleagues" and it is reasonable to infer that this was personally known to one or more of the panel members. In respect of one of the other candidates the description of his command of language is in virtually identical terms to those used of the applicant's but the candidate is given 16 points to the applicant's 15 points. That candidate received a total score seven points greater than that of the applicant. One of the successful candidates was noted to have had "12 years of experience in translation, mostly in technical and military fields, including *some three years* [in fact, it seems, two years ten months] at the U.N.…preceded by two years relevant experience as journalist in the Arab press" (italics added).

7. In his statement tendered to the Tribunal one of the panel members stated that the process was based on an objective consideration of the qualifications of all candidates, their responses during the competency-based interviews and evaluation of all these elements by the selection panel. He said that "to ensure the maximum objectivity, the panel was composed of members of ATS as well as members from other UNOG translation sections". Interviewing candidates via telephone was undertaken for practical reasons and was a standard procedure with the individual interviews from other duty stations, but all interviews were in substance equal. A second panel member agreed with what had been said by the other member adding that the panel members unanimously agreed that the performance of the recommended candidates surpassed that of the applicant. He also confirmed that "the

selection process was fair, rigorous and fully conformed with the UN standards". It is true that, in a sense, the panel members are witnesses in their own cause and, accordingly, their statements should be approached with caution. At the same time, no attempt was made, as I have mentioned, to have them called for cross-examination and in those circumstances it is neither fair nor appropriate to decline to accept the truthfulness of the statements. As to whether, objectively speaking, the panel complied with the UN standards, this question cannot be decided upon the mere expression of opinion by one or more of the members but their statements to this effect should be understood as assertions that, so far as they were aware, the members of the panel did not express any bias, take into account any irrelevant or omit consideration of any relevant matter.

8. Two candidates were recommended for the posts but not the applicant. On 2 November 2007 the Central Review Committee considered that the recommended candidates were evaluated on the basis of the relevant criteria and that the applicable procedures were followed, with the consequence that it was recommended that the Director-General proceed with a final selection.

9. On 3 December 2007 the applicant was notified that he had not been selected for either of the two posts.

Applicant's submissions

10. The applicant contends that his candidacy for the two positions in question was not properly evaluated as the wording of his assessments indicated bias by omitting any explanation of the significance of the particular experience he possessed within the United Nations system, including the International Telecommunication Union. He also criticizes the comment of the panel that he had "not yet reached a level warranting assignment of self-revision/revision work at UNHQ" because, according to him, no one at that time was doing self-revision in the ATS at UNHQ. The applicant pointed out that self-revision was not even mentioned in the evaluations of the successful candidates. He contends that it was unfair that he was interviewed

over the telephone while the two selected candidates were interviewed in person and known to the panel members. So far as self-revision is concerned, he also contends that the panel's evaluation was wrong because it was inconsistent with the comments in his e-PAS that he produced high-quality translations and met the quantities standards. He also claimed that one of the successful candidates did not meet the posts' requirement of having "preferably" three years' work experience within the UN and, as a relatively new recruit, could not properly be regarded as better suited for the position.

11. At trial the applicant orally submitted that he had been told that outside candidates are never fairly considered and that e-PAS evaluations are also not considered. These contentions are based on hearsay and, at all events, were raised too late for it to be fair to require a response. I have therefore disregarded them.

Respondent's submissions

12. In substance, the respondent submits the applicant received full and fair consideration for his applications. He contends that the evidence shows that the selection panel was not biased in any way and the fact that the applicant was not personally interviewed was irrelevant. The differences in the modes of expressing the evaluations of the candidates did not justify any adverse conclusion as to the objectivity and adequacy of the panel's consideration. Mere personal knowledge by members of the panel of the candidates interviewed did not justify any conclusion of bias especially in light of the unchallenged evidence contained in the tendered statements of the two panel members. The criterion "preferably including three years [of translation experience] within the United Nations..." was not an essential but merely a desirable attribute.

The right to full and fair consideration

13. There can be no doubt that in the case of any appointment or promotion, the Secretary-General is obliged by his contract with the employees to comply with all

the statutory instruments (UN Charter, regulations, rules, administrative issuances, etc) governing such matters and established practices which amount to undertakings or representations by the Secretary-General to employees as to the applicable procedures. Any particular appointment or non-appointment that is marred by conduct which is not authorized is plainly a breach of contract. It is scarcely necessary to appeal to authority to justify this proposition, although it is customary for both parties, especially the respondent, to cite long lists of decisions made by the United Nations Administrative Tribunal in support of this elementary principle. By way of elaboration of the principle it has been pointed out that "full and fair" consideration must be given to all applicants for a post, language usually or at least often drawn from *Williamson* (1986) Judgment 362 and *Shamapande* (1997) Judgment 828, in turn derived, it seems, from reg 4.4 of the Staff Regulation (ST/SGB/2001/8), which reads, in part –

> 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.

14. The phrase "the fullest regard" is not primarily (or, arguably, at all) a reference to the nature of the selection process in itself or of the evaluation of the materials supplied by or in respect of an internal candidate but rather focuses on the consideration to be given to employees of the United Nations as distinct from outside applicants, a factor substantially if not altogether reduced to virtual insignificance by the opening proviso that this "fullest regard" is "without prejudice to the recruitment of fresh talent", phrasing that may be justifiably interpreted as taking away with the one hand what is given with the other. This provision, practically speaking, simply means that no *a priori* favour is to be accorded to either the external or the internal candidate. Any differential treatment must be (and, of course, is) authorized by other and more specific provisions.

15. Since it is obviously essential that all relevant matters affecting the suitability of a candidate must be considered and irrelevancies ignored, it is difficult to see what purpose, apart from exhortation, the superlative "full*est*" serves: either all relevant considerations are taken into account and given appropriate weight or they are not. In the absence of this phrase, could it seriously be argued that only partial regard is to be had to the candidature of the UN employee? And does its presence suggest that less than the fullest regard should be given to outside candidates? So far as "fair" consideration is concerned, it is self evident that this is a necessarily implicit requirement of the appointment and promotion process – as, indeed, of every consideration by a decision-maker of questions affecting the rights of staff members. Of course, what fairness requires will vary depending on the circumstances. This is of particular importance in this case, as I discuss below.

16. One other point might to be made: the outsider whose claims are not fairly considered has no recourse to the Tribunal, since he or she is, *ex hypothesi*, not a staff member (subject to the meaning of art 3.1(b) of the Statute of the Tribunal, which is regrettably ambiguous but, I think, has no relevance to recruitment) and must rely simply on the good faith of the decision-maker.

17. Fortunately, perhaps, the rights of staff members and the duties of management in respect of appointments and promotion can be more prosaically based upon the ordinary canons of contractual construction, since the UN statutory instruments concerning employment rights and duties form by far the major part of the staff contract. (Of course, they must be interpreted in a manner that takes into account international norms and standards: see, eg, *Nogueira* UNDT/2009/088.) So far as the issues in the present case are concerned, it is obvious that the promotion process involving the applicant and the two vacancies in question required, as a matter of contractual obligation binding on the Secretary-General and his delegates, that the persons evaluating his qualifications did so rationally and fairly in the sense and to the extent necessary to reasonably assess his claims as against others competing with

him, taking into account and appropriately weighing up all relevant matters free of any bias and irrelevant considerations and based upon accurate information in so far as it could be reasonably ascertained. So far as could reasonably be ensured, the promotion process itself was clearly designed to enable this to be achieved and it cannot sensibly be maintained that a significant departure that adversely affected its transparency, reasonableness and objectivity would not be a breach of both the Administration's obligations to the applicant and the decision-maker's obligations to the Organization. Indeed, such a departure might well call into question the authority of the decision-maker(s) to make the impugned decision since, in so doing, he, she or they would have failed to comply with the terms of any delegated authority which might have been conferred on them.

18. These contractual rights and obligations, of course, have nothing to do with any expectation that a staff member might have to an appointment or promotion. The expectation to which the staff member is entitled is that the Secretary-General and those acting under his authority will comply in good faith with the terms of the contract of employment, in particular, the instruments governing the matter in question. The requirements of the promotion and appointment process to which I have drawn attention are merely necessary implications of those instruments. This is not to say, of course, that the outcome of the process will always be irrelevant. There may be cases, hypothetically, in which the outcome is so unreasonable that it bespeaks a failure of the process even though such failure may not be patent. I should say at once that the present case is not an example of this situation.

The burden of proof

19. It is, of course, one thing to allege and quite another to prove a particular failure. There are two distinct and, in principle, contradictory lines of United Nations Administrative Tribunal jurisprudence on this question. The first and most general rule was accurately stated (if I may respectfully say so) by my colleague Laker J in *Bye* (2009) UNDT/2009/083 (for simplicity called the *Bye* rule) –

> It has been UNAT's long lasting jurisprudence that anyone alleging harassment, prejudice, discrimination or any other extraneous factor or improper motivation of a particular decision, has the *onus probandi* of such an assertion (Cf. Judgments No. 554, *Fagan* (1992); No. 553, *Abrah* (1992); No. 312, *Roberts* (1983) and No. 428, *Kumar* (1988)). This is in fact in line with a well-known maxim of law that the party who alleges a fact bears in principle the burden of proving its veracity.

20. The second rule applies in cases of disputed appointment and promotion. It is usually sourced to *Williamson* (1986) Judgment 362, where the Administrative Tribunal said –

> VII...The Respondent therefore asserts that "Applicant has not demonstrated that he had not been considered…" As to this particular assertion, the Tribunal holds that since the staff member has a statutory right to have "the fullest regard" given to his candidature, the burden of establishing the Administration's failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave "the fullest regard" to it.

21. Quite what amounts to material that "seriously calls into question" the due consideration of a candidacy is not spelt out. This is not surprising since cases will vary significantly, but I think that it is clear that the doubt must be rational and raised by some evidence, not merely by an allegation made by the applicant. Another uncertain aspect is the reference to making a *minimal showing* that "the staff member's statutory right was honoured in good faith". What is a *minimal showing*? The Compact Oxford University Dictionary defines "minimal" as "of a minimum amount, quantity, or degree". In *Abbas* (1989) Judgment 447 (at VII), the Administrative Tribunal, referring to this passage, said simply, "It follows that the burden of proof of having given [due] consideration is on the Respondent whenever a staff member questions that such consideration was given". In *Agbele* (2004) Judgment 1188 (at VII) this simple formulation was repeated but then immediately qualified by inconsistent and confusing reasoning in an attempt to escape from the clear import of the rule that the Administration must show it acted "in good faith" –

> In the case of the Applicant's claim that his application was not given fair and reasonable consideration, if there are reasons to suspect this, the onus of establishing that it was afforded proper consideration moves to the Respondent … In the view of the Tribunal, in the instant case, reasonable *prima facie* evidence was forthcoming to establish that the Applicant's candidacy had been given proper consideration. The Tribunal accepts this evidence at face value as it has not been undermined. Insofar as the Application may seek to infer that the Applicant was treated with hostility or prejudice, there is no evidence which would justify such a conclusion. The Applicant's complaints that his candidacy was never considered, that his recourse was never considered and that the Respondent is engaged in some sort of cover-up are effectively complaints of bias and prejudice, and there is no evidence to support them. The Applicant carries the onus of proving those complaints, the Tribunal having consistently held that the burden of proof is on the Applicant where allegations of extraneous motivation are made…

22. In my opinion, it is most undesirable that there should be introduced into the Tribunal's trial process varying standards of proof, especially by the use of language which is obscure. If the rule in *Williamson* is correct and the Administration is obliged to establish a fact, then it should be established on the balance of probabilities as, I think, the Administrative Tribunal accepted in the latter two cases cited above.

23. Of much greater significance in point of legal principle is the limit placed on the application of the rule to appointments and promotions as distinct from other administrative decisions subject to statutory requirements. In *Williamson*, the Administrative Tribunal based the rule upon what it called the staff member's "statutory right" in respect of his or her candidature. But the instruments of the Organization confer many "statutory rights" upon the staff member. The mere fact that they also govern the terms of the staff members' employment is immaterial to this point. After all, the same is true of the requirement that applications for appointment or promotion must be given full and fair consideration. The issue can be illustrated by reference, by way of example, to art 8 of the Charter. It states that the "United Nations shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and

subsidiary organs". This is a prohibition at the highest statutory level within the Organization of sexual discrimination or harassment in any form, plainly giving to all staff members, without qualification, a "statutory right" to equal, non-discriminatory treatment. Yet it appears from the decisions cited above that the onus of proof of discrimination or sexual harassment is firmly placed upon an applicant in respect of every impugned administrative decision except that which concerns appointment or promotion. There is no logical basis for this exception or, to put it the other way, if the rule is justified because of the existence of a statutory right, it cannot logically be limited to cases of promotion or appointment. Nor, leaving logic aside, is it possible to justify the exception on policy grounds. Nor is there any logical reason for the purposes of determining who should bear the burden of proof to distinguish impropriety derived from sexual discrimination from any other impropriety rendering a decision wrongful. The duty of management not to act improperly or, to put it positively, to act in conformity with the governing instrumental regime is directly derived from its statutory obligations towards both the Organization and staff members and is the necessary logical counterpart of the statutory rights of the staff member. Moreover, it must be immaterial in point of principle that, as it happens, the requirement in any particular case might be implicit rather than explicit.

24. The two situations can of course be differentiated – as between promotion and appointment decisions and all others or as between compliance with procedures and compliance with standards – but upon what basis of logical or rational legal principle? In my view, these artificial distinctions smack of arbitrariness reflective of unexpressed policy considerations, with a consequent lack of transparency, and undermine the legitimacy of the legal process. Coherence and consistency of principle are essential characteristics, with transparency close behind, of any legal system that aspires to justice, even accepting that there is much truth in the oft-quoted epigram of Oliver Wendell Holmes Jr in his celebrated essays on *The Common Law* (1881, before he became a judge), "The life of the law has not been logic: it has been experience".

25. Since the applicant in the present case alleges bias (amongst other things), the *Bye* rule appears to apply to him but, as it is a case of promotion, *Williamson* appears also to apply. On the face of it, this is contradictory. As a practical matter, each approach seems quite reasonable but analysis shows that the matter is not really so simple. The *Bye* rule is widely used in many areas of litigation and appears to be commended by common sense. However, of itself it does not actually yield an answer. Sometimes the facts are not in dispute and the question is purely one of law: these cases do not raise problems of the burden of proof. In cases where the staff member asserts the impugned decision is wrong for particular facts and the Administration that the decision is right for other facts, which may be additional or simply contradictory, the rule that the party who asserts must prove will not resolve the dispute. In reality it will be resolved by whichever case is the more probable. The rule that the staff member bears the onus of proof is of utility only where the cases are evenly balanced, though this is extremely rare, and, in my view, can be disregarded. But, if such case needs a determining rule, it should be that the Administration bears the burden of proof, as this term is explained below.

26. A rule that the staff member bears the onus of proving the impugned decision is wrong is simply another way of saying that there is a presumption, which can be rebutted, that administrative decisions are right. It is easy to see why this rule should apply in resolving civil litigation in general, but it is far from obvious why this should be so in the very restricted litigation conducted in the Tribunal, where all plaintiffs are staff members, there is only one defendant, the sole issue is the correctness of an administrative decision that affects a staff member's employment and, furthermore, either party can require the persons involved in making the decision to be identified and called to give evidence. A recent striking example of the significance of this procedural context is the case of *Calvani* UNDT/2009/092, where a crucial issue was whether the Secretary-General (pursuant to provisional staff rule 10.4) had actually decided to place the applicant on administrative leave without pay. My colleague Cousin J said (in my respectful view, quite rightly) –

> [25] Before the hearing, the Tribunal requested the Respondent to produce the Secretary-General's decision, to no avail. During the hearing, the Respondent reiterated that the contested decision had been made by the Secretary-General. The Respondent refused, however, to comply with the Tribunal's orders to submit a signed confirmation from the Secretary-General that he made the decision to place the Applicant on administrative leave without pay.
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> [26] Faced with contradicting allegations from the Applicant and the Respondent, the Tribunal must strive to establish the truth. If a party refuses to comply with an order from the Tribunal to produce evidence, the Tribunal must draw consequences from such refusal. An administrative decision is unlawful if the author of the decision cannot be clearly identified. In the present case, it results from the Respondent's ill will that the proof of the identity of the author of the contested decision has not been adduced. Thus the decision to place the Applicant on administrative leave appears prima facie to be unlawful.

27. I cannot for myself see any good reason why the commencing assumption (the default position, as it were) in determining a dispute in the Tribunal should be that the impugned administrative decision is correct, that is to say, that it was made on the correct and adequate basis in compliance with the requirements of the relevant instruments. After all, the Administration is the moving party in the sense that it makes the decision, which in turn must be made by a person having the relevant authority who must both have and is obliged to give reasons for doing so (certainly when demanded). Those reasons are either right or wrong (or within the reasonable range of administrative discretion, which makes the decision right). This kind of litigation is thus very different from that conducted in the outside world, which is the context in which the rule placing the burden of proof on the moving or asserting party developed.

28. It seems to me that, as a matter of fundamental principle, *neither* the staff member nor the Secretary-General should be in a favoured position. As a practical result of the rule of equality before the law, the appropriate starting position is that there are no assumptions either way. (It is implicit that I do not accept the existence of any presumption of regularity, which applies in some jurisdictions to governmental

or official acts.) Accordingly, the general rule should be that the case is determined by the preponderance of evidence. In the rare event that there is no preponderance of evidence one way or another, in my view the more appropriate rule is that the impugned administrative decision should be regarded as unjustified since the Administration has the contractual obligation of making decisions for reasons that are accurate, sufficient and proper. Although the outcome is consistent with that which results from imposing a burden of proof, this characterization depends explicitly on the contractual rights and obligations of the parties rather than on an *a priori* legal rule resting on inappropriate presumptions.

29. That there should be no rule that the administrative decision is correct by default does not mean that the decision is assumed to be wrong. As the International Labour Organization Administrative Tribunal has said, "While there is no doubt whatsoever that the Organisation owes a duty of good faith to its staff … bad faith must be proved and is never presumed": (2004) Judgment 2293 at [11], (2007) Judgment 2647 at [4]. In this context, "bad faith" does not mean mere disobedience of a rule, making a mistake of significant fact, taking into account irrelevant or omitting to consider relevant matters, or denying procedural fairness where that is a contractual requirement, but the presence of an immoral or improper motive of some kind. The requirement that alleged bad faith must be proved is entirely satisfied by the preponderance of evidence test: if the preponderance of evidence demonstrates the probability of bad faith, the staff member will have succeeded and if it demonstrates no bad faith, then he or she will not.

30. Whilst the ILOAT has also consistently stated that the staff member alleging harassment must prove specific facts supporting such an allegation, it candidly acknowledged (in (2004) Judgment 2370, at [9]) that this is often difficult to prove and warned that it was necessary to "be particularly careful to take into account all the elements arising from an adversarial examination of the alleged facts…" Although the practical effect of this warning has not been elaborated or explained, it

seems to me to be a reference to the widely accepted approach that, where evidence capable of refuting an available inference is in the hands of one party, the failure of that party to adduce that evidence may well lead the tribunal of fact to accept the inference in question although it might not otherwise have done so. This has sometimes been referred to as moving the evidentiary burden of proof of a fact, to distinguish it from the ultimate burden of proof, which does not move. This is precisely what Cousin J did in *Calvani*. This logic applies, in my view, to all administrative decisions called into question, not merely to those cases where bad faith is alleged.

31. Accordingly, even accepting that the *Bye* rule applies to the cited types of cases (namely "harassment, prejudice, discrimination or any other extraneous factor or improper motivation"), in substance, those cases where the alleged inappropriate conduct amounts to bad faith, the *effective* rule is that the outcome of the case is determined by the preponderance of evidence, including those adverse inferences that may be drawn where the party with the ability to refute or contradict a relevant fact does not do so.

32. I now turn to consider the *Williamson* rule, which is prima facie relevant to the present case, since it concerns promotion. For the reasons which I have already explained, the *Williamson* rule cannot sensibly be justified upon the basis that the obligation of the Administration is statutory, since if this is so it must apply to virtually every administrative decision affecting the staff member. The rule, however, can be adequately explained upon the basis that the Administration bears the *evidentiary* burden of demonstrating that full and fair consideration has been given to the claims of the applicant where there is evidence raising a serious doubt as to whether this occurred, since the evidence concerning the process is peculiarly within its own province and is entirely at its command. This rule, then, is rather one of practical reasoning than a principle of law and is capable of being applied to a wide range of factual disputes that the Tribunal is required to determine.

Analysis of the facts

33. That the applicant was interviewed by telephone and the successful candidates in person, does not give the latter had an unfair advantage. Of itself, the mode of interview is neutral. The personal interview might be either advantageous or disadvantageous for the particular candidate and there is nothing in this circumstance itself which could justify a conclusion one way or the other. It can readily be accepted that, in an ideal world, candidates would all be interviewed in the same environment not so much because otherwise they would not be treated equally but so that the potential for criticism would be avoided. It might have been possible for the panel to have interviewed the other candidates by telephone from another room but it seems to me that this would have been to give too much credence to an unreasonable criticism. In short, I consider that the mode of interviewing the applicant by telephone was fair, even though other candidates were interviewed in person.

34. A more significant criticism is that it appears that one or more of the panel members was personally acquainted with the successful candidates, though it is not suggested and there is no reason to believe that this was anything more than mere professional acquaintance. That members of the panel were personally acquainted with the successful candidates appears from the note to which I have already referred concerning the applicant's relations with colleagues stating that "we don't have direct experience on that as he is not working at UNOG" implying that one or more of the panel members did have direct experience of the successful candidates' teamwork. The clear sense of the passage, read as a whole, is that the panel acted on the basis that the applicant indeed did maintain good relations with colleagues.

35. As a more general matter, I do not think that the mere fact that one or more members of the panel had some personal knowledge of the other candidates and the successful ones in particular is of itself unfair to the applicant: it obviously does not follow that they gave less consideration to his claims; and there is no reason to infer that they gave more consideration to the claims of the candidates they knew. It is, of

course, reasonable to infer that they knew more about those candidates than merely appeared on the documents but I think that is knowledge which the panel was entitled to take into account in evaluating the competing claims.

36. A selection panel is not a judicial or quasi-judicial tribunal having the duty of impartially determining a case between litigating parties, each of whom must be made aware of and have the opportunity to respond to the evidence upon which the case is to be decided. Candidates are not in any sense like witnesses whose evidence must be assessed in its own terms by a judicial tribunal which cannot bring into account any personal knowledge of a witness or, indeed, any special knowledge relevant to the case but which has not been adduced by the parties. The function of the selection panel is fundamentally different, for all that it must act objectively and fairly. It is its duty to bring to bear its combined knowledge of the requirements of the position, the particular competencies necessary, the environment in which the work is to take place, and any other relevant factor that might assist them in their task of selecting the best candidate. In my view this includes any personal knowledge that they might have about a particular candidate, whether in favour of or adverse to him or her. If adverse, of course, it would be necessary in the interests of fairness to bring that matter to the attention of the candidate during the interview in order to provide an opportunity for response. However, I do not see why, in principle, the Organization should not be able to take advantage of the knowledge of members of a particular selection panel of the attributes of the candidates which it is interviewing. To do this is not, to my mind, to be in any way unfair to a candidate who is not personally known. Of course, if there were any real suggestion of favouritism or conflict of interest of any kind then it would be quite wrong for the panel member whose relationship with a candidate could give rise to such a suspicion to sit on the panel. Mere personal knowledge of a candidate does not in my opinion give rise of itself to a serious question of favouritism or conflict of interest, as distinct from a speculative possibility. At all events the statements of the panel members, in effect, refuted this allegation. Furthermore, it was not disputed that the panel, as is

conventional, proceeded by way of asking the same set of agreed questions. I conclude that, so far as the evidence goes in this case, in acting, in part, on the knowledge of a candidate, the panel acted fairly.

37. The applicant contends that the comment of the panel that "[h]e has not yet reached a level warranting assignment of self-revision/revision work at UNHQ, even under monitoring as common practice" was inaccurate since, according to him, "no one, at that time, was doing self-revision in the Arabic Translation Service (ATS) at UNHQ". It does not seem to me that this is a contradiction. Since self-revision was a function of the post, I would infer that the applicant had dealt with this question in his application and possibly also in the interview. The applicant also relies on his favourable e-PAS evaluations but these, though no doubt advantageous for him as a general matter, do not deal with the question of self-revision. As was in effect pointed out by one of the panel members, the applicant's e-PAS evaluation did not deal with self-revision since this was no part of his work. In the end, the level of the applicant's skill in this respect referred to by the panel was a matter peculiarly within its expertise to assess and the evidence does not permit the conclusion that it was mistaken. The fact that this matter is not mentioned in the evaluations of the successful candidates justifies the inference that it was not an issue as far as they were concerned. It does not suggest any unequal treatment.

38. The applicant submits that the extent of his experience as a translator was not duly taken into account in his overall evaluation, since, unlike the other candidates, it was not described (as distinct from listed) in his overall evaluation. However, the chronology of his experience was set out and it can reasonably be inferred that the panel was fully cognizant of the kind of work which he would have been undertaking in the employments listed. The applicant also contends that one of the other candidates received one point more for his language skills, namely 16 points, than the applicant, who only received 15 points, even though their language skills were identically described. It is one thing to use the same descriptive narrative about a

skill set and another to infer these skills were precisely identical. The difference of one point is not inconsistent with the descriptions.

39. Finally, the applicant contended that requirement in the vacancy announcement that the candidate's experience "preferably includ[ed] three years within the United Nations" as spelled out in the for the posts, was not satisfied in the case of one of the successful candidates, whose UN experience of two years ten months was noted as "some three years". It is clear that the three year preferential criterion was not mandatory but that, if it was not satisfied in any case, it would be necessary that other factors would need to compensate this particular shortcoming. It is obvious from the language used by the panel (which was accurate enough for its purposes) that it regarded the shortfall of about two months as insignificant when weighed against the other experience and attributes of the successful candidate. The mere fact that this candidate had considerably less experience within the UN context than the applicant does not in any way support an argument that he was overall less suitable than the applicant for selection: it is obvious that the whole of a candidate's experience must be taken into account.

40. It is, I think, worth pointing out that the narrative of evaluation cannot be interpreted as one would a legal document. It is obviously created at the end of the process and quite possibly after the scores had been agreed. The mere fact that the qualifications of the successful candidates are somewhat more elaborately set out than those of the applicant cannot justify any inference of unequal treatment or less than full consideration of his claims. It is not surprising, in the ordinary course, that a selection panel might wish to explain in greater detail why it considered the recommended candidates to be the most suitable for appointment.

41. One can understand and sympathise with the applicant's feelings of disappointment but, in the result, his contentions, though not entirely unreasonable, cannot be accepted.

Conclusion

42. The preponderance of evidence demonstrates that the applicant's candidature was given full and fair consideration and, accordingly, the application is dismissed.

(*Signed*)

Judge Adams

Dated this 24th day of December 2009

Entered in the Register on this 24th day of December 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York