



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/053-R1

Judgment
No.: UNDT/2014/116

Date: 19 September 2014

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KACAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Karen M. Farkas, UNHCR

Introduction

1. By application filed on 8 June 2012, the Applicant contests the decision not to renew his fixed-term contract with the United Nations High Commissioner for Refugees (“UNHCR”) beyond 31 December 2011.

2. The Respondent filed his reply on 12 July 2012 and upon the Tribunal’s instructions, the Applicant filed observations thereon on 16 August 2012. On 5 February 2013, a hearing took place in Geneva in the presence of the parties, during which the Applicant requested the Tribunal to call a witness to provide testimony concerning his claim that the non-renewal decision was discriminatory since based on his Kurdish ethnicity. His request to have his witness heard was, however, not granted.

3. On 19 February 2013, Judge Cousin of the Dispute Tribunal in Geneva issued Judgment UNDT/2013/025 in the matter *Kacan v. Secretary-General of the United Nations* (Case No. UNDT/GVA/2012/053), dismissing the application in its entirety.

4. The Applicant appealed the Judgment, and by Judgment No. 2014-UNAT-426 of 2 April 2014, the United Nations Appeals Tribunal (“UNAT”) noted that “due process required that [the Applicant] be given a fair hearing with the opportunity to present his own case and to answer the case against him” and remanded the case to the Dispute Tribunal “before a different judge for a determination of the facts including the merits of the application after having heard the evidence of [the Applicant’s] witness”.

5. The remanded case was registered under Case No. UNDT/GVA/2012/053-R1 and assigned to the undersigned Judge. By Order No. 87 (GVA/2014) of 18 June 2014, the Tribunal ordered the Applicant to provide it with a detailed explanation on which facts exactly his above-mentioned witness would provide evidence, which the Applicant did on 2 July 2014. In his submission, the Applicant made reference to an email that the then Head, Aliens Police, Van,

allegedly mentioned to the Applicant's witness in 2011, and written to the Inspector General's Office ("IGO") of UNHCR.

6. By Order No. 103 (GVA/2014) of 7 July 2014, the Tribunal ordered the Respondent to provide it with the email referred to by the Applicant's witness or, in the alternative, a signed written statement by the Inspector General, UNHCR, that no such email was received by the IGO.

7. On 21 July 2014, the Respondent filed a submission in response to Order No. 103 (GVA/2014), including a signed written statement from the Inspector General, UNHCR, who confirmed that he had reviewed the database of the IGO, and that he could not find any trace of a communication the IGO would have received from the Head, Aliens Police, Van.

8. By Order No. 112 (GVA/2014) of 24 July 2014, the parties and the Applicant's witness were convoked to a hearing on 2 September 2014, which took place on that date, in the presence of Counsel for the Respondent and the Applicant attending via video/audio conference.

9. The Applicant's witness appeared in person at the hearing. She testified on her encounter with the Head, Aliens Police, Van, in Van in July/August 2011.

Facts

10. The Applicant first joined UNHCR in March 2001, as an Individual Contractor, on the basis of a letter of understanding, which was renewed several times. Following a competitive recruitment procedure, he entered the service of UNHCR on 18 September 2007, as a Protection Associate at the G-6 level in the Field Office in Van, Turkey, under a one year fixed-term appointment ("FTA"). His FTA was subsequently renewed on a yearly basis, until its expiration on 31 December 2011.

11. From 1 to 10 May 2011, a standard inspection of UNHCR operation in Turkey was conducted by the IGO.

12. Van was hit by an earthquake on 23 October 2011, which greatly damaged the city. As a consequence, nearly all UNHCR staff members in service at the Field Office, Van, were evacuated, while a small team, including the Applicant, stayed. After the city of Van was struck by another earthquake on 9 November 2011, the remaining UNHCR staff, with the exception of a few volunteers—including the Applicant—left Van. Following a strong aftershock which occurred on 15 November 2011, all UNHCR staff members, including the Applicant, were evacuated.

13. By email of 23 November 2011 to the Division of Human Resources Management (“DHRM”), the UNHCR Representative, Turkey, referred to the difficult conditions in Van after the earthquake and noted that UNHCR would not return to full operation at this stage. She further stressed that in view of the change in the operational needs at the respective duty station, they were considering not renewing beyond 31 December 2011 the FTAs of several staff members—namely those of the Applicant and of two other staff members from the Field Office, Van, UNHCR, plus one United Nations Volunteer (“UNV”). She further requested that until 31 December 2011, these staff member be placed on special leave with full pay (“SLWFP”). DHRM approved her request by email of 25 November 2011.

14. Only three staff members from the Field Office, Van, were maintained and stationed in Ankara pending the determination of the reopening of the UNHCR Field Office, Van, namely one international staff member (P-3), plus one GL-4 and one GL-3 staff member with indefinite appointments. All the other UNHCR staff members of the Field Office, Van, including the Applicant, were placed on SLWFP until their appointments were not renewed beyond 31 December 2011.

15. By email of 28 November 2011, the IGO Report Standard Inspection Turkey, dated “October 2011”, was sent to all UNHCR staff in Turkey. In the email, it was noted that the IGO mission had not yet taken into account the crisis in Van and that this might be considered when the Office reports back to the IGO on the implementation of the report.

16. In its report, the IGO stated that “[r]esolving the Kurdish problem, which has blocked economic development in the south-east of the country, is arguably

the most pressing political issue”. In several parts, the report stresses that the constructive relationship and confidence the UNHCR Representation enjoys with the Turkish authorities shall be fostered, since it might contribute to speed up the progress in the relevant national legislation and national capacity building. With respect to the Field Office, Van, the report notes that “[t]here appeared to be ... a need for the adoption of measures to avoid the politicization of the largely-Kurdish local staff—or the perception thereof, by the local authorities and the population of concern” and recommends, *inter alia*, that:

9. The representation should review the functions and staffing of the Office in Van, in line with the reassessment of the role and responsibilities of the [Field Office (“FO”)]. The more sensitive protection functions such as registration and [refugee status determination (“RSD”)] should be removed from FO Van and taken over by [Branch Office (“BO”)] Ankara, in order to avoid any claims or perceptions of political bias while the monitoring and outreach role should be strengthened.

17. On 30 November 2011, the Applicant was informed that his FTA would not be renewed beyond 31 December 2011.

18. By email of 2 December 2011 addressed to the UNHCR Office in Ankara, the Applicant requested to be provided with the reason for his non-renewal. The following day, he received a response to his email, stressing that the decision did not constitute a termination of his appointment, but rather a non-renewal; he was however not provided with a reason for the decision.

19. On 9 December 2011, a meeting took place between the Applicant, the UNHCR Representative and Deputy Representative and the Associate Administrative Programme Officer, during which the Applicant was informed that the functions of the Field Office, Van, would be changed and that in view of the inoperability of the Field Office, Van, after the earthquake and lack of budget, UNHCR Headquarters was not willing to extend the Applicant’s and his colleagues’ contracts.

20. By memorandum dated 27 December 2011, the UNHCR Representative, Turkey, informed the Director, DHRM, that she had decided to suspend the

operation in Van at the beginning of December and to relocate all staff and that currently, the Head of the Field Office plus the two local staff holding indefinite contracts and one Registration Assistant (National UNV) were working on mission in Ankara, while three holders of FTAs and one National UNV had been notified of their non-renewal beyond 31 December 2011. She further described the current situation in Van and sought the Director's approval for interim measures until 30 June 2012, *inter alia*, the redeployment until that date of the posts and incumbents of the positions of Head of Field Office (P-3) and the two G3 and G4 posts, whose incumbents had indefinite appointments, to Ankara. Further, as interim measure, she requested that the unencumbered post of Interpreter Assistant (GL-4), of the Field Office, Van, vacant as of 31 December 2012, be permanently redeployed from Van to Silopi, with the title changed to Administrative/Program Assistant. One of the staff members, other than the Applicant, whose FTA had equally not been renewed beyond 31 December 2011 was subsequently rehired against that redeployed post.

21. On 27 January 2012, the Applicant requested management evaluation of the decision not to extend his FTA, to which he did not receive a response. On 8 June 2012, he filed an application with the Dispute Tribunal.

Parties' submissions

22. The Applicant's principal contentions are:

- a. The decision was unlawful and discriminatory; he was not provided with the reason for the non-renewal; the real reason behind the decision was his Kurdish ethnicity, as can be deducted from the IGO Report which contained clearly discriminatory recommendations on staff members of Kurdish origin; the chronology shows that the Administration acted on the basis of these recommendations; the decision was not based on legitimate organizational interests, but was unlawful and made in bad faith;
- b. The Office was closed only for a temporary period and his post was not abolished and funding continued to exist; his performance had always been appraised favourably; the new role of the Field Office which was

described as focussing on a protection outreach perspective perfectly matches his job description and protection functions; a new post of Protection Associate for the Field Office, Van, had been announced in July 2011;

c. After the earthquake, other staff members of the Field Office, Van, were reassigned to other functions within UNHCR Turkey and one of the staff members who had also received the non-renewal memorandum of 30 November 2011 subsequently was given a temporary appointment with the Silopi Office, though in fact that Office had been closed at the end of 2010; the rest of the staff was relocated to the Office in Ankara (altogether four staff members);

d. UNHCR never offered him any vacant position nor did it discuss any alternative job opportunities with him following the earthquake;

e. After several renewals of his FTA and in view of the nature of his duties and responsibilities, he had an expectancy of renewal;

f. For the breach of his rights and resulting damages, including his loss of potential employment and earnings, as well as associated benefits and entitlements, he requests compensation in the amount of one year net base salary and retroactive reinstatement in the United Nations Joint Staff Pension Fund; he also requests compensation for moral injury in the amount of USD100,000; finally, he requests a written apology from UNHCR.

23. The Respondent's principal contentions are:

a. In 2011, the Branch Office and Field structure of UNHCR Turkey were reviewed, and a strategy was developed in which the registration and refugee status determination functions were shifted and planned to be conducted only by the Branch Office (Ankara); in this context, following the Standard Inspection of UNHCR Operations in Turkey, the IGO Report of October 2011 recommended, *inter alia*, that the functions and staffing of the Field Office, Van, be reviewed; the findings of this report were not

discriminatory and in any event, they were and could not be implemented, due to the earthquake and the following closure of the Field Office, Van;

b. Therefore, the decision not to renew the Applicant's appointment beyond 31 December 2011 was not discriminatory, but based on the operational realities faced by UNHCR Operations in Turkey, particularly in Van, following the earthquake after which the activities in Van had to be temporarily suspended;

c. Two UNHCR staff members of the Field Office, Van, of Kurdish descent were kept on board by UNHCR, namely one staff member with an indefinite appointment and staff member whose FTA was not extended but who in January 2012 was recruited on a temporary appointment for the position that had been redeployed to Silopi; this shows that the Applicant's argument that his non-renewal was discriminatory since motivated by his Kurdish ethnicity is unfounded;

d. The Applicant's post was not abolished but, as at July 2012, the operations in Van had not yet resumed and no final decision had yet been taken with respect to the redeployment of the Applicant's former post; at the hearing on 2 September 2014 Counsel for the Respondent stressed that the Field Office, Van, had re-become operational only on 1 April 2013 and that on 16 December 2013, it was again closed, until it was reopened on 1 June 2014;

e. The three staff members who were relocated to Ankara had a status that was different from that of the Applicant—one was an International Recruit, two had indefinite appointments—hence the principle of equal treatment does not apply;

f. The non-renewal decision was based on operational grounds and constituted a valid exercise of the Administration's discretion, hence the application should be dismissed as unfounded.

Consideration

24. The Tribunal recalls the longstanding and consistent jurisprudence of the Appeals Tribunal according to which a FTA does not carry any expectation of renewal or of conversion to another type of appointment (*Pirnea* 2013-UNAT-311) and that if based on legitimate reasons, supported by the facts, the decision not to renew a FTA may be legal (*Islam* 2011-UNAT-115). To determine the lawfulness of a non-renewal decision, the Dispute Tribunal must assess whether the Administration abused its discretion, whether the decision was based on discriminatory or other improper considerations, or whether the Administration made an express promise creating an expectancy that an Applicant's appointment be renewed (*Abdalla* 2011-UNAT-138; *Ahmed* 2011-UNAT-153). In a recent judgement, the Appeals Tribunal further stressed that to create an expectancy of renewal such express promise by the Administration has to be "at least ... in writing" (*Igbinedion* 2014-UNAT-411). The Tribunal has consistently held that the burden of proof of showing that the non-renewal decision was arbitrary or tainted by improper motives lies with the Applicant (*Jennings* 2011-UNAT-184).

25. With respect to the Applicant's argument that in view of his years of service and since after the earthquake, UNHCR kept him in service for 20 days, he had an expectancy of renewal, the Tribunal did not find anything on file amounting to an express promise to the Applicant that his FTA would be renewed, under the standards reiterated by the Appeals Tribunal in *Igbinedion* 2014-UNAT-411. This argument of the Applicant must therefore fail.

26. The main argument of the Applicant is, however, that the decision not to extend his FTA was based on improper motives and discriminatory, since taken on the grounds of his Kurdish ethnicity.

27. The Tribunal, having heard the Applicant's witness, notes that without questioning the latter's personal reliability and credibility, the evidence she provided was merely a description of what the Head, Aliens Police, Van, had told her. The witness stated that he mentioned to her his views on UNHCR operations in Van and the problems resulting from the protests and the Kurdistan Workers Party ("PKK"). The witness stated that the Head, Aliens Police, Van, particularly

referred to the Applicant as a PKK militant/terrorist, and that he had told the IGO, and even written to the IGO, that if the Applicant stayed in service, he would make sure that the Office had to close.

28. As such, the witness statement does not establish that a conversation with respect to the Applicant did in fact take place between the Head, Aliens Police, Van, and the IGO or that the former did in fact by any other means, including in writing, contact the IGO to ensure that the Applicant was no longer employed by UNHCR. In this respect, the Tribunal takes note that the Respondent, upon the Tribunal's request, submitted a signed written statement of the Inspector General that there was no trace of any written communication from the Head, Aliens Police, Van, to the IGO. The Tribunal also notes that the witness admitted that no such written communication was shown to her.

29. Moreover, the Tribunal finds that the evidence provided by the witness is unable to serve, to any extent, as proof that even if the Head, Aliens Police, Van, had indeed attempted to influence the course of action of UNHCR with respect to its staffing in the Field Office, Van, a causal link existed between such an attempt and the non-renewal of the Applicant's FTA. On the contrary, the Tribunal finds that the chronology of events, and the circumstances faced by the UNHCR operations in Van following the various earthquakes that occurred between October and November 2011, leaves no reasonable doubt that the temporary closure of the Field Office, Van, was an appropriate and comprehensible reaction. As a consequence, the services of the Applicant and of other staff members of the Field Office, Van, were no longer needed, for an indeterminable period. Therefore, UNHCR could legitimately decide to let to expire the contracts of staff members whose services were no longer required under the circumstances. The Tribunal recalls, in this respect, that the Respondent confirmed at the hearing that after its closure in December 2011, the Field Office, Van, had again become operational only on 1 April 2013.

30. The Tribunal further notes that the fact that other staff members of the Field Office, Van, remained in service and were redeployed to Ankara, even after the temporary closure of the Field Office, does not have an impact on the legality of

the non-renewal of the Applicant's FTA. Indeed, the staff members who remained in service had a different status than the Applicant: two of them had indefinite appointments while one of them was an international recruit; as a consequence, the obligations of the Organization vis-à-vis these staff members are different from those vis-à-vis the Applicant and the latter cannot claim that the decision not to renew his FTA constitutes a violation of the principles of equal treatment.

31. The Tribunal also recalls that amongst the staff members with an indefinite appointment who remained in service was one of Kurdish descent, and that the staff member, who, after the expiration of his FTA on 31 December 2011, was temporarily re-employed at the Field Office, Silopi, in January 2012, was equally of Kurdish origin. Insofar, the Applicant's allegation that he was discriminated due to his Kurdish ethnicity does not conform to UNHCR's treatment of other concerned staff members.

32. In view of all the foregoing and well aware of the terms of the IGO report as referred to in para. 16 above, the Tribunal concludes that under the circumstances, it was not established that the decision not to renew the Applicant's FTA was motivated by improper motives and discriminatory, particularly based on the Applicant's Kurdish origin. Rather, the decision was based on the operational realities faced by the Field Office, Van, and justified in view of the temporary closure of the Office, which, *de facto*, rendered the services of the Applicant unnecessary, as such constituting a legitimate exercise of discretion on the part of the Administration.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 19th day of September 2014

Entered in the Register on this 19th day of September 2014

(Signed)

René M. Vargas M., Registrar, Geneva