Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2011/087
Judgment No.:	UNDT/2012/016
Date:	30 January 2012
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

KRALJEVIC

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 she was not eligible for consideration for conversion of her fixed-term appointment to an indefinite appointment.

2. She requests rescission of the contested decision.

Facts

3. The Applicant was recruited by UNHCR in Croatia in December 1992 on a short-term contract in the General Service category. She was granted a fixed-term appointment in August 1996, followed by an indefinite appointment in January 2000. In January 2005, her contract was terminated following the abolition of her post.

4. In February 2005, the Applicant was reappointed at the Professional level under a fixed-term contract in Kuala Lumpur, Malaysia, an A duty station.

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 1 March 2011.

7. By email dated 28 February 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, she was not eligible for consideration for conversion of her fixed-term appointment to an indefinite appointment.

8. On 13 April 2011, the Applicant submitted a request for management evaluation of the decision communicated on 28 February 2011.

9. By letter dated 7 July 2011, sent to the Applicant on 15 July 2011, she was notified by the Deputy High Commissioner for Refugees that the decision not to consider her eligible for consideration for conversion of her fixed-term appointment to an indefinite appointment would stand.

10. The Applicant submitted her application to the Tribunal Registry in New York on 13 October 2011, and the Respondent filed his reply on 16 November 2011. The same day, the Respondent also requested a change of venue from New York to Geneva because, *inter alia*, three similar cases were before the Tribunal in Geneva.

11. By Order No. 282 (NY/2011) of 1 December 2011, the Tribunal decided to transfer the case to the Geneva Registry.

12. By Order No. 8 (GVA/2012) of 6 January 2012, 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.

13. Counsel for the Respondent and Counsel for the Applicant submitted their observations on 12 and 13 January 2012, respectively.

14. 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

15. The Applicant's contentions are:

a. The High Commissioner acted *ultra vires* in introducing the additional criterion of two years of service in a D or E duty station, contrary to United Nations General Assembly resolutions 37/126 and 51/226. This additional requirement by the High Commissioner is without nexus to the concept of career service as it disregards the fact that the assignment to a designated duty station is contingent upon the outcome of a selection process that does not take staff members' wishes into account. Application of the contested criterion excludes, *inter alia*, staff members who have never been selected for service in D or E duty stations and staff members who would be unable to work in such duty stations even if the organization gave them the opportunity to do so;

b. Thus, application of the contested criterion precludes "reasonable consideration" for a request for conversion of appointment. 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;

c. The Applicant, through no fault of her own, was unable to meet the contested criterion because the Administration failed to include her on the International Professional Roster until June 2008, when she was at the P-2 level;

d. Exceptions to the above requirement have been granted for other staff members, and the Applicant's personal circumstances should have been taken into account in determining her eligibility. In particular, she faithfully served UNHCR during the war in Croatia from 1992 to 1995. In addition, the criterion imposed by the High Commissioner was impossible to fulfill given her situation as a single mother, which prevented her from requesting assignment to non-family duty stations. Moreover, until 2005,

the Applicant was a General Service staff member and therefore not subject to rotation;

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

16. The Respondent's contentions are:

a. The Applicant does not claim to have been eligible under the internal memorandum of 21 January 2011; rather, she 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 to 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. It has not been established that the Administration failed to comply with an obligation to include the Applicant on the International Professional Roster until June 2008. In any event, the Applicant did not submit any application for service in a D or E duty station between 6 September 2002 and 3 November 2008. After that, she applied only once for service in a D or E duty station;

h. 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;

i. 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

17. The Tribunal, through its Order No. 8 (GVA/2012) of 6 January 2012, 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.

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

19. 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.

20. 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.

21. 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*.

22. 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 service 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[.]

23. 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.

24. 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.

25. While the Applicant goes on to maintain that it was the UNHCR Administration that prevented her from meeting the requirement of two years of service in a D or E duty station because she had not been placed on the International Professional Roster before 2008, she does not substantiate her allegation that she was entitled to be included in the said Roster. Moreover, the Respondent points out, without being contradicted, that the Applicant did not apply for any position in a D or E duty station between September 2002 and November 2008, whereas she had applied for positions in other categories of duty stations.

26. Lastly, while the Applicant maintains that staff members who did not meet the criterion of service in D or E duty stations were nevertheless granted indefinite appointments, she provides no evidence in support of her 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.

27. 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 in similar situations alike.

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

Conclusion

29. 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