



Before: Judge Goolam Meeran
Registry: Nairobi
Registrar: Abena Kwakye-Berko

ELZAROV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nusrat Chagtai, ALS/OHRM
Nicole Wynn, ALS/OHRM

INTRODUCTION

1. The Applicant is a Senior Political Affairs Officer with the African Union/United Nations Hybrid Operation in Darfur (UNAMID). He has been Acting Chief of Service, Humanitarian Affairs on a temporary assignment, at the D-1 level. He filed an application on 29 December 2017 contesting the decision not to select him for the position of D-1 Chief of Service, Humanitarian Affairs (the position).

2. On 23 March 2018, the Respondent filed his reply.

THE CLAIM

3. The Applicant submits that the decision not to select him for the position is improper and arbitrary for the following reasons:

a. The Secretary-General's strategy on gender parity was accorded preference over the merit in the selection process. In the circumstances, being a man, he was not selected contrary to the principle that selection shall be made on a competitive basis and without regard to race, sex or religion;

b. While UNAMID recently hired a number of senior male colleagues, the strategy on gender parity was only applied in this particular case;

c. The criterion that selection should be on a wide geographical basis was ignored. The fact that he is a national of the Russian Federation, an underrepresented State, was not taken into consideration;

d. The selection process was tainted by favoritism. Two nationals from France were given preference over him. The hiring manager downplayed the Applicant's merits and inflated and exaggerated those of the other two candidates;

e. The hiring manager did not consider the fact that the Applicant had been successfully performing the functions of Chief of Service, Humanitarian Affairs, UNAMID on a Special Post Allowance (SPA) at the D-1 level for more than two years with a performance of “exceeds expectations”;

f. The hiring manager misled the Senior Review Board (SRB) and, subsequently, the Secretary-General to ensure the selection of her preferred candidate;

g. The Applicant would lose his job after 21 years of dedicated service with the Organization as a consequence of his non-selection for the position.

4. The Applicant seeks the rescission of the contested decision and his appointment as Chief of Service, Humanitarian Affairs at the D-1 level.

THE REPLY

5. The Respondent submits that the contested decision is lawful and that the Applicant was given full and fair consideration:

a. The selection process was conducted in accordance with ST/AI/2016/1 (Staff selection and managed mobility system). The Applicant was screened and assessed on the basis of his education, qualifications and work experience. The Programme Manager ranked 11 suitable candidates, including the Applicant. The ranking took into consideration the Personal History Profiles (PHP) of the candidates as well as the results of the written test and competency based interview. The SRB recommended the Applicant along with two other suitable candidates for selection by the Secretary-General;

b. The Applicant had no right to be selected for the position. The Secretary-General had broad discretion to choose any of the three recommended candidates. Once the SRB endorsed the Applicant for selection, his only right was to be included in the roster;

c. The Programme Manager did not conceal the Applicant's years of work experience, or that he had been performing the functions of the position. Apart from the ranking and comments of the Programme Manager, the SRB had access to all suitable candidates' PHPs showing their work experience, as well as the comparative analysis report indicating that the Applicant was acting in the position;

d. The selected candidate had 19 years experience while the Applicant only had 15 since the Applicant's five years of experience at the G-5 level does not fall into the category of progressively responsible professional experience. The selected candidate scored highest in the competency of professionalism. Moreover, she is not only fluent in English and French but, unlike the Applicant, she also has competency in Arabic which was a desirable requirement;

e. The Applicant failed to produce any evidence of the Programme Manager's bias or "favouritism" with respect to the selected candidate's nationality. Contrary to the Applicant's claim, the job opening was not for a post subject to geographical representation. Pursuant to para. 67 of General Assembly resolution 65/247 (Human resources management), adopted on 24 December 2010, the system of geographical distribution is applicable solely to regular budget posts in the Professional and higher categories of staff;

f. Gender was not considered over merit. The selected candidate was no less qualified than the Applicant, as evidenced by her PHP and the comparative analysis report. The Secretary-General determined that she was the most suitable candidate and accordingly, he selected her for the position;

g. The Applicant is not entitled to the relief he requests. He will not lose his job with the Organization as he has a continuing appointment and will return to the P-5 Senior Political Affairs officer post he previously encumbered.

THE HEARING

6. Given the time differences between Nairobi and New York, where most of the witnesses were based, a hearing took place from 21 to 25 May 2018. The Applicant was self-represented and the Respondent was represented by Ms. Nusrat Chagtai. The Applicant and the following witnesses gave evidence:

- a. Mr. Luke Mhlaba, UNAMID Mission Chief of Staff.
- b. Ms. Jan Beagle, Under-Secretary-General for Management.
- c. Ms. Yvette Blanco, Interview Panel Member and currently Chief Security Council Practices and Charter Research Branch.
- d. Ms. Bintou Keita, Hiring Manager and currently Assistant Secretary-General for Peacekeeping Operations.
- e. Mr. John Kamea, Senior Officer, Senior Leadership Appointments Team, EOSG.
- f. Ms. Alicia Barcena, Chairperson SRB and currently Executive Secretary of the United Nations Economic Commission for Latin America and the Caribbean.

FINDINGS OF FACT

7. The Applicant joined the Organization on 21 April 2007. Since May 2015, he served as Acting Chief of Service, Humanitarian Affairs on a temporary assignment at the D-1 level. On 28 October 2016, his fixed-term appointment was converted to a continuing appointment.

8. A job opening (JO) for the position of D-1 Chief of Service, Humanitarian Affairs in UNAMID (JO Number: 17-HRA-UNAMID-74843-B-EL FASHER) was advertised on 21 February 2017. The JO specifically mentioned that “due regard will be paid to the importance of recruiting staff on as wide a geographical basis as possible” and that “[t]he United Nations places no restrictions on the

eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs”.

9. On 9 March 2017, the Applicant submitted his application for the post in which he had been acting for over one year. The Applicant is continuing to occupy this post pending the successful candidate taking up the appointment.

10. A total of 117 applications were received in response to the job opening. After the Network Staffing Team (NST) of the Office of Human Resources Management (OHRM) reviewed the eligibility of the candidates, 61 non-rostered and seven rostered candidates were found to be eligible¹.

11. After reviewing the suitability of the 61 non-rostered candidates against the requirements in the job opening, only 17 were found to be suitable and were invited to take the test².

12. Seven candidates, including the Applicant, passed the test. The passing score for the test was set at 40 out of 100 points. Ms. Bintou Keita, the Hiring Manger, clarified that the passing score was set by her in consultation with the POLNET team prior to the test being administered to the candidates. The Applicant scored 66.33 points in the test, the highest score among the candidates, while the candidate that was ultimately selected scored 42.57 points.

13. The seven candidates that passed the test were subsequently interviewed between 22 and 24 May 2017. Only four candidates, including the Applicant, were rated as being successful. Ms. Yvette Blanco, a member of the interview panel confirmed that the panel was not provided with the scores of the written test and that the test was used to identify candidates to progress to the interview stage. Ms. Blanco stated that the interview panel evaluated the candidates based on their answers to the competency based questions but did not rank them. Ms. Blanco further testified that the candidate who was ultimately selected provided the best

¹ Memorandum dated 20 September 2017 from the Chairperson, SRB to the Secretary-General titled “Meeting of the [SRB]- POLNET D-1, Chief of Service, Humanitarian Affairs, Au/UN Hybrid Operation, UNAMID Job Opening 74843. para. 1

² Idem, para. 2-3

answer in the professionalism competency and that she was particularly effective in conveying her experience in humanitarian affairs.

14. Following the assessment, OHRM transmitted, for review by the Programme Manager, a list of 11 suitable candidates. The list included the four non-rostered candidates, including the Applicant, and the seven previously rostered candidates.

15. The Programme Manager ranked the 11 candidates indicating her preference for selection³. She ranked a female candidate from France in first place, a male candidate from France in second place and the Applicant in third place⁴. Ms. Keita confirmed that, in the ranking of candidates, she took into consideration their PHPs, the results of their interviews, their performance evaluations and their language skills. She noted that the candidate ranked first was fluent in Arabic which in the context of UNAMID was important. Ms. Alicia Barcena's evidence was that the ranking is also determined based on supplementary information such as organizational priorities, like gender parity and geographical diversity, where applicable.

16. On 28 August 2017, the SRB convened to review and evaluate the list of suitable candidates. On 20 September 2017, the SRB sent a memorandum to the Secretary-General recommending for selection, the Applicant and two candidates from France⁵. The SRB also recommended that two non-recommended candidates be placed on the relevant roster. Ms. Barcena, Chair SRB, confirmed that the evaluation criteria were properly applied in this selection process and clarified that while the SRB considered the ranking of the hiring manager, in its recommendation to the Secretary-General the SRB placed candidates in alphabetical order.

³ *Idem*, paras. 7-9

⁴ *Idem*, page 5.

⁵ See para. 17 of the SRB memorandum to the Secretary-General dated 20 September 2017 which reads as follows: “[t]he SRB concluded that the evaluation criteria were properly applied and the applicable procedures outlined in ST/AI/2016/1 were followed. Following the review and validation of suitable candidates who have successfully passed the assessment process, the SRB recommends the following three (3) candidates (in alphabetical order) for the Secretary-General’s consideration. Mr. Zurab Elzarov, UNAMID, Russian Federation, Under-represented, [...] UNMIK, France, Over-represented, [...], OCHA, France, Over-represented”.

17. Within the Executive Office of the Secretary-General (EOSG), the Chef de Cabinet has delegated authority to make selection decisions on behalf of the Secretary-General for positions at the D-1 and D-2 level⁶. Mr. Kamea, Senior Officer of the Senior Leadership Appointments Team (SLAT), EOSG informed the Tribunal that following standard practice, an Officer of SLAT prepared a Note for the Chef de Cabinet containing all relevant background information for her consideration including a summary of the SRB review of candidates and recommendations, the UNAMID's gender target score⁷ and the names, gender, nationalities and geographical representation of the candidates. Mr. Kamea also testified that SLAT/EOSG requested Mr. Lacroix, Under-Secretary-General for the Department of Peacekeeping Operations (USG/DPKO) to advise on the candidate considered most suitable among the three candidates. However, when questioned on the legal basis for such a request to the USG/DPKO, Mr. Kamea agreed that there was no such provision in ST/AI/2016/1. However, it was in accordance with standard operating practice within the EOSG and the wide discretion of the Secretary-General in selection decisions. Mr. Lacroix, USG/DPKO recommended the appointment of the female candidate from France simply by appending a signature next to her name but with no explanation as to why she was preferred amongst three equally appointable candidates.

18. The Note to the Chief de Cabinet included the three top candidates recommended by the SRB, in alphabetical order, and a note mentioning the candidate recommended by the USG/DPKO. Mr. Kamea's evidence was that all three candidates were equally appointable and that any one of the three candidates could have been selected and the final selection decision was at the discretion of the Chef de Cabinet under delegated authority from the Secretary-General.

19. The Chef de Cabinet selected the candidate recommended by the USG/DPKO, that is the female candidate from France.

⁶ See Note from the Secretary-General to the Chef the Cabinet dated 20 March 2017.

⁷ The Note to the Chef de Cabinet includes the following information: "UNAMID's gender target scorecard for senior women is 20% & has reached 20% at P5-D2 levels; non- geographical position).

20. On 27 December 2017, Mr. Luke Mhlaba, UNAMID's Chief of Staff informed the Applicant by telephone that the Secretary-General had not selected him for the position probably because of the Secretary-General's policy on gender parity. Mr. Mhlaba clarified that he was not involved in the selection process but that he was requested by DPKO in Headquarters to communicate the outcome of the selection to the candidates. It was in this context that he contacted the Applicant. Mr. Mhlaba stated that he was only speculating about the reasons for the Applicant's non-selection when he referred to the Secretary-General's policy on gender parity.

21. On 29 December 2017, the Applicant requested management evaluation of the contested decision.

22. By letter dated 26 February 2018, Ms. Jan Beagle, Under-Secretary-General for Management replied to the Applicant's request for management evaluation informing him that the Secretary-General had upheld the contested decision. In her letter, Ms. Beagle referred to the comments from the Administration noting that "[t]he decision to ultimately select a female candidate was made to ensure equal distribution of female representation at senior positions (P-5 and above) at UNAMID, given that the Mission has one of the lowest percentages of female representation at senior levels of 21 per cent"⁸. She further noted in her letter that the Management Evaluation Unit (MEU) considered that the Applicant's claim that "[he] [was] not selected for the post solely due to the Secretary-General's Strategy on Gender Parity (Gender Strategy) [was] not supported by the facts. Indeed, the successful candidate met the required criteria for the Post, and also the desirable criterion of knowledge of Arabic". Ms. Beagle confirmed that gender parity was one of the factors taken into consideration but was not a decisive factor in the selection process. She also testified that there was nothing in the SRB memorandum to the EOSG indicating that gender parity was the main issue in the selection process.

⁸ See page 3 of the letter from Ms. Jan Beagle, Under-Secretary-General for Management to the Applicant dated 26 February 2018.

THE APPLICABLE LAW

23. Article 101.3 of the Charter of the United Nations provides that:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

24. Staff regulation 4.2 provides that:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

25. In relation to the assessment of eligible candidates, ST/AI/2016/1 provides in section 7 that:

7.3 Assessments will be conducted by assessment panels, which will be set up by the Office of Human Resources Management. Each assessment panel shall have a minimum of three staff members at the same or at a higher level than the vacant position and shall hold appointments under the Staff Regulations and Rules other than temporary appointments. The programme manager of the vacant position may participate in the assessment panel. There shall be at least one female staff member, one male staff member and one staff member from outside the organizational unit where the vacant position is located. An assessment panel shall also include an ex officio member. The ex officio members of the assessment panels shall prepare a reasoned and documented record of the assessment process in Inspira.

7.4 The assessment panels will contribute to the development and marking of the written assessments. The assessment panels shall establish passing thresholds for the written assessments in order to determine which candidates may be invited for interviews, and shall conduct those interviews. [...]

7.5 The assessment may include:

(a) A written test [...]

(b) Candidates who pass the written test shall be invited to participate in an interview, which will consist of a competency-based interview to ascertain whether the candidates possess the core values and core and managerial competencies stipulated in the

job opening and may also include other oral test formats to further assess other evaluation criteria stipulated in the job opening.

7.6 Upon completion of the assessment process, the Office of Human Resources Management shall transmit the list of suitable candidates who have successfully passed the assessment process to the programme managers for their review, pursuant to section 10 below, prior to submitting them to the Global Central Review Board or the [SRB]. Pursuant to section 7.2 above, the names of previously rostered candidates will not be submitted to the Global Central Review Board or the [SRB].

26. Regarding the review of suitable candidates by the programme manager, ST/AI/2016/1, provides in section 8 that:

8.1 The Office of Human Resources Management shall prepare and submit to programme managers for their review a list containing the names of previously rostered candidates found suitable for the vacant position in accordance with section 7.2 above and the names of suitable candidates who have successfully passed the assessment process in accordance with section 7.6 above. Such lists shall normally include at least three candidates, including at least one female candidate and at least one male candidate.

8.2 Along with such lists, the Office of Human Resources Management shall submit to programme managers the following information:

- (a) A copy of the job opening associated with the vacant position;
- (b) The personal history profiles of the candidates on the lists;
- (c) The performance evaluation reports of the candidates on the lists;
- (d) Reasoned and objectively justifiable records on the application of the evaluation criteria stipulated in the job opening for the candidates on the lists.

8.3 In consultation with their respective heads of departments and offices, programme managers shall review the list of suitable candidates submitted by the Office of Human Resources Management and indicate their input and preferences, in ranking order, of candidates deemed suitable for the vacant positions. In providing their written input and preferences, programme managers shall be guided by the provisions of staff regulation 4.2 and shall consider the extent to which the suitable candidates will complement the skillsets of the organizational unit where the vacant positions are located and whether the candidates will be most likely to facilitate the implementation of the mandate of the departments or offices. Programme managers shall record their input and preferences in Inspira within the deadline established by the Office of Human Resources Management. In the event that

programme managers do not provide their written input and preferences within the established deadline, the Office of Human Resources Management shall deem all suitable candidates to be equally ranked by the programme managers.

27. Staff rule 4.15 (a) provides as follows regarding the role of the SRB:

Senior review bodies shall be established by the Secretary-General to review and provide advice on recommendations for the selection and managed mobility of senior staff. The Secretary-General shall decide on the membership and shall publish the rules of procedure of the senior review bodies.

28. ST/SGB/2016/3 (Senior Review Board) provides in section 2.1 that the SRB is a standing advisory body constituted to review, validate and endorse lists of suitable candidates to fill vacant positions and lists of suitable staff members for placement under managed mobility, as prepared by OHRM and submitted by the SRB secretariat pursuant to sections 4.3 and 4.10 of ST/SGB/2016/3, and to provide recommendations to the Secretary-General for selection to fill vacant positions and for placement under managed mobility of staff members at the D-1 and D-2 levels in the Secretariat.

29. In relation to the functions of the SRB, section 4 of ST/SGB/2016/3 provides that:

4.2 The [SRB] shall review the lists of suitable candidates prepared by the Office of Human Resources Management and submitted by the [SRB] secretariat pursuant to section 4.3 below, for the filling of vacant positions at the D-1 and D-2 levels or for placement on a roster.

4.3 The [SRB] secretariat shall review the lists of suitable candidates prepared by the Office of Human Resources Management, together with, where applicable, the lists of previously rostered candidates, to ensure that the integrity of the process of identifying suitable candidates to fill vacant positions through job openings was upheld, that the candidates were evaluated on the basis of the pre-approved evaluation criteria specified in the job opening and that the applicable procedures were followed. In so doing, the [SRB] secretariat shall consider whether:

(a) The list of suitable candidates is reasoned and objectively justifiable based on evidence that the pre-approved evaluation criteria set out in the job opening were properly applied;

(b) The record indicates that there was no prejudice, improper motive or mistake of fact or of procedure that could have prevented a full and fair consideration of the candidates' requisite qualifications;

(c) The record contains a fully justified analysis of each of the competencies listed in the job opening, which must have been evaluated for all candidates during the competency-based interview or other assessment methodologies.

4.4 The [SRB] secretariat shall submit its findings under section 4.3 above to the [SRB] for its validation and endorsement.

4.5 When the [SRB] has questions regarding the proper application of the evaluation criteria or the applicable procedures, it shall request the necessary information from the Assistant Secretary-General for Human Resources Management.

4.6 In the event that the [SRB] finds that the evaluation criteria were improperly applied or that the applicable procedures were not followed, the Board shall transmit its findings to the Assistant Secretary-General for Human Resources Management.

Review and selection recommendations for the filling of vacant positions

4.7 Upon completion of the validation and endorsement process pursuant to section 4.4 above, the [SRB] shall develop and submit its selection recommendations for candidates to fill vacant positions at the D-1 and D-2 levels, or for placement on a roster, to the Secretary-General for his or her selection decision. The [SRB] shall complete a reasoned and documented record of the outcome of its review explaining its selection recommendations.

4.8 When making its selection recommendations to the Secretary-General, the [SRB] shall take into account the provisions of staff regulation 4.2, the strategic staffing needs of a department or office and the human resources organizational priorities provided in the new staff selection and managed mobility system.

30. Similarly, ST/AI/2016/1, provides in section 11 that:

11.1 Pursuant to staff rule 4.15, the [SRB] shall review, validate and endorse lists of suitable candidates who have successfully passed the assessment process in accordance with section 7.6 above for the filling of vacant positions of staff members at the D-1 and D-2 levels in the Secretariat, in accordance with Secretary-General's bulletin ST/SGB/2016/3 entitled "[SRB]".

11.2 In accordance with section 4.3 of Secretary-General's bulletin ST/SGB/2016/3, the Office of Human Resources Management shall prepare and submit to the [SRB] secretariat for their review lists of suitable candidates who have successfully passed the assessment process, in accordance with section 7.6 above.

11.3 Along with such lists, the Office of Human Resources Management shall prepare and submit to the [SRB] secretariat the following information:

- (a) A copy of the job opening associated with the vacant position;
- (b) The personal history profile of all candidates who applied;
- (c) In accordance with section 5.2 above, the performance evaluations reports of all candidates who applied;
- (d) A reasoned and objectively justifiable record on the application of the evaluation criteria stipulated in the job opening for the candidates on the list of suitable candidates who have successfully passed the assessment process, in accordance with section 7.6 above.

11.4 Further to section 3.7 of Secretary-General's bulletin ST/SGB/2016/3, a secretariat will be gradually established in the Office of Human Resources Management to support the work of the [SRB].

11.5 When the [SRB] finds that the evaluation criteria have not been properly applied or that the applicable procedures were not followed, it shall transmit its findings and recommendations to the Assistant Secretary-General for Human Resources Management for decision.

Selection recommendations

11.6 Further to section 11.1 above, for positions at the D-1 and D-2 levels, the [SRB] shall review the lists containing previously rostered suitable candidates and suitable candidates and develop selection recommendations to fill vacant positions in accordance with sections 4.7 and 4.8 of Secretary-General's bulletin ST/SGB/2016/3.

11.7 Pursuant to section 11.2 above, the Office of Human Resources Management shall prepare and submit to the [SRB] secretariat the following information:

- (a) A copy of the job opening associated with the vacant position;
- (b) The personal history profiles of the suitable candidates;
- (c) The performance evaluations reports from the suitable candidates;
- (d) A reasoned and documented record of the outcome of the suitability evaluation;
- (e) The written input and preferences, in ranking order, of programme managers submitted under section 8.3 above;
- (f) The human resources organizational priorities and the human resources targets set out in the departmental human resources scorecard.

11.8 The Office of Human Resources Management shall further indicate for due consideration by the [SRB] those suitable candidates who are:

(a) Internal candidates; [...]

11.9 Further to sections 11.7 and 11.8 above, the Office of Human Resources Management shall also indicate for due consideration by the [SRB] those suitable candidates who have had prior service or employment in the field for D-1 and D-2 positions for which relevant field experience is highly desirable.

11.10 The [SRB] shall present to the Secretary-General, in no ranking order, selection recommendations of three candidates, including at least one female and at least one male candidate, taking into account the provisions of staff regulation 4.2 and Secretary-General's bulletin ST/SGB/2016/3 and the information provided pursuant to sections 11.7, 11.8 and 11.9 above.

31. In relation to the selection decision, section 12.2 of ST/AI/2016/1 provides that the Secretary-General "shall make the selection decision based on the selection recommendations submitted by the [SRB] for the filling of vacant positions at the D-1 and D-2 levels".

32. In *Abassi* 2011-UNAT-110, the United Nations Appeals Tribunal (UNAT) held that:

In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

33. Regarding the discretion of the Secretary-General in matters of selection, UNAT held in *Bofill* 2013-UNAT-383 that:

The Appeals Tribunal has consistently held that the Secretary-General has a broad discretion in matters of promotion and it is not the function of this Tribunal, or the UNDT, in the absence of evidence of bias, discriminatory practices or mala fides to substitute its judgment for that of the competent decision-maker.

34. Similarly, UNAT ruled in *Toure* 2016-UNAT-660 as follows:

When judging the validity of the Administration's exercise of discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate.

The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Tribunal to consider the correctness of the choice made by the administration amongst the various courses of action open to it. Nor is it the role of the Tribunal to substitute its own decision for that of the administration [...]

35. In relation to the jurisdiction of the Tribunal to rescind a selection decision, UNAT held in *Rolland* 2011-UNAT 122 that:

The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.

All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

36. Regarding allegations of improper motive and the burden of proof, UNAT held in *Rolland* that:

There is always a presumption that official acts have been regularly performed. This is called the presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

CONSIDERATIONS

37. Where the application lacks clarity, the Tribunal has a duty to do its best to ascertain the nature of the impugned decision and the relief being sought. The UNAT held in *Massabni* 2012-UNAT-238⁹ that:

⁹ See also *Zachariah* 2017-UNAT-764.

The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

38. The Applicant, who is self represented, provided a detailed and well argued case identifying a series of what he considered to be errors of procedure which impugned the correctness of the final decision not to appoint him. A brief recitation of these errors included the following with the Tribunals findings in italics:

- a) That Mr. Mhlaba suggested that he was a strong candidate but that a female was selected probably in line with the strategy on gender parity. This was subsequently confirmed by the MEU letter of 26 February 2018 which stated at paragraph 4 on page 3 that “[t]he decision to ultimately select a female candidate was made to ensure equal distribution of female representation at senior positions (P-5 and above) at UNAMID, given that the Mission has one of the lowest percentages of female representation at senior levels of 21 per cent”. The Applicant’s submission that this was in breach of Staff regulation 4.2 and 4.3, which required appointments to be made without distinction as to race, sex or religion merited serious consideration by examining both the various stages of the selection process and particularly what was in the mind of the decision maker at the time the decision was made.

Mr Mhlaba stated that he took no part in the decision-making process. He was asked by DPKO, Headquarters, to convey the decision to the candidates. He was engaging in pure speculation when he expressed the

opinion that the successful candidate may have been appointed because of the policy on gender parity. The Tribunal accepts this explanation.

- b) That as a national of the Russian Federation, he is from an underrepresented country and that the decision maker did not take geographical diversity, an organizational priority, into account although it was specifically referred to in the JO Number: 17-HRA-UNAMID-74843-B-EL FASHER as “due regard will be paid to the importance of recruiting the staff on as wide a geographical basis as possible”. The Respondent submitted that the system of geographical distribution is applicable solely to regular budget posts in the Professional and higher categories of staff and that the posts explicitly earmarked for geographical status indicate a “G” at the end of the vacancy number and include a special note that applicants from unrepresented or underrepresented countries are strongly encouraged to apply. The post for which the Applicant applied was a non-geographical post. Nevertheless, the Tribunal received no satisfactory explanation if this was the case why did the JO state that “due regard will be paid to the importance of recruiting the staff on as wide a geographical basis as possible”.

That said, this explanation is accepted by the Tribunal and the apparent inconsistency does not impugn the selection decision for reasons set out below.

- c) That he was acting in this position on a SPA and that this was not taken into account in the decision in breach of section 11.9 of ST/AI/2016/1.

The Tribunal accepts the Respondent’s explanation that the relevant reports in the selection process did mention the Applicant’s experience at the D-1 level. The report entered in the Inspira system by Ms. Keita to the SRB reflects that the Applicant had been serving on SPA at the D-1 level since May 2015. The SRB Memorandum to the Executive Office of the Secretary-General (EOSG) dated 20 September 2017 included, as an attachment, the Applicant’s PHP which included all his experience. Moreover, the Note to the Chef de Cabinet dated 20 December 2017

indicates that the Applicant was acting on a SPA at the D-1 level. Therefore, the Applicant's claim in this regard is not substantiated.

- d) That the pass mark of 40% for the written test was too low for such a senior position and may have been lowered after the tests were scored in order to accommodate the fact that the successful candidate scored 42.57% while he scored 66.33%.

The Tribunal finds that the pass mark was set prior to the test being taken by the non-rostered candidates and the Applicant is mistaken in his belief that the pass mark may have been deliberately lowered to accommodate the low score of the selected candidate. Further, it is not for the Tribunal to determine pass marks for written selection tests.

- e) That he has performed excellently as Acting Chief of Service, Humanitarian Affairs with performance ratings of “exceeds expectations”. This is accepted by the Respondent.

The Tribunal notes that a staff member occupying a post on a temporary basis does not have an automatic right to be appointed even though s/he may have been performing the self-same duties with a rating of “exceeds expectations”.

- f) That he did not receive full and fair consideration in the selection process.

The Applicant was one of three candidates recommended for selection, in alphabetical order, to the Chef de Cabinet. Mr. Kamea's evidence was consistent with the record, including the Note to the Chef de Cabinet which shows that any one of the three recommended candidates could have been selected for the position because all of them were considered suitable and equally appointable. In the circumstances, the decision was taken in accordance with standard operating procedures, which have been in existence prior to the current Secretary-General taking office, to ask the lead office to express a view as to whom they considered to be most suitable to meet UNAMID's needs.

By email dated 28 September 2017, Ms. Marianne Haugaard, Senior officer, SLAT, EOSG, requested Mr. Marco Bianchini, Chief, Office of the USG/DPKO to obtain the advice of Mr. Lacroix, USG/DPKO on the candidate considered most suitable among the three recommended candidates. By email dated 20 December 2017, Mr. Bianchini conveyed to Ms. Haugaard the DPKO's recommendation for the vacant position. In his reply, Mr. Bianchini named the successful candidate without providing any reason for the recommendation.

In the circumstances, the question whether the Applicant was given full and fair consideration at this stage will depend on whether, in the absence of any specific provision in ST/AI/2016/1, it was permissible for the SLAT/EOSG, to ask DPKO to indicate whom they would prefer for this position. The Tribunal finds that in view of the very wide discretion given to the Secretary-General as held by UNAT in *Bofill* and *Toure* and the fact that the Department concerned is best placed to know what is required on the ground, it was not an impermissible exercise of discretion.

It may be advisable when ST/AI/2016/1 is revised to consider, in the interest of transparency, the advisability of making specific provision so that staff members will know what procedures and practices apply. It may also be advisable to ask the Department to state the reason for their choice when responding to the request made by SLAT/EOSG as a safeguard against actual or perceived bias, favouritism, or other impermissible consideration.

39. The issues for determination are:
 - a. Were there any errors of procedure having regard to the Charter of the United Nations and the Staff Rules and Regulations such that they carried a credible risk of infecting the final decision making stage which followed the SRB's referral to the Secretary-General under Section 11.10 of ST/AI/2016/1?

b. If there was such a risk, did it materialize by manifesting itself in the manner in which the decision of the Secretary-General was reached such that it infected the integrity of the selection process resulting in the Secretary-General being misled into believing that the integrity of the selection process remained intact?

40. It is not surprising, and entirely understandable, that the Applicant who had been acting in the position on an SPA for two years and seven months with a performance of “exceeds expectations” should have entertained a belief that he was not accorded full and fair consideration given his track record of achievements, favourable performance ratings and having obtained the highest score on the written test, with the successful candidate having barely passed the minimum score. In addition to these factors are the various references to gender parity as one of the organisation’s priorities. Accordingly, the question to address is whether the successful candidate was chosen because she was a woman or because she was one of three equally appointable candidates who happened to be a woman. Given the underrepresentation of women in senior positions in UNAMID was it permissible to factor into the equation the candidates gender as an organizational priority? If it was permissible to do so at what stage in the selection process was this applied, if in fact it was?

41. Mr. Kamea’s evidence was clear and unequivocal in that all three candidates were equally appointable and SLAT/EOSG, who were responsible for preparing the submission to the Chef de Cabinet, did not confer any advantage on the female candidate. Prior to the SRB submitting its report to the EOSG, Ms. Keita, the Hiring Manager ranked the candidates placing the successful candidate at the top of the list on the basis of her answers on the competence, “professionalism” as well as her Arabic language skills which was a preferred criterion. When asked by Ms. Haugaard, Senior officer, SLAT/EOSG, DPKO expressed a preference for the successful candidate. However, DPKO were not asked to give a reason nor did they provide one. The Secretary-General delegated responsibility for appointments at D-1 level to the Chef de Cabinet and there is nothing to suggest that in preparing and submitting its report SLAT took into account any impermissible consideration or that the Chef de Cabinet had done so.

42. The UNAT held in *Rolland* that “[i]f the management is able to even minimally show that the Appellant’s candidature was given full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion”. The Respondent has made more than a minimal showing that the decision was not tainted by improper considerations and the burden having shifted to the Applicant he has failed to show that he was denied a fair chance of promotion.

JUDGMENT

43. The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 12th day of June 2018

Entered in the Register on this 12th day of June 2018

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi