



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

BALAKRISHNAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), contests the failure of the Assistant Secretary-General for Human Resources Management to take a decision on his case for conversion to a permanent appointment in a timely fashion, as well as the decision to submit his case to the Central Review Committee established at the United Nations Secretariat Headquarters in New York.

2. He requests the Tribunal:

a. To declare the contested decisions null and void;

b. To award him compensation for the violation of his procedural rights and for moral damage;

c. To order the Assistant Secretary-General for Human Resources Management to complete her review of his case for conversion as a matter of priority within one month of the UNDT decision in this case or to order that his case be submitted to the ICTY Central Review Committee for prompt consideration.

Facts

3. The Applicant entered the service of ICTY in September 2002 on a fixed-term appointment at level P-2. He was promoted to the P-3 level in November 2008 and separated from service on 1 March 2012.

4. On 23 June 2009, the Secretary-General issued bulletin ST/SGB/2009/10 on the consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009.

5. Guidelines on the consideration for conversion were further approved by the Assistant Secretary-General for Human Resources Management on 29 January 2010 and transmitted by the Under-Secretary-General for Management on 16 February 2010 to all Heads of Department and Office, including at ICTY, who

were asked to conduct a review of individual staff members in their department or office and to submit a recommendation to the Assistant Secretary-General for Human Resources Management.

6. By letter dated 17 February 2010, the President of ICTY wrote to the Secretary-General of the United Nations to complain about the position taken by the Under-Secretary-General for Management that ICTY staff were not eligible for conversion because ICTY was an organization with a finite mandate.

7. By letter dated 10 March 2010, the Under-Secretary-General for Management responded to the above letter clarifying that “[i]n accordance with the old staff rules 104.12(b)(iii) and 104.13, consideration for a permanent appointment involves ‘taking into account all the *interests* of the Organization’”. She further noted that in 1997, the General Assembly adopted resolution 51/226, in which it decided that five years of continuing service do not confer an automatic right to conversion to a permanent appointment and noted that other considerations, such as the operational realities of the Organization and the core functions of the post should be taken into account in granting these permanent appointments. Therefore, she added, “when managers and human resources officers in ICTY are considering candidacies of staff members for permanent appointments they have to keep in mind the operational realities of ... ICTY, including its finite mandate”.

8. On 23 April 2010, ICTY implemented an online portal on staff eligibility for permanent appointments.

9. On 11 May 2010, ICTY transmitted to the Office of Human Resources Management (“OHRM”) at UN Headquarters in New York the list of staff eligible for conversion to a permanent appointment. The Applicant’s name was included in the list.

10. At the XXXI Session of the Staff-Management Coordination Committee (“SMCC”) held in Beirut from 10 to 16 June 2010, it was “agreed that management [would] consider eligible Tribunal staff for conversion to a permanent appointment on a priority basis”.

11. On 12 July 2010, the Registrar of ICTY transmitted to OHRM a list of 371 eligible staff members, including the Applicant, found suitable for consideration for conversion and thus “jointly recommended by the Acting Chief of Human Resources Section” and the Registrar of ICTY.

12. On 31 August 2010, the Deputy Secretary-General, on behalf of the Secretary-General, approved the recommendations contained in the Report of the SMCC XXXI Session (see paragraph 10 above).

13. By email dated 6 September 2010, the Applicant wrote to the Assistant Secretary-General for Human Resources Management to enquire about the status of his case for conversion. On 20 September 2010, the Chief of Section C, Human Resources Service, Learning Development and Human Resources Services Division, at OHRM responded to the Applicant that his “case [was] being considered with other recommendations submitted by the ICTY” and that he would “be informed of the Secretary-General’s decision [sic] in writing when the review process has been finalized”.

14. Based on its review of the ICTY submission of 12 July 2010, on 19 October 2010 OHRM submitted the matter for review to the New York central review bodies, stating that “taking into consideration all the interests of the Organization and the operational reality of [ICTY], [OHRM] was not in the position to endorse [ICTY] recommendation[s]”, as ICTY was downsizing and expected to close by 2014.

15. In November and December 2010, the central review bodies reviewed the recommendations made for ICTY staff and concurred with OHRM recommendation that the staff members not be granted permanent appointments.

16. In February 2011, ICTY staff were formally notified that there had been no joint positive recommendations by OHRM and ICTY on the granting of permanent appointments and that accordingly, the cases had been referred “to the appropriate advisory body”.

17. By letter dated 16 February 2011, the Applicant requested management evaluation of the “administrative decision ... taken by the Assistant Secretary-General [for] Human Resources Management ... to (i) forward [his] application to a central review committee (CRC) at UN Headquarters, and, in so doing, (ii) failing to provide priority consideration for the conversion of [his] fixed-term appointment to a permanent appointment. Furthermore, the ASG-OHRM (iii) violated [his] procedural right to notice by not informing [him] in a timely manner of her decision to submit [his] application to a CRC.”

18. On 25 February 2011, the Management Evaluation Unit, UN Secretariat, New York, responded to the Applicant that his request was “not receivable as no final administrative decision [had] been made at this time”. The Management Evaluation Unit noted that the cases for conversion of staff serving at ICTY were “still under review by the Central Review Bodies” and that the Applicant may request a management evaluation “[o]nce an administrative decision has been taken regarding [his] suitability for conversion to permanent appointment by the ASG/OHRM”.

19. Further to her review of the central review bodies’ opinion of late 2010, the Assistant Secretary-General for Human Resources Management noted that the bodies in question did not appear to have had all relevant information before them. Accordingly, on 4 April 2011, OHRM returned the matter to the central review bodies, requesting that they review the full submissions of ICTY and OHRM and provide a revised recommendation.

20. On 13 May 2011, the Applicant filed the present application, which was transmitted on the same day to the Respondent.

21. On 2 June 2011, the Respondent filed a motion for leave to have receivability considered as a preliminary issue, on the ground that there was no final administrative decision since a determination of the Applicant’s suitability for conversion was still pending.

22. By Order No. 97 (GVA/2011) dated 9 June 2011, the Tribunal rejected the Respondent's motion noting that the question of whether the application was receivable was not a clear-cut issue.

23. On 20 June 2011, the New York central review bodies' revised recommendation was submitted to the Assistant Secretary-General for Human Resources Management.

24. On 21 June 2011, the Respondent filed and served his reply to the application and on 21 July, the Applicant filed observations.

25. By letter dated 6 October 2011 and communicated to the Applicant on 10 October, the Registrar of ICTY informed the Applicant of the decision of the Assistant Secretary-General for Human Resources Management not to grant him a permanent appointment. The letter stated that:

This decision was taken after review of your case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly the downsizing of ICTY following the Security Council Resolution 1503 (2003).

26. On 28 November 2011, the Respondent transmitted to the Tribunal the above-mentioned decision.

27. By email dated 29 November 2011, the Applicant's private counsel informed the Tribunal that he had decided to withdraw, that he would be replaced by another counsel, and that the Applicant had no objections. However, no authorization signed by the Applicant was provided and no information was submitted on the good standing of the newly designated counsel.

28. By Order No. 47 (GVA/2012) of 2 March 2012, taking note of the decision of 6 October 2011, recalling its case law on preparatory decisions, and considering the time that had elapsed since the application was filed, the Tribunal allowed the Applicant to review and amend his pleadings as necessary. The Tribunal further informed the parties that it considered that the case could be dealt with on the papers, without a hearing, and gave them one week to file objections,

if any. The Applicant did not file amended pleadings and neither party objected to the case being decided on the papers.

29. By email dated 23 March 2012, the Tribunal requested the Applicant and the newly designated counsel to complete and sign a counsel authorization form, pursuant to articles 8.2(c) and 12 of its Rules of Procedure, and to return it to the Tribunal by 27 March. Although both the Applicant and counsel confirmed receipt of the email on the same day, the duly completed form was not returned within the prescribed time limit.

Parties' submissions

30. The Applicant's principal contentions are:

Receivability

a. The application is receivable *ratione materiae* because the delay in reviewing his case for conversion was entirely avoidable, violates his right to priority consideration, and constitutes an administrative decision that produces direct legal consequences for him;

Merits

b. The Guidelines on the consideration for conversion approved by the Assistant Secretary-General for Human Resources Management on 29 January 2010 contain an additional criterion whereby only staff members in active service are eligible for conversion. This criterion is unlawful;

c. The Assistant Secretary-General for Human Resources Management unduly delayed the taking of a final decision on his case for conversion to a permanent appointment. This was done on purpose: as ICTY is downsizing and the Guidelines provide that only staff members in active service are eligible for conversion, there are every month fewer eligible staff members;

d. OHRM failed to comply with its obligation to give priority consideration to the Applicant's case for conversion;

e. ICTY staff members have been discriminated against in their cases for conversion. In 2010-2011, hundreds of UN staff members have been timely converted to permanent appointments, whereas no ICTY staff member has been converted. The fact that ICTY is a downsizing organization that will close within the next couple of years does not justify discriminating against ICTY staff;

f. He was not given timely notice of the fact that his case for conversion had been submitted to the Central Review Committee;

g. The decision to submit his application to the Central Review Committee established at UN Headquarters in New York is an abuse of discretion.

31. The Respondent's principal contentions are:

Receivability

a. The Applicant's claims are not receivable as they do not concern a final administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute. The referral to the central review bodies was a step in the decision making-process. When the application was filed, there was no final decision from the Assistant Secretary-General for Human Resources Management on whether the Applicant should be granted a permanent appointment;

b. The Applicant's argument that the referral of his case to the central review bodies created a legal consequence on him in the form of an avoidable delay is incorrect. First, there is no factual basis for saying that there was avoidable delay; considering that the one-time review involves 5,693 cases in numerous offices and departments across the world, the time taken to conduct the review is reasonable and justified. Second, any delay in the review would have no legal consequence on the Applicant's

conversion as the effective date of conversion would be 30 June 2009. Third, the Applicant does not elaborate which term of appointment or contract has been violated by the length of time required to review his case for conversion;

c. The decision whether the central review bodies at UN Headquarters are the appropriate advisory bodies to review the cases where OHRM and ICTY do not agree on the granting of a permanent appointment is a regulatory decision of general application and is not appealable;

Merits

d. 10 months have transpired between the Applicant's request for conversion of his appointment and his application to the Tribunal. This cannot be characterized as an undue or unreasonable delay, especially given the large scale of the one-time review;

e. The Applicant's claim that he has a right to priority consideration has no legal basis. The SMCC report does not form part of the Organization's regulations, rules, and administrative issuances;

f. His claim of discrimination is unfounded. He was considered for conversion in accordance with the provisions of ST/SGB/2009/10. The review for suitability considered *inter alia* the operational realities of the Organization as mandated by the General Assembly and the objective reality in the Applicant's case is that he is employed with a downsizing entity scheduled for closure by 31 December 2014;

g. The Applicant has been duly notified of the referral of his case to the central review bodies. The timing of the notice did not affect his rights;

h. The Applicant's allegation that the delay in finalizing his case is motivated by an improper purpose is not substantiated by any evidence;

i. The Applicant's claim that the Guidelines contain an additional requirement not present in ST/SGB/2009/10 is moot/purely academic and thus not receivable. The Applicant has not been prejudiced by the alleged additional requirement. Further, this requirement is not an additional one since ST/SGB/2009/10 is clearly limited to staff;

j. As there is no reference to the ICTY duty station in ST/SGB/2009/10, it was within the Respondent's lawful discretion to provide for referral of the Applicant's case to the New York central review bodies.

Consideration

32. As a preliminary matter, the Tribunal notes that the requirements of article 8.2(c) and article 12 of its Rules of Procedure have not been complied with since the Applicant did not formally authorize counsel to represent him and no information was provided on the good standing of counsel. Accordingly, the Tribunal considers that the Applicant, at this stage of the proceedings, is self-represented.

33. The decisions contested by the Applicant before the Tribunal are the failure of the Assistant Secretary-General for Human Resources Management to take a decision on his case for conversion to a permanent appointment in a timely fashion, as well as the decision to submit his case to the New York Central Review Committee.

34. The Applicant was notified on 10 October 2011 of the final decision dated 6 October 2010 of the Assistant Secretary-General for Human Resources Management not to grant him a permanent appointment. This decision, however, has not been contested by the Applicant before the Tribunal, at least not yet. Although he was given the opportunity to amend his pleadings in this case, the Applicant did not do so.

35. The Tribunal recalls that according to its well-settled case law, preparatory decisions are not subject to appeal. For example, in *Bajnoci* UNDT/2012/028,

which also concerned the review of the case for conversion to a permanent appointment of an ICTY staff member, the Tribunal held:

23. Even assuming that in fact, in her application, the Applicant intended to contest, as in her request for management evaluation, the decision of her Chief of Section not to recommend her for conversion, such decision is only a preparatory decision which does not affect the scope or extent of the Applicant's rights and which is thus not subject to appeal. As the Tribunal held in *Payman* UNDT/2011/193,

[t]he one-time review for conversion to permanent appointment involves a series of interlocutory findings which lead to an administrative decision. These findings may be challenged only in the context of an appeal against the outcome of the consideration for conversion to permanent appointment but cannot be, alone, the subject of an appeal to the Tribunal.

24. The challenge of the decision not to recommend the Applicant for conversion is therefore not receivable (see also *Ishak* UNDT/2010/085, *Elasoud* UNDT/2010/111, *Price* UNDT/2011/095, *Gehr* UNDT/2011/178).

36. This approach is consistent with the jurisprudence of the United Nations Appeals Tribunal. In *Ishak* 2011-UNAT-152, the Appeals Tribunal adopted a similar reasoning, albeit in a non-selection case:

A selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT. In the event of *Ishak*'s non-promotion continuing after the recourse session, those decisions may well have become grounds to challenge the administrative decision of non-promotion.

37. The Tribunal considers that the decisions contested by the Applicant before this court are preparatory decisions which may only be challenged in the context of an appeal against the final decision of the Assistant Secretary-General for Human Resources Management dated 6 October 2011.

38. Accordingly, the application is not receivable.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 28th day of March 2012

Entered in the Register on this 28th day of March 2012

(Signed)

René M. Vargas M., Registrar