



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Officer-in-Charge

CHOWDHURY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Alan M. Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is contesting the decision of the Assistant Secretary-General for Human Resources Management (ASG/OHRM) not to grant him a permanent appointment. The contested decision arose as a consequence of the downsizing of the International Criminal Tribunal for Rwanda (ICTR) following the adoption of Security Council Resolution 1503 (2003).

Facts

2. The Applicant entered the service of the United Nations in 1993 as a Finance Officer with the United Nations Development Programme (UNDP) in Dhaka, Bangladesh. He joined the Department of Peacekeeping Operations (DPKO) in 2001. He served in the United Nations Office of the Humanitarian Coordinator for Iraq (UNOHCI) and the United Nations Mission in Liberia (UNMIL). He began service with the ICTR on 1 April 2005. At the time of the Application, the Applicant was at the P4 level.

3. On 16 February 2010, the Under-Secretary-General for Management issued 'Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as of 30 June 2009' to all Heads of Departments and Offices including the Registries of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively). On 22 February 2010, Ms. Sandra Haji-Ahmed, the Officer-in-Charge, OHRM, informed the Registry of the ICTR and all Heads of Departments at headquarters that they were expected to follow the Guidelines in reviewing the eligibility of staff for conversion to permanent appointments.

4. These Guidelines included a template memorandum for the submission of recommendations for conversion to ASG/OHRM as the final authority for decisions under ST/SGB/2009/10. Section 5 required the entity submitting the request to specify whether the staff member is currently serving 'in an entity which is downsizing or expecting to close...' or 'in an entity which is not downsizing or expected to close.'

5. Staff of the ICTR was informed by Information Circular No. 10 from the Chief of the Division of Administrative Support Services on 3 March 2010 that the Human Resources and Planning Section would review the eligibility of ICTR staff members for consideration for conversion to permanent appointment. The Information Circular stated that “in the case of the ICTR, as the appointments are limited to the Tribunal, any permanent appointment will also be limited to the Tribunal”.

6. Staff members were further advised by Information Circular No. 12 dated 8 March 2010, that those who met the eligibility criteria according to the Guidelines should complete the appropriate form and submit it to the Human Resources and Planning Section.

7. Two lists of staff considered eligible for consideration for conversion were submitted to the ASG/OHRM on 20 and 28 July 2010 by the ICTR Human Resources and Planning Section. 229 international staff members and 181 locally recruited General Service staff members were recommended for conversion by ICTR.

8. In a Town Hall meeting on 4 March 2011 the ICTR Registrar informed all ICTR staff that ‘the CRB of New York endorsed the recommendation of the ASG/OHRM not to recommend the staff member of the Tribunals for one time conversion to permanent appointment due to the operational needs of the organisation.’

9. The Applicant was notified by the Registrar of the ICTR on 2 November 2011 that they had received the decision of the ASG/OHRM not to grant him a permanent appointment. The Registrar asserted that this decision was taken with due regard to the interests of the Organization and the operational realities of the Organization.

Applicant’s submissions

10. The ICTR is an integral part of the Secretariat.

- a. Various reports of the Secretary-General on the composition of the Secretariat indicate this fact.
- b. The recognition by the ASG/OHRM of an option to transfer from the ICTR to the Secretariat confirms that the ICTR is an integral part of the Secretariat.
- c. While ST/SGB/2009/10 was relied upon to deny the Applicant a permanent position, it in fact confirms that the ICTR is an integral part of the Secretariat.
- d. The promulgation of 'Guidelines' indicates that the Applicant must have been considered a staff member of the Secretariat. The 'Guidelines' indicate that to be 'eligible' for consideration for conversion to permanent appointment the staff member 'must be in active service with the UN secretariat at the time he or she is considered for conversion permanent appointment'. OHRM agreed with the conclusion of the ICTR that a number of staff members of the ICTR were 'eligible' but not 'suitable'. Therefore OHRM agreed that at the time of consideration the Applicant was in active service with the United Nations secretariat.
- e. The Applicant is a staff member under Chapter XV of the United Nations Charter, to find otherwise would be indefensible.
- f. The relevant clauses in the Applicant's letter of appointment do not indicate that the ICTR is not part of the Secretariat. It is common understanding that staff members of the ICTR and ICTY have in the past been issued letters of appointment that confirm that their appointments are with the Secretariat.
- g. The ICTR is not an 'organization' contemplated in A/RES/51/226.

11. The permanence of an appointment should not be confused with the permanence of a post or position. A permanent post or position is not a requirement for a permanent appointment. Instead, ST/AI/2010/3 (Staff selection

system) contemplates that the ASG/OHRM has the discretion to *reassign* staff affected by post abolition. Thus, the author of the impugned decision should have determined whether the specific skills of the Applicant were transferable to other roles within the Secretariat.

12. In the alternative, assuming that the permanence of posts or positions can be an overriding criterion, the Secretary-General has failed to promulgate proper instructions on how to determine the permanence of posts.

13. The *Alba*¹ case held that all staff should be granted reasonable consideration for career appointment irrespective of the source of funding for their posts. The fact that the Secretary-General might have funds to cover potential termination indemnities but that it would not be in the financial interests of the Secretariat or United Nations to do so, is insufficient to substantiate the alleged distinction between the *Alba* case and the current one.

14. The Respondent's oral submissions regarding *Ademagic et al.* UNDT/2012/131 are misplaced. The Tribunal in that case made the following findings:

- a. The authority delegated to the ICTY Registrar is a valid delegation of authority.
- b. The ICTY Registrar was delegated the authority to grant permanent appointments absent a clear exception.
- c. The former Staff Rules were applicable throughout the relevant time in that fact pattern.
- d. In response to the Respondent's argument that as the delegated authority to the ICTY was improper and therefore it was ipso facto moot, the Tribunal stated that any exclusions to the delegated authority of the ICTY should have been explicit. When a delegation of authority is granted, the delegating authority must

¹ UN Administrative Tribunal Judgement No. 712, *Alba* (1995).

first clearly and formally revoke the delegation before it can exercise its authority again.

- e. The entry into force of the new Staff Regulations and Rules had no bearing on the delegation of authority.

Respondent's submissions

15. The Applicant did not have any legal expectancy or right, irrespective of his length of service, to a conversion to a permanent appointment. The Applicant had a limited right to reasonable consideration for conversion to a permanent appointment. Satisfying the eligibility requirements only qualified the Applicant to be considered for a permanent appointment. It did not grant him a right to be given a permanent appointment.

16. The consideration of the Applicant was procedurally correct. The Registrar of the ICTR reviewed staff eligibility and submitted the Applicant's name to OHRM. OHRM reviewed and concluded that in light of the operational realities and best interests of the Organization, the Applicant should not receive permanent appointment. The Applicant failed to meet his burden of proving that the consideration he received was tainted by extraneous factors. The contested decision was reasonable in light of the operational realities and interests of the organization. It is also consistent with the Secretary-General's Bulletin, the Guidelines and Chapter XV of the United Nations Charter.

17. The Applicant cannot be automatically transferred.

18. The Applicant's letter of appointment limited his appointment to the ICTR. Staff rule 4.1 and former staff rule 104.11 provide that a staff member's contractual entitlements are strictly limited to those contained in the letter of appointment. This contractual limitation originates from the operational requirements of the ICTR and the delegation of authority it received to carry out its mandate. This limited delegation was reviewed following the implementation of the new staff selection system pursuant to Section 1.5 of ST/SGB/2002/6 (Central review bodies). In June 2004, the ICTR and ICTY decided not to fully

implement the staff selection system and to retain the limited delegation of authority to recruit staff members whose service would be limited to the ICTR.

19. Permanent appointments are not intended to be used as staff retention measures in downsizing entities. Staff retention policies and measures of the ICTR have been considered and decided upon by the Organization in a separate and appropriate manner.

20. In response to the Applicant's argument that the Administration should have considered whether his specific skills in his present function were/are transferrable to other functions in other offices or departments within the Secretariat, the Respondent asserts that he should have applied for a post and been selected following a competitive selection exercise.

21. *Alba* is distinguishable from the Applicant's case in that operational realities did form the basis of the decision to deny the Applicant a permanent appointment. In contrast to *Alba*, the Applicant has also received consideration for conversion to a permanent appointment based on all relevant factors, by four different reviewing bodies. Additionally, the former UN Administrative Tribunal in Judgment 1476 upheld the authority of the Secretary-General to suspend the consideration of staff members for permanent appointments in light of the financial situation of the Organization.

22. The judgment in *Ademagic et al.* in relation to delegation of authority should not be relied upon for the following reasons:

- a. it used an older version of the Staff Rules (104.14.b) that had been superseded by an updated version.
- b. according to the new rules of January 2004, only executive heads of subsidiary bodies with Executive Boards have the power to be expressly granted and to exercise delegated authority (and this does not include the ICTR and ICTY, as they do not have an executive board).

- c. as the ICTY had not been granted such delegated authority in line with the new version of the Staff Rules and the relevant Secretary-General's Bulletin, it lacked the power and authority to grant permanent appointments to its staff members. According to ST/SGB/151 (Administration of the Staff Regulations and the Staff Rules), delegation of authority must be express, and the delegation to the ICTR was not express.

23. *Ademagic et al.* is correct as to the discretionary nature of the granting of permanent appointments. Operational realities and the interests of the Organization should be taken into account.

24. Despite the decision of the Administration to postpone the closing date of the ICTR from 2010 to 31 December 2014, the current decision of the Security Council to close the ICTR by 2014 should be taken seriously and the necessary repercussions for human resources enacted accordingly.

Considerations

25. The issue to be decided in the present judgment is whether the rules applicable to the granting of permanent appointments were adhered to in the circumstances of the Applicant's case.

26. The legal framework for the conduct of a one-time review for conversion to permanent appointments of eligible staff members is contained in ST/SGB/2009/10.² Section 2 provides:

In accordance with staff rules 104.12 (b) (iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the highest standards of efficiency, competence and integrity established in the Charter.

27. In resolution 37/126 of 17 December 1982, the General Assembly decided that:

² Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered by 30 June 2009.

[S]taff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment.

28. Resolution 51/226 of 3 April 1997 brought a qualification to resolution 37/126 as follows:

[F]ive 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.

29. Former staff rule 104.12(b) on 100-series fixed-term appointments, which was applicable until 30 June 2009, provided that:

(ii) The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment;

(iii) Notwithstanding sub paragraph (ii) above, upon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2 and who is under the age of fifty-three years will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.

30. ST/SGB/2009/10 set out specific criteria for conversion to permanent appointments and these are: i) the interests of the Organization; ii) eligibility of the staff member as regards qualifications, performance, conduct, and suitability as an international servant; and iii) high standards of efficiency, competence and integrity.

31. It is the responsibility of the department or office where the staff member is serving to ascertain whether these criteria are satisfied, on the basis of which determination a recommendation to grant a permanent appointment is then transmitted to the ASG/OHRM.

32. Section 3.3 of ST/SGB/2009/10 provides that

[i]n order to facilitate the process of conversion to permanent appointment under the present bulletin, recommendations to grant a permanent appointment that have the joint support of the department or office concerned and of the Office of Human

Resources Management or local human resources office shall be submitted to the Secretary-General for approval.

33. A recommendation was sent for conversion to permanent appointment in regard to several staff members, including the Applicant, serving at the ICTR by Ms. Ana Maria Machaki of the ICTR (then) Human Resources and Planning Section (HRPS/ICTR). This was necessitated by S/RES/1503/2003 which endorsed the ICTR Completion Strategy and urged the organisation to take all possible measures to complete its work in 2010. This was followed by S/RES/1996/2010, which established the International Residual Mechanism for Criminal Tribunals. This resolution also urged the ICTR to complete all remaining work by 31 December 2014.

34. The recommendation of HRPS/ICTR was not accepted by OHRM. The staff members were informed. But this was not the end of the matter.

35. Section 3.4 of ST/SGB/2009/10 provides that:

In the absence of joint support for conversion to permanent appointment, including cases where the department or office concerned and the Office of Human Resources Management or local human resources office both agree that the staff member should not be granted a permanent appointment, the matter shall be submitted for review to the appropriate advisory body designated under section 3.5 below. The purpose of the review shall be to determine whether the staff member concerned has fully met the criteria set out in section 2 of the present bulletin. The advisory body may recommend conversion to permanent appointment or continuation on a fixed-term appointment.

36. As provided in section 3.4 of ST/SGB/2009/10, since the recommendations had not obtained the *joint* support of ICTR and OHRM, the matter was referred to the Central Review Bodies (CRB) for consideration and advice. The CRB endorsed the recommendation of OHRM on grounds that the concerned staff members were serving at the ICTR, which is a “downsizing entity.”

37. The CRB recommendation was then transmitted to the ASG/OHRM pursuant to section 3.6 of ST/SGB/2009/10.

38. At a Town Hall meeting on 4 March 2011, the ICTR Registrar informed all staff that the CRB in New York had endorsed the recommendation of the ASG/OHRM not to recommend the staff member of the Tribunals for conversion to permanent appointment due to the operational needs of the Organization.

39. Subsequently, the matter was resubmitted to the CRB for review because the ASG/OHRM discovered additional information that should have been made available to the CRB. On 27 May 2011, the CRB informed the ASG/OHRM that it had endorsed the views of the ASG/OHRM that no conversion should take place.

40. In this second decision by the CRB, the Board concluded that as the appropriate procedures had been followed when considering candidates of the ICTR for permanent appointment “the recommendation of [OHRM] on non-suitability for conversion of all recommended staff to permanent appointments, due to the limitation of their service to their respective Tribunals and the lack of established posts” was correct.

41. Following that second review and recommendation, the Applicant was informed on 2 November 2011 that he would not be granted a permanent appointment.

42. The task of the CRB is to determine whether a staff member recommended for permanent appointment satisfies the criteria prescribed in section 2 of ST/SGB/2009/10. Section 2 lists a number of criteria that have to be considered by OHRM and the CRB when the matter is referred to them.

43. Section 2 of ST/SGB/2009/10 refers to rule 104.12 and 104.13 on permanent appointments and its interrelation with the interest of the Organization. Further, Resolution 37/126 of 17 December 1982 refers to operational realities of the Organization and the core functions of the post. The recommendation of the CRB after the second submission by ASG/OHRM makes no mention of the personal attributes of the candidates like efficiency for permanent appointment. It appears from the decision that the exercise was limited to ascertaining whether it

would be in the interest of the Organization or not to confer permanent appointments to the staff members concerned including the Applicant.

44. The exercise in the determination of whether candidates should be granted a permanent appointment is two-fold. The responsible officers in OHRM and the CRB should first consider whether the candidates satisfy the test of personal attributes. Then the interest of the Organization comes into play. From a reading of the correspondence between OHRM and the ICTR as well as the CRB it seems that there was no dispute on the personal attributes of the candidates. The Tribunal concludes that in the absence of any specific contention to the contrary, the CRB accepted that there was no dispute or controversy as to these personal attributes. While the Tribunal observes, that it would have been more appropriate to address this issue definitively, the absence of such a discussion is not sufficient ground to nullify the decision.

45. The Applicant's letter of appointment states that he was recruited by the ICTR. The ICTR is in the process of downsizing. The Tribunal concludes that the ASG/OHRM and the CRB correctly determined that it cannot be in the interest of the Organization nor of its operational activities to grant permanent appointments under the circumstances in force. The application to rescind the decision of the Respondent not to grant him permanent appointment is therefore rejected.

Delegation of Authority to HR of ICTR

46. The other issue is whether the decision to recommend conversion to permanent appointment should have been taken by the ASG/OHRM or the officer in charge of HR in ICTR. There is no indication that ICTR was afforded delegation of authority to convert a staff member to a permanent appointment. Section 3.3 of SGB/2009/10 only gives power to the responsible officer of HR at a duty station to recommend a staff member for permanent appointment. This recommendation has to be approved by the ASG/OHRM, which approval can then be reviewed by the CRB. This procedure was correctly applied in this case.

Recommendation of the CRB of 27 May 2011.

47. The recommendation made by the CRB was properly acted upon by the Respondent. The necessary elements of the conversion process were correctly adhered to.

48. It was also appropriate for the CRB to recommend that OHRM and the Administration of both the *ad hoc* Tribunals continue their joint efforts to place the staff of these two Tribunals within other offices of the Secretariat offices using established procedures. The CRB also recommended that once such placement was made on an established post, the administration should bear in mind the acquired rights of the staff of both Tribunals when considering conversion to a permanent appointment and to convert the appointment of such staff to permanent without further reference to a CRB, if such placement, including reinstatement, occurs one year before or after the abolition of their post.

CONCLUSION

49. For the foregoing reasons, the Application is dismissed.

(Signed)

Judge Vinod Boolell

Dated this 30th day of April 2013

Entered in the Register on this 30th day of April 2013

(Signed)

Abena Kwakye-Berko, OiC Registrar, Nairobi Registry