



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

AZAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Edward Patrick Flaherty

Anca Apetria

Counsel for Respondent:

Elizabeth Brown, UNHCR

Jan Schrankel, UNHCR

Introduction

1. By application filed on 10 January 2017, the Applicant, a representative of the United Nations High Commissioner for Refugees (“UNHCR”) in Rwanda (D-1), seeks to challenge the decisions of the High Commissioner of 27 June 2016 to appoint several staff members to positions at the D-2 level, which the Applicant claims effectively rejected his request of 15 March 2016 to be promoted to the D-2 level and to be appointed to a position at this level.

2. The Tribunal has reviewed the application, the reply filed on 19 January 2017, and additional submissions on the receivability filed by both parties on 24 October, 7 November and 21 November 2018, pursuant to Order No. 169 (GVA/2018) of 9 October 2018, and has determined that this matter shall be determined on the papers alone.

Factual background

3. The application arises from a consideration of a letter of 15 March 2016 from the Applicant’s Counsel to the High Commissioner for Refugees. In this letter, the Applicant’s Counsel recalled the Applicant’s career progression at UNHCR since 1994 up to the D-1 level in 2006, asserted that “[t]he hierarchy of UNHCR continued to say that he would be considered when opportunities at D[-]2 arise, but failed to do so” and made the following request:

We are writing to you now on [the Applicant]’s behalf as it is his information and belief that some D[-]2 posts would be opened in Africa, Asia, the Middle East and Headquarters. In view of the foregoing, and the repeated failure of your predecessor to recognize his undeniable contribution to the UN in general, but more importantly to UNHCR and persons of concern to the Agency in particular, we would ask that you consider appointing [the Applicant] to the next D[-]2 position and promote him to this grade. Please treat this as a request for a final administrative decision.

4. No response to the letter was received by the Applicant or his Counsel. The Applicant asserts that his request has been implicitly rejected and that consequentially there is an appealable administrative decision.

5. The Applicant sought management evaluation of the asserted decision on 24 August 2016 and received a reply thereto on 24 October 2016.

Consideration

6. It is necessary to examine whether the Tribunal has jurisdiction to consider this matter, to wit, if there is a reviewable administrative decision under the terms of the Tribunal's Statute.

7. The Tribunal's jurisdiction *ratione materiae* is defined in art. 2 of its Statute, which relevantly provides:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance[.]

8. The Appeals Tribunal has adopted the definition of an administrative decision set forth by the former United Nations Administrative Tribunal in *Andronov*, Judgment No. 1157 (2003), which reads:

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions

are commonly referred to, within administrative law systems, as implied administrative decisions.

9. In this matter the Applicant, through his Counsel, made a unilateral request to be appointed to “the next position” at the D-2 level, without identifying any specific position. There has been no job opening advertised, no call for applications or anything indicating that a specific position was vacant and available for appointment pursuant to the Staff Regulations and Rules or any administrative issuance issued by UNHCR in respect of appointments and promotions. The Applicant has no right to make such a unilateral application or request and have it considered and determined as an application for appointment.

10. Essentially the Applicant has attempted to create an administrative decision which he now tries to contest. A staff member cannot unilaterally create circumstances that are not part of his/her terms of appointment or the terms of his/her contract of employment and then assert that there is an implied administrative decision consequent upon a refusal to consider the matter. Whilst the approach discloses some imagination on the part of the Applicant, the absence of a response by the High Commissioner does not create any direct legal consequence for him. Thus there is no administrative decision, directly or by implication, that the Tribunal would have jurisdiction to consider.

11. Further, in the application the Applicant is aggrieved by what he refers to as the appointment of “several staff from D[-]1 to D[-]2” and the inferential refusal “to appoint (and promote) the Applicant to the grade D[-]2”. The movement of these staff members is characterised by the Respondent as lateral transfers. For current purposes it does not matter whether such staff were promoted or transferred; the Applicant has no right to make an appeal in respect of matters to which he was not a party. Indeed, the Applicant did not assert that the High Commissioner failed to consider his candidacy for any of these positions, nor did he claim that he was even qualified for them. The Applicant has no interest in the decisions made and thus no legal standing and right of appeal in respect of such.

12. Finally, the Applicant takes issue with the fact that positions at the D-2 level in UNHCR are granted without any recruitment process, which makes it impossible for him to challenge his non-promotion to the D-2 level and the High Commissioner's failure to appoint him to a position at this level before this Tribunal. The Tribunal notes that recruitment and assignment to positions at the D-2 level is excluded from the High Commissioner's Recruitment and Assignment Policy (UNHR/HCP/2017/2), which governs recruitment process at UNHCR. According to the Respondent, it is within the High Commissioner's discretion to appoint and promote his most senior representatives and members of his Senior Management Committee from within the Organization without advertisement. If positions at the D-2 level at UNHCR are granted without advertisement and recruitment processes, the Applicant may indeed have limited possibilities to challenge his non-selection for positions at the D-2 level. In order for the Tribunal to entertain an application in this context, the Applicant would at least have had to identify a specific position for which he considers he was not fully and fairly considered. The Tribunal cannot review policy decisions or consider cases in a vacuum.

13. The application is therefore not receivable.

Conclusion

14. In view of the foregoing, the Tribunal DECIDES that the application is dismissed.

(Signed)

Judge Rowan Downing

Dated this 20th day of December 2018

Entered in the Register on this 20th day of December 2018

(Signed)

René M. Vargas M., Registrar, Geneva