UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/022
Judgment No.: UNDT/2014/043
Date: 15 April 2014
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

ALIKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Monica Bileris

Counsel for Respondent:
Kong Toh, UNOPS

Introduction and procedure

1. On 23 April 2013, the Applicant, then unrepresented, filed an application contesting several decisions made by the United Nations Office for Project Services ("UNOPS") and the United Nations Development Programme ("UNDP").

2. By Order No. 50 (GVA/2013) of 3 May 2013, the application was split into two separate cases, registered under case numbers UNDT/GVA/2013/021 and UNDT/GVA/2013/022, respectively, and served on the Respondent, who filed his reply on Case No. UNDT/GVA/2013/022 on 1 June 2013.

3. The Tribunal ordered that Case No. UNDT/GVA/2013/022 addresses exclusively the decisions not to change the Applicant's nationality, to use leave balance and separation entitlements for education grant reimbursements and not to forward the separation documents to the United Nations Joint Staff Pension Fund ("UNJSPF").

4. On 19 June 2013, the Applicant instructed counsel to represent him in this matter, and on the same date, Counsel for the Applicant filed a motion requesting leave to file a response to the Respondent's reply, which was granted by Order No. 107 (GVA/2013) of 24 July 2013. Counsel for the Applicant therefore filed a rejoinder to the Respondent's reply on 20 September 2013.

5. On 26 September 2013, Counsel for the Respondent submitted a motion for leave to file comments regarding the Applicant's rejoinder of 20 September 2013.

6. By Order No. 139 (GVA/2013) dated 1 October 2013, the Tribunal granted the Respondent's motion to file comments on the Applicant's rejoinder, by 14 October 2013. Counsel for the Respondent filed comments regarding the Applicant's rejoinder on 11 October 2013.

7. By Order No. 21 (GVA/2014) of 6 February 2014, the Tribunal requested the Respondent to provide it with additional information with respect to the actual amounts recovered through the use of leave balance and separation entitlements, and with respect to the specific separation documents that had already been provided as well as those that were yet to be provided to the UNJSPF.

8. The Respondent submitted the requested information on 14 February 2014.

9. By Order No. 43 (GVA/2014) of 10 March 2014, the Tribunal convoked the parties to a hearing for Cases Nos. UNDT/GVA/2013/021 and UNDT/GVA/2013/022, which was conducted on 26 March 2014, with both Counsel for the Applicant and Counsel for the Respondent attending via videoconference.

Facts

10. The Applicant started employment at the Switzerland Operations Center ("SWOC"), UNOPS, as Portfolio Manager of the Environment Portfolio, at the P -3 level, on 1 March 2009, in Geneva, Switzerland.

11. In his Personal History Form ("P-11"), signed in December 2008, the Applicant indicated Albanian under "Nationality(ies) at birth" and French under "Present nationality(ies)". He also indicated Thoiry, France, as his "Permanent address".

12. The offer of appointment, dated 23 February 2009, signed by the Applicant on the same day, stated "Education Grant and Education Grant Travel not applicable since your home country is within commuting distance of your duty station as per staff rule 203.8 (iv)".

13. The Applicant's letter of appointment dated 9 March 2009 expressly stated that "[t]his appointment is offered on the basis, inter alia, of [the Applicant's] certification of the accuracy of the information provided by [the Applicant] on the personal history form".

14. In his Personnel Induction Questionnaire, which the Applicant sent to the UNOPS Human Resources ("HR") and the Benefits and Entitlements Services ("BES"), UNDP, upon his recruitment, he indicated "Albanian" under "Official nationality" and "French" under "Other Nationalities".

15. On 6 October 2009, upon the Applicant's request, UNDP, BES, sent the Applicant a Personnel Action ("PA") Form and on 7 October 2009, he requested UNDP, BES, to correct and add some missing information to the PA, which related to his place of home leave and his dependents. He stressed that "[w]hile [he had] double nationality: Albanian and French, [his] home leave should be Albania since that is the country where [he was] born, grew up, where [his] family…and [his] home [are]".

16. On 5 January 2010, the Applicant again requested BES, UNDP, to change his place of home leave from France to Albania. After several exchanges of emails, a Team Lead and HR Associate, BES, UNDP, informed the Applicant by email of 7 October 2010 that "[she had] received the decision from BES Management on [his] request to change [his] official UN nationality from French to Albanian" and that his request was not granted, since at the time of his appointment with UNOPS, as well as now, he was more closely associated to France than to Albania.

17. On the same day, namely on 7 October 2010, BES, UNDP, advised the Applicant that if he wanted to appeal the decision, he should submit his request to the General Counsel, UNOPS.

18. Still on the same day, the Applicant asked HR, UNOPS, to inform him about the internal recourse procedure and on 8 October 2010, a Human Resources Specialist, UNOPS, confirmed that HR, UNOPS, would review his request.

19. On 11 November 2010, a Legal Associate, UNOPS, EMO, requested the Applicant to respond to some questions and provide supporting documents to allow UNOPS to better assess the merits of his request for change of his nationality for UN purposes. The Applicant provided additional information with respect to, *inter alia*, his Albanian passport, countries where he had resided,

property (real estate), mother tongue and nationality of himself and his children, on 15 November 2010.

20. On 20 June 2011, the Applicant submitted an education grant request for the school year 2009/2010 for his daughter.

21. By notification of 22 June 2011, the Director, HR, UNOPS, informed the Applicant that his nationality for UNOPS purposes would not be changed to Albanian.

22. On 6 July 2011, the Applicant sent a message to the Executive Director and the Deputy Executive Director, UNOPS, expressing his disagreement with the decision of the Director, HR, UNOPS, to reject his request to change his official nationality with the UN, and requested whether there was still a chance that the merits of his case be reviewed.

23. The first payment of education grant for the Applicant's daughter was made to the Applicant on 31 July 2011.

24. On 4 August 2011, the Deputy Executive Director, UNOPS, replied to the Applicant, confirming the decision that his request for change of nationality for UN purposes was rejected.

25. On 1 March 2012, the Applicant submitted a request for payment of education grant for the school year 2010/2011 and of education grant advance for the school year 2011/2012; payment of the education grant 2010/2011 and the education grant advance 2011/2012 were made on 30 April 2012.

26. At a face-to-face meeting between the Applicant and the Director, HR, UNOPS, in April 2012, with respect to his request for change of nationality, the latter suggested to the Applicant to send him a new request, which he did on 30 April 2012. On 8 May 2012, the Director, HR, UNOPS, sent a message to the Applicant, noting that there was no new element which would justify reopening his case.

27. The Applicant was separated from UNOPS on 30 September 2012.

28. By email of 8 October 2012, a Team Lead and HR Associate, BES, informed the Applicant that as he had been advised earlier, in his offer of appointment and through subsequent email correspondence, he was not entitled to international entitlements and that he had nevertheless, unduly, received education grants for his daughter for the period 2009 through 2012, and that monies paid would need to be recovered upon his separation from UNOPS. The Applicant did not receive that email, since his UNOPS account had been removed as of 1 October 2012; it was, however, forwarded to his private email address on 2 November 2012.

29. The separation letter of 23 October 2012 referred to the email of 8 October 2012, and confirmed to the Applicant that the recovery of the overpayment of education grant amounts—totalling CHF53,644.83—had to be settled upon his separation from UNOPS and that no salary or repatriation grant from which the overpayment could be recovered were available.

30. On 2 November 2012, the Applicant wrote to the Team and HR Associate, BES, stressing that as an international staff he should be entitled to international entitlements. He noted that he was not aware of any email correspondence advising him that he was not entitled to education grant. He requested that the separation letter be amended accordingly. The same day, namely 2 November 2012, the Team Lead and HR Associate, BES, wrote to the Applicant, noting that they were pleased that he had now received the separation letter and her earlier email of 8 October 2012. She reiterated that in view of the fact that he was a French national, residing in France, he was not entitled to international benefits, including education grant, since his duty station, Switzerland, was within commuting distance from France. She further noted that due to an oversight on the side of the Administration, the requests for education grant had nevertheless been processed, despite the fact that he was not entitled to them, and that they would need to be recovered upon his separation from UNOPS.

31. Yet, on 2 November 2012, the Applicant responded that his first nationality and that of his wife and children was Albanian and that he found it unreasonable to retroactively advice of the recovery of education grant. He noted that if that

decision were maintained, he would have to explore options to challenge the same.

32. After several exchanges of emails, the Applicant, by email of 29 November 2012, asked the Officer, BES, UNDP, to correct his nationality in the system to Albanian, and noted that that correction would make BES request for recovery of the education grant irrelevant; he also asked to be provided with the amount of repatriation grant to which he was entitled.

33. By email of the same day, a Human Resources Specialist, BES, UNDP, informed the Applicant that "a decision ha[d] already been made by UNOPS on the determination of [his] official nationality" and that his entitlements were administered on the basis of that decision, hence he was not entitled to education or repatriation grant.

34. By another email of 29 November 2012 to the Director, HR, UNOPS, the Applicant noted that in his view, BES request for recovery of the approved education grant payments constituted a good opportunity to reopen the case of changing his nationality to Albanian.

35. By email of 3 December 2012, the Director, HR, UNOPS, responded to the Applicant, stating that though he was not sure that this was a good opportunity to reopen the case, he would review it with his team. By email of 13 December 2012, he informed the Applicant that after further review of his case, he still considered that UNOPS original decision was correct.

36. By email of 17 December 2012, a UNDP Officer requested the Applicant to pay back the overpayment of the education grant he had received. The Applicant, in an email of the same day, responded that he had no intention to pay the education grant back, since, in his view, the decision with respect to his nationality was unlawful; moreover, the education grant had been approved by the Administration since 2009 and if he had known that he was not entitled to it, he could have made other choices for his daughter's schooling. He also asked BES to confirm that the UNJSPF received all necessary separation documentation. Yet, by email of the same day, the UNDP Officer responded to the Applicant, stressing

that any pending entitlements to him would be used to recover the overpayment made and that UNDP/UNOPS could not certify his pension papers until the overpayment was settled.

37. After some further exchanges, by email of 20 December 2012 to the Applicant, the Deputy Director, HR, UNOPS, recalled that in the Applicant's offer of appointment of 23 February 2009, which the latter had signed, it was clearly noted that education grant was not applicable to him since his home country, France, was within commuting distance of his duty station, as per the applicable staff rule and that he was neither entitled to home leave. The Deputy Director, HR, UNOPS, also referred to email communications from 2011 with respect to the Applicant's request for change of his nationality and related denial of his request for home leave. He noted that UNOPS provided the Applicant advice that his nationality for UN purposes was French in 2009, 2011 and 2012 and that the relevant administrative instruction on Education grant puts an obligation on staff members to verify the correctness of the information provided. The Deputy Director, HR, UNOPS, noted that all of the above should have prompted the Applicant not to submit any education grants. He noted that "upon the finalisation of the separation procedures relating to [the Applicant's] employment…[his] pension papers [would] be finalised", while recalling that the Applicant still owed the Organisation the amount of USD60,743.27 (CHF 53,644.83), and urged him to make the necessary arrangements to reimburse the overpayment.

38. On 21 December 2012, the Applicant responded to that email and expressed his disagreement; he thanked the Deputy Director, HR, UNOPS, for having withdrawn the decision to keep his pension fund pending by not providing the UNJSPF with the relevant separation documentation, and asked him about the decision with respect to the outstanding leave balance and other separation entitlements, noting that in his view, any recovery of overpayment should be made my means of deductions from salaries.

39. By email of 23 December 2012, the Deputy Director, HR, BES, UNOPS, informed the Applicant that "separation procedures include ensuring that staff

members have settled all their indebtedness to the Organization" and that "therefore [his] pension papers [would] be finalized after the CHF53,644.83 [were] recovered from [him]" and that "any amounts…otherwise due to [him]—including any annual leave balance—[would] be credited against this debt".

40. On 8 February 2013, the Applicant requested management evaluation of the decision of the Director, HR, UNOPS, dated 13 December 2012, not to change his nationality recognized under the UN Rules and Regulations and of the decision of the Deputy Director, HR, UNOPS, dated 23 December 2011 (sic), "to use his leave balance and separation entitlements to compensate for [UNDP BES] Education Grant reimbursement claim or to keep pension contribution on hold by not providing [UNJSPF] with separation documentation."

41. By letter of 18 March 2013, in response to his request for management evaluation, the Applicant was informed that both decisions were upheld.

42. The Applicant filed the present application on 23 April 2013.

Parties' submissions

43. The Applicant's principal contentions are:

The decision not to change his nationality for UN purposes

a. The application is receivable;

b. When he received a copy of his Personnel Action Form on 6 October 2009, he requested that it be corrected, particularly that his place of home leave should be Albania; he subsequently confirmed with UNDP, BES, his request to change his nationality to Albanian, and on 7 October 2010 was informed by BES, UNDP, that his request was rejected;

c. His request of 29 November 2012 to reconsider his change of nationality for UN purposes was based on new material information which was likely to change the merits of his case, namely the unfair and incomprehensible claim for reimbursement of education grant payments and

the non-payment of relocation grant of the Applicant and his family to Albania in December 2012, which warranted a new review of the decision;

d. While at the outcome of the new review, conducted after the new information was obtained, the previous decision was maintained, the new review process led to a new decision, notified to the Applicant on 13 December 2012, therefore, his request for management evaluation was timely;

e. In any event, no time limits should apply to request the review of a decision that violates individual rights protected by the Declaration of Human Rights; the successive decisions not to change his nationality constitute a violation of the UN Declaration of Human Rights and an abuse of the authority delegated to UNOPS by the Secretary-General which is inconsistent with the applicable rules and regulations;

f. The arguments brought forward to reject his claim are unfounded or do not show in any way ties to any country; he was granted French citizenship in 1994, and not in the late 80s as submitted by BES, UNDP; while he made mistakes in filling his P-11—he mistakenly only put "French" as his "Present nationality(ies)", while adding "Albanian" as his "Nationality(ies) at birth"; he incorrectly indicated Thoiry, France, as his permanent address, though in fact it was only his "present" address—the P11 was filled in a rush; later, in his Personnel Induction Questionnaire of 26 February 2009, he clearly indicated "Albanian" as his "Official Nationality", French as his "Other Nationality" and Albania as his Permanent Address, whereas he put Thoiry, France, as his "home address at duty station"; the P-11 does not prevail over the Personnel Induction Questionnaire;

g. All the circumstances of his case show without any ambiguity that he has closer ties to Albania than to France; UNOPS Administration did not even make the effort to show why it considered that he is most closely associated to France rather than to Albania; the Director, HR, and Deputy

Director, UNOPS, misrepresented the facts and provided false certifications and, as such, committed misconduct;

h. The decision was arbitrary, unreasonable and abusive; it was based on facts and arguments that were mainly misleading, untrue and not supported by evidence; since the Respondent did not respond thereon, a default judgement should be rendered in favour of the Applicant;

The decision to use leave balance and separation entitlements as well as not to provide separation documents to the UNJSPF to recover education grant

i. The decision to use leave balance and separation entitlements to reclaim alleged overpayments constitutes a separate administrative decision which is distinct from the decision to find him ineligible for education grant; the claim against that separate decision is receivable;

j. The decision to recover the education grants, which had been approved and disbursed since 2009, is arbitrary; had he known that he was not entitled to education grant for his daughter he could have made other schooling choices; the funds have already been disbursed to the school; if they were paid by error over a period of over four consecutive years, the error lies on UNDP, BES, which should have processed the claims and payments correctly; he has no control about UNDP, BES, actions and should not bear the consequences for its mistakes; UNDP, BES, accepted an oversight on its part;

k. He submitted the claims in good faith on the assumption that as a French national, he was entitled to education grant for his daughter attending a private school in Switzerland, his duty station; he did not submit the claims under the assumption that his nationality would be changed; however, had his request for change of nationality been examined objectively, he would have been entitled to education grant for his daughter;

l. Once his nationality is corrected, the request for reimbursement of education grant becomes irrelevant and he and his family also become entitled to repatriation/relocation grant;

m. He was entitled to the education grant as an Albanian national, therefore, there was no overpayment and the Administration has no right to recover;

n. Administrative instruction ST/AI/2000/12 (Private legal obligations of staff members) does not apply, since overpayment by an Organization does not fall under the definition of private legal obligation in that administrative instruction; instead, ST/AI/2009/1 (Recovery of overpayments made to staff members) applies to his case; according to sec. 3.1 of that Administrative Instruction, when an overpayment resulted from an administrative error on the part of the Organization, recovery shall be limited to the amounts paid during the two years period prior to the notification; since UNDP, BES, and UNOPS, HR, acknowledged responsibility in his case, the two year limit should be applied to him;

o. ST/AI/2009/1 provides for recovery of overpayment by means of deductions; full retention of salary (leave balance) constitutes a breach of the administrative instruction; the latter also requires an agreement between the staff member and the Administration on the mode of recovery; UNOPS did not try to reach such an agreement with him;

p. The decision not to release his separation entitlements including two months of annual leave and pension benefit, constitutes a violation of the Rules and Regulations of the United Nations and of the UNJSPF; his pension rights are inviolable;

q. Under the UNJSPF Regulations and Rules, the Fund may remit any portion of the benefit to the former employing organization only in case of criminal conviction for fraud against the employing organization, evidenced by a final and executable court order issued by a competent national court; neither the Fund, nor BES, UNDP, or HR, UNOPS, have a right over his

pension contribution; BES, UNDP, and HR, UNOPS, should immediately provide the Fund with the relevant separation documents and the Fund should immediately release the payment of his pension;

r. He and staff under his supervision were subject to harassment and intimidation by UNOPS Management;

s. He requests that UNOPS officially recognizes Albanian as his first nationality and changes it retroactively as of 1 March 2009 in its system; that UNOPS releases all outstanding payments relating to his separation, including his pension contribution; that it provides an estimate of all "missed entitlements" since 1 March 2009 in view of his new status, and pays him a lump sum with the corresponding amount; that UNOPS pay a lump sum to compensate him for compensatory and punitive damages for the total estimated amount of two years of salary, including salary (with staff assessment) and pension contribution (both contributions of the staff member and of the Organization).

44. The Respondent's principal contentions are:

The decision not to change the Applicant's nationality for UN purposes

a. The application, as far as it is directed against the decision concerning the Applicant's nationality for the purposes of the UN Staff Regulations and Rules, is not receivable, since he failed to comply with the statutory time limit provided for in staff rule 11.2 (c);

b. The decision was communicated to the Applicant for the first time on 7 October 2010, and subsequently reiterated on 22 June 2011, 4 August 2011 and 8 May 2012; the decision of 13 December 2012, which was the subject of the management evaluation request did not constitute a new decision; the information submitted by the Applicant on 29 November 2012, namely the reimbursement of education grant and his relocation to Albania were irrelevant and do not constitute grounds to justify that the decision be reviewed;

c. The Appeals Tribunal ruled in *Cremades* 2012-UNAT-271 that restatements of an earlier decision do not restart time limits; if the request for management evaluation is time-barred, the application is not receivable, because under its Statute, the Tribunal cannot waive time limits for management evaluation;

d. In case the Tribunal finds that the message of 6 June 2011 from the Applicant to the Executive Director and Deputy Executive Director, UNOPS, constitutes a request for management evaluation, the Applicant failed to file his application within the statutory period provided for in art. 8 (1)(i)(a) of the Tribunal's statute, namely 90 calendar days counted as from the reply of 4 August 2011 of the Deputy Executive Director;

e. Should the Tribunal find the application against the decision on the nationality receivable, the Respondent notes that the decision was well founded; the Applicant's letter of appointment expressly referred to the Applicant's PHP, in which he had indicated only "French" as his "Present Nationality(ies) and "Thoiry, France" as his "Permanent Address"; when he worked for the Global Fund, French was equally recorded as his only nationality; he applied for French citizenship as an adult; he has got real estate both in France and in Albania; his wife has both Albanian and French nationalities, and acquired French nationality through her marriage with the Applicant; while his mother and two sisters mostly have Albanian ties, he also has a son who has got only French nationality and the Applicant did not ensure that he got Albanian nationality, too;

f. The Administration reasonably exercised its discretion when it determined that the Applicant was most closely associated with France and not Albania; the initial decision and subsequent reiteration of the same, by which the Applicant's request for change of nationality were refused, did not contain any factual errors;

The decision to use leave balance and separation entitlements and not to provide separation documents to the UNJSPF to recover education grants

g. The application against the decision "to use leave balance and separation entitlements to compensate for…education grant reimbursement claim", while receivable, should be dismissed on the merits;

h. Any claim against the underlying decision to find the Applicant ineligible for education grant, however, is not receivable and can no longer be challenged; therefore, the Applicant cannot now claim that "there is no overpayment because [he] was entitled to education grant"; on the merits, the decision not to grant him education grant is lawful, his ineligibility for education grant was clearly indicated in the offer of appointment of 23 February 2009 signed by the Applicant, which stated that education grant was "[n]ot applicable since [his] home country [i.e. France] [was] within commuting distance of [his] duty station [i.e. Geneva] as per staff rule 203.8(iv)"; the Applicant submitted his first education grant claim on 20 June 2011, with respect to the school year 2009/2010; accordingly, his claim that he would have made other choices for his daughter's schooling had UNDP, BES, not made an error is not tenable; it seems that he enrolled his daughter in the private school hoping that UNOPS would change his nationality for the purpose of the UN Staff Rules and Regulations; UNOPS did not do anything to make the Applicant believe that this would be the case therefore, UNOPS is not liable for his decision to enroll his daughter in a private school;

i. Before he submitted the first education grant claim, the Applicant was aware that he was not entitled to education grant and that his nationality for UN purposes would not be changed to Albanian; under the ST/AI/2004/2 (Education grant and special education grant for children with a disability), he was obliged to provide accurate and complete information; he should have stated that he was not eligible for education grant, in which case his claims would have been rejected; in fact, in view of the above, he should not

have submitted education grant claims; the payment of the education grant; by error, was more due to the Applicant than to the Administration;

j. UNOPS has a duty to safeguard public funds, which includes that it cannot make any payment to staff members who are not entitled to certain payments;

k. All payments made to the Applicant as education grant were made within two years of UNDP, BES, notifying the Applicant of the overpayment, hence, the two-year limitation provided for in ST/AI/2009/1 is irrelevant; in any event, it only applies in case the staff member "was unaware or could not reasonably have been expected to be aware of the overpayment", and not "when the facts indicate that an overpayment was due to the submission of erroneous, fraudulent or incomplete information by the staff member"; under the circumstances, since the Applicant, although he had been told in his letter of appointment that he was not eligible to receive education grant, and that he was considered a French national for UN purposes, submitted an education grant claim, the two year limit would not apply;

l. The above-mentioned administrative instruction provides that in case of overpayment, the staff member's indebtedness shall be recovered by deductions from salaries, wages and other emoluments, which include commutated annual leave and other separation entitlements; accordingly, the recovery from those entitlements was lawful;

m. ST/AI/155/Rev.2 (Personnel Payroll Clearance Action) provides that staff members are responsible for settling their indebtedness to the UN upon separation and that the Organization may refuse to issue the P.35 form, which is required by the UNJSPF to process the pension benefit, until that is done; in fact, P.35 form is no longer used but ST/AI/155/Rev.2 allows for the Organisation to withhold the separation notification (PF.4)—this is what was done in the case at hand;

n. The Respondent is not claiming any overpayment from the UNJSPF, but only exercised his right under ST/AI/155/Rev.2 to not to provide the Fund with the relevant separation documentation to process the pension, as long as the Applicant's indebtedness is not settled;

o. Therefore, the decision "to use leave balance and separation entitlements to compensate for UNDP BES education grant reimbursement claim or to keep transfer of [his] pension contribution on hold" was lawful;

p. The application should be dismissed in its entirety.

Consideration

Scope of the application

45. Upon the Tribunal's Order No. 50 (GVA/2013) of 3 May 2013 the application was split into two cases, with Case No. UNDT/GVA/2013/022 covering exclusively the decisions not to change the Applicant's nationality and to use leave balance and separation entitlements and not to provide separation documents to the UNJSPF to recover education grants. The Tribunal will therefore examine these decisions in turn.

Decision not to change the Applicant's nationality for UN purposes

46. Before reviewing the chronology of events with respect to this decision, the Tribunal recalls that according to the established jurisprudence of the Appeals Tribunal, statutory time limits have to be enforced strictly (*Mezoui* 2010-UNAT-043, *Cooke* 2012-UNAT-275) and that it noted in *Cremades* 2012-UNAT-271 that the mere confirmation of an original decision does "not have the effect of suspending, or re-starting, the time limits for initiating formal proceedings".

47. With this in mind, the Tribunal notes that UNOPS decision not to change the Applicant's nationality for United Nations purposes from French to Albanian was communicated to him for the first time on 7 October 2010, when he was also informed about internal recourse mechanisms in case he wanted to contest the decision. However, the Tribunal considers relevant that thereafter, namely on

11 November 2010, the Applicant was requested to submit additional information to allow UNOPS to make a better assessment of the merits of his request to have his nationality changed for UN purposes. After the Applicant provided such additional information on 15 November 2010, he was informed on 22 June 2011 that his nationality would not be changed. In the Tribunal's view, the decision of 22 June 2011 was not a mere confirmation of the decision of 7 October 2010, since it implied a new review, on the basis of additional information provided by the Applicant upon an explicit request by the Administration. Therefore, the decision of 22 June 2011 constitutes a new administrative decision, and the time limits of staff rule 11.2(c) started to run, anew, as of that date.

48. In applying the same rationale, the Tribunal cannot, however, find that the subsequent decisions of 4 August 2011, 8 May 2012 and finally 13 December 2012 equally constitute new decisions which would re-start the statutory time-limits to request management evaluation. On the contrary, these decisions, including the decision of 13 December 2012 which was the subject of the Applicant's request for management evaluation, were mere confirmations and repetitions of the decision of 22 June 2011. The Applicant's argument that UNDP, BES, claim of reimbursement of the education grant payments and his relocation and that of his family to Albania upon his separation are new elements justifying that his case be reconsidered, hence that the decision of 13 December 2012 constitutes a new administrative decision which restarted the statutory time-lines, is without merit. Both events happened after the fact and do not constitute material information which might, at the time of the original decision, have led the Administration to change its position; they are therefore irrelevant for the purpose of a substantive review of the original decision. Therefore, in view of the clear parameter set by the Appeals Tribunal in the above-referenced Judgment *Cremades*, the Tribunal cannot but conclude that the time-limit for requesting management evaluation started to run on 22 June 2011 and that in filing his request for management evaluation only on 8 February 2013, the Applicant failed to respect the statutory time-limits provided for under staff rule 11.2(c).

49. Since the application concerning the decision not to change the Applicant's nationality for UN purposes is not receivable, the Tribunal has to refrain from

assessing the merits of the Applicant's claim (see *Servas* 2013-UNAT-349) in this respect.

Decisions to use leave balance and separation entitlements and not to provide separation documents to the UNJSPF to recover education grants

50. The Tribunal notes that the Applicant was informed that he would not be entitled to education grant for the first time through the offer of appointment dated 23 February 2009, which he signed on the same day, and which stated "Education grant … not applicable since your home country is within commuting distance of your duty station." Moreover, by email of 8 October 2012—received by the Applicant on 2 November 2012—the Administration sent the Applicant his separation letter of 23 October 2012, in which it noted that the education grant payments were to be recovered in the context of his separation. The Tribunal also notes that the request for management evaluation was filed only on 8 February 2013.

51. It follows from the above that any claim against the decision that he was not entitled to education grant and against the recovery of the overpayment are clearly time-barred.

52. With respect to the actual decisions to use leave balance and to withhold separation documents, the Tribunal notes that while the Applicant was notified on 2 November 2012 that the overpayment of the education grant would have to be recovered "in connection with his separation from UNOPS", this notification did not specify that such recovery would be done through the use of leave balance/withholding of separation documents for the UNJSPF. These decisions were communicated to the Applicant only on 20 and 23 December 2012, therefore, this part of the application is receivable *ratione temporis.*

53. With respect to the decision to use leave balance for the purpose of the recovery, the Tribunal recalls that sec. 2.2 of ST/AI/2009/1 provides that "overpayment creates on the part of the staff member an indebtedness which shall normally be recovered by means of deductions from salaries, wages and other emoluments under staff rule 3.17(c)(ii)", while staff rule 3.17(c)(ii) then in

force—i.e. current staff rule 3.18(c)(ii)—stated "deductions from salaries and other emoluments may also be made for: indebtedness to the United Nations". Upon its request, the Tribunal was informed by the Respondent that from the total amount of education grant payments to be recovered, that is USD60,743.27, USD20,291.36 were recovered by using 38 days of the Applicant's commutated annual leave, plus USD84 by using life insurance contribution of the Applicant. It is the considered view of this Tribunal that such leave balance and separation entitlements clearly fall under the notion of "other emoluments" under the above-referenced rules; hence, it was legal to use these emoluments to partially settle the Applicant's indebtedness to the Organization and the application in this respect has to be rejected on the merits.

54. Finally, the Tribunal has to consider the argument put forward by the Respondent that he can, on the basis of ST/AI/155/Rev.2 (Personnel Payroll Clearance Action), withhold the separation notification needed by the UNJSPF to process the Applicant's pension benefits due under the UNJSPF Regulations and Rules.

55. Sections 10 to 12 of ST/AI/155/Rev. 2 provide as follows:

> 10. The Office of Programme Planning, Budget and Finance will be responsible for:
>
> (a) Recording on form P.35 if there are any outstanding cash advances, travel advances, income tax reimbursements, accounts receivable and other charges not already noted;
>
> …
>
> (c) Following completion of section I, II and III of form P.35, distributing the copies of the form as appropriate;
>
> (d) Preparing the Pension Fund separation notification (PF.4) and sending it to the secretariat of the [UNJSPF] within three days of completion of the action taken under subparagraph (c) above;
>
> …

> Staff members
>
> 11. Staff members separating from service, in accordance with their contractual obligations to the United Nations are responsible for:
>
> (a) Settling all indebtedness to the United Nations;
>
> …
>
> 12. The Under-Secretary-General for Administration and Management may refuse to issue the P.35 form or may delay its issuance until a staff member has satisfactorily fulfilled the requirements set out in paragraph 11 above.
>
> 13 Staff are reminded that non-issuance of a P.35 form will prevent them from receiving their pension benefits since this form is required by the Pension Fund for the processing of those pension benefits. Staff are also reminded that failure to comply with the obligations set out in paragraph 11 above may result in the suspension of the separation procedure, which may delay any payments otherwise due to the staff member.

56. The Tribunal notes that in his reply the Respondent had initially stated that on the basis of sec. 12 of the above-referenced administrative instruction, he had not yet provided the UNJSPF with the form P.35. Upon the Tribunal's inquiry, the Respondent confirmed, however, that form P.35 was in fact "no longer used by UNOPS (the UNJSPF can now access the UNOPS Enterprise Resource Planning (ERP) computer system to view the required information)", and submitted that the decision not to send the separation notification (PF.4) was lawful under ST/AI/155/Rev.2, which "envisages a 'separation notification' (PF.4) not being sent to the UNJSPF if the circumstances would entitle the Organization to refuse to complete a P.35."

57. The Tribunal recalls that staff members' rights to payment of their pension benefits are determined exclusively under the Regulations of the UNJSPF and that no deductions may be made from the benefits due from the Pension Fund, except for indebtedness to the Fund as well as under the very strict conditions set forth under art. 45 *bis* (Disposition of pension benefits in case of conviction for fraud against employing organization) of the UNJSPF Regulations. With this in mind and in view of the unambiguous terms of ST/AI/155/Rev.2, the Tribunal finds that

the Administration has no legal grounds for refusing to issue the separation notification to the UNJSPF to secure the payment of a debt the Applicant has vis-à-vis UNOPS.

58. The Tribunal stresses that while sec. 12 of ST/AI/155/Rev.2 constitutes the legal basis for withholding the P.35, it does not allow the withholding of the separation notification (PF.4). In other words, the employing Organization may withhold the submission of separation documents to the UNJSPF to have a staff member settle his debts to the Organization only under the explicit and very restrictive terms of ST/AI/155/Rev.2, sec. 12. These terms are limited to the P.35 and, due to their exceptional character, are not open to any analogous extension. Therefore, the Organization cannot argue that since the document referred to in the administrative instruction (P.35) is "no longer used", the application of ST/AI/155/Rev.2 has to be adjusted to the current practice with respect to the interaction of the employing organization with the UNJSPF, as such circumventing the actual wording and interpreting the administrative instruction as the Respondent sees fit. The Tribunal concludes, on the contrary, that by processing the Separation Personnel Action which contained information reflected in the past in the P.35 form, and by transmitting that information to the UNJSPF through the interface system, the Administration forewent the opportunity to legally avail itself of an action intended to assist in the settlement of indebtedness to the Organization, namely the withholding of the P.35. Therefore, in the case at hand the subsequent decision not to transmit the separation notification (PF.4) to the UNJSPF was illegal.

59. Regarding various claims related to the harassment the Applicant alleges he was subjected to, the Tribunal considers that the Applicant did not prove how these allegations might have impacted the contested decisions found receivable under the present application.

Remedies

60. During the hearing, the Tribunal sought clarification from Counsel for the Applicant on the remedies requested by her client, and got confirmation that the Applicant was seeking the Tribunal to order the Respondent to send the separation

notification to the UNJSPF, and to be awarded interest with respect to the fact that his pension entitlements were not paid on time.

61. The Tribunal recalls that art. 10.5 of its Statute provides that it may order one or both of the following:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

62. The fundamental purpose of judicial remedy is to attempt, to the extent possible, to place the aggrieved party in the position she or he would have been in but for the breach (*Warren* 2010-UNAT-059). However, in some instances rescission as a remedy may be unavailable or the Tribunal may find that, although rescission is available, other types of relief, such as specific performance or compensation, may be more appropriate (*Klein* UNDT/2011/169).

63. In the case at hand, the Tribunal considers that the most appropriate remedy is to order the Respondent to exercise specific performance, namely to send the separation notification (PF.4) to the UNJSPF, within 60 days of the issuance of the present judgment.

64. Moreover, the Tribunal finds that the Applicant suffered material damages for since his separation on 30 September 2012, processing and subsequent payment of pension benefits to which he was entitled to under the UNJSPF Regulations has not been made, because the Administration illegally withheld the separation notification. The Tribunal estimates that the Applicant, a former staff member at the P-3 level, with UNJSPF contributory service of around 3 and a half years, will be entitled to an amount of approximately USD40,000 under

art. 31(b)(i) (Withdrawal settlement) of the UNJSPF Regulations. Since payment of this amount has been in abeyance for a period of approximately 18 months, the Tribunal determines that the appropriate amount of compensation under art. 10, para. 5(b) of the Tribunal's Statute shall be calculated on the basis of an annual interest rate of 5%, entitling the Applicant to the payment of USD3,000 for material damages.

Conclusion

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

a. The Respondent is ordered to transmit to the UNJSPF the Applicant's separation notification (PF.4) within 60 days of the issuance of the present judgment;

b. The Applicant is awarded USD3,000 for material damages;

c. The compensation set in sub-paragraph (b) above shall bear interest at the United States Prime Rate with effect from the date this judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the United States Prime Rate 60 days from the date this judgment becomes executable;

d. All other please are rejected.

(*Signed*)

Judge Thomas Laker

Dated this 15th day of April 2014

Entered in the Register on this 15th day of April 2014

(*Signed*)

René M. Vargas M., Registrar, Geneva