



**Before:** Judge Vinod Boolell  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

HASSOUNA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Edwin Nhliziyo

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Elizabeth Gall, ALS/OHRM

## **The Application**

1. The Applicant filed an Application before the United Nations Dispute Tribunal (UNDT) in Nairobi on 13 July 2012, contesting the decision of the Secretary-General to not redeploy him from the African Union/United Nations Hybrid Operation in Darfur (UNAMID) following the Government of Sudan's decision declaring him as *persona non grata* (PNG). On 27 August 2012, the Respondent filed his Reply to the Application.

## **Procedural History**

2. On 12 November 2012, the Tribunal issued Order No. 144 (NBI/2012) seeking an update from the Parties as to the status of the Applicant's employment.

3. The Respondent filed his submissions in response to Order No. 144 (NBI/2012) stating that the Applicant's appointment had been extended through 28 February 2013; that the Applicant had been sent on a temporary duty assignment (TDY) to Syria and that the Administration was continuing to encourage the Applicant to "apply to suitable job openings".

4. The Applicant's filing in response to Order No. 144 (NBI/2012) confirmed that he was on TDY in Syria but lamented that he was being deprived of the benefits and entitlements that he would ordinarily be receiving (on a one-year fixed-term appointment (FTA)) because of the short-term extensions he was being subjected to. The Applicant informed the Tribunal that the temporary deployment to Syria was only valid up to 16 February 2013, and that his FTA with UNAMID would expire at the end of February 2013, contrary to the initial recommendation that the FTA be valid through to 30 June 2013.

5. The Applicant also advised the Tribunal that the TDY he was on was at the P3 level, significantly different from the P4/8 post he encumbered at UNAMID. A Case Management hearing was held on 7 February 2013.

6. The Respondent maintained that the Application is moot given that the Applicant's FTA had been renewed through 30 June 2013.

7. The Applicant maintained that he has the right to be deployed to a position commensurate with his grade and experience, which was not the case with his position in Syria. The Applicant also reiterated that the decision of the Government of Sudan to declare him *persona non grata* was not made through any fault of his own.

8. The Tribunal issued Order No. 037 (NBI/2013), following the Case Management hearing, urging the Parties to consult and deliberate on having this matter informally resolved or mediated.

9. On 28 March 2013 and 29 March 2013, the Respondent and the Applicant made their respective submissions informing the Tribunal that there are no prospects of the matter being resolved informally.

10. The matter was then set down for hearing on 4 June 2013. The Applicant testified, as did one other witness called by the Respondent.

## **Facts**

11. The Applicant entered into service of the United Nations in 2003, as a Protocol and External Relations Officer at the International Criminal Tribunal for Rwanda (ICTR).

12. He was subsequently appointed to UNAMID as a Political Affairs Officer at the P4 level. Following the reforms pertaining to contracts in the United Nations in 2009, the Applicant was given an FTA limited to service with UNAMID.

13. On 12 January 2012, while the Applicant was on leave, he received an email from UNAMID Human Resources advising him to delay his return to the Mission area. The Applicant was informed that the Mission had been verbally advised by the Host Government that it was not in favour of his return to, and continued stay, in Sudan.

14. The Applicant was then, effective 13 January 2012, placed at the Regional Service Centre in Entebbe (RSC-Entebbe) on TDY as a Special Projects Officer.

15. On 15 January 2012, the UNAMID Liaison Office in Khartoum received a *Note Verbale* dated “15 December 2012” (*sic*) from the Sudan Ministry of Foreign Affairs directing that the Applicant “leave the country within 72 hours” as he “was proven to be involved in activities that contribute negative to peace progress in Darfur that contravene with the mandate of UNAMID”. (*sic*)

16. On 27 January 2012, the Department of Field Support (DFS) responded with a *Note Verbale* to the Permanent Mission of the Republic of Sudan to the United Nations. DFS protested the unilateral decision of the Government to expel the Applicant and another UNAMID staff member, and noted that the actions of the Government were contrary to its obligations under international law. DFS requested that the Government rescind its decision.

17. On 21 February 2012, the Applicant (through counsel) wrote to DFS seeking reassignment to “an equivalent position in another field mission”.

18. DFS responded to the Applicant (through counsel) on 29 February 2012, stating that his temporary duty status in RSC-Entebbe was “not a long-term option ... as there is no position in that location corresponding to his area of competence”. The response also stated that DFS would continue its efforts to assist the Applicant to find a suitable position.

19. The Applicant's appointment was thereafter extended for the period 1 April to 30 June 2012.

20. The Applicant sought management evaluation of the decision to not reassign him to another mission on 1 March 2012. The impugned decision was upheld on 13 April 2012.

21. On 12 June 2012, UNAMID sent a second *Note Verbale* to the Sudanese Ministry of Foreign Affairs. UNAMID requested the Government to provide it with information on the specific acts alleged to have been committed by the Applicant and the other staff member. UNAMID also requested that the Government rescind its decision to expel the staff members and that they be permitted to continue their service in UNAMID without hindrance.

22. The Government of Sudan responded on 20 June 2012 saying that it had "legally exercised its right to protect the national security of the country".

23. The Applicant's appointment was renewed for a further three months through 30 September 2012. Following another renewal, the Applicant went on TDY to the Golan Heights from 6 November 2012 to 15 May 2013.

24. It is in evidence that the UNAMID Director of Mission Support (DMS) had recommended the extension of the Applicant's appointment (ending 30 June 2013) to 30 September 2013.

25. It is also in evidence, from the testimony of the DMS, that the Applicant's appointment would have been extended for a further twelve months but for the Government of Sudan's declaration that he was "undesirable" or *persona non grata*.

## **Parties' Submissions**

### ***The Applicant***

26. The Charter of the United Nations prohibits the Organization from taking instruction from member states. This principle means that where a member state takes an arbitrary position against a staff member in good standing, the Secretary-General has a duty under staff regulation 1.1(c) to protect the rights of that staff member. In the case of the Applicant, the Secretary-General has failed to accord the staff member with that protection.

27. Although the Applicant has remained employed by the Organisation, he has been on a series of short-term appointments which deprives him of the security of tenure normally accorded to other staff members in good standing. He has also suffered financial losses as a result of the *persona non grata* status imposed upon him by the Government of Sudan.

28. The Applicant's career as a political affairs officer has been undermined, in that he is being made to compete afresh for positions similar to that which he has been encumbering contrary to his requests to be laterally reassigned to any other mission. The Applicant's reassignment must surely be a remedy available to him given that he is in his current position through no fault of his own. That act by the Government of Sudan was arbitrary and has neither been explained nor justified.

29. The Secretary-General has a duty under staff regulation 1.1(c) to protect the rights of the Applicant. The Secretary-General has both the power and authority to laterally re-assign the Applicant to a suitable post in any mission. In circumstances such as that facing the Applicant, the Secretary-General can and should exercise his wide discretionary powers distinct from the rules and regulations governing ordinary recruitment, promotion and re-assignment procedures.

30. Asking the Applicant to use his own efforts to find another post is tantamount to accepting the arbitrary action by the Government of Sudan as legitimate. It should be pointed out that PNG decisions are ordinarily taken by member states against international personnel when they have violated local laws.

31. As a remedy to his current situation and predicament, the Applicant asks to be reassigned to another mission. He has applied to join the new mission in Mali and there are no reasons known to him that would prevent the Secretary-General from assigning him to that mission. In fact, the new mission has asked staff at large to express their interest should they be keen to join it.

32. The Applicant also seeks financial compensation for his suffering and loss of income, benefits and allowances he would otherwise have been receiving were it not for the arbitrary actions of the Government of the Sudan.

33. Finally, the Applicant submits that the Tribunal has both the power and authority to order the Respondent to re-assign him to the next available suitable post.

### ***The Respondent***

34. The Respondent's position is that the Application before the Tribunal is not receivable and should be dismissed as such because the Applicant's contract was extended beyond 30 June 2012.

35. The contention that the short-term renewals were unlawful is also not receivable, as it was advanced for the first time when the matter was orally heard. It is therefore outside the scope of the Tribunal's jurisdiction as the issue was never subject to management evaluation.

36. The Respondent has, at all times, acted lawfully and in good faith. The repeated renewal of the Applicant's contract and his reassignment to Entebbe, in spite

of the fact that his initial contract with the Secretary-General was frustrated by the Host Government is evidence of the Respondent's good faith. The Applicant has no right to be reassigned to another position in the Organization. The Organization has nevertheless made all reasonable efforts to assist the Applicant to find a suitable position to enable him to continue his career with the Organization, within the legal framework established by the Staff Regulations and Rules.

37. The Applicant's contention that the Respondent or other staff members of the Organization have breached article 100.1 of the Charter of the United Nations by seeking or receiving instructions from the Government of Sudan has no merit. The same applies to the assertion that the Respondent has "reneged" on his duty under staff regulation 1.1(c) to protect the Applicant's rights as a staff member.

## **DELIBERATIONS**

38. The issues in this case are as follows:

- a) Receivability:
  - i. Is the matter receivable before the UNDT given that the Applicant's contract was extended beyond June 2012; and
  - ii. Is the issue of the short-term renewals which the Applicant has been subject to receivable before the UNDT given that that specific issue has been deliberated upon by the Management Evaluation Unit?
- b) Does the Secretary-General have the duty and authority to laterally reassign or take appropriate measures to protect the employment rights of a staff member who has been declared *persona non grata* by a Host Government?



***Receivability***

39. The Applicant held a fixed term contract of one year at the time that he was declared *persona non grata* by the Government of Sudan. Had he not been declared *persona non grata*, according to the testimony of the DMS, he would have been renewed for another year.

40. The Respondent submits that the application is not receivable because the Applicant's contract had been renewed beyond 30 June 2012. The Respondent also submits that the short-term renewal is not a materially receivable issue before the Tribunal because that decision has not been subject to management evaluation.

41. But what the Respondent overlooks is that the initial contract which was for one year, was indeed extended *but* in a piecemeal fashion – that is three months at a time.

42. The grievance of the Applicant is that his appointment should have been extended for a year at a time from June 2012 given that that would have been the case had he been in Darfur and given that his reassignment was through no fault of his own.

43. On the facts of the present case, had the Applicant not been declared *persona non grata* he could legitimately have expected a renewal of his contract for one year subject only to factors such as performance and funding. The UNAMID DMS said as much in his testimony to the Tribunal.

44. In his request for management evaluation, the Applicant stated that he was challenging the “temporary nature” of the position he was assigned to in Entebbe and the decision not to renew his contract beyond 30 June 2012. In his Application he challenges precisely the temporary nature of this contract in the sense that he was being extended on a three month basis whereas his original contract was a yearly one

and would have been renewed had he not be declared *persona non grata*. In his request for management evaluation, the Applicant avers that he was contesting what appeared to him to be the temporary nature of his contract. The Applicant stated, “[i]n addition this position [assignment to RSC in Entebbe] appears to be of a temporary nature”.

45. It is this continuum of events – the repeated short-term renewal of his appointment stemming from the decision of the Government of Sudan to oust the Applicant from its territory - that the Tribunal finds the Applicant to be challenging. As a decision of “individual application” with “direct legal consequences” to the Applicant, the Tribunal finds this decision to be materially receivable.<sup>1</sup>

46. The Tribunal is therefore not persuaded by the Respondent’s arguments as to the receivability of this Application *ratione materiae* and finds the matter to be properly before this Court.

***Does the Secretary-General have the duty and authority to laterally reassign or take appropriate measures to protect the employment rights of a staff member who has been declared persona non grata by a Host Government?***

47. In the peacekeeping context, the Organization can only operate in a sovereign State with the consent of that State commonly referred to as the host country. To that end an agreement, known as the Status of Forces Agreement (SOFA), is signed between the host country and the Organization. On 9 February 2008, UNAMID and the Government of Sudan signed a SOFA by which the host country recognized the “exclusively international nature of UNAMID” and also recognized the application of the 1946 Convention on the Privileges and Immunities of the United Nations (the Convention). Pursuant to Article V, section 20 of the Convention, only the Secretary-General has the authority to waive the immunity of a United Nations staff member. Where the responsibility of the staff member who is PNGed is not clearly established

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<sup>1</sup> Judgement No. 1157 (2003), *Andronov*.

by the host country, the Secretary-General is entitled to request the host country for particulars leading to the PNG decision to enable him to determine whether or not the staff member was acting in his/her official capacity. The decision to remove the staff member still vests in the Secretary-General though it is triggered by a decision of the host country.

48. In the present case the Applicant was declared “undesirable” by the Government of Sudan and the only explanation given by the Sudanese government in the exercise of its sovereign powers was contained in a *Note Verbale* dated 15 December 2012 requesting that the Applicant leave the country within 72 hours on the putative basis that the Applicant was proven to be involved in activities that contributed negatively to the peace process in Darfur. The Organization’s request for the rescission of the decision in successive *Notes Verbale* proved futile.

49. It is within the sovereign prerogative of a State to ask that a foreigner leave its soil. Although one would expect such a decision to be taken judiciously, this may not always be the case. When a staff member is asked to leave the territory of a host country, the Secretary-General would normally ask for reasons or request that the decision be reversed. In the case of the Applicant, the Secretary-General did this. When that approach failed to yield results, there was not much else that the Secretary-General could do. He could not, of course, return the staff member to a duty station located in the territory of a host country that is hostile to that staff member.

50. Under these circumstances, what then is the duty of the United Nations towards a staff member who has been declared *persona non grata*? Specifically, what were the duties of the United Nations in respect of the Applicant?

51. Non-renewal or renewal on adverse terms and conditions is an option open to the Secretary-General depending on the circumstances surrounding the PNG decision by the host country. In some cases, staff members are declared *persona non grata* for overstepping their TORs and the mandate of the mission. Where the host country

provides the information requested and the SG decides, pursuant to section 20 of the Convention, that the staff member acted outside his/her official capacity, non-renewal is an option. However in the case of a staff member who has been declared *persona non grata* and the host country is not forthcoming with information as to the basis for his/her expulsion or the reasons, if any, do not justify a PNG decision, other considerations may apply. Under these circumstances, a change in the terms and conditions of the staff member's contract or non-renewal is not an option open to the Secretary-General. The Tribunal takes the view that under such circumstances it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country.

52. In the present matter, the Secretary-General cannot plead frustration of the contract by *force majeure* and so use the conduct of a third party to exempt him from his obligations towards the Applicant.

53. The Tribunal finds that the Applicant should properly have been given a one-year extension in Entebbe so that he would have been entitled to the benefits and entitlements that ordinarily accompany such a contract. While the Secretary-General has wide discretion as to where he deploys the Applicant, it would have been prudent to ensure that such redeployment did not adversely affect him.

54. In paragraph I under Details of Contested Decision the Applicant asked that he be "assigned to another mission so that the unlawful Sudanese action will not impact his future career in the UN".

55. In the remedies section at the end of the Application, the Applicant sought "priority for placement against the next available post in the department of peace-keeping".

56. The Tribunal understands his claim to be the following: that he should not bear the adverse consequences of a decision made by the host country for which he

was not to blame and that efforts should have been made to deploy him to a different duty station to minimize the impact of the PNG decision on his career. In other words, his redeployment should have been on the same terms and conditions as his original contract.

**Decision**

57. The Tribunal therefore orders the payment of those benefits and entitlements that would have accrued to the Applicant on the basis of a yearly extension of appointment **in Entebbe** as of 13 January 2012.

*(signed)*

Judge Vinod Boolell

Dated this 10<sup>th</sup> day of July 2014

Entered in the Register on this 10<sup>th</sup> day of July 2014

*(signed)*

Abena Kwakye-Berko, Registrar, Nairobi