



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/051

Judgment No.: UNDT/2012/013

Date: 30 January 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

AMER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bart Willemsen, OSLA

Counsel for Respondent:

Shelly Pitterman, UNHCR

Introduction

1. The Applicant contests the decision by which the Office of the United Nations High Commissioner for Refugees (“UNHCR”) considered that he was not eligible for consideration for conversion of his fixed-term appointment to an indefinite appointment.

2. He requests rescission of the contested decision.

Facts

3. The Applicant was recruited by UNHCR in Cairo, Egypt, an A duty station, in March 2002 for a fixed-term contract at the Professional level. His contract was extended several times. In 2005, he was reassigned to Accra, Ghana, a B duty station.

4. In January 2006, he was appointed to a post in Rumbek, Southern Sudan, an E duty station. However, his post was discontinued on 31 December 2006 and his appointment was extended in Southern Sudan by two months. After accepting a temporary contract in Geneva in February 2007, the Applicant was reassigned to a new post there in June 2007.

5. In an internal memorandum of 21 January 2011 entitled “One-Time Review for the Granting of Indefinite Appointments” (IOM/04-FOM/05/2011), the High Commissioner for Refugees informed UNHCR staff that in view of the entry into force of the new Staff Regulations and Rules on 1 July 2009, a one-time review would be initiated in order to consider candidates who met the eligibility requirements as of 30 June 2009 for consideration for conversion from a fixed-term appointment to an indefinite appointment. Paragraph 12(b) of the memorandum also stated that in order to be eligible, Professional staff must have served a minimum of two years in a D or E duty station.

6. Pursuant to this memorandum, by email dated 23 February 2011, the Director of the Division of Human Resources Management indicated that the staff members who met the eligibility requirements for consideration for conversion to

an indefinite appointment had been informed through individual mail. Staff members who had not received such notification but considered that they met the requirements were invited to contact the Recruitment and Appointments Service, which the Applicant did on 27 February of the same year.

7. By email dated 2 March 2011, the Applicant was advised that, owing to non-compliance with the requirement of at least two years of service in a D or E duty station, he was not eligible for consideration for conversion of his fixed-term appointment to an indefinite appointment.

8. On 23 March 2011, the Applicant submitted a request for management evaluation of the decision communicated on 2 March 2011.

9. By letter dated 21 June 2011, he was notified by the Deputy High Commissioner for Refugees that the decision not to consider him eligible for consideration for conversion of his fixed-term appointment to an indefinite appointment would stand.

10. The Applicant submitted his application to the Tribunal Registry on 9 September 2011 and the Respondent filed his reply on 10 October of that year.

11. By Order No. 178 (GVA/2011) of 19 October 2011, the Tribunal raised, on its own motion, the issue of the lawfulness of the conversion procedure provided for in the internal memorandum of 21 January 2011 in view of the fact that the Staff Rules with effect from 30 June 2009 precluded the granting of indefinite appointments.

12. Counsel for the Respondent and Counsel for the Applicant submitted their observations on 2 and 3 November 2011, respectively.

13. On 24 January 2012, the Tribunal held a hearing in which Counsel for the Respondent and Counsel for the Applicant participated in person.

Parties' submissions

14. The Applicant's contentions are:
- a. As at 30 June 2009, he had more than seven years of service, thereby fulfilling one of the eligibility criteria for the one-time review;
 - b. He served in a number of duty stations in compliance with the expectation that staff members rotate on a regular basis. He served in an E duty station for 13 months, and it was because his post was discontinued that he was unable to meet the two-year requirement. Notwithstanding his own efforts to remain at that duty station, UNHCR was unable to allow him to remain there, and he is now being penalized for that reason. Yet, the purpose of the one-time review is to reward staff members who have demonstrated their commitment to UNHCR, including in dangerous duty stations, and the Applicant's work history makes it clear that he has such a commitment;
 - c. Since indefinite appointments are considered career appointments and since the General Assembly, while underlining in its relevant resolutions the importance of the concept of career service in the United Nations, has never suggested that the granting of career appointments should be made contingent upon two years of service in a particular category of duty station, the High Commissioner's imposition of such a requirement was *ultra vires*;
 - d. While General Assembly resolution 51/226 states that five years of continuing service do not confer the automatic right to a permanent appointment and that "other considerations, such as outstanding professional performance, the operational realities of the organizations and the core functions of the post" should be duly taken into account, the "other considerations" should have a reasonable nexus to the concept of career service. This is not true of the contested requirement in this case since the criterion of two years of service in a designated duty station is

contingent upon the outcome of a selection process that does not take staff members' wishes into account;

e. Application of the contested criterion excludes staff members who have demonstrated an objective interest in serving in D or E duty stations but were never selected for those positions and staff members who have served in such duty stations but were unable to complete two years of service as a result of events outside their control. Thus, application of the contested criterion precludes "reasonable consideration" of requests for conversion of appointments. Such consideration should be based on criteria that are within the staff member's control or that have some reasonable nexus to the concept of career service and are applicable to all staff members without distinction;

f. The Deputy High Commissioner for Refugees has already authorized exceptions to the contested criterion and the circumstances of the three staff members who benefited from those exceptions are not sufficiently different from the Applicant's to warrant a less rigid application of the contested criterion;

g. Concerning the issue raised by the Tribunal on its own motion, he concurs with the Respondent's observations.

15. The Respondent's contentions are:

a. The Applicant does not claim to have been eligible under the internal memorandum of 21 January 2011; rather, he questions its lawfulness. The Tribunal does not have the authority to amend the applicable regulations or to set aside the memorandum, but only to interpret its provisions in light of higher-ranking laws. In this case, the memorandum does not violate such laws;

b. The High Commissioner did not act *ultra vires* when introducing the requirement of two years of service in a D or E duty station. In its resolution 37/126, the General Assembly decided that "staff members on

fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment". Former staff rule 104.12(b)(iii) and current staff rule 13.4(b) state that the status of staff members who meet the eligibility criteria for a permanent appointment will be considered "taking into account all the interests of the Organization". Furthermore, resolution 51/226 states that considerations other than five years of continuing service should be taken into account in awarding a permanent contract and, in light of the operational considerations of UNHCR, the requirement of two years of service in a D or E duty station, which provides an incentive for staff to assume functions in the deep field, is a reasonable consideration with a view to career service;

c. The requirement of two years of service in a D or E duty station has a reasonable nexus with the concept of career service. A strict rotation policy for UNHCR staff both satisfies the Office's operational requirements and the need for burden-sharing among its professional staff and gives staff working at headquarters an understanding of field realities;

d. The requirement of two years of service in a D or E duty station has been a crucial part of the legal framework governing the granting of indefinite appointments for an extended period of time. It was introduced under the former Staff Rules and was expressly stipulated in the Procedural Guidelines for Appointments, Postings and Promotions promulgated on 3 November 2003. Consequently, it does not constitute a new limitation to the applicable provisions and the Applicant had long been aware of it;

e. The contested criterion allows for reasonable consideration of requests for conversion of appointments. It was applied without distinction to all staff who were subject to rotation;

f. The General Assembly did not intend to confer on staff the right to conversion of their appointments to indefinite appointments and the Administration has discretionary authority in that area;

g. The circumstances of the staff who were granted indefinite appointments despite not having served in the deep field were substantially different from those of the Applicant. Even if he had been in the same situation as those staff members, that would have had no impact on his chances of being granted an indefinite appointment since the number of contract conversions was unlimited;

h. Concerning the issue raised by the Tribunal on its own motion, the one-time review exercise for the granting of indefinite appointments in accordance with internal memorandum IOM/04-FOM/05/2011 addresses the acquired rights of UNHCR staff and does not violate any higher-ranking law.

Consideration

16. The Tribunal, through its Order No. 178 (GVA/2011) of 19 October 2011, raised on its own motion the issue of the lawfulness of conversion of fixed-term appointments to indefinite appointments by UNHCR as provided in the internal memorandum of 21 January 2011. However, in light of the written observations submitted by the parties and their oral observations during the hearing, the Tribunal considers that there is no further need to consider the issue that it raised.

17. Therefore, it must now consider the arguments submitted by the Applicant in contesting the lawfulness of the High Commissioner's decision not to convert his fixed-term appointment to an indefinite appointment.

18. The Applicant first maintains that the High Commissioner acted *ultra vires* in requiring at least two years of service in a D or E duty station for conversion of a staff member's fixed-term appointment to an indefinite appointment, as he did in his internal memorandum IOM/04-FOM/05/2011 of 21 January 2011, since this criterion was not envisaged by the General Assembly.

19. Internal memorandum IOM/04-FOM/05/2011 of 21 January 2011, entitled "One-Time Review for the Granting of Indefinite Appointments", refers to the Procedural Guidelines for Appointments, Postings and Promotions, promulgated

by internal memorandum IOM/FOM/75/2003, which establish the eligibility criteria for a staff member's consideration for conversion of a fixed-term appointment to an indefinite appointment, including the requirement of a minimum of two years of service in a D or E duty station.

20. The Applicant maintains that the General Assembly, in its resolution 51/226 (Human resources management) of 25 April 1997, did not expressly establish that criterion of length of service in a particular duty station and that the High Commissioner therefore acted *ultra vires*.

21. However, the aforementioned resolution states:

[The General Assembly,] *Taking note* of the report of the Secretary-General on the ratio between career and fixed-term appointments,

1. *Underlines* the importance of the concept of career service for staff members performing continuing core functions:

...

3. *Decides* that five years of continuing services as stipulated in its resolution 37/126 of 17 December 1982 do not confer the automatic right to a permanent appointment, and also decides that other considerations, such as outstanding performance, the operational realities of the organizations and the core functions of the post, should be duly taken into account [.]

22. Thus, the intent of the United Nations General Assembly, as expressed in the aforementioned resolution, was not to establish an automatic right to a permanent appointment but to allow the Secretary-General, and therefore the High Commissioner for Refugees, to take other considerations into account, including the operational realities of the organizations that they head.

23. It is beyond dispute that, owing to the operational realities of UNHCR as assessed by the High Commissioner, he may wish to grant indefinite appointments only to staff members on fixed-term appointments who have two years of service in D or E duty stations, which are considered more difficult than other duty stations, and the Tribunal does not find this unreasonable within the meaning of General Assembly resolution 37/126, adopted on 17 December 1982.

24. While the Applicant goes on to maintain that it was the UNHCR Administration that prevented him from meeting the requirement of two years of service in a D or E duty station since his position in one such duty station was discontinued, this circumstance has no bearing on the lawfulness of the contested decision since it is clear that UNHCR deliberately chose to give a career advantage to staff who met the established criteria.

25. Lastly, while the Applicant maintains that staff members who did not meet the criterion of service in D or E duty stations were nevertheless awarded indefinite appointments, he provides no evidence in support of his allegations. Although the High Commissioner, in his defense, admits that exceptions were made for medical reasons, it appears that internal memorandum IOM/04-FOM/05/2011 of 21 January 2011 refers to the Procedural Guidelines for Appointments, Postings and Promotions, promulgated by internal memorandum IOM/FOM/75/2003, which provide for medical exceptions to the rotation requirement for staff members.

26. Thus, the Applicant, who was not in the same situation as the staff members for whom medical exceptions were warranted, cannot claim that the Administration did not meet its obligation to treat staff members in similar situations alike.

27. It is clear from the foregoing that none of the Applicant's contentions establish the unlawfulness of the contested decision.

Conclusion

28. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 30th day of January 2012

Entered in the Register on this 30th day of January 2012

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry