



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

WONDIMU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Jan Schrankel, UNHCR
Elizabeth Brown, UNHCR

Introduction

1. The Applicant is a staff member of the United Nations High Commission for Refugees (UNHCR) in Juba, South Sudan. In his application filed on 5 May 2014, he contests the decision to remove him from the post of Deputy Representative, UNHCR, South Sudan, and the attendant decision to re-advertise his post.

Facts

2. The Applicant joined UNHCR as a staff member in 1984 as General Service staff in Ethiopia. In 1989, he was converted to the National Professional category and in July 1995, he became an International Professional staff member.

3. In November 2012, the Applicant was appointed to the post of UNHCR Assistant Representative (Operations) in South Sudan. In the absence of the UNHCR Country Representative, he often served as the Officer-in-Charge (OIC) of the South Sudan operation and was remunerated at the P-5 level even though he encumbered a P-4 level post.

4. In March 2013, the Applicant's substantive post as Assistant Representative (Operations) was reclassified to Deputy Representative, South Sudan for which the Applicant underwent a full competitive selection process with other candidates.

5. On 15 December 2013, a conflict broke out in South Sudan and lasted into 2014.

6. At the time of the outbreak of the said conflict, the Applicant was on annual leave which was due to end on 13 January 2014. At the same time, the UNHCR Representative in South Sudan, Mr. Cosmos Chanda, was also away from South Sudan on home leave.

7. Although away on leave, the Applicant was in contact with Mr. Greg Balke, the Assistant Representative (Protection) in the UNHCR South Sudan

office who was at the duty station at the time of the outbreak of hostilities. Mr. Balke emailed both the Applicant and Mr. Chanda on 20 December 2013 and asked that either of them should relieve him. After a teleconference with Mr. Balke and the Director of the UNHCR Africa Bureau in Geneva on the same day, the Applicant assured them that he was willing to end his annual leave early in order to return to Juba and assist UNHCR in responding to the crisis.

8. On 22 December 2013, the Africa Bureau Director emailed Mr. Balke, copying the Applicant, Mr. Chanda and Ms. Noriko Yoshida. He stated therein that Mr. Chanda would interrupt his home leave and return to Juba during the weekend of 27-29 December while the Applicant would return to Juba on 23 December 2013. He also stated that Ms. Yoshida of the Africa Bureau office in Geneva would undertake a special mission to Juba pending the return of Mr. Chanda. She was to arrive in Juba on 24 December 2013.

9. The Applicant returned to Juba on 23 December 2013 due to the emergency situation, and through a UNHCR broadcast on the same day, learned that he had been selected for the post of Deputy Representative of Operations, South Sudan for which he had undergone a competitive selection process and that his new appointment was to take effect on 1 January 2014.

10. On 24 December 2013, Ms. Yoshida arrived in Juba. She was to perform the Country Representative's duties until he returned to the duty station. Her presence was also meant to show that UNHCR senior management was present at that critical time of the crisis.

11. Upon the Applicant's return to Juba, he met with South Sudanese government officials and with the leadership of the Commission for Refugee Affairs. Through these meetings, the Applicant was able to obtain agreements from the parties that ensured the safety and security of South Sudanese civilians endangered by the conflict as well as UNHCR staff members in South Sudan.

12. The Applicant also arranged for payments to be made to a local security company in South Sudan for the purpose of increasing the number of guards at

UNHCR refugee camps in order to enhance protection against any possible attacks at these camps.

13. On 25 December 2013, the Applicant received reports that a communication breakdown had occurred between the OIC of UNHCR's refugee camp in Bunj, South Sudanese government officials, UNHCR's national staff and the refugee leadership of the Bunj refugee camp. He travelled to Bunj and engaged in negotiations with these parties and successfully resolved the disputes which were primarily related to access of the refugee camp and the use and distribution of resources.

14. Also while in South Sudan, the Applicant and Ms. Yoshida attended meetings with the United Nations Country Team (UNCT) and the United Nations Crisis Management Group (UNCMG). These meetings were arranged to ensure that UNHCR was effectively responding to the then on-going conflict.

15. By 29 December 2013, the Applicant had organized the return to South Sudan of the head of the Bunj sub-office, Mr. Adan Ilmi, to ensure that essential services to refugees and Internally Displaced Persons (IDPs) were resumed.

16. The Applicant additionally organized the return to South Sudan of the head of the Yida/Pariang sub-office, Mr. Cleophas Mbungazi, and assigned him to coordinate the provision of services from Juba while the security situation persisted. He also instructed other UNHCR personnel to engage with non-governmental organizations (NGOs) and other United Nations entities to assist the IDPs who had taken refuge in various UNMISS compounds.

17. In the morning of 30 December 2013, the Applicant met with Ms. Yoshida and informed her that he would return to Addis Ababa, Ethiopia, later that day to see his family. Ms. Yoshida immediately informed the Regional Bureau for Africa office in Geneva. The OIC in the Regional office, Ms. Liz Ahua, called the Applicant later that morning and he told her that he had compelling family reasons to return to Addis Ababa. Before he left for the airport, Ms. Yoshida asked him who had approved his leave and he told her it was the Representative, Mr. Chanda.

18. Mr. Chanda did not return as scheduled nor had he returned by 30 December when the Applicant travelled back to Ethiopia. When he eventually returned to Juba, he sent a memorandum a few days later on 7 January 2014 to the High Commissioner asking for the reversal of the recent assignments of the Applicant as Deputy Representative and that of the head of the Bunj sub-office. His stated reason for the request was that since the announcement of the new assignments, dramatic developments in the country required that the profile of the staff members occupying the two positions be adjusted.

19. In the same correspondence, he stated that the Legal Advise Section (LAS) had advised that the Applicant and the new head of the Bunj sub-office whose assignments he sought to be reversed be consulted before the reversal decision was made. He additionally recommended that the Applicant and the head of the Bunj sub-office be replaced by two other candidates who had competed for their positions but were not originally selected.

20. In line with the request for the reversal of the Applicant's assignment, on 8 January 2014, the Applicant received an email from the OiC of UNHCR's Division of Human Resources Management (DHRM), Ms. Barbara Kalema-Musoke, stating that as a result of the civil war and violence that had occurred in South Sudan, the High Commissioner for Refugees had decided to review assignment decisions including that of the Applicant for the purpose of reconfiguring UNHCR's response to the crisis. The email further stated that the Applicant's job description and functions would be revised and his new position re-advertised to reflect the changed operational realities.

21. On 13 January 2014, the Applicant responded to Ms. Kalema-Musoke's email. He stated in his response that he understood the decision of the High Commissioner to review UNHCR's response to the emergency situation. He stated also that he had volunteered to end his rest and recuperation (R&R) and had returned to Juba to support UNHCR's operations during the conflict. He added that he was willing to be part of the team in South Sudan.

22. In a private conversation on 14 January 2014, Mr. Chanda told the Applicant that the UNHCR leadership was unhappy with him because he had left Juba on 30 December 2013.

23. On the same day, the Applicant sent emails addressed to Ms. Yoshida, Mr. Chanda and others in UNHCR leadership asking to be forgiven for having left South Sudan prior to the arrival of Mr. Chanda. On 15 January 2014, he sent another email to some UNHCR staff members in South Sudan and headquarters also apologizing for his email of 29 December 2013 in which he urged female staff members who were not at the duty station when the crisis broke out not to return to South Sudan during the hostilities due to the high incidence of gender-based violence at the time.

24. Via email dated 16 January 2014, Ms. Karen Farkas, Director/DHRM, sent the Applicant a memorandum dated 13 January 2014. The memorandum stated that after considering his replies and comments on 13 and 14 January 2014, the High Commissioner decided to remove him immediately from his position as Deputy Representative in South Sudan and to assign another staff member with the requisite skills and experience suitable to the emergency situation in the country on a temporary basis. The said memorandum also stated that DHRM would contact him to advise him of the relevant administrative formalities regarding his departure from Juba and assist him with securing another assignment.

25. On 23 January 2014, the Applicant received a letter from UNHCR's Personnel Administration Payroll Section (PAPS) providing him with information related to his departure from the duty station and interim administrative details relating to a future assignment. On 28 January 2014, PAPS informed him that his replacement would arrive in South Sudan on 31 January 2014.

26. On 28 January 2014, the Applicant filed a management evaluation request contesting the PAPS letter of 23 January 2014 that instructed him to leave the duty station until further reassignment. The next day 29 January, PAPS wrote to the Applicant to correct the contents of the memorandum it had sent on 23 January.

27. On 30 January 2014, the Applicant filed a second request for management evaluation against the memorandum of 13 January 2014 conveying UNHCR's decision to remove him from his position as Deputy Representative.

28. The next day, 31 January 2014, the Applicant filed an application for Suspension of Action (SOA) pending management evaluation seeking to suspend the decision of the High Commissioner's to remove him from the post of Deputy Representative in South Sudan pending his reassignment to another post.

29. The SOA application was refused on 6 February 2014 since the management evaluation process had been completed at the time. The position of Deputy Representative in Juba was subsequently re-advertised on 19 February 2014.

Applicant's Case

30. The crux of the Applicant's case is that the decision by the UNHCR leadership to remove him from his new position as Deputy Representative in South Sudan and to re-advertise the post is unlawful and constitutes a breach of his employment contract.

31. Firstly, the illegality of that decision is manifested in the fact that the reasons provided by UNHCR for removing him are not supported by the evidence. It has been established by the Dispute Tribunal that reasons supported by facts must be provided for the non-renewal of a fixed-term appointment.¹ If the Organization is required to provide reasons supported by the facts for the non-renewal of a fixed-term appointment, it necessarily follows that it is required to do the same when an appointment or assignment is prematurely terminated.

32. The Representative, Mr. Chanda, gave the reasons for removal of the Applicant from the position of Deputy Representative in his 7 January memorandum to be 'dramatic developments in South Sudan' which necessitated 'adjustments to the profile of staff members to occupy the position.' In its reply, UNHCR also stated that its operational context in South Sudan had changed

¹ See *Obdeijn* UNDT/2011/032, also *Dzintars* UNDT/2010/150.

dramatically after the announcement of the appointment of the Applicant on 23 December 2013.

33. It is noteworthy that the said acute emergency situation in South Sudan started on 15 December 2013. Eight days later, UNHCR announced the appointment of the Applicant to the position of Deputy Representative following a competitive recruitment process. This means that as at the time that the Applicant's appointment was announced, UNHCR was already aware of the changed operational context in South Sudan and therefore the reasons it has given for removing the Applicant from his new position are inconsistent and not supported by the facts.

34. Also disingenuous is UNHCR's pleadings that it decided to re-advertise the Applicant's post because of a need for management familiarity with inter-agency operational environment and ability to exercise diplomatic and external relations skills in dealing with a government under threat by an organized armed insurgency.

35. The Applicant's leadership skills and ability to work in emergency operations had never been questioned. His performance evaluations and his UNHCR fact sheet consistently commended him for his excellent performance as a manager and his work in emergency situations.

36. Secondly, UNHCR's impugned decision constitutes a breach of its own legislation on Policy and Procedures on Assignments and Promotions (PPAP) which states at its paragraph 19 that changes in the status of encumbered positions shall come into effect no earlier than six months after the manager has formally notified the staff member of the change.

37. The said PPAP additionally provides² that apart from exceptional operational imperatives necessitating significant change in the nature and scope of an operation, encumbered positions should not be discontinued or altered requiring their re-advertisement until the incumbent has served at least one year in the said position.

² Paragraph 23.

38. UNHCR has not demonstrated that any exceptional operational imperatives existed at the time necessitating significant change in the nature and scope of its operations as to warrant any alteration of the Applicant's position and lead to removing him from the said position.

39. Thirdly, the decision to remove the Applicant from his position and re-advertise it was motivated by extraneous factors that did not justify the said removal. There is evidence that the Applicant was removed because he had left South Sudan on 30 December 2013 prior to the arrival of Mr. Chanda.

40. On 14 January 2014, Mr. Chanda told the Applicant that UNHCR leadership was not happy with him because he left South Sudan on 30 December 2013 to visit his family. Further, in its reply to the Applicant's SOA application, UNHCR stated that Mr. Chanda had asked the High Commissioner to revoke the Applicant's new appointment as Deputy Representative.

41. The Applicant left South Sudan on 30 December 2013 after returning to the troubled country to respond to the refugee and other humanitarian issues that had emerged following the unexpected conflict. He left for Addis Ababa to see his son who had undergone some therapy and was soon to return to school in Canada.

42. The Applicant was not told at any time that he could not leave the duty station to see his family. He never acted contrary to his supervisors' instructions or to his duties. He did not violate any rule of the Organization by leaving South Sudan when he did.

Remedies sought

43. The Applicant was removed from his position and placed on a stand-by status of Staff in between assignments (SIBA) pending further assignment by UNHCR. This means that his job opportunities within UNHCR are now limited since it is more difficult to obtain a posting after being removed. It also compromises his eligibility for promotion since he cannot take advantage of UNHCR's rank-in-post policy.

44. The manner of his removal from his new appointment has caused damage to his professional reputation.

45. The Applicant asks for judgment to the effect that he be allowed to encumber his earned position as Deputy Representative of UNHCR, South Sudan which position had not been filled at the time of the filing of this application.

46. In the alternative, the Applicant asks for one year's salary as compensation for professional damage for his unlawful removal from his position as Deputy Representative.

Respondent's Case

47. The Respondent on his part contends that the Applicant's case has no merit.

48. Firstly, the High Commissioner had the authority to re-assign the Applicant from his functions and to place him on SLWFP pending a future assignment. Staff regulation 1.2(c) gives the Secretary-General broad discretionary powers in the organization of work. This allows for the removal of a staff member from his or her functions in the interest of the service.

49. The United Nations Appeals Tribunal (UNAT) held in *Lauritzen*³ that the placement of a staff member on SLWFP pending a future assignment is in accordance with staff rule 5.3(iii) provided it is done on an exceptional basis and for a limited duration.

50. The Applicant was given sufficient opportunity to make comments on the proposed review of his assignment before a decision was made by the High Commissioner in light of the changed operational realities in South Sudan. The Applicant was told to provide written comments and he did so on 13 and 14 January 2014.

51. Secondly, the reasons given to the Applicant for removing him from his new position were supported by the facts. The reason for his removal was the

³ 2013-UNAT-282.

acute emergency situation and the need to address it by temporarily assigning another staff member with the requisite skills and experience. The escalating emergency situation required a different set of skills and competencies from what was previously advertised.

52. With regard to the Applicant's argument that his position as Deputy Representative was announced after the hostilities broke out, the said announcement was made before any reliable predictions about the development of the crisis could be made. Therefore that announcement made eight days after the crisis started did not take into account the magnitude of the displacements, the humanitarian crisis and exponential expansion of UNHCR's operation in South Sudan at the time.

53. Thirdly, the High Commissioner has discretion in making decisions on promotions and appointments and the Tribunal cannot substitute its own views regarding the outcome of a selection process. In *Abbassi*⁴, UNAT held that the Tribunal's function is limited to reviewing whether the procedures set down in the Staff Regulations and Rules were followed and whether the staff member was fairly considered.

54. Moreover, the Applicant's experience and accomplishments in armed conflict situations relate to his service as a national officer and mid-level management levels as an international officer at the P-3 and P-4 levels. These do not provide evidence of his suitability for the position of Deputy Representative in the emergency operation in South Sudan following the drastic changes in operational portfolio.

55. Further his comparison of his accomplishments in armed conflict with those of Mr. Fernando who was sent to replace him pending a new recruitment for his position is irrelevant. Mr. Fernando had served at the P-5 level in Pakistan as Assistant Representative (Operations) in a complex operation. The Applicant did not challenge the outcome of the new selection process for his position.

⁴ 2011-UNAT-110.

56. Fourthly, the impugned decision was not improperly motivated by extraneous factors. There is always a presumption that official acts have been regularly performed. In *Assad*, UNAT held that although that presumption is rebuttable, the burden is on the Applicant to successfully rebut it.⁵

57. The Applicant has not discharged the burden of proof with regard to his claim that the real reason for his removal as Deputy Representative was that he left South Sudan on 30 December 2013 prior to the arrival of the Representative. The Applicant's suggestion that his removal was a disguised disciplinary measure is not true.

58. The reason for removing him was operational and not punitive. It was also not only the Applicant's assignment that was reconsidered and reversed in the light of the operational realities. The Head of the Bunj sub-office was similarly affected. He was satisfied with the explanations given him by UNHCR Management. Both reversed positions were announced at the same time.

59. Even if the Applicant's departure was a factor that influenced the decision to remove him, it would not constitute an improper motive because the said departure was an error of judgment and corroborates senior management's assessment that the Applicant lacked leadership and the required abilities to deputize in the circumstances of the emergency.

60. The Applicant's lack of leadership and the requisite abilities was evident also in his action at the time of the crisis when he unilaterally instructed some female staff members previously evacuated or on leave to postpone their return to South Sudan due to horrific reports of gender-based violence crimes.

61. The Applicant's claim that he was never told that he could not leave the duty station to visit his family and therefore never acted contrary to the instructions of his supervisors or his duties tends to suggest that Ms. Yoshida acquiesced in his departure. The circumstances of his return to South Sudan during the crisis meant that he ought to have known that he was expected to stay on until he got a new leave request by the Representative or Ms. Yoshida. The

⁵ 2010-UNAT-021.

Applicant later tendered a public apology referring to his action as a stupid mistake.

62. In view of the Applicant's actions and his failure to discharge the burden of proof that he was removed based on extraneous factors, the Respondent properly exercised his discretion and acted in the best interest of the Organization.

63. Fifthly, the decision to remove the Applicant as Deputy Representative did not violate the provisions of the PPAP. Position status changes which truly are subject to a six-month notice comprise discontinuations, reclassifications and redeployments. Paragraph 19 of the PPAP is not applicable to the re-advertisement of a position with a revised operational context.

64. The provisions of paragraph 19 of the PPAP apply only to changes carried out by managers with delegated authority under the Resource Allocation Framework (RAF). It does not fetter the discretion of the High Commissioner to reassign staff under staff regulation 1.2(c). Even if the provision applies to an assignment by the High Commissioner, it cannot restrict his authority to swiftly react to an emergency.

65. With regard to the restrictions to re-advertisements under paragraph 23 of the PPAP, the outbreak of a major humanitarian crisis that significantly changed the scope of UNHCR's country operation may allow for an exceptional re-advertisement of a recently-filled position in accordance with the said paragraph 23 of the PPAP. In the circumstances, the requirements of paragraph 23 were met.

66. Sixthly, the decision to remove the Applicant from the new position did not negatively affect his assignment prospects or eligibility for promotions. The Applicant is able to compete for numerous other positions as they become vacant and advertised in future. The main impediment to a future assignment is not the impugned decision but the Applicant's refusal to apply to any other duty station other than Juba. The Applicant holds an indefinite appointment and continues to receive all his entitlements without any change in status until reassigned.

67. The Applicant's eligibility for promotion is not affected because he is subject to the rank-in-person policy and would not automatically be promoted to the P-5 level had he remained the Deputy Representative. Instead he would have to be subjected to the Annual Promotions Review for which his placement of SLWFP has no bearing.

68. The Applicant's claims regarding damage to his professional reputation and any stress he claims to have suffered have not been substantiated.

Considerations

69. The Tribunal will here interrogate the issue of the lawfulness of the removal of the Applicant from the position of Deputy Representative of UNHCR South Sudan which is at the heart of this Application. In dealing with this issue, three questions arise for determination.

70. The first question is whether the sudden decision by UNHCR to remove the Applicant from the position of Deputy Representative was made in order to address the emergency situation that arose in South Sudan on 15 December 2013. Secondly, whether the said removal of the Applicant was actually based on extraneous factors, and thirdly whether the impugned decision constituted a breach of the provisions of the UNHCR's PPAP.

Was the decision to remove the Applicant from the position of Deputy Representative made in order to effectively address the emergency situation that started from an inter-ethnic conflict in South Sudan on 15 December 2013?

71. The Respondent's case is that staff regulation 1.2(c) confers authority on the UNHCR High Commissioner to assign staff members to any activities or offices of the organization. Thus, it follows that he also has authority to remove a staff member from his or her functions in the interest of the service. He cited the case of *Lauritzen*⁶ in support.

72. It was also submitted for the Respondent that the need to address the acute emergency situation that arose in South Sudan on 15 December 2013 as a

⁶ UNDT/2010/172 and 2013-UNAT-282

result of inter-ethnic conflict required the removal of the Applicant and his replacement by another staff member who had the requisite skills and experience. It was decided that the position of Deputy Representative then required different competencies to that previously advertised and which led to the selection of the Applicant which was announced two weeks prior.

73. The Respondent further submitted that by 23 December 2013 when the Applicant's assignment was announced and eight days after the outbreak of hostilities; there were as yet no reliable predictions about the development of the crisis. He continued that it is wrong to conclude that because the new assignment of the Applicant was announced on 23 December 2013, the reason given by UNHCR that further development of the crisis necessitated his removal and the recruitment of a more skilled incumbent is unsubstantiated.

74. In his closing statement, the Respondent submitted that the removal of the Applicant was in the interest of the operation since it was based on a reasoned request by Mr. Chanda to review selection decisions and make adjustments due to the exceptional circumstances that unfolded in South Sudan. It was additionally submitted that the Tribunal should refrain from determining whether the Applicant's removal and placement on SLWFP was in the interest of the operation. He continued that even if the Tribunal reviewed the reasoning of UNHCR in determining the best interests of the Organization in this case, it must accord due deference to UNHCR in assessing its operational needs.

75. The Applicant challenged the case for the Respondent and submitted that the reasons proffered in the Respondent's pleadings for his removal from the post of Deputy Representative are not supported by the evidence. He cited the cases of *Pirnea*⁷, *Bowen*⁸ and *Obdeijn*⁹ and pointed out that the said reasons are not in any way supported by the memorandum sent by Mr. Chanda to the High Commissioner on 7 January 2014 requesting that the Applicant be replaced.

⁷ UNDT/2012/068.

⁸ UNDT/2010/197.

⁹ UNDT/2011/032 & UNAT/2012/20.

76. The Applicant submitted that while the memorandum requested the reversal of his assignment as Deputy Representative in light of the recent “*dramatic developments in South Sudan*”, it did not state that the Applicant lacked the requisite skills needed due to the said dramatic developments. He also submitted that Mr. Fernando whom Mr. Chanda recommended in the same memorandum of January 7 2014 to replace the Applicant was among the short-listed candidates for the post of Deputy Representative over whom the Applicant had been chosen in December 2013.

77. It is the view of the Tribunal that while there is no contest that staff regulation 1.2(c) confers authority on the Secretary-General to assign staff members to suitable duties and offices, the argument that he can also on the strength of that authority alone simply and arbitrarily remove staff members from their duties is not unimpeachable. It has been well established by judicial pronouncements that any discretionary authority must be exercised judiciously and in the best interests of the Organization.¹⁰

78. Even at the risk of repeating the facts, it is imperative here to closely examine the circumstances surrounding the request and rationale for the removal of the Applicant as Deputy Representative as evidenced in the memorandum sent by Mr. Chanda to the High Commissioner on 7 January 2014. As already stated, the same memorandum had recommended that another previously unsuccessful candidate be immediately brought in to replace the Applicant as Deputy Representative.

79. An armed ethnic conflict had broken out between the government of South Sudan and an opposing group on 15 December 2013. The said armed conflict quickly spread through Juba and some of the states in the country. Expectedly, the situation gave rise to the displacement of people in four of the eight states of the country on a large scale. At the start of the conflict, the UNHCR Country Representative, Mr. Chanda, and the Applicant who was then the Assistant Representative (Operations) were on leave and outside South Sudan.

¹⁰*Adundo et al* UNDT/2012/037; *Contreras* UNDT/2010/154.

80. After consultations between UNHCR leadership in Geneva and the officers on leave, an email was sent from Geneva on 22 December 2013 to Mr. Balke, the then OiC UNHCR in Juba and copied to the Applicant and others informing them that Mr. Chanda was to cut short his leave and return to Juba during the weekend of 27-29 December while the Applicant would also cut short his leave and return on 23 December. Ms. Yoshida from the Regional Bureau for Africa office in Geneva was to proceed to and arrive in Juba on a special mission on 24 December to act for Mr. Chanda until his return to the duty station.

81. As scheduled, the Applicant returned to Juba on 23 December 2013 and on the same day his appointment as Deputy Representative was announced following a competitive recruitment process. The new appointment was to take effect on 1 January 2014. Also as scheduled, Ms. Yoshida arrived in Juba the next day 24 December 2013. The Applicant worked with Ms. Yoshida to contain the escalating emergency situation until 30 December 2013.

82. In the morning of the said 30 December 2013, the Applicant told Ms. Yoshida that he would resume his interrupted leave and return to his family later that day. Mr. Chanda had not returned and the Applicant was not instructed by Ms. Yoshida not to leave Juba. Instead Ms. Yoshida reported to the Regional Bureau for Africa office in Geneva and Ms. Liz Ahua who was then OiC called the Applicant that morning to ask him about the resumption of his leave and to ask him who approved the leave. Like Ms. Yoshida, she neither objected to his resumption of leave nor instructed him not to leave Juba. The Applicant then left later that day for Addis Ababa.

83. Within one week of Mr. Chanda's return to Juba, he sent the memorandum of 7 January 2014 to the UNHCR High Commissioner asking that the Applicant's new appointment be reversed. His evidently hasty memorandum was not accompanied by any properly documented analysis of the conflict or the identified challenges which was of a scale unknown to the usual UNHCR operations as to warrant a reversal of the appointment of the Applicant. The said memorandum did not also identify what new skill-set would be required for the

position of Deputy Representative and why the Applicant's competencies and skills were no longer suited to the position.

84. Mr. Chanda's memorandum essentially stated that since the 23 December 2013 appointments, there were dramatic developments in South Sudan that needed adjustment to the profile of the new position of the Applicant to enable UNHCR to handle the demanding challenges that had emerged. This claim was then followed by a statement that since 15 December 2013, an escalation in violence had engulfed about four states in South Sudan and produced 200,000 IDPs. The memorandum also advised that the Applicant be consulted before the action to remove him was taken.

85. The next day 8 January 2014, the OiC of the UNHCR Human Resources office wrote to the Applicant informing him about a proposed review of assignments that could remove him from his new position as Deputy Representative. Meanwhile in a conversation with the Applicant on 14 January 2014, Mr. Chanda told him that the UNHCR's senior management was angry with him for leaving Juba on 30 December 2013 when the crisis was still on-going. The Applicant thereafter quickly wrote apologies to members of senior management the next day 15 January 2014.

86. The Tribunal has carefully considered these events preceding the removal of the Applicant and the Respondent's explanations that as at 23 December 2013 when the Applicant's new appointment was announced there were no reliable predictions about the development of the crisis and that the decision to remove the Applicant was made in the interests of the Organization. The Respondent does not contest the Applicant's claims regarding the different actions and initiatives he undertook with others to help contain the emergency. The summary of the Respondent's submissions is that reliable predictions on the scope of a crisis that started on 15 December 2013 were not made by UNHCR until Mr. Chanda's memorandum of 7 January 2014.

87. In order to determine whether the High Commissioner exercised his discretion judiciously and whether UNHCR acted in the best interest of the Organization in relieving the Applicant of his appointment, certain questions need

to be answered. These questions are: (a) At what point in time were reliable predictions about the scope of the South Sudan crisis made by UNHCR? (b) When were these reliable predictions which Mr. Chanda relied upon to seek the removal of the Applicant, only a few days after he returned from leave, made? (c) Where are these reliable predictions documented?

88. The clear answer is that there were no properly documented analyses of the refugee emergency in South Sudan by UNHCR or Mr. Chanda upon which the decision to relieve the Applicant of the position for which he had properly competed and won could have been based. Such proper and detailed analyses, which would provide needed justification for the reversal of the appointments of a staff member, should have shown what new skill-set was required and how that of the Applicant was not suitable in the circumstances. This documented analysis should have been sent to the High Commissioner together with the memorandum of 7 January 2014 for consideration.

89. In closing arguments, the Respondent submitted that Mr. Chanda made a reasoned request for the reversal of the Applicant's appointment. The Tribunal finds that a mere statement by a Country Representative, who had been away from South Sudan for most of the crisis, that there had been "dramatic developments" in the country that required adjustment to the profile of the Deputy Representative and other staff was not a reasoned request and cannot, without more, constitute a sufficient basis for the exercise of the High Commissioner's discretion to remove the Applicant.

90. It must be noted that Mr. Chanda's memorandum provided no analyses of the said emergency situation and how and why it required a new set of skills that the Applicant did not have. Instead, in the same memorandum, he discussed the previous work of Mr. Fernando whom he recommended to replace the Applicant.

91. It was only in his pleadings that the Respondent sought to tender detailed explanations to justify the reversal of the Applicant's appointment. This is not acceptable because pleadings do not take the place of evidence. The explanations which were pleaded to defend the reversal of the Applicant's

appointment were evidently never presented to the High Commissioner at the material time to provide him with a basis to take the impugned administrative decision.

92. Where indeed the Organization acts without proper justification, as in this case, to remove a staff member from a position he had properly earned, the claim of an exercise of discretion will fail because discretion must be exercised judiciously. UNAT held that Courts or Tribunals do not normally interfere in the exercise of a discretionary authority except where there is evidence of illegality, irrationality and procedural impropriety.¹¹

93. There is no doubt that the best interests of UNHCR were clearly not served by the removal of the Applicant. It is unfortunate that some members of the UNHCR senior management sought to hide behind the veil of acting in the Organization's best interests to act in their own self-interest. The Tribunal therefore finds on this score that the Respondent's explanation is a mere afterthought which was only spun to defend an action that is clearly lacking in due process and constitutes an unfair and high-handed removal of the Applicant and abuse of official discretion.

Was the Applicant's removal as Deputy Representative based on other extraneous factors? Was the Applicant being punished for leaving the duty station during the emergency when the Country Representative had not returned?

94. The evidence before this Tribunal shows that the Applicant's appointment to the position of Deputy Representative was published on 23 December 2013 in a UNHCR broadcast. The Applicant's said appointment was made following a competitive recruitment process. At the time of the broadcast, the Applicant had just cut short his leave and returned to Juba, South Sudan to assist in the emergency situation that arose from the sudden outbreak of violence.

95. As already outlined, the Applicant spent about seven days in Juba during which he addressed some of the problems created by the emergency. With

¹¹ *Abu Hamda* 2010-UNAT-022.

regard to the role he played, there is unchallenged evidence that within that period he met with South Sudanese government officials and with the leadership of the Commission for Refugee Affairs. In those meetings, he obtained agreements that ensured the safety and security of civilians and UNHCR staff who were endangered due to the conflict.

96. He also met with UNHCR staff members to discuss stress-management and reinstated a peer support system for them. He additionally arranged for the regional office to send someone to assist staff in the country with stress-related issues. Also, the Applicant arranged for extra security at UNHCR refugee camps. He was able to resolve disputes at the Bunj refugee camp between UNHCR and government officials with regard to access to the camp and the use and distribution of resources.

97. Together with Ms. Yoshida, the Applicant attended meetings with the UNCT and UNCM to ensure that UNHCR responded appropriately to the conflict. He also organized for the return of two heads of UNHCR sub-offices at Bunj and Yida in order to ensure essential services for refugees and IDPs.

98. The Applicant left Juba and returned to his family home in Addis Ababa on 30 December 2013 citing family problems and before the substantive country representative Mr. Chanda, who was expected to return between the 27 and 29 December 2013 eventually returned to relieve Ms. Yoshida.

99. By 7 January 2014, Mr. Chanda had officially asked the High Commissioner to revoke the Applicant's new assignment which took effect on 1 January 2014 and to remove the Applicant. In the same memorandum, he recommended that the Applicant be replaced by another staff member who had unsuccessfully competed for the position of Deputy Representative with him.

100. On 8 January 2014, UNHCR's HR officer informed the Applicant by email that the High Commissioner intended to review his new assignment and may reassign him to another function. He was asked to send his written comments by 13 January 2014. In a conversation with Mr. Chanda on 14 January 2014, the

Applicant learned that the UNHCR's leadership was unhappy with him for leaving Juba on 30 December 2013.

101. Interestingly in pleadings, the Respondent while denying that the Applicant was removed from the position of Deputy Representative due to extraneous reasons, went on to explain in some detail that the said Applicant resumed his home leave on 30 December 2013 without proper authority or permission from Ms. Yoshida. He also brought into issue an email which the Applicant had sent to staff members who at the time were outside South Sudan asking the female staff not to return but to work from their leave locations due to incidences of gender-based violence.

102. The Respondent went on to exhibit written apologies tendered on 14 January 2013 by the Applicant to UNHCR senior management and international staff for leaving Juba on 30 December 2013 and for asking female staff members to stay away from South Sudan until Mr. Chanda told them to return due to the prevalence of gender-based crimes during the crisis.

103. Soon after these public apologies to UNHCR senior management, on 15 January 2014, the Applicant was informed by memorandum from the HR office on 16 January 2014 that he had been removed as Deputy Representative.

104. In reviewing the entire pleadings and evidence on this score, the Tribunal notes the submission of the Respondent's counsel that it is not the role of the Tribunal, the Applicant or any of his colleagues who have provided testimony on his behalf to substitute their views for the views of the High Commissioner in this case. While counsel is at liberty to attack the relevancy of the Applicant's or his witness' statement, counsel insofar as he sought to warn the Tribunal as to its role and spell out its work for it displayed an unfortunate lack of decorum and contempt of the Tribunal.

105. It has become the style of some counsel that appear for the Respondent to lecture the Tribunal in their submissions about its proper role. The Tribunal is an umpire, not a party. It therefore does not stand on the same platform as the parties. In submitting to the Tribunal's jurisdiction, it is not the place of any party

to a case to lecture the Tribunal as to its proper role. Counsel must respectfully refrain from telling the Tribunal what it cannot do but can always exercise the due rights of appeal to UNAT where he or she believes that an error of law has occurred.

106. It is certainly and properly the role of this Tribunal to determine whether the Respondent acted in good faith when he removed the Applicant from a position that was duly earned after going through a competitive selection process. It is the role of the Tribunal also to determine whether the said decision to remove the Applicant was a judicious exercise of discretion and whether the reasons given for the removal are borne out by the facts and supported by relevant evidence and the applicable legislation.

107. The relevant facts as already established are that on the morning of the said 30 December 2013, the Applicant informed Ms. Yoshida who had been sent all the way from headquarters in Geneva to act for the Representative during the emergency that he was leaving Juba. Although he tried to explain to Ms. Ahua, who called from the Regional Bureau for Africa office at headquarters following Ms. Yoshida's report to ask him why he was leaving, that he had urgent family issues to attend to, he did not obtain leave approval from Ms. Yoshida.

108. It is curious that Ms. Yoshida did not directly instruct the Applicant not to leave when he told her that he would travel back home on 30 December 2013. It is also strange that after Ms. Yoshida reported to the regional office in Geneva that the Applicant was about to leave the duty station without her approval, Ms. Ahua who was OiC of UNHCR Regional Bureau for Africa spoke to the Applicant from Geneva and after asking him who had approved his leave, did not convey the disapproval of the office to him or instruct him not to leave.

109. On 29 December 2013, the Applicant by email advised female staff members who were on leave not to return to South Sudan due to the escalation of gender-based violence until the Representative who was expected back on that day reversed the advisory. He instructed that they work from UNHCR offices closest to their leave locations. Although the Tribunal was not told if this directive

negatively affected the work of UNHCR in South Sudan at the time, it was stated that approval was not obtained from Ms. Yoshida for such an advisory.

110. As events unfolded, the Applicant learned on 14 January 2014 from Mr. Chanda that some senior UNHCR officers were displeased with him for leaving and for his unauthorized advisory to female staff. The Applicant tendered profuse apologies to all the senior staff and to his colleagues in the office by email the next day 15 January 2014 and explained that he sent the advisory based on happenings at the time in order to protect staff members. The Respondent's counsel exhibited the said apologies in Annex 10 to the Reply.

111. In his pleadings, the Applicant stated that he needed to return to Addis Ababa on 30 December 2013 because he had to see his son who was in school in Canada and had been going through a very difficult time for over a year. His problems were such that he had had therapy. That son was then home in Addis Ababa and was due to return to school in two days. According to the Applicant, Ms. Yoshida did not instruct him not to leave Juba but merely said she was waiting for Mr. Chanda so that she could leave South Sudan.

112. It was submitted on behalf of the Applicant that the Organization recognizes the importance of engendering an appropriate work balance between the professional and private lives of staff members. This issue, it was further submitted, was addressed in the Report of the Secretary-General on Strengthening of the United Nations: an agenda for further change presented at the 57th session of the General Assembly as it was stated therein that the Organization sought to "help staff balance their personal and professional lives."

113. The Tribunal is not in any doubt that the removal of the Applicant from his new position as Deputy Representative was predicated on the offence he was perceived to have caused Ms. Yoshida and other senior staff of UNHCR. The said offence consisted of leaving Juba during the emergency and taking it upon himself to decide without authority to advise UNHCR female staff members to stay away from South Sudan due to the high incidence of gender-based violence at that time.

114. The Respondent's case is that the removal of the Applicant from his new assignment, placing him on SLWFP and then replacing him with a candidate against whom he was previously selected during the recruitment process were based on operational reasons. In the same breath, the Respondent's Counsel argued that "had the Applicant's unauthorized departure from South Sudan been taken into consideration..., this would not have constituted an extraneous factor."

115. The Tribunal disagrees with the submission that if the Applicant's departure from South Sudan on 30 December 2013 were considered, it would justify the reversal of his appointment. The argument does not hold water because UNHCR's case is that the reversal of the Applicant's appointment had nothing to do with the fact that he left South Sudan on 30 December 2013. For UNHCR to successfully base the reversal decision on that fact, it ought to have called for an explanation from the Applicant as to why he left the duty station when he did. It would then remain to be seen if the removal of the Applicant could be justified in the light of his explanations and the United Nations' policy on staff balancing their personal and professional lives.

116. Also with regard to his removal as Deputy Representative, the Applicant stated both in his pleadings and witness statement that Mr. Chanda told him on 14 January 2014 during a conversation between them that senior staff of the UNHCR were unhappy with him for leaving South Sudan on 30 December 2013. Even though the Respondent's case is that the reversal of the Applicant's appointment was based purely on operational needs and that no extraneous reasons informed the decision, he has not rebutted the claim that Mr. Chanda told the Applicant why he was removed.

117. The clear inference is that some UNHCR senior officials were determined to punish the Applicant but would not institute a disciplinary process as they ought to have done. The Tribunal can see through the efforts of these senior officials to inflict punishment while circumventing a proper disciplinary process which could have served to exonerate the Applicant. The Respondent's counsel's submission that had the Applicant's unauthorized departure from South Sudan on 30 December 2013 been taken into consideration, it would not have

constituted an extraneous factor reveals not only the Respondent's mindset but his motivation.

118. This Tribunal finds and holds that notwithstanding the Respondent's denials, the alleged unauthorized departure of the Applicant from South Sudan on 30 December 2013 and his unilateral advisory to female staff members not to return to the country during the emergency were definitely the reasons for his removal from the position of Deputy Representative. In other words, the decision of the UNHCR leadership to remove the Applicant in this case was not based on any operational reasons but was simply disciplinary action by stealth.

What is the true purport of the memorandum of 7 January 2014 requesting the removal of the Applicant as Deputy Representative in South Sudan? Did the removal of the Applicant from the said position constitute a breach of some of the provisions of UNHCR Policy and Procedures on Assignments and Promotions (PPAP)?

119. The Applicant referred the Tribunal to UNHCR's PPAP. It was argued on his behalf that UNHCR violated its own rules, policies and procedures when it removed the Applicant from the position of Deputy Representative in South Sudan and placed him on SIBA status.

120. Specifically, the Applicant's Counsel submitted that paragraphs 19 and 23 of UNHCR's PPAP were breached in the manner of the removal of the Applicant from the position which he encumbered as from 1 January 2014. According to Counsel, this is because paragraph 19 requires that the Applicant be given six months' notice of any change in the position he encumbered before he could be removed from the said position.

121. He pointed out also that under paragraph 23 of the PPAP, encumbered positions should not be discontinued or altered requiring their re-advertisement until the incumbent has served for at least one year on the said position except where significant change to the nature and scope of an operation make it necessary. It was his submission on this score that this provision was similarly breached by the Respondent.

122. In his reply, the Respondent argued that the administrative decision to remove the Applicant from the position of Deputy Representative in South Sudan did not violate any of the provisions of the PPAP. He submitted that paragraph 19 of the PPAP is based on relevant provisions of Part 5 of the Resource Allocation Framework (RAF). He continued that position status changes although subject to six months' notice to an incumbent, affect only discontinuations, reclassifications and redeployment of positions.

123. The Respondent also submitted that paragraph 19 of the PPAP governs only changes carried out by managers under delegated authority under the RAF and does not fetter the executive discretion of the High Commissioner of the UNHCR. He added that the authority of the said High Commissioner to act swiftly in the context of a civil war cannot be subject to the six months' notice prescribed by the legislation.

124. With regards to paragraph 23, the Respondent submitted that the outbreak of a major humanitarian crisis as happened in South Sudan changed the nature and scope of UNHCR's country operations and allowed for an exceptional re-advertisement of the Applicant's position. The emergency was not envisaged at the time that the Applicant's appointment was made and therefore the provisions of paragraph 23 of the PPAP were met in re-advertising the Applicant's position without the required one year notice to him.

125. Before reviewing the submissions by both parties on the relevant provisions of the PPAP in this case, the Tribunal will first examine the intention of the law-giver with regard to that legislation. At paragraph 5 of the PPAP, it is clearly provided that the PPAP which was promulgated on 14 June 2010 replaces and supersedes the 2003 Rules of Procedure and Procedural Guidelines of the Appointments, Postings, and Promotions Board (APPB) as amended and pertinent policies and guidelines.

126. In his introduction of the PPAP, the UNHCR High Commissioner stated that the purpose of the legislation is that "assignment decisions are made with the overall goals and needs of the organizations in mind as well as the staff

members' rights and legitimate career expectations and the managers' accountability.”

127. Also in the PPAP preamble at paragraph 4(a), it is stated that the document is designed to “facilitate meeting the global human resources needs of UNHCR and to assign and promote the most suitable candidates to available positions in a timely manner in accordance with the established rules while taking into consideration operational realities.”

128. Further paragraph 6(b) of the PPAP provides that it establishes rules, principles and criteria which “ensure that the functions of each position are carried out by staff members whose competencies, knowledge, experience, skills, qualifications and performance best match the requirements of the position.”

129. In considering the relevance of paragraphs 19 and 23 of the PPAP to the present application, the Tribunal notes that both appear in the section of the PPAP titled “Position Status Management” which starts from paragraph 18 of the document. Paragraph 18 provides as follows:

When a manager intends to request a reclassification, discontinuation or redeployment, of a position encumbered by a staff member who was appointed either under the process set out in this PPAP or any previous process..., the manager is encouraged to inform the staff member of his or her intent in writing. As soon as a decision to change the status of the position has been taken, the manager must formally notify the staff member in writing of the decision and the effective date of the change of status of the position.

130. The relevant portion of paragraph 19 provides: “Changes in the status of encumbered positions shall come into effect no earlier than 6 months after the manager has formally notified the staff member of the change.”

131. The Respondent's position is that paragraph 19 is only applicable in cases of discontinuations, reclassifications and redeployments of positions. He added that the said paragraph 19 does not apply in this case but merely refers to changes carried out by managers with delegated authority under the RAF.

132. The memorandum of 7 January 2014 authored by the Applicant's manager Mr. Chanda states that its purpose is to request that the Applicant's assignment as Deputy Representative made on 23 December 2013 be reversed. His justification for the said request is that there were "dramatic developments" in South Sudan which needed adjustments to the profile of the staff member to occupy that position.

133. Essentially, Mr. Chanda's request on 7 January 2014 for the reversal of the Applicant's assignment as Deputy Representative was based on his view that the profile of the position needed skills and experiences different to its reclassification in March 2013 which led to the selection of the Applicant. Rather interestingly, he asked that the High Commissioner not proceed with the implementation decision. The correct legal position is that the post was encumbered by the Applicant since 1 January 2014 even if the said Applicant was on leave as at that date.

134. In those circumstances, it cannot be denied that what Mr. Chanda sought on 7 January 2014 was a reclassification of the Applicant's position. In the circumstances also, it must be noted that the PPAP is the applicable legislation since it replaces and supersedes all policies, procedures and guidelines that govern human resources needs in UNHCR including appointments, reassignments, reclassifications and promotions.

135. The evidence shows that Mr. Chanda did not inform the Applicant of his intention to request a reclassification of his position in writing as required under paragraph 18 of the PPAP. As already submitted for the Applicant, paragraph 19 which provides that changes in an encumbered position should not come into effect until six months have elapsed after the staff member is notified of the change was also not complied with.

136. The Respondent's submission that the authority of the High Commissioner to act swiftly in the context of a civil war cannot be fettered by paragraph 19 which requires six months' notice to the Applicant is ridiculous. Also untenable is his other submission that because there was a major humanitarian crisis which was not envisaged, it was lawful under paragraph 23 of

the PPAP to re-advertise the recently-filled position of the Applicant without allowing him to stay on that position for at least one year or even until it was re-advertised and a new selection was made.

137. The PPAP acknowledges in its first paragraph the mandate of UNHCR to ensure the protection of Refugees, IDPs, Stateless persons and others of concern. It notes that UNHCR works in a complex operational environment requiring a highly mobile and versatile workforce. Clearly, addressing emergency situations is part and parcel of its work and cannot excuse any breaches by UNHCR of its extant legislation. If indeed there were exceptional operational imperatives in this case that affected the nature and scope of UNHCR operations in South Sudan and the Deputy Representative position of the Applicant as of 7 January 2014, no properly documented justification was provided for it by Mr. Chanda or anyone else.

138. In conclusion, the Tribunal finds that the 7 January 2014 memorandum by Mr. Chanda sought a reclassification of the position of Deputy Representative already encumbered by the Applicant. The PPAP promulgated by the UNHCR on 14 June 2010 superseded all its former legislation regarding appointments, reassignments, reclassifications and promotions. By the manner of its removal of the Applicant from his position as Deputy Representative, the UNHCR acted in violation of the extant provisions of the paragraphs 18, 19 and 23 of its own legislation, the PPAP.

Summary of findings

139. The Tribunal's findings are summarized below:

- a. The 7 January 2014 memorandum of Mr. Chanda on which the removal of the Applicant as Deputy Representative was predicated ought to have been supported by properly documented analyses of the scope of the South Sudan refugee crisis justifying the removal on the ground of operational exigencies. This was not the case.

b. The Respondent's explanations and reasons for the removal of the Applicant from the position of Deputy Representative were only stated in the Respondent's pleadings and were not borne out by the facts or evidence. They were but mere afterthought unfortunately spun to defend an administrative action that was clearly lacking in due process and constitutes an unfair and high-handed removal of the Applicant and abuse of official discretion

c. The removal of the Applicant from his position as Deputy Representative so soon after the announcement of his new assignment was actually because of the offence he was perceived to have caused Ms. Yoshida and other senior staff of UNHCR. The said offence consisted of leaving Juba during the emergency and taking it upon himself to decide without authority to advise UNHCR female staff members to stay away from South Sudan due to the high incidence of gender-based violence at that time.

d. The decision of the UNHCR leadership to remove the Applicant from the position of Deputy Representative was not based on any operational reasons but was simply disciplinary action by stealth. In other words, the removal was based on extraneous factors.

e. By the manner of its removal of the Applicant from his position as Deputy Representative, UNHCR acted in violation of the extant provisions of the paragraphs 18, 19 and 23 of its own legislation, the PPAP. The decision to remove the Applicant is therefore unlawful.

Judgment

140. On 16 February 2017, the Tribunal issued Order No. 038 (NBI/2017) which required the Applicant to apprise the Tribunal of his employment status from 7 January 2014 to the present. The Applicant filed his reply to the said Order on 17 February and informed the Tribunal that from 7 January 2014 until the present he was employed with UNHCR at the level P4/16.

141. With the exception of the period from December 2014 until September 2015 when he was placed in a temporary assignment with UNHCR in Uganda, the Applicant has been in the SIBA category with full pay since UNHCR was unable to place him.

142. Having found that the Applicant's removal from his position as Deputy Representative was unlawful and that this removal has evidently harmed his career prospects, the Applicant is entitled to compensation for the illegal actions of the UNHCR Administration including its failure to follow its own rules and procedures and accordingly awards the Applicant four months' net base salary as compensation.

(Signed)

Judge Nkemdilim Izuako

Dated this 10th day of March 2017

Entered in the Register on this 10th day of March 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi