



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/005

Judgment No.: UNDT/2013/105

Date: 20 August 2013

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko, Acting Registrar

MUBIRU

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Stephen Musisi, Esq.

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Bérengère Neyroud, ALS/OHRM

## **Introduction**

1. The Applicant is a Legal Officer (Assistant Appeals Counsel) at the P-3 level at the International Criminal Tribunal for Rwanda (ICTR). In his Application dated 29 January 2012, he contested the decision of the Registrar of the ICTR not to select him on promotion for the post of Appeals Counsel (P-4) on the grounds that:

- a. the decision was based on improper purposes;
- b. there were procedural irregularities in the selection process; and
- c. the decision to hold a second interview was unlawful.

2. The Respondent filed his Reply on 29 February 2012 in which it was submitted that:

- a. the contested decision was taken lawfully;
- b. although there was a procedural irregularity in the selection process, the Applicant is not entitled to any relief as he had no foreseeable chance of being selected; and
- c. the decision to hold a second interview was necessary to preserve the integrity of the selection process.

3. A hearing of the case on the merits was held on 16 July 2013 and subsequently both parties filed their closing submissions on 31 July 2013.

## **Facts**

4. On 24 June 2010, an internal vacancy announcement for the post of Appeals Counsel, P-4, was issued at the ICTR for multiple posts within the Appeals and Legal Advisory Division (ALAD) of the Office of the Prosecutor (OTP).

5. The Applicant applied for the post and was shortlisted along with four other candidates all of whom were invited to take part in a competency-based interview.

6. On 23 August 2010, interviews were conducted for the five shortlisted candidates via telephone.

7. On 29 October 2010, Ms. Deborah Wilkinson, Senior Appeals Counsel and Officer-in-Charge, ALAD who had been a member of the interview panel wrote to Mr. Justice Hassan Bubacar Jallow, ICTR Prosecutor, attaching the interview Panel's report of the recruitment exercise.

8. On 2 November 2010, Mr. Bongani Majola, Deputy Prosecutor, ICTR wrote to Mr. Jallow indicating the Interview Panel's decision to forward the names of three out of the five candidates who had been interviewed, in order for the Prosecutor to recommend them to the Registrar for appointment.

9. The Applicant who had scored 77.64% at the interview was amongst the three candidates whose names were forwarded to the Prosecutor for recommendation to the Registrar.

10. On 3 November 2010, Mr. Jallow decided to recommend to the Registrar the names of all the five candidates who had been interviewed, rather than the three that had been forwarded to him by the Interview Panel. On the rationale by which he arrived at this decision, the Prosecutor made the following remarks:

I have decided to recommend [the two other candidates] although the Panel had advised to the contrary. However, in view of the fact that they had been scored higher than some of the other candidates whom the Panel found suitable, I am recommending the two for the consideration of the Registrar.

11. On 5 November 2010 Mr. Majola wrote to Mr. George Kabore, Chief, Human Resources, Staff Recruitment and Policy Section (HRPS) regarding the Prosecutor's recommendation and stated as follows:

In reviewing the applications of the candidates together with the report of the interviewing Panel, the Prosecutor has decided to recommend all five candidates as being suitable for selection by the

Registrar. The reasoning of the Prosecutor is that while the lowest scoring candidate, at 71.70% was recommended by the Panel, the Panel did not recommend the candidate who scored the second highest, at 77.96%, and did not explain why the candidate was not suitable for recommendation.

12. On 22 November 2010, Ms. Halima Mumin, Human Resources Officer, HRPS, forwarded to Mr. Adama Dieng, ICTR Registrar, the names of all the five candidates as per the Prosecutors decision for his consideration.

13. In the email, she pointed out to the Registrar that the Interview Panel recommended three candidates out of the five who were interviewed but that the Prosecutor had decided to recommend all the five candidates to him for further consideration by the Central Review Board (CRB).

14. The CRB, on considering the Interview Panel's report, noted and commented that the interview panel's report was incoherent and marred by inconsistencies in that higher ranking candidates were not recommended whereas lower ranking candidates were recommended. The Board members were under the impression that this was an oversight by the panel and felt that these discrepancies needed to be fully addressed. The CRB therefore referred the case back to the Programme Manager for further explanations and clarifications.

15. On 16 December 2010, Ms. Mumin wrote to Mr. Majola requesting explanations regarding the above comments made by the CRB on the recruitment exercise.

16. On 7 January 2011, in response to the above enquiry, Mr. Majola wrote to Mr. Sergey Cherepko, Officer-in-Charge (OIC), HRPS, stating that the Programme Manager considered the interview report as a whole, being both the comments of the Panel in respect of each candidate as well as the marks allocated. He stated that while the Panel made negative comments in respect of certain candidates, it had allocated the highest marks to them and that it was apparent that there was an "inconsistency in the reasoning of the Panel." Adding that, "it is not conceivable why the Panel would give high scores to the candidates that it considered to have performed poorly at the interview." The email further stated as follows:

The Programme Manager concluded that, while the Panel made negative comments, it must have been greatly impressed by the performance of the said candidates, to the extent that it decided to award them high scores, comparatively speaking. Finally, the statute vests the power to recommend candidates for staff of the OTP, in the Prosecutor. The opinions of the Panel are not binding and are only advisory to the Prosecutor who is required by the laws of this Tribunal to exercise an independent discretion. In exercising that discretion, he took into consideration the comments of the Panel as well as the scores it allocated. Noting the conflict between the two, he exercised his discretion in favour of recommending these candidates. The Prosecutor shares the concerns of the CRB regarding the inconsistencies in the interview.

17. Thereafter, the interview file was returned from the OTP to the OIC of HRPS for his further action.

18. On 31 January 2011, Ms. Mumin wrote to the Chairperson of the CRB attaching the explanations and clarifications provided by Mr. Majola for the Board's consideration and review.

19. On 7 February 2011, Mr. Mandiaye Niang, Chairperson of the CRB wrote to Mr. Adama Dieng informing him that the CRB on considering the comments provided by the Program Manager (the Prosecutor) had decided to recommend the case to him to decide what course to take.

20. In the said letter, the CRB noted that it would have been appropriate and necessary for the interview panel to be given the opportunity to provide explanations and clarifications regarding the inconsistencies. The CRB nevertheless proceeded to recommend the case to the Registrar for his decision and selection of a candidate, and placement of the non-selected candidates on the roster.

21. On 18 February 2011, the Registrar sent the recruitment file back to OTP with comments that having reviewed the case; he had the same concerns as the CRB regarding the inconsistencies between the high marks attributed to some candidates and the very negative comments made on their core competencies. The Registrar returned the file to OTP to fully address the inconsistencies and if need be to set up a new panel.

22. The Prosecutor thereafter set up a new panel to evaluate the candidates.
23. On 9 May 2011, Mr. Majola wrote to the Applicant informing him that due to the noted inconsistencies in the report of the first Interview Panel, the Prosecutor had decided to constitute another Panel to re-interview the candidates. He extended to him an invitation to attend a second interview to which he agreed.
24. On 25 May 2011, another interview was conducted and the Applicant participated (“the second interview”).
25. On 15 June 2011, Mr. Majola wrote to Mr. Jallow attaching the interview report of the new Panel in which the Applicant had scored 51% and was not recommended to the Prosecutor. Of the five candidates who were re-interviewed, only the two highest scoring candidates were recommended.
26. On 22 June 2011, Ms. Mumin wrote to Mr. Dieng informing him of the decision reached by the new Interview Panel and submitting the names of the two recommended candidates for his consideration and decision. The Registrar approved the selection.
27. On 19 July 2011, Mr. Majola wrote to the Applicant informing him that his candidature for the position of Appeals Counsel, P-4 had not been successful.
28. On 16 September 2011, the Applicant wrote to Ms. Angela Kane, Under-Secretary-General for Management and submitted his request for management evaluation on the decision not to select him for the post of Appeals Counsel, P-4.
29. On 2 November 2011, Ms. Kane wrote to the Applicant with a response on his request for management evaluation. The Management Evaluation Unit (MEU) upheld the contested decision.

### **Applicant’s case**

30. The Applicant’s case as deduced from both his oral testimony and his pleadings is summarized below.

31. Based on the panel's recommendation after the first interview, the Applicant was entitled to be appointed on promotion as a matter of right or to be placed on the roster.

32. In the alternative, and at the very least, the Prosecutor's initial recommendation of five candidates of which the Applicant was one, created a legitimate expectation that the Applicant would be promoted.

33. The decision of the Registrar not to accept the initial recommendation of the Prosecutor after the first interview was unlawful and the decision to order a new interview was excessive and disproportionate. In doing so, the Registrar acted outside of his powers, the impact of which was the unlawful denial to the Applicant of his accrued right to be promoted.

34. The role of the Registrar in the selection process was limited to making a decision on the appointment of candidates from amongst those whom the Prosecutor had initially recommended.

35. Even if the Registrar had the discretion to reject the recommendation of the Prosecutor, he abused that discretion and/or acted arbitrarily by:

- a. penalizing the Applicant for alleged inconsistencies that he was not aware of and never contributed to. Rather than nullify the entire interview process, the Registrar ought to have rectified the alleged inconsistencies.
- b. Ordering a second interview on the purported motivation of rectifying the alleged flaws identified by the CRB in the first report; and
- c. requiring the Applicant to sit for a second interview notwithstanding the fact that the inconsistencies in the report were not linked to his candidature in any way.

36. The Applicant submitted that he was not informed in time of the Registrar's decision regarding the first interview.

37. The concerns raised by the CRB about the first selection process were addressed sufficiently by the Prosecutor and therefore there was no need to hold a second interview.

38. The decision to hold a second interview was unlawful and further, the selection process on which the second interview Panel's decision was based was flawed and tainted with procedural irregularities in the following ways:

- a. one of the members of the first interview Panel was part of the second Panel which was supposed to be a newly reconstituted Panel;
- b. the absence of an *ex-officio* member who was to represent HRPS;
- c. one of the candidates considered was no longer an internal candidate; and
- d. the report of the second Panel was not subjected to review by the CRB as required.

39. With respect to the failure to subject the second process to review by the CRB, this was a grave irregularity that affected the integrity of the entire process especially when coupled with the fact that MEU was deliberately misinformed by the Administration that the CRB had reviewed the process.

40. With regard to the presence of a panel member who sat in the first interview, the Applicant submitted that it was the first panel on which he sat that was responsible for the alleged inconsistencies and it was for this reason that the Registrar ordered for a "new" panel to be constituted and as long as the member sat on the panel, it lost the definition of a new panel.

41. The contested decision was based on improper purposes as evidenced by the following factors: only two posts out of an available four were recommended to be filled, one of which was by an external candidate, the rest were immediately re-advertised, externally and for roster purposes. This shows that the decision not to promote the Applicant was ill-motivated by a desire to open up competition for the posts to external candidates.



42. The Applicant also submitted that he was not fairly considered by the second Panel and that he passed the second interview as well. The only reason that the results of the two interviews could be so different was because the second Panel considered irrelevant facts and failed to consider relevant facts.

43. While in the first interview the Applicant had scored full marks (5 out of 5) for academic qualifications, in the second interview he was only awarded 2. Similarly, while in the first interview he had scored 10 out of 10 for relevant experience, in the second interview he was only awarded 6.66. This is notwithstanding the fact that his qualifications had not changed adversely in the intervening period and his relevant experience had been enhanced by about 9 months of appellate work hence showing that relevant factors were not taken into account.

44. The Panel's assessment and decision were arbitrary as it never developed a benchmark for assessment prior to the interview. The benchmark of 65 points out of 100 for a candidate to be recommended was only established after the interview had been concluded. The set benchmarks were only for the categories and marks to be assigned to each question but not the overall threshold of 65.

45. The Applicant therefore prays that the impugned decision be set aside and that he be promoted retrospectively from the time it would have taken effect had the Registrar not acted in the unlawful manner that he did. Alternatively, he prays for compensation in lieu of the rescission of the contested decision. He also seeks a declaration that the Registrar acted *ultra vires* in disregarding the Prosecutor's recommendation after the first interview.

### **Respondent's case**

46. The Respondent's case is summarized below:

47. Contrary to his contentions, the Applicant received full and fair consideration for the posts. With respect to the first interview, no final decision was taken on any of the candidates' suitability for the posts; instead all the five were invited to the second round of interviews.

48. The Applicant's contentions that he had a legitimate expectation to be promoted are incorrect. Even if there were no irregularities arising from the first interview, there is no guarantee that the Applicant would have been selected given that no less than five candidates had been recommended for only three vacant posts. It is for the Registrar to decide who among the recommended candidates is best suited for the function of the post and in this case he could have decided not to select the Applicant.

49. Given the irregularities occasioned in the first interview, the Registrar was not in a position to proceed to make a selection decision. In such circumstances, his authority to make a selection was withdrawn and he had no option but to remedy the irregularities as he did by requesting the Prosecutor to either address the discrepancies or to conduct a second interview.

50. The Prosecutor on his part followed the Registrar's advice in choosing to conduct a second interview with a newly constituted Panel.

51. Therefore, the decision to hold a second round of interviews was proper and necessary to preserve the integrity of the selection process. The Registrar was competent, in line with his delegated authority to make decisions on the selection process geared towards remedying the irregularities identified by the CRB.

52. Principles of fairness required that all the interviewed candidates be treated equally during the second round of interviews which was why the results of the first round of interviews were disregarded completely for a fresh interview to be conducted.

53. The Applicant was informed of the decision to conduct a second round of interviews within a reasonable time; he was informed of the need to conduct a second interview on 9 May 2011, around eight months after the conduct of the first interviews. This length of time was not unreasonable as it was required to resolve the issue of the occasioned irregularities.

54. In his second interview, the Applicant failed to demonstrate that he had the minimum competencies and qualifications necessary for the post of P-4 Appeals

Counsel. He only scored 51 out of 100 points, well below the set threshold of 65 points that had been set by the Panel and it was based on this sub-standard performance that the second Panel did not recommend the Applicant for the post.

55. Mr. James Arguin who had been the chair of the second panel testified that the Applicant did not perform well at the interview and gave largely generic responses that did not reflect the strength and depth of experience required of appellate work, or the analytical skills required of Appeals Counsel.

56. Accordingly, the Applicant's candidacy was given full and fair consideration during the selection process and his contentions that the Panel took into consideration irrelevant facts and failed to consider relevant facts is unsubstantiated. There is no evidence that the result of the Applicant's performance at the second interview was the outcome of anything but his performance during the interview.

57. With respect to the Applicant's contentions that the second interview was tainted with procedural irregularities, the Respondent states:

a. The participation of one of the members of the initial Panel was neither irregular nor prejudicial to the Applicant's candidature. It created no conflict of interest and was necessitated by the fact that the ICTR had a relatively small pool of staff members at the appropriate levels to sit on an interview Panel for P-4 posts. Moreover, there is no allegation by the Applicant that the Panel member was advocating for another candidate.

b. Contrary to the Applicant's allegations, the *ex-officio* member was present during the telephone interviews of all the five candidates. Mr. James Arguin testified that the *ex-officio* member was present when the interviews commenced and remained present during nearly all the five interviews. He stepped out briefly during the third interview but came back after a short time.

c. The consideration of a candidate who was no longer an ICTR staff member was not irregular because the candidate was one of the original five staff members who were invited to the second round of interviews.

d. The failure to submit the recommendations following the second round of interviews to the CRB did not prejudice the Applicant.

58. Mr. James Arguin testified that of the two candidates selected from the second interview, one declined the offer of appointment as he had already left the ICTR. It was for this reason that another internal job opening had to be published. Mr. Arguin states that he encouraged the Applicant to apply and even gave him tips on how to improve his interviewing skills by illustrating his answers with practical examples but the Applicant declined to apply saying that he had already applied several times and had been unsuccessful.

59. The Applicant is not entitled to any relief as he had no foreseeable chance of being selected; the Respondent requests the Dispute Tribunal to dismiss the Application.

### **Considerations**

60. Having reviewed the entire case on the record, the Tribunal finds that the following legal questions arise for consideration:

a. Did the Registrar of the ICTR act unlawfully in declining to accept the outcome of the first interview process and instead referring it back to the Office of the Prosecutor by reason of the identified inconsistencies?

b. Was the decision of the ICTR Prosecutor to conduct a second interview for the post unlawful?

c. Did the second interview panel conduct itself competently during the second interview as to give credence to their report?

d. Did the Applicant have any right to be promoted based on the results of the first interview?

***Did the Registrar of the ICTR act unlawfully in declining to accept the outcome of the first interview process and instead referring it back to the Office of the Prosecutor by reason of the identified inconsistencies?***

61. The Applicant submitted that the Registrar's decision not to accept the recommendation of the Prosecutor after the first interview was unlawful in light of art. 15.5 of the Statute of the ICTR which provides thus: "The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor." He asserts that the Registrar did not have the powers or discretion to reject the recommendation of the Prosecutor to appoint the Applicant or the power to order a second round of interviews.

62. The Respondent on the other hand maintains that this decision was lawful since the role of the ICTR Registrar is to exercise authority delegated to him by the Secretary-General to select candidates based on recommendations.

63. Article 101.1 of the United Nations Charter states that staff shall be appointed by the Secretary-General and art. 15.5 of the ICTR Statute provides that the staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

64. By memorandum dated 14 March 2002 from Joseph E. Connor, Under-Secretary-General of Management to Mr. Adama Dieng, Registrar of the ICTR, all authority in the areas of human resources management within the ICTR was delegated to the ICTR Registrar by the Secretary-General.<sup>1</sup> The appointing authority in the ICTR, therefore, was the Registrar in exercise of his delegated authority as conferred on him in the memorandum mentioned above.

65. The Applicant submitted that the provisions of the ICTR Statute are binding and that by relying on authority delegated to him vide the memorandum, the Registrar acted contrary to art. 15.5 of said Statute; however, the Tribunal finds that there is no inconsistency between the Statute, the Charter and the authority delegated to the Registrar as evidenced by the memo.

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<sup>1</sup> Memorandum dated 14 March 2002 from Joseph E. Connor, Under-Secretary-General of Management to Mr. Adama Dieng, Registrar of the ICTR.

66. The contention in this case arises from the fact that after the first interview, the Prosecutor recommended the names of five candidates to the Registrar for appointment. The Registrar however declined to make any appointments based on that recommendation and made the following comments regarding his decision:

Having reviewed the case, I must note that I have the concerns noted by the CRB regarding the high marks attributed to some candidates and the very negative comments made on their core competencies. This needs to be explained to assist me in making an informed decision. Leaving this into the dark in the name of “independent discretion” would defeat the whole purpose of having recruitment procedures designed to foster transparency. Please return the file to OTP to fully address the inconsistencies and if need be to set up a new interview Panel.

67. The question that arises for consideration at this point is whether, having the authority to appoint staff, the Registrar also had the authority to reject to appoint staff that have been recommended to him by the Prosecutor for appointment.

68. When the CRB sent its comments regarding the first interview process, as a responsible officer, the Registrar needed to have the CRB’s concerns clarified and he had no obligation to accept the outcome of the first interview process given that its transparency was in question. Some of the comments made by the CRB were as follows:

The Board members noted some incoherence and inconsistency in the interview Panel report between the marks and the comments. Higher ranking candidates in marks were given poor evaluation and were not recommended, while lower ranking candidates were found more suitable for the position and were recommended. The Board members were under the impression that this was an oversight by the Panel.

After discussions and having reviewed the Panel interview report, as well as the Programme Manager’s recommendation (Prosecutor’s recommendation), the Board members noted that the Programme Manager gave preference to the marks, while totally disregarding the negative comments, particularly paragraphs 14 and 20 of the Panel’s report, without any explanations.

The Board felt that these discrepancies need to be fully addressed and therefore referred the case back to the Programme Manager for further explanations and clarifications.

69. On receiving the explanations given by the Prosecutor on the inconsistencies, the board members noted that it would have been appropriate or necessary for the panel to have been given the opportunity to give explanations and clarifications regarding the inconsistencies. However, the board proceeded to recommend the candidates as shown below:

Although the Programme Manager denied the interview panel that opportunity [to give explanations or clarifications] on the basis of his statutory prerogative, the Board members nevertheless unanimously *agreed to recommend the case* to the Registrar for decision and selection of a candidate, and placement of the non-selected candidates on the roster. [Emphasis added]

Notably, the Board was far from satisfied with the explanations given by the Program Manager; also, the Board did not agree to recommend the candidates, but rather to recommend the case to the Registrar for his further action.

70. Being the administrative officer on whose shoulders the appointing authority is vested, the Registrar bore the ultimate duty to ensure the integrity of the selection process right from the conduct of the first interview. His role in the process was not limited to only making an appointment from amongst the recommended candidates but rather, it extended to ensuring the transparency and integrity of the process.

71. Section 5.3 of ST/SGB/2002/6 (Central Review Bodies)<sup>2</sup> which at the time was the relevant bulletin on Central Review Bodies provided that the CRB was to consider among other things, whether the record indicated the existence of a mistake of fact, a mistake of law or procedure, prejudice or improper motive that could have prevented a full and fair consideration of the requisite qualifications and experience of the candidates. Section 5.4 of the same bulletin provides further:

When the CRB has found that the evaluation criteria were properly applied and the applicable procedures followed it shall so inform

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<sup>2</sup> Since replaced by ST/SGB/2011/7 (section 4.8).

the head of department/ office concerned and recommend that the head of department/office approve the proposed candidate(s) for selection or placement on the roster.

72. In situations where the CRB is dissatisfied with the procedure section 5.5 of ST/SGB/2002/6 provides that:

Where the Central Review Body has questions or doubts regarding the proper application of the procedure... [it] shall request the necessary information from the Program Manager...[I]f the questions are answered and the doubts resolved to the satisfaction of the Central Review Body that body shall proceed as provided in section 5.4.

73. In the present case, given the nature of the comments that were made by the CRB both after the first review and after receiving the explanations from the Program Manager, it was evident that the doubts that had been expressed about the process had not been resolved. The CRB then recommended the case to the Registrar for his further action rather than recommend the candidates to him for appointment.

74. Since the CRB is charged with the responsibility of conducting the review of the selection process prior to a final selection, the Registrar was right to take appropriate action regarding their misgivings. This he did when he recommended that the Program Manager, either rectified the inconsistencies or set up a new interview panel altogether.

75. The Registrar did not ‘order’ a second interview contrary to what the Applicant submitted, he made a recommendation for two courses of action between which the Prosecutor was to make a decision. Also, the Applicant’s contention that the Registrar’s only recourse was to take a decision for appointment is not correct in light of section 8.2 of ST/AI/2010/3 (“Staff Selection System”) which provides:

The authority to make a selection decision with respect to a particular job opening shall be withdrawn when a central review body finds that the evaluation criteria have not been properly applied and/or the applicable procedures have not been followed.



76. The fact that the first interview was marred by irregularities is not in dispute. It is also on record that the CRB expressed serious concerns about the report of the first panel and the Tribunal finds that these misgivings by the CRB were properly acted upon by the Registrar. In light of the provision of section 8.2 of ST/AI/2010/3 cited above, the Registrar was right not to make a selection from the five recommended candidates.

77. Moreover staff rule 4.15 states that where the advice and recommendation given by the CRB is not in line with that of the relevant manager, the Secretary-General shall give due consideration to the advice of the CRB and shall make the decision. In the present case, the Registrar had the discretion to make the relevant decision pursuant to staff rule 4.5 given his delegated authority. Having decided to refer the process back to the OTP, the Registrar properly exercised his discretion.

78. The Tribunal therefore finds that in view of the foregoing circumstances, the Registrar did not act unlawfully by declining to accept the outcome of the first interview process. It is the view of the Tribunal that he did what was required of him to ensure the integrity and transparency of the process. The Applicant's argument that the Registrar's decision to decline to make an appointment based on the Prosecutor's recommendation was contrary to the provisions of the Statute and constituted an abuse of authority is accordingly wrong and baseless.

***Was the decision of the ICTR Prosecutor to conduct a second interview for the post unlawful?***

79. It is also the Applicant's case that the decision to hold the second interview was ill-motivated and an abuse of authority while the Respondent maintains that this was done to safeguard the integrity of the entire process and was neither an abuse of discretion nor arbitrary.

80. In *Verschuur*<sup>3</sup> and *Conteras*<sup>4</sup> this Tribunal held that it is the responsibility of the Programme Manager to set up an interview panel, which for all intents and

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<sup>3</sup> Judgment No.: UNDT/2010/153.

<sup>4</sup> Judgment No.: UNDT/2010/154.

purposes acts as the Program Manager's agent. The Tribunal in these cases also found as follows:

Like a principal in law, the Programme Manager must be bound by the evaluation and recommendations of the interview panel he has set up as long as that panel has acted within its terms of reference. He has no authority to ask the panel to change its report or any part of it *except where he is satisfied that the panel had gone outside of its mandate.*

Where the panel exceeds its mandate or acts outside its terms of reference....., the Programme Manager, in the light of the need for accountability on his part would have a *duty to properly redirect the panel or if need be reconstitute it.*<sup>5</sup>[Emphasis added]

81. In light of these decided cases, it was the responsibility and duty of the Programme Manager to set up a second interview panel since it was clear that the first panel did not properly discharge its mandate.

82. Contrary to the Applicant's claim that the Registrar ordered the second interview, he only discharged his mandate by requesting the Prosecutor to either address the discrepancies or to have a second interview. After that the onus and discretion lay on the Prosecutor as the Program Manager to elect which of these two recommendations he would choose to go by.

83. In *Asariotis*<sup>6</sup>, the Tribunal held that it is the task of the Tribunal to note the primary irregularities tainting the selection procedure up until it was officially terminated. This implies that, the moment the process marred by irregularities has been terminated, and a new one lawfully undertaken, the entire process gains legitimacy as the irregularities are cured by the new and lawful process.

84. The Tribunal's decision in the above mentioned case that given the numerous irregularities in that selection procedure, it was right for the Administration to terminate it and that the Applicant could not successfully complain about the termination was upheld by the Appeals Tribunal.<sup>7</sup>

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<sup>5</sup> UNDT/2010/153, para 23.

<sup>6</sup> UNDT/2012/066 para 43.

<sup>7</sup> UNDT/2012/066.

85. In the present case, the Tribunal finds and holds that the decision by the Prosecutor to conduct a second interview did not constitute an unlawful intervention in the selection process.

***Did the second interview panel conduct itself competently during the second interview as to give credence to their report and recommendations?***

86. The Applicant submitted that the second interview panel was improperly constituted due to:

- a. the absence of the *ex-officio* member;
- b. the presence of one of the members of the original interview panel;
- c. the consideration of a candidate who at the time was an external candidate;  
and
- d. the failure to submit the report to the CRB.

87. The Respondent maintained that the *ex-officio* member was present at the interview and that the consideration of the external candidate was not unlawful. The Respondent however admitted to the participation of one of the members of the first interview panel who sat in the second panel as claimed by the Applicant as well as the failure to submit the second panel's report to the CRB. The Respondent however argued that these did not prejudice the Applicant's candidature or create a conflict of interest.

88. The Tribunal will consider each of these sub-issues in turn.

**a. The question of the alleged absence of the *ex-officio* member from the panel**

89. The Respondent's case is that the *ex-officio* member was present during the telephone interviews of the five candidates. Mr. Arguin who was the chairperson of the second panel testified that the *ex-officio* member was present at least for most of the Applicant's interview as he only left for a short while.

90. The Applicant cannot substantiate his claim that the *ex-officio* member was absent and that he never joined his interview panel. During cross-examination, the Applicant acknowledged that he could not exclude with all certainty that the *ex-officio* member joined the panel later without his knowledge especially considering that the interview was conducted over the phone.

91. The Tribunal has examined the role of an *ex-officio* member of the panel so as to determine whether the presence or absence of the *ex-officio* member was so critical or prejudicial to the Applicant's candidature.

92. An *ex-officio* member does not judge or score candidates by awarding marks and also does not vote. In this case his presence was only as a representative of the HRPS and is therefore not particularly critical to the substantive conduct of the interview. Moreover there is no evidence that the presence or absence of the *ex-officio* member prejudiced the Applicant in any way.

**b. The consideration of an external candidate**

93. With respect to the consideration of a candidate who at the time had left the service of the ICTR and was an external candidate, the Applicant contended that he should not have been invited since he was no longer an internal candidate.

94. The Tribunal finds that having been one of the original five candidates who took part in the first interview, it was proper to invite him for the second interview. It was only fair to invite all the five since the second process was meant to remedy the first.

95. This candidate, at the time of his application had been an internal candidate and the fact that he subsequently left the ICTR did not preclude him from being considered for the post since he had taken part in the first interview. Thus the consideration of this candidate was not irregular under the circumstances and did not prejudice the Applicant's candidature.

**c. The participation of one of the members of the original panel**

96. The Applicant argued that the participation of a member of the original panel caused the second panel to lose its character of a new panel and that this was a serious irregularity in the process. He has not claimed and the Tribunal has not found that the presence of the member prejudiced his candidature or that the said member was in a conflict of interest situation.

97. The mere participation of one of the members of the first interview panel members is not *ipso facto* evidence of impropriety.

**d. Identified irregularities in the second selection process**

98. Under this head, the Tribunal has identified three issues for address being: the second panel's decision on a pass mark of 65%, the scores awarded to the Applicant by the second panel and the failure to submit the second report to review by the CRB.

99. In his submissions, the Applicant contended that the second interview panel's assessment was arbitrary as it never developed a benchmark for assessment prior to the interview. Mr. Arguin testified for the Respondent that the Panel had decided before the interview that candidates who scored less than 65 out of 100 points would be considered as not having demonstrated the relevant competencies.

100. The Tribunal has not found any convincing evidence on the record to prove that the 65% benchmark was agreed upon by the panel before the interview. To ensure fairness and transparency, it is of utmost importance that all the criteria to be relied upon by an interview panel are arrived at and properly recorded for the guidance of the panel members prior to the actual interview in order to avoid decision making on an *ad hoc* or arbitrary basis. In the absence of a pre-agreed upon pass mark, it may appear as though the decision to recommend only the candidates who scored above 65% was engineered for the sole purpose of cutting out certain candidates.

101. The Tribunal also finds issue with the scores awarded to the Applicant by the second interview panel. In the evaluation of his educational qualifications, the Panel awarded the Applicant two out of five. The Required educational qualifications for the post as set out in the vacancy announcement were:

Advanced law degree from a University of recognized standing.  
Advanced studies in International Criminal Law or International Humanitarian Law and relevant advocacy experience before international and national jurisdictions may be accepted in lieu of an advanced law degree.

102. The Applicant had an advanced law degree. It is indeed strange and unsettling that he was scored less than half of the total mark for educational qualifications when he clearly met the full educational requirements set out in the Vacancy Announcement.

103. The third irregularity found by the Tribunal is the failure to submit the second report to the CRB. Both the Applicant and the Respondent agree that the report of the second interview panel was not submitted to the CRB for review. The Respondent however argued that this irregularity was not prejudicial to the Applicant as it did not deny him his right to full and fair consideration.

104. The Applicant on his part maintained and the Tribunal accepts his submission that it was mandatory for the CRB to review the process and that in the instant case, it was even more critical to involve the CRB as the first interview process was discarded due to inconsistencies raised by the CRB.

105. It is mandatory for the outcome of an interview process to be submitted for review by the CRB as shown by section 2.3 of ST/AI/2010/3 which provides that:

Selection decisions up to and including the D-1 level are made by the head of department/office/mission under delegated authority *when* the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. [Emphasis added]

Further, section 8.1 of ST/AI/2010/3 mandates the CRB to review proposals for filling a position.

106. The Administration is under an obligation to follow the Organization's rules and procedures. The failure to submit the second panel's report to the CRB constitutes a substantial procedural irregularity in the process.

***Did the Applicant have any right to be promoted based on the results of the first interview?***

107. The Applicant submitted that in view of art. 15.5 of the ICTR Statute, he should have been appointed to the position of Appeals Counsel, P-4 or placed in a roster following the recommendation of the Prosecutor after the first interview process.

108. The Tribunal however considers that having established that the decision to conduct a second interview was lawful; it follows that all the candidates' results and performance at the first interview were overtaken by the second interview.

109. The Tribunal also accepts the Respondent's submission that to ensure fairness at the second interview, it was necessary that all the interviewed candidates be treated equally during the second interview and that to ensure this, there was a need to completely set aside the results of the first interview.

110. While the Applicant had every right to be fully and fairly considered for the post, he had no right to be promoted. The Applicant did not have any assured chance or accrued right to be selected on promotion, even though he was recommended, had the irregularity in the first interview not occurred. Even if the second interview had never happened, the Applicant's claim that he was bound for a selection as a matter of right is not sustainable and is wrong in law.<sup>8</sup>

111. In *Asariotis* the Dispute Tribunal held as follows:

[G]iven the broad discretionary powers of the Secretary-General in the organization of services, he may suspend or interrupt a selection procedure for a post at any time, *as long as a staff member has not been officially advised of his or her selection*, he

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<sup>8</sup> *Liarski*, UNDT/2010/134, para 9.

can nonetheless do this only *when there are legitimate grounds to do so.*<sup>9</sup>[Emphasis added]

112. In the instant case, after the first interview, the Applicant, along with the four other candidates had only been recommended to the Registrar who was then to select three from amongst them for appointment to the post of Appeals Counsel, P-4. The Applicant had not been selected and therefore in light of the decision in *Asariotis*, given the fact that there were legitimate grounds for questioning the integrity of the first process, the Administration was entitled to interrupt and rectify the process as it did.

113. The final selection decision is made by the head of department or office who in this case was the Registrar as the overall administrative head of the ICTR under section 9.2 of ST/AI/2010/3. After the first interview, the Registrar did not make any selection decision and even if he had done so there was no guarantee that the Applicant would have been selected from among the five candidates. The Tribunal agrees with the Respondent's submission that this is not a case where but for the irregularities in the first interview; the Applicant would have been selected.

114. The Applicant's submission that he had a legitimate expectation of promotion or indeed a right to be promoted is wrong. His claim that it was only the Registrar's intervention that denied him the promotion is equally wrong.

115. Recommendation for a post is not the same thing as selection to a post within the United Nations recruitment processes. While, there is discretion in selection there is no discretion in recommendation. In exercising his discretion in selection, the Registrar was not bound to select the Applicant to the post.

## **Conclusion**

116. The decision of the Registrar in declining to accept the outcome of the first interview process and referring the file back to the OTP was lawful. The decision of the Prosecutor to set up a new interview panel, in the circumstances, was taken in the lawful exercise of his discretion.

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<sup>9</sup> UNDT/2012/066 para 44.



117. The Applicant's prayers that the impugned decision be set aside and for a declaration that the Registrar acted *ultra vires* therefore fail.

118. The Tribunal however finds irregularities in the failure to submit the report of the second interview panel to the CRB for review, in the absence of convincing evidence of the second panel's decision on a pass mark of 65% before the commencement of their assignment, and in the rationale for scoring the Applicant a mere two out of five for educational qualifications when in fact he had an advanced law degree as advertised.

119. The Appeals Tribunal has held that not every violation of due process rights will necessarily lead to an award of compensation<sup>10</sup> and that compensation may only be awarded if it has been established that the staff member actually suffered damages.<sup>11</sup> In *Zhouk* although the Dispute Tribunal found that a breach of Mr. Zhouk's procedural rights had occurred, an order for compensation was not warranted because the Applicant had not provided evidence of any harm that he had suffered. In *Charles* the Appeals Tribunal found that the irregularities in that case did not deprive the Applicant of any real opportunity to be promoted or even included in the roster.<sup>12</sup>

120. The Tribunal deems it important and necessary to distinguish the above cited precedents from the instant case.

121. In this case, the importance of having the second panel's report reviewed by the CRB cannot be gainsaid. The Applicant had been recommended for selection after the first interview process; and while he had no guarantee of selection, there was a legitimate expectation that at the very least he would have been rostered.

122. The failure to submit the second report to the CRB had consequences for the Applicant as he had lost both the chance to be either selected or rostered due to the CRB's dissatisfaction with the first interview process. The entire first interview and its outcome having been discarded as a result of the inconsistencies

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<sup>10</sup> *Wu* 2010-UNAT-042, para. 33.

<sup>11</sup> *Zhouk* 2012-UNAT-224, paras 16,17; *Mirkovic* 2013-UNAT-290, para 26

<sup>12</sup> *Charles* 2013-UNAT-283.

noted by the CRB; it was critical for the CRB to review the second report to ascertain whether the inconsistencies noted after the first interview had been rectified and that the second process was free from irregularities.

123. The irregularities identified by the Tribunal in the second interview process would have possibly been noted and recommended by the CRB for rectification. For instance the Tribunal has found that the Applicant was deliberately marked down, especially as pertains to his educational qualifications. While the Tribunal has not undertaken a review of the entire marking process, this alone shows that something was amiss with it.

124. With respect to the absence of evidence to show that the pass mark of 65% was arrived at by the panel before the actual interview, it is the role of the CRB to ensure that applicants were reviewed on the basis of the pre-approved evaluation criteria.<sup>13</sup> In this case, there is nothing to convincingly show that the 65% pass mark was pre-approved. The failure to submit the second report to the CRB denied the Applicant the chance to have these anomalies regarding the process reviewed by the CRB.

125. A staff member is at all times entitled to the expectation that the Organization will be bound to follow its own procedures. In this case, there was a failure by the Administration to follow the Organization's own rules and secondly, there was a failure by the panel to follow the criteria for the advertised post in as far as the educational qualifications of the Applicant were concerned.

126. These irregularities are in themselves evidence enough to support a compensation award to the Applicant.

127. The Applicant is entitled to compensation for these procedural irregularities. The Tribunal accordingly awards him compensation in the sum of USD 3,000 which is to be paid to him within 60 days of the date that this judgment becomes executable, during which period the US Prime Rate applicable at that date shall apply. If payment is not effected within the 60-day period, an

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<sup>13</sup> ST/SGB/2011/7, Section 4.5.

additional five percent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 20<sup>th</sup> day of August 2013

Entered in the Register on this 20<sup>th</sup> day of August 2013

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi