UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/038
Judgment No.: UNDT/2018/089
Date: 19 September 2018
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MAYSTRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alistair Cumming, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 6 June 2017, the Applicant contests the decision not to release her on reimbursable loan to a P-4 post with the United Nations Commission of Inquiry on Human Rights in Burundi through the UN Entity for Gender Equality and the Empowerment of Women ("UN Women") and the UN High Commissioner for Human Rights ("OHCHR").

2. The application was served on the Respondent, who filed his reply on 19 July 2017.

3. On 15 December 2017, Counsel for the Applicant filed a motion to adduce additional evidence and comments on the reply, already attaching it to his motion. In his motion, the Applicant's Counsel stressed that in his client's view, it was necessary to have a hearing in this matter.

Facts

4. The Applicant joined the United Nations International Criminal Tribunal for the former Yugoslavia ("ICTY") as an Associate Legal Officer (P-2) in the Appeals Chamber in 2009. She resigned effective September 2017.

5. The Applicant was released to the Justice Rapid Response ("JRR") to support the Commission of Inquiry on Human Rights in Eritrea for six months in 2016. She returned to ICTY effective 1 July 2016.

6. Email communications from August 2016 show that the Applicant asked to be assigned certain tasks and that the Head of Chambers, ICTY, told her that he did not have anything else for her to review at that point. Judge P. also indicated in an internal memorandum of 23 September 2016 that the Applicant had made herself available to provide assistance with respect to pre-appeal matters in the case of *Prlic et al.* and also offered to help with the drafting and reviewing of the Preparatory document, but that her cooperation so far had not been regarded as necessary with respect to the Preparatory document.

7. By email of 30 August 2016, the Applicant informed Judge P. that she had no work to do, had asked but was not given anything and that she had consequently decided to apply to other positions. In a further email of 31 October 2016 she reiterated that she was demoralized by the fact that she had nothing to do and that staff on temporary contracts were extended to draft the interlocutory appeals in *Mladic.* while staff with fixed-term contracts had nothing to do.

8. The Applicant was informed on 15 November 2016 that she had been selected by UN Women and OHCHR from a roster of experts managed by JRR to be deployed to assist the UN Commission of Inquiry on Human Rights in Burundi established pursuant to UN Human Rights Council Resolution A/HRC/RES/33/24 of 30 September 2016. She was selected for a P-4 post as Gender Advisor/Sexual and Gender-based violence investigator, and the deployment period was to be from 1 January to the end of August 2017. The modality of the deployment was to be by reimbursable loan and costs related to it were to be covered by UN Women.

9. By email of 17 November 2016, the Applicant informed the Head of Chambers, who was her first reporting officer, that Judge P. supported her possible loan to the JRR. By email of the same day, the Head of Chambers informed the Applicant that she also had his support and that he would inform the President of ICTY ("the President"), Judge C.A..

10. By email of the next day, the Head of Chambers informed the Applicant that the President, also supported her request, but that he should consult with the Senior Legal Officer on the *Prlic et al.* case before going forward. He noted that thereafter, he would ask the Applicant to inform JRR to send the request to the Chief, Human Resources ("HR"), ICTY. By another email of 18 November 2016, the Head of Chambers informed the Applicant that the President had not yet made a final decision and that "if [she thought] that a delay until Monday [would] hurt [her] standing with JRR, then [she should] consider telling them now to send the request".

11. By letter to the Chief, HR, ICTY, dated 21 November 2016, the Executive Director, JRR, officially requested the Applicant's release on loan, stressing that UN Women would be covering the costs related to her deployment. The Chief, HR, ICTY, responded on the same day that the Organization would review the request and revert back to JRR. The Chief, HR, ICTY, forwarded the request to the Head of Chambers on 22 November 2016.

12. The Head of Chambers forwarded the request to the Registrar, ICTY, on the same day, noting that:

> [A]fter consulting with the President, Vice-President and *Prlic* team leader, I can inform you that Chambers unfortunately cannot support the request of JRR. Other Chambers staff members have subsequently been contacted by JRR with respect to another position concerning Cambodia. This causes the issue of precedent to arise—if one is granted, why not another? Further, it would be difficult for the President to justify to the [Security Council] why staff members were allowed to leave if we run into difficulty keeping our cases on schedule. It will be up to you to decide how much of this reasoning to include in your reply to JRR.

13. The Head of Chambers informed the Applicant by email of 22 November 2016 that "after many consultations, [he was] able to inform [her] that Chambers unfortunately [could] not support JRR's request", stressing that once she had been contacted, "JRR began to contact other Chambers staff members about their availability for other positions. This brought the element of precedent into the equation, and would make it difficult for the President to justify to the [Security Council] why staff members were allowed to be loaned to other agencies if [ICTY] run into difficulty keeping [its] cases on schedule".

14. The Applicant responded by email of the same day, noting that JRR had informed her that no one else was offered a position, and that JRR would be willing to clarify any issues in that respect.

15. The Registrar, by email of 23 November 2016 to the Deputy Registrar, ICTY, noted that he was not able to deal with this and that the Deputy Registrar should take it over and handle all correspondence, and that she may want to talk to Judge P. and the Applicant before proceeding formally.

16. By letter dated 23 November 2016, the Director of Operations, JRR, informed the President that JRR would not request the release of several of staff members of ICTY in the near future, and that only the Applicant had been selected for the particular position as Gender Advisor/SGBV Investigator for the Commission of Inquiry on Human Rights in Burundi. He stressed that JRR fully understood if it was only possible to grant the release of one of ICTY staff members at a given time.

17. By email of 24 November 2016, the Deputy Registrar informed the Applicant as follows:

> I wanted to let you know that—very regrettably—we are refusing the JRR/UN Women request to release you for Burundi. … A number of matters were taken into consideration and it was discussed by the President, Vice President, Team leader and Head of Chambers. This resulted in the negative recommendation. I believe the main issues were precedent for other staff (there are other pending requests) and the difficulty of explaining why we let experienced staff take leave at this stage if there is any delay in completion of the judgments.

18. On the same day, the President informed the Applicant by email that he had decided that he could not accede to the Applicant's request for release, stressing, *inter alia*, that "if [he grants the Applicant's] release [he] would have to do the same with others because [he] simply [could] not treat anyone else differently if [he gets] further similar requests".

19. The Deputy Registrar informed the Executive Director, JRR, by letter of 29 November 2016, copied to the Applicant, that ICTY was not in a position to approve the request for the Applicant's release to JRR. She stressed that "the President, Vice-President and Head of Chambers have expressed concerns about the potential impact that releasing staff at this stage could have on the timely delivery of the remaining judgments", hence the request could not be granted.

20. In an email exchange between the Applicant and the President of the United Nations Criminal Tribunals Staff Union of 12 December 2016, the latter informed the Applicant that he had discussed with the President who was however not open to give a positive response to the Applicant's request.

21. On 13 December 2016, the Deputy Registrar informed the Applicant that although she and the Registrar had insisted to convince the President to release her, it was to no avail.

22. The Applicant wrote a long email to the President on 18 December 2016, offering, *inter alia*, her resignation tied to her loan with the official effective date being the last day of her loan, hence, that she would not come back to the Tribunal and her position would be available as of 1 January 2017 until the end of her contract at the end of November 2017. She stressed that as such, her departure would not set a precedent for someone leaving for a few months and then wishing to exercise the right to come back to the post. She asked him to consider this solution.

23. The President responded by email of 20 December 2016, stressing that much to his regret, he could not accede to her request, at this point in time where he was under pressure from the Security Council to keep staff of ICTY and that he considered her case would constitute a precedent.

24. The Applicant wrote to the Registrar, ICTY, on 3 January 2017, asking him to reconsider his decision not to permit her acceptance of the position and promotion offered to her by the UN Commission of Inquiry on Human Rights in Burundi based in Geneva. She asked him to take into account, *inter alia*, the following:

a. That Judge P., whom she assisted, was not currently presiding over any case and fully supported her request for release;

b. That Judge P. would agree to, and could be assisted by, N.R. during the Applicant's absence;

c. The fact that she was given hardly any work from July to November 2016, although she offered numerous times to work on the *Prlic et al.* case, shows that her absence would not impact the timely conclusion of this appeal;

d. That the President had also decided that other tasks which the Head of Chambers had assigned to the Applicant should be assigned to an Associate Legal Officer in the President's Office, in order to justify the extension of that person's contract;

e. That the refusal to give the Applicant work on the *Prlic et al.* case had even been highlighted by Judge P. in a memorandum, was arbitrary and amounted to unfair treatment and discrimination, verging on constructive dismissal;

f. That this, paired with the refusal to release her to JRR, appears to establish a pattern of harassment; the refusal to release her would violate the Organization's duty of care and constitute an abuse of authority; and

g. That while he had to consult with the President, the authority for the decision, and its reconsideration, under the Staff Rules, lies solely with the Registrar and delegating it to the President, who is not a staff member, is unlawful.

25. She closed by noting that if the Registrar was not willing to reconsider his original decision, she had no choice but to formally contest it.

26. The Applicant was informed on 4 January 2017 that the Registrar was on leave, hence he could not revert back to her before his return the week after.

27. The Applicant's lawyer sent a letter to the Registrar and Deputy Registrar on 10 January 2017, asking them to reconsider the decision.

28. The Registrar responded by email of 17 January 2017, noting that the Administration's decision regarding the Applicant's request for release would be maintained. He stressed that her release had been granted for a period of six months in the first half of 2016, since at the time, her absence would not have an impact on the delivery of the judgment in *Prlic et al.* but that those circumstances had now changed and that a lot of work needed to be done in this case.

29. On 25 January 2017, the Applicant requested management evaluation of the decision of 29 November 2016 not to release her to JRR.

30. The Management Evaluation Unit ("MEU"), in its response to the Applicant dated 10 March 2017, found that the request was not receivable, and that, in any event, the Deputy Registrar's exercise of discretion was legal.

Procedure

31. By Order No. 33 (GVA/2018) of 6 February 2018, the parties were convoked to a case management discussion, which was held on 28 February 2018. By Order No. 87 of 25 April 2018, the Tribunal scheduled a hearing on the merits of the case, which was held on 3 and 10 July 2018 and included evidence from several witnesses.

Parties' submissions

32. The Applicant's principal contentions are:

Receivability

a. The application is receivable and her request for management evaluation was not time-barred; the communication of 24 November 2016 was not a final decision and, hence, did not trigger the 60-day deadline for management evaluation;

b. The evidence from the Deputy Registrar confirmed that immediately after receipt of the email of 24 November 2016, the Applicant spoke to the former, and received information that had not previously been known to her; during that conversation, the Deputy Registrar informed her that she had essentially copy pasted an email from the Head of Chambers into the email to the Applicant, and that she was not aware that Judge P. supported the Applicant's release, that the Head of Chambers had supported the request and that the information regarding the JRR seeking release of other staff members

was incorrect; the Deputy Registrar indicated that she would look further into the matter and try to find a solution;

c. Thus, the purported decision-maker was unaware that the communication was based on incorrect information immediately corrected; she further indicated in the phone call immediately after the email transmission that it was not a final decision;

d. The Applicant relied on the letter of 29 November 2016—sent on 30 November 2016—as the final decision, which is supported by the Registrar's reliance on the same in his email of 17 January 2017; the Administration cannot initially identify this as the date of communication of a final decision and then subsequently use an earlier communication to create a procedural hurdle to challenge;

e. Further or alternatively, it is argued that after the letter of 29 November 2016, the decision-maker was informed of a number of circumstances she had previously been unaware of, thus requiring a review of the decision; as such, the decision communicated by the Deputy Registrar on 13 December 2016 cannot be considered a confirmative decision, rather, that decision triggered the 60-day deadline; this is further demonstrated by the fact that the 13 December 2016 communication shows that the Registrar and Deputy Registrar—the lawful decision makers—were actively seeking the release of the Applicant; they communicated their failure to reverse the decision only on 13 December 2016; the request for management evaluation was thus timely;

Merits

f. The decision is *ultra vires*; under staff rule 4.9, inter-organization movements fall within the jurisdiction of the Secretary-General, hence, he has the authority to delegate it;

g. Under the memorandum of 20 May 1994, the Under-Secretary-General for Administration and Management defined the arrangements for administration of ICTY staff delegating authority specifically to the Registrar, who had the authority to decide on the Applicant's matter; MEU accepted this;

h. Nothing in the Staff Rules or in any other document provides for the possibility to delegate this power, directly or indirectly, to the President of ICTY; the MEU appears to have accepted that the President lacked the authority to make the impugned decision and seeks to assert that he was not the decision-maker but that it was the Deputy Registrar who weighed the President's opinion;

i. However, the evidence leaves no doubt that the decision was taken by the President; this is supported, *inter alia*, by the fact that the Deputy Registrar and Registrar tried—in vain—to make him change his mind; also, the President himself acknowledged that he had taken the decision;

j. Under the Rules, the President does not have the authority to make the decision; he is not even a staff member of the United Nations; the decision was thus *ultra vires* and void *ab initio*;

k. By justifying the decision mainly on the assumption that if the Applicant's release request was granted, similar requests would have to be granted as well, the President's based it on irrelevant factors, which resulted in an error of fact and of law; first, releasing the Applicant would not bind the Organization to release other staff members under a different set of circumstances; her circumstances were unique as she was assigned to a Judge who fully supported her release and she had been told many times that she was not a member of the *Prlic et al.* drafting team;

l. Second, the Applicant offered to resign, tied to her loan, with the official effective date being the last day of her loan; she expressly offered to renounce her right to come back for the last three months of her contract;

m. No precedent would thus have been set of someone leaving for a few months on a loan and then wishing to exercise the right to come back to a post;

n. The President's reliance on the inconsistency of the Applicant's release with his representations to the Security Council of the importance to retain staff is unlawful; political promises to some members of the Security Council are entirely irrelevant to a decision concerning staffing arrangements, particularly when the President lacked the authority for such decisions to start with; reliance on appearance over substance constitutes reliance on irrelevant criteria and is arbitrary;

o. The evidence shows that the Applicant's workload at ICTY was reduced drastically during the period from 1 July to 30 November 2016 and although she sought to assist in reviewing or drafting the Preparatory document in the *Prlic et al.* appeal case (the last appeal case), her assistance was deemed unnecessary for the completion of the case; the evidence further confirms that her assistance was also deemed unnecessary for other judicial matters pending before the Appeals Chamber of ICTY, particularly her offer to assist with other drafting work, including the appeal decisions on the interlocutory appeals in the *Mladic* case, was refused on the basis that the work was required to justify the extension of the contract of another staff member;

p. The decision failed to consider relevant factors, *inter alia*:

i. That a replacement had already been identified and agreed upon by the Judge to whom she is assigned, and that that Judge was not presiding over any case;

ii. That said Judge and the team leader of the *Prlic et al.* case supported the loan, which would not impede the timely completion of ICTY cases;

iii. That she had agreed to resign from ICTY following her release thereby freeing up her post if desirable and further ensuring that no precedent would be set;

iv. That her offer to assist in the work relating to the Preparatory document was consistently rejected; and

v. That the Registrar's email of 17 January 2017, after the Applicant's lawyer had pointed out several illegalities, suddenly tried to detail the Applicant's relevance for the *Prlic et al.* case;

q. Previously, the President had already alleged that the Applicant was essential for the timely completion of ICTY cases. However, this is contradicted by the repeated refusal by him to allocate to the Applicant any work in the drafting and/or reviewing of the *Prlic et al.* Preparatory document and his decision to assign the drafting of interlocutory appeal decisions to an Associate Legal Officer in his office, instead of to the Applicant; also, since 31 March 2017, the Applicant has not been provided with any substantive work and was forced to be inactive;

r. The Respondent's argument that the Applicant's work was cyclical shows a profound lack of understanding of the work of the Appeals Chamber of ICTY and is completely incorrect;

s. The exercise of discretion was thus unlawful and the reason provided to justify the refusal to release the Applicant was not supported by the facts, or rather, was false and baseless; the real reason was extraneous and the decision constitutes a breach of her right to be treated fairly, honestly and honourably;

t. She requests compensation for loss of earnings that would have resulted from her release including post adjustment for the period of the deployment at the Geneva rate, and compensation for damage to career prospects; she also requests moral damages for anxiety, frustration, psychological stress and related physical symptoms resulting from the decision.

33. The Respondent's principal contentions are:

a. The application is not receivable *ratione materiae*; the decision was notified to the Applicant on 24 November 2016, and she failed to request management evaluation within the 60-day time limit; the decision of 24 November 2016 was final, and further discussions did not produce a new decision triggering a new deadline; the Tribunal cannot waive the deadline for management evaluation;

b. The decision was lawful and taken by the Deputy Registrar within her delegated authority, who took all relevant considerations into account;

c. ICTY applies ICTY/IC/2013/06 (Special Leave without Pay and Inter-Organizational Exchange) to requests for release, which provides that the staff member's supervisor has to agree to the release; ICTY practice is to make such decisions dependant on operational requirements and since 2015, the Registrar has routinely required written confirmation from the Head of Chambers that the release will have no negative impact on the completion of the Tribunal's mandate; the Head of Chambers, in turn, consults the President, Vice-President and the Presiding and/or assigned Judge;

d. The Deputy Registrar took the decision within the delegation of authority from the Registrar, in accordance with the staff regulations and rules; the Deputy Registrar considered a number of factors, *inter alia*, the views of the President, Vice-President, Head of Chambers and Team Leader, as well as the timely completion of the mandate of ICTY and the imperative to complete the remaining appeal cases on which the Applicant was working, her experience, and the need for equal treatment of staff;

e. The Security Council has repeatedly stressed that ICTY must complete its work as quickly as possible and the importance of retaining staff; ICTY has committed itself firmly to closing by the end of 2017; completion of the *Prlic et al.* and *Mladic* cases proves challenging, particularly as staff members are likely to resign and workload for staff members who remain will increase; therefore, the Applicant's departure under any arrangement, including her

resignation following special leave might have contributed to a delay in the completion of the mandate of ICTY;

f. In light of her long experience and institutional knowledge, the Applicant played a pivotal role in issuing the final judgment in the *Prlic et al.* case; the fact that Judge P. had agreed to accept the replacement of the Applicant by an Associate Legal Officer was taken into account; however, she did not have the experience of the Applicant and hence, her replacement could not have compensated for the loss of the Applicant's experience;

g. Other staff members' requests for special leave without pay or release on loan were generally not granted since mid-2015; for example, ICTY denied the extension of special leave to two Chambers legal officers and several others were asked to return from special leave by 1 January 2016;

h. The granting of the Applicant's request was thus found by the Deputy Registrar to be inconsistent with ICTY operational requirements and its practice as well as unfair to other staff;

i. The contested decision was not made by the President of ICTY; however, since he is responsible for the judicial work, he is aware of factors that may not be known to other Judges or the Registry; hence, his views are crucial to the Registrar or Deputy Registrar and were correctly taken into account by the latter;

j. The Deputy Registrar took all relevant factors into account and properly exercised her discretion; some of the factors identified by the Applicant were not relevant, such as the mission undertaken by the UN Commission on Inquiry on Human Rights in Burundi, which is not part of the mandate of ICTY;

k. The Applicant's workload since the date of the contested decision is irrelevant as it cyclically shifts from the drafting team to the Judges of the Appeals Chamber and their assigned legal officers and back; and

l. The decision is lawful and the Applicant is not entitled to any compensation.

Consideration

Receivability

34. The Respondent challenges the receivability *ratione materiae* of the application, arguing that the final administrative decision was notified to the Applicant on 24 November 2016.

35. The Tribunal notes that at the hearing, the Deputy Registrar confirmed that she talked with the Applicant after the email of 24 November 2016, and that new important elements were brought to her attention which she had not previously been aware of, *inter alia*, that the Applicant had the full support of Judge P. and that she had been given no work to do over the last months. She also asked the Applicant to send her the letter of JRR of 23 November 2016 and stressed that she conveyed to the Applicant that on the basis of that additional information, she would try to find a solution and she in fact discussed the matter with the President and various other people for the first time herself after that conversation with the Applicant. She also talked to Judge P. who told her he was happy with the release, provided that the Applicant could be replaced by another staff member.

36. On the basis of the evidence, the Tribunal is satisfied that after the notification of 24 November 2016, the Deputy Registrar engaged in a genuine review of the matter on the basis of new elements, and that she clearly communicated to the Applicant that she would review the matter anew and find a solution. Thus, the Applicant could and did in good faith rely on the fact that the decision was not final on 24 November 2016.

37. Thereafter, by letter dated 29 November 2016 and sent by email of 30 November 2016—copied to the Applicant—the Deputy Registrar informed JRR that the request for release could not be granted. The Tribunal notes that the Registrar refers to that communication of 29 November 2016 in his communication of 17 January 2017 to the Applicant, after her lawyer had written to the Registrar.

38. In an email of 13 December 2016 to the Applicant, the Deputy Registrar confirmed that the Registrar and herself had talked to the President but that although they had persisted, it was to no avail. At the hearing, the Deputy Registrar stated that that email was somewhat "misleading" and that in fact, she had been convinced by the President that a release of the Applicant at that point was not possible.

39. In light of all the documentary evidence, and the evidence heard at the hearing, the Tribunal is satisfied that no final decision had been taken on 24 November 2016, and that the matter was being further reviewed, on the basis of new elements and discussions, *inter alia*, with the President.

40. It follows that by filing her request for management evaluation on 21 January 2017, against the communication of 29 November 2016 to JRR and copied to the Applicant denying her release, she respected the statutory deadline of 60 days. The application is therefore receivable *ratione materiae*.

Merits

41. After having reviewed the evidence produced at the hearing and the documents on the case file, the Tribunal has identified the following legal issues:

a. Whether the contested decision is *ultra vires*; and

b. Whether the Administration properly exercised its discretion in not releasing the Applicant.

Is the contested decision *ultra vires*?

42. It is uncontested by the parties that under the Inter-Office memorandum of 24 May 1994 on *Delegation of authority for recruitment and administration of staff* from the then Director of Personnel to the former Acting Registrar of ICTY, the authority to deal with staffing matters was delegated from the Under-Secretary-General for Administration and Management to the Registrar of ICTY. It is further undisputed that in the case at hand, the latter had himself further delegated that authority to the Deputy Registrar by email dated 23 November 2016, in accordance with ST/SGB/2015/1 (Delegation of authority in the administration

of the Staff Regulations and Staff Rules). However, the Applicant argues that the decision was *de facto* made by the President, ICTY, who did not have any decision making authority, and that, hence, it was *ultra vires*.

43. The Tribunal is aware of the delicate exercise of discretion with respect to staffing decisions in an institutional framework where staff members support and assist Judges—who are not staff members—in the adjudication of cases, while reporting to senior managers within the organizational structure.

44. The Tribunal notes that in the institutional setting of ICTY, decisions with respect to human resources and staff careers fall within the authority of the Registrar, who can and did further delegate it to the Deputy Registrar.

45. In the exercise of that authority, it is reasonable for the Registrar/Deputy Registrar to give due consideration to the views expressed by the Judges involved, including, in this instance, that of the President, who was also the Presiding Judge in the *Prlic et al*. case. In this double capacity, he not only had a good understanding of the overall operational needs of ICTY, but also of the staffing needs for the timely completion of the *Prlic et al.* case. Consulting with and taking into account the President's views on the workload and operational requirements of ICTY does not, in and of itself, constitute an abrogation of power by the Deputy Registrar, but was reasonable in the circumstances.

46. The Tribunal carefully examined the available documentary evidence, and also took into account the evidence provided at the hearing. The records show that initially, Senior Management of ICTY, particularly the Registrar, the Deputy Registrar herself and the Head of Chambers, were supportive of the Applicant's release. Even the President confirmed in his evidence that he was initially in favour of granting it. However, he later changed his mind and wrote in an email that he regretted that he could not change what he labelled as "his decision".

47. The Tribunal noted that the President, as well as the Head of Chambers and the Deputy Registrar, in several communications refer to the "President's decision". It also noted, however, that in his evidence, the President stressed that while he could be consulted on this issue, he could not take a decision in these matters. The Tribunal is of the view that what matters is not how a decision is labelled, but who had the final say and took the final decision, in light of all the relevant factors and considerations.

48. Relevantly, the Deputy Registrar stated in her evidence that she took into account the President's view as one of several factors, which she weighted in taking the decision. She also talked to the Head of Chambers, the Team Leader, Judge P. and the Applicant to take a fully informed decision. The Tribunal is satisfied that it was the Deputy Registrar, within her delegated authority, who took the contested decision.

49. In the Tribunal's view, the decision would have been *ultra vires* only if the Deputy Registrar had taken the decision on the basis of the views expressed by the President, despite her not being in agreement with such views. That was not the case here: despite the terms of the email of 13 December 2016, the Tribunal found credible the evidence given by the Deputy Registrar at the hearing, that she had in fact been convinced by the view of the President that it was not in the operational interest of ICTY—a closing entity—to facilitate the departure of a staff member of the Applicant's calibre at that point in time.

50. The President also convinced her that such facilitation could not be allowed in light of the fact that the Applicant was to assist Judge P. to review the Preparatory Document in the *Prlic et al.* case and since, at that time, it was not sure that that Judgment could be finished on time before the completion of the mandate of ICTY. Thus, while certainly the President's views were determining in taking the decision that the Applicant could not be released, the Deputy Registrar had been convinced by them and took the decision by weighting them against other available elements.

51. As stated above, this consultation of the President was reasonable and did not constitute an abrogation of power on behalf of the Deputy Registrar in the decision making process.

52. The Tribunal therefore finds that the decision was not *ultra vires*.

Did the Administration properly exercise its discretion in not releasing the Applicant?

53. The Inter-Organization Agreement concerning Transfer, Secondment or Loan of staff among the Organizations applying the United Nations Common System of Salaries and Allowances defines "Loan" under sec. 2(e) as "the movement of a staff member from one organization to another for a limited period, normally not exceeding one year, during which the staff member will be subject to the administrative supervision of the receiving organization but will continue to be subject to the staff regulations and rules of the releasing organization".

54. Section 3(b) of the Inter-agency agreement provides that "an Organization which seeks the … loan of an official of another organization will make a request, therefore, to the human resources office of that organization". According to sec. 3(c), negotiations on a loan are undertaken between the human resources offices of the releasing and the receiving Organization.

55. The Tribunal understands that inter agency mobility is facilitated whenever possible in order to allow career advancement of staff members and to ensure that the Organizations benefits from a competent workforce with broad experience. The foregoing notwithstanding, the decision to release a staff member on loan or secondment is a matter of administrative discretion, which is subject to limited judicial control.

56. Staff members do not have a right to be released on loan since release requests are subject to the Organization's discretionary evaluation of the circumstances of each case. Nonetheless, the Organization has the duty to make a reasonable, balanced and rational decision and to provide reasons in case it denies the release.

57. The Appeals Tribunal held in *Sanwidi* 2010-UNAT-084 that:

> [A]dministrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.

58. This is the standard to be applied by the Tribunal in the case at hand. The Deputy Registrar stressed in her evidence that at the time of the Applicant's request for release to the Commission of Inquiry on Human Rights in Burundi, the strategic goal of Senior Management and the Judges of ICTY was to finish the *Prlic et al.* case on time (that is, before the end of 2017), and that it was not sure, or doubtful, whether that could be achieved. It was considered not to be in the operational interests of the Tribunal to release the Applicant at that point in time, taking into account the finite mandate of ICTY.

59. The Tribunal notes that it is not contested that when the Applicant came back from Eritrea to ICTY on 1 July 2016, she was not given any meaningful work for several months, although she had repeatedly offered her help, *inter alia*, in reviewing parts of the Preparatory Document of the *Prlic et al.* case. Judge P. wrote a memorandum to the President, on 23 September 2016, stressing that the Applicant had offered her assistance with respect to pre-appeal matters in the *Prlic et al.* case and help with the drafting and review of the Preparatory document, to no avail. The President in his evidence stated that he had discussed with the Team Leader of the drafting team whether she could make use of the Applicant, and that the Team Leader had told him that she was reluctant to do so. Thus, no work was assigned to the Applicant with respect to the drafting of the Preparatory document or judgment in the *Prlic et al.* case. Evidence also shows that the Applicant was not given any work in the *Mladic* case. That was a radical change to the workload the Applicant had had at ICTY prior to her release to the Commission of Inquiry on Human Rights in Eritrea in the first half of 2016.

60. While the Applicant's workload was thus minimal during the second half of 2016, the Tribunal found credible the evidence that this was partly due to her having been on loan in the first half of 2016 and the fact that it was thus more difficult to integrate her into the drafting team. That being said, the evidence also confirmed that at the time of the contested decision, it was to be expected that upon receipt of the Preparatory document of the *Prlic et al.* case at the end of 2016, the Applicant would be rather busy in assisting Judge P. to review this voluminous document. The Applicant herself admitted in her evidence that she had work to do from December 2016 to March 2017, after the Preparatory document had been sent for review to Judge P., and for another month from mid-June to mid-July 2017.

61. While, arguably, during the second half of 2016 the Applicant's presence at ICTY was thus not essential, it was reasonable to conclude at the time of the contested decision that it would be essential as of receipt of the Preparatory document for review by Judge P., expected at the beginning of 2017.

62. The Deputy Registrar assessed and was convinced by the President's view that it was against the operational interests of ICTY to facilitate the departure of a staff member of the Applicant's calibre and seniority just prior to the release of the Preparatory document in the *Prlic et al.* case to the Judge she was assigned to, in a situation where timely completion of that judgment was crucial, in light of the finite mandate of ICTY.

63. As stressed above, the Deputy Registrar also clarified that her email of 13 December 2016 was somehow misleading since during her discussion with the President, he had convinced her that in light of the closure of the Tribunal at the end of 2017, it was then not possible to release the Applicant. She also said that she had denied special leave without pay to other staff members around the same time, yet again in light of the end of the mandate of ICTY. She informed the Tribunal that in fact, there had been a radical change of policy at ICTY, from a very flexible practice to let staff members go on different forms of loan/leave/secondment in the past, to a restrictive policy during the last year of existence of ICTY. That change in policy was based on the end of the mandate of ICTY on 31 December 2017 and the related timelines to finalize the remaining cases.

64. The Deputy Registrar also discussed the matter of the Applicant's release with Judge P. who was supportive of the Applicant's request, provided that she would be replaced by a particular, more junior Legal Officer. However, the President was not in agreement with the replacement of the Applicant by the less senior Legal Officer, which he said he needed in the drafting team. It was not unreasonable for the Deputy Registrar to also rely on the broader view of the President, who was also the Presiding Judge in the *Prlic et al.* case.

65. The Tribunal notes that while, ultimately, upon the Applicant's resignation, that Associate Legal Officer replaced the Applicant until the end of the Tribunal's mandate, Judge P. said in his evidence that she did so on a part-time basis, that is, she worked 50% for him and 50% for the drafting team. While it may have been agreeable to Judge P. to have that Associate Legal Officer as a replacement for the Applicant during her requested release on reimbursable loan from 1 January to August 2017, it was reasonable to conclude on the basis of all the elements and in particularly in light of the completion of the mandate of ICTY on 31 December 2017, that it was not in the operational interests of ICTY as a whole. The Tribunal is thus satisfied that the Deputy Registrar did take the opinion of Judge P. duly into account, and weighted it against other elements.

66. The Deputy Registrar also talked to the Head of Chambers and the Team Leader for the *Prlic et al.* case. While they were initially in favour of the release, they changed their mind and, particularly, the Head of Chambers, after talking to the President, Vice-President and Team Leader, expressed the view that the Applicant's release at that time could have a negative impact on a timely completion of the remaining cases (particularly the *Prlic et al.* case), that it would be difficult to justify the release to the Security Council, and that it could set a precedent for other staff members who had also been contacted by JRR.

67. The Tribunal is not convinced that the fact that the Applicant's release may have "set a precedent" is a relevant consideration in taking the contested decision. The facts of each case are different, and it is the duty of the Administration, in its exercise of discretion, to give due individual consideration to each request. It is quite possible, and may have been reasonable, to ultimately refuse any such request upon individual consideration, on the grounds of the forthcoming closure of ICTY. That, however, did not dispense the Organization from its duty to give individual consideration to each request, including to that of the Applicant.

68. The Tribunal carefully read the letter on file from JRR, according to which JRR committed not to request the loan of another person, simultaneously, at any given time. It is the Tribunal's understanding that that letter does not exclude that other ICTY staff members would be approached for release for another position, before the completion of the mandate of ICTY. Also, the Tribunal has no reason to doubt the evidence of the President, who said that other staff members had told him that they had also been approached by JRR around the same time for a position in Cambodia. The President also credibly stated in his evidence that he had written to JRR to tell them to refrain from contacting ICTY staff during the last year of the Tribunal's mandate, but that they continued to contact staff members nevertheless. As stated above, while the issue of a precedent may have been a concern for ICTY, it was not a relevant consideration, and each case had to be examined on its own.

69. The foregoing notwithstanding, the Tribunal is satisfied that while the issue of the precedent was taken into account in taking the contested decision, the Applicant's case was nevertheless given individual consideration. It was considered that her release at the critical time when Judge P. to whom she was assigned was to review the Preparatory document may have resulted in a delay in the completion of the judgment in the *Prlic et al.* case before the closure of the Tribunal and that it was therefore not in the operational interests of ICTY to grant her request.

70. With respect to the loan tied to the Applicant's resignation without return right, the Deputy Registrar informed the Tribunal that it was in fact her who had brought that proposal into the discussion. However, while she gave due consideration to that option, she ultimately considered that it was not viable. The Tribunal is of the view that it was not an unreasonable exercise of discretion not to further pursue that avenue.

71. Finally, the Tribunal recalls that shortly before the contested decision, the Applicant had been released to the United Nations Commission of Inquiry on Human Rights in Eritrea, during the first half of 2016. The President said in his evidence that he had not objected to the Applicant's release at the time, upon confirmation by the Head of Chambers and the Team Leader, as well as Judge P., that they did not need the Applicant at that stage and that she could indeed be released.

72. Moreover, the Tribunal notes that the fact that ICTY was a downsizing entity reasonably entailed balancing two competing challenges: on the one hand, the duty of ICTY to ensure it had the necessary resources to finalize its mandate by the end of 2017 and, on the other hand, the particular duty of ICTY to allow staff members who knew that their assignment with ICTY was equally expiring and, hence, who might face unemployment upon completion of the mandate, to find new career opportunities.

73. The Tribunal considers that in light of all the elements of the present case and particularly the fact that ICTY had to finalize its remaining cases before its closure at the end of 2017, it was not unreasonable to refuse the Applicant's release shortly after she had come back from a previous release in 2016.

74. The Tribunal also finds that the evidence showed that the Applicant's case was considered individually, and that the Deputy Registrar took steps to take a fully informed decision by talking to the relevant stakeholders, and duly weighting, *inter alia*, the views of the President and that of Judge P.. She did thus not blindly apply a (unwritten) policy, without giving due consideration to the particular circumstances of the Applicant's case.

75. Finally, the Tribunal finds that any political considerations, notably the President's commitment vis-à-vis the Security Council and a potential perception of the release, were not the determining factors that led to the refusal to release the Applicant. Rather, the determining factor lied in the impact the Applicant's release might have had at the time on the operations of ICTY and on the timely completion of its mandate by 31 December 2017.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Teresa Bravo
Dated this 19th day of September 2018

Entered in the Register on this 19th day of September 2018

(*Signed*)

René M. Vargas M., Registrar, Geneva