UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/016
Judgment No.: UNDT/2019/022
Date: 20 February 2019
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

McILWRAITH et al.[1]

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicants:
April L. Carter
Robbie Leighton, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

[1] A list of all Applicants is attached as an annex to this Judgment.

Introduction

1. By joint application filed on 24 March 2017 and completed on 11 May 2017, 179 former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), 27 Professional staff and 152 General Service staff, contest the decisions of the Officer in Charge, Assistant-Secretary-General, Office of Human Resources Management ("OiC ASG/OHRM") of November 2016 denying each of them a conversion of their fixed-term appointment into a permanent appointment.

2. The contested decisions are the culmination of two previous rounds of litigation and were taken in response to Judgment *Ademagic et al.* 2016-UNAT-684 of 22 August 2016, as briefly recalled below.

3. In 2010, the ICTY submitted recommendations to OHRM for the granting of permanent appointments to all 448 eligible ICTY staff members, including the Applicants. Upon review, OHRM disagreed with the ICTY's recommendations and referred the cases to the central review bodies, which concurred with OHRM's recommendation that none of the ICTY eligible staff members be granted permanent appointments.

4. The ASG/OHRM decided on 20 September 2011 not to grant permanent appointments to all of the ICTY recommended staff members on the basis that the ICTY was a downsizing entity expected to close by 2014. The Applicants, together with others, challenged the decision before the Dispute Tribunal (Judgment *Ademagic et al.* UNDT/2012/131 of 29 August 2012; see also *Malmstrom et al.* UNDT/2012/129; *Longone* UNDT/2012/130; *Schoone* UNDT/2012/162). The Dispute Tribunal's Judgment was subsequently appealed to the Appeals Tribunal (Judgment *Ademagic et al. and McIlwraith* 2013-UNAT-359 and *McIlwraith* 2013-UNAT-360; see also *Baig et al.* 2013-UNAT-357; *Longone* 2013-UNAT-358; *Schoone* 2013-UNAT-375).

5. In its Judgment *Ademagic et al and McIlwraith* 2013-UNAT-359 of 19 December 2013, the Appeals Tribunal concluded that placing reliance on the operational realities of the Organization to the exclusion of all other relevant factors amounted to discriminating against the ICTY staff members because of the nature of the entity in which they served, and violated their right to be fairly, properly and transparently considered for a permanent appointment. Accordingly, the Appeals Tribunal rescinded the decision, remanded the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of the staff members and awarded to each appellant EUR3,000 in non-pecuniary damages.

6. On 14 February 2014, the ICTY recommended again that all staff members whose cases had been remanded by the Appeals Tribunal be granted a permanent appointment, except for four individuals who were found to be ineligible. OHRM disagreed with this recommendation. The Central Review Committee and the Central Review Panel endorsed OHRM's recommendation in respect of the P-2 to P-4 staff members and of the General Service staff, respectively. The Central Review Board, however, disagreed with OHRM's recommendation and recommended that nine staff members at the P-5 level and above be granted permanent appointments.

7. Between 13 and 19 June 2014, the ASG/OHRM decided again not to grant to any of the ICTY staff members retroactive conversion of their fixed-term appointment into a permanent appointment. Each of the concerned staff members, including the Applicants, were found to meet three out of the four required criteria but not the fourth one, namely that the granting of a permanent appointment be in accordance with the interests of the Organization, because of the finite mandate of the ICTY and the limitation of their appointment to service with this entity. The Applicants, together with others, challenged the decisions before the Dispute Tribunal (Judgment *Ademagic et al.* UNDT/2015/115 of 17 December 2015; see also *Sutherland et al.* UNDT/2015/116; *Featherstone* UNDT/2015/117; *Longone* UNDT/2015/032) and the Judgment was subsequently appealed to the Appeals Tribunal (Judgment *Ademagic et al.* 2016-UNAT-684; see also *Marcussen et al.* 2016-UNAT-682; *Featherstone* 2016-UNAT-683).

8. In its Judgment *Ademagic et al.* 2016-UNAT-684 of 22 August 2016, the Appeals Tribunal concluded that the ASG/OHRM failed to give individual consideration to the transferrable skills of each staff member and based his decisions solely on the finite mandate of the ICTY. It held that "the Administration's unrelenting reliance on ICTY/MICT's finite mandate constitute[d], once again, an unlawful fettering of the ASG/OHRM's discretion". The Appeals Tribunal remanded the cases back to the ASG/OHRM for reconsideration for a second time.

Facts

9. In the third round of the conversion exercise, the OiC ASG/OHRM reconsidered 255 former ICTY staff members for permanent appointments in light of the situation in 2011, including the 179 Applicants in the present case.

10. The ICTY confirmed its initial recommendation submitted in 2010 that all Applicants were suitable for the granting of a permanent appointment.

11. By memorandum of 1 November 2016, the Chief, Section III, Learning Development and Human Resources Services Division, OHRM, submitted her assessment of the suitability for permanent appointment of the 175 General Service staff to the Central Review Panel, based on her consideration of (1) the qualifications/skills of each staff member and (2) the transferability of these skills to other functions within the Organization, more specifically positions in the Secretariat but outside the ICTY and the International Residual Mechanism for Criminal Tribunals ("MICT").

12. She concurred with the ICTY that these staff members all had demonstrated the highest standards of efficiency, competence and integrity but had a different opinion when it came to determining whether the staff members were suitable for a permanent appointment taking into account all the interests of the Organization. She concluded that 148 General Service staff members would have the qualifications, experience and skills that would qualify them for alternative positions in the Secretariat outside The Hague. She found, however, that the 27 remaining General Service staff members, who were all language staff, did not

have transferrable skills since their skills were specific to translation from Bosnian/Croatian/Serbian ("BCS") and they had not passed the Language Competitive Examination ("LCE"). Irrespective of the foregoing, she recommended that none of the 175 General Service staff be granted a permanent appointment given that all relevant Secretariat posts were located outside The Hague and the Applicants, who were locally recruited, could not be transferred to these.

13. By memorandum of 3 November 2016, the Chief, Section III, Learning Development and Human Resources Services Division, OHRM, similarly submitted her assessment of the suitability for permanent appointment of the 51 Professional staff at the P-2 to P-4 levels to the Central Review Committee, which included 35 language staff, 14 legal staff and 2 political affairs staff. It is noted that 22 Professional staff had already been found suitable for permanent appointments by both the ICTY and OHRM, thus their cases were not submitted to the Central Review Committee. OHRM again agreed with the ICTY that these 51 Professional staff had all demonstrated the highest standards of efficiency, competence and integrity but had a different opinion when it came to determining whether the staff members were suitable for permanent appointments taking into account all the interests of the Organization. OHRM considered the individual skills of each staff member and identified the staffing needs of the Secretariat in September 2011 for these skills, but outside the ICTY and the MICT. The process was detailed as follows:

> In 2011, there were 15,320 international professional posts in Secretariat entities of the Organization that supported functions it was foreseen would be required on an ongoing basis. To assess the Organization's interest in retaining ICTY staff beyond their appointments with the ICTY, the qualifications, transferable skills of the ICTY staff were cross-matched against the relevant positions identified in this list. Specifically, a short-list of potentially suitable positions was identified based on the staff members' functional title, the legal network their job fell within and a search of key terms associated with the functions performed. The staff member's qualifications, experience and skills were matched against these positions and their suitability for these positions assessed.

14. OHRM found that it was not apparent that the 51 Professional staff could be transferred to these positions upon the closure of the ICTY and thus recommended against the granting of permanent appointments.

15. In November 2016, the relevant central review bodies reviewed all the files of the Applicants, amongst others, and the recommendations made by the Learning Development and Human Resources Services Division, OHRM, for conversion to permanent appointments. The various central review bodies endorsed the recommendations made by OHRM that the Applicants not be granted permanent appointments. However, the Central Review Panel noted that nine General Service language staff showed other experience that could potentially qualify them to different positions within the Organization, amounting to 157 out of 175 General Service staff who would be suitable for positions in the Secretariat upon the closure of the ICTY instead of 148.

16. In November 2016, the OiC ASG/OHRM granted permanent appointments limited to the ICTY to 45 Professional staff. The OiC ASG/OHRM did not fully follow the recommendation of OHRM and the Central Review Committee insofar as it granted permanent appointments to some of the Professional staff members who had not been recommended for such appointments, including the 14 legal and 2 political affairs staff (see para. 13 above).

17. In turn, the OiC ASG/OHRM denied permanent appointments to 35 Professional staff and 175 General Service staff, including the 179 Applicants in the present case.

18. More specifically, 27 Applicants in the professional category, who are all language staff ("Professional language Applicants"), were informed by individual letters dated between 15 and 18 November 2016 from the OiC ASG/OHRM of the decisions not to grant any of them retroactive conversion of their fixed-term appointments into permanent appointments on the ground that they did not have "transferrable skills". Each of these language staff was found to lack the required language skills to be suitable for language positions within the Secretariat as at September 2011 either because they had not passed the LCE and/or they possessed skills in unneeded language combinations such as BCS. It was thus considered

unlikely that the staff members' services would be required by the Organization beyond the end of 2014 or early 2015, when the ICTY was scheduled to close, and a career appointment was deemed unjustified. Each Applicant received an individual letter reviewing their professional qualifications and background, with a similar conclusion as follows:

> In light of your qualifications and background, we have reviewed the needs of the Organization in September 2011 for translation services and observe that there were no ongoing positions for translators from English to BCS. Further, a pre-requisite for the employment of professional language staff in the Secretariat is that they pass the Language Competitive Examination (LCE). As at September 2011, you had not passed the LCE.
>
> Taking into account your individual background, qualifications and skills, as at September 2011, it was unlikely that your services would be required by the Organization beyond the needs for your services at the ICTY. Specifically, it was not expected the Organization would be in a position to retain you to perform the functions you were performing beyond the end of the year 2014/early 2015, when the ICTY was scheduled to close. Whereas this period may have extended for more than three years, it does not justify a career appointment. For these reasons, I do not consider that your individual qualifications and skills make you suitable for conversion to permanent appointment.

19. In turn, 152 Applicants in the General Service category were informed by individual letters dated between 15 to 18 November 2016 from the OiC ASG/OHRM that they had been denied a permanent appointment. A distinction in the reasons for these decisions was made between 23 Applicants who are language staff ("General Service language Applicants") and the remaining 129 non-language Applicants ("General Service non-language Applicants").

20. Each of the 129 General Service non-language Applicants were found to have the qualifications and background that would make them suitable for positions in duty stations outside The Hague as at September 2011. However, they were denied a permanent appointment on the ground that they could not be transferred to any of these positions outside The Hague since they were locally recruited. Each of these 129 Applicants received a letter that reviewed their individual qualifications and background and contained the following conclusion:

> In light of your qualifications and background, it is apparent there were a number of jobs in duty stations outside The Hague that you may have been suitable for at the time of the initial decision not to grant you a permanent appointment in September 2011. However, your appointment was and remains limited to the duty station The Hague, where you were locally recruited. Transfer to a duty station in another country presupposes international recruitment status, which is incompatible with your status as local recruit under staff rule 4.4(a). Only in rare instances; such as when there is a limited number of qualified applicants within the local labor market, is an exception to staff rule 4.4(a) granted. In September 2011, there were no reasons to suggest an exception to staff rule 4.4(a) may be granted upon the expiration of the budget for your functions. Instead, to be appointed to positions outside The Hague, it would have been necessary for you to resign, relocate and be re-appointed following regular staff selection process for these positions.
>
> In September 2011, it was not expected the Organization would be in a position to retain you to serve in the functions you were performing beyond the end of the year 2014/early 2015 when the ICTY was scheduled to close. Whereas this period may have extended for more than three years, it does not justify a career appointment.
>
> For these reasons, I do not believe that granting a permanent appointment is justified considering the rules governing your appointment.

21. As to the 23 General Service language Applicants, they were found to not be suitable for alternative positions within the Secretariat, in addition to lacking mobility due to their local recruitment. They each received a letter reviewing their professional qualifications and background and a conclusion that "[o]utside the ICTY, in September 2011, there were no ongoing positions in the Secretariat for translators with the language combination Bosnian/Croatian/Serbian into English or French". This also applied to the 9 staff members that the Central Review Panel had identified as having transferrable skills beyond their language ones (see para. 15 above). The letters also reproduced the reasons why, as local recruits, they could not be transferred to positions outside The Hague in any event (see para. 20 above). In view of the fact that it was not anticipated that their services would be needed beyond the closure of the ICTY in 2014 or early 2015, they were found to be not suitable for permanent appointments.

22. The 179 Applicants jointly requested management evaluation of the contested decisions on 12 January 2017, together with other ICTY former staff members who were similarly denied permanent appointments in this third round of review. Their request was rejected on 3 March 2017.

23. On 24 March 2017, Counsel for the Applicants filed an incomplete application on behalf of the Applicant Mr. McIlwraith and, on 30 March 2017, they filed a motion for joinder seeking to join to this case those to be instituted by the many other former ICTY staff members affected by decisions of the same nature issued in the context of the same reconsideration process, and to provide a common brief on the merits with supporting annexes. The motion was granted by Order No. 79 (GVA/2017) of 31 March 2017.

24. The 179 Applicants filed their joint application on 11 May 2017. They are divided in three categories:

a. 129 General Service non-language Applicants who were found to be suitable for alternative positions within the Secretariat but to lack mobility;

b. 27 Professional language Applicants who were found to lack the requisite examination and/or to possess unneeded language combinations (e.g. BCS/English or French); and

c. 23 General Service language Applicants who were found to lack both mobility and to possess unneeded language combinations (e.g. BCS/English or French).

25. The Respondent filed his reply on 14 July 2017.

26. By motion of 23 August 2017, the Applicants requested production of evidence to support their claim that they should benefit from the same "check box" approach established by the ASG/OHRM and applied to all other candidates for conversion to permanent appointment in the 2009 exercise, including various statistical data and several policy documents concerning this conversion exercise. This request was granted by Order No. 175 (GVA/2017) of 13 September 2017.

27. On 13 October 2017, the Respondent produced documents in response to Order No. 175 (GVA/2017) and indicated that some statistical data requested by the Applicants was not available.

28. By motion of 6 November 2017, the Applicants requested that the Respondent be ordered to compel with Order No. 175 (GVA/2017) by providing all statistical data listed therein or otherwise to make admissions. The motion was granted in part by Order No. 98 (GVA/2018) of 25 May 2018 and the Respondent was ordered again to produce statistical data concerning the conversion exercise as well as the working papers of this exercise. By the same Order, Counsel for the Applicants were authorised to file common submissions and evidence within the case of *Ademagic et al.*, registered under No. UNDT/GVA/2017/071.

29. On 31 August 2018, the Respondent filed "the statistics and documentation, including all working papers or digital representations thereof, in respect of the 2009 consideration of the conversion of staff to permanent appointments … of all 5909 eligible staff members for such conversion". These were filed *ex parte* and released on an under seal basis to Counsel for the Applicants only, with an undertaking that they would not disclose any of these documents without the express authorisation of the Tribunal.

30. By motion of 19 October 2018, the Applicants requested the production of additional documents related to, *inter alia*, the conversion to permanent appointment of 18 Security Officers who previously served in The Hague as locally recruited staff members and received permanent appointments following their transfer to Vienna. This request was denied by Order No. 191 (GVA/2018) of 9 November 2018 as the requested information was not considered to be directly relevant or necessary to the determination of the matter.

31. The Tribunal held a hearing on the merits from 27 to 28 November 2018, limited to the issue of liability, where the following witnesses were heard:

a. Mr. David Falces, former Chief of Administration at the ICTY;

b. Ms. Sandra Haji-Ahmed, former Director, Learning, Development and Staffing Division and OiC, OHRM; and

c. Ms. Tine Hatlehol, former Chief, Section III, OHRM.

Parties' submissions

32. The Applicant's principal contentions are:

a. They were discriminated against, once again, due to the fact that they were working at the ICTY at the time of the conversion exercise. The OiC ASG/OHRM tied the Applicant's suitability for permanent appointment exclusively to future service outside ICTY, thereby unlawfully adding a mobility criterion that did not apply to any other eligible staff members serving in non-downsizing entities;

b. It is not disputed that the Applicants meet all the eligibility and suitability criteria set forth in ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) to be granted permanent appointments. Whilst all other staff members of the Secretariat who similarly met these criteria were automatically granted permanent appointments during this one-time conversion exercise, the Applicants were not. In examining whether granting permanent appointments to the Applicants was in the interests of the Organization, the Administration limited its consideration to the fact that they were serving in a downsizing entity. This "unrelenting reliance on ICTY/MICT's finite mandate" was previously found to be unlawful by the Appeals Tribunal;

c. The Administration failed to consider the needs of the MICT and the ongoing needs of the ICTY;

d. As to General Service Applicants, the Administration unlawfully added a criterion that the Applicants had to be suitable for positions outside The Hague available at the time of the conversion to which they could be transferred. The Administration changed the criterion of "transferrable skills" to an issue of "transferability" of the staff members. This new criterion was not applied to any other General Service staff member serving in non-downsizing entities. Furthermore, the OiC ASG/OHRM refused to make use of staff rules 4.5(c) and 4.18 that would have allowed for the Applicants' mobility;

e. As to Language Applicants, the OiC ASG/OHRM failed to consider the necessary language roles they perform at the ICTY, and could perform at the MICT and elsewhere in the Organization. He also failed to give individual consideration to their transferrable skills. It is incomprehensible why the Language Applicants were not given a permanent appointment limited to the ICTY like all other Professional non-language staff members;

f. The Administration failed to take into account relevant individual facts and took into consideration irrelevant ones on numerous occasions;

g. The denial of permanent appointments to the Applicants was motivated by budgetary considerations, in violation of the Appeals Tribunal's previous holding that such "may not trump the requirement of equal treatment"; and

h. The Applicants request the Tribunal to:

i. Set aside the decisions denying the Applicants a permanent appointment;

ii. Order the granting of permanent appointments to the Applicants or the payment of termination indemnities;

iii. Award the Applicants moral damages; and

iv. Award costs.

33. The Respondent's principal contentions are:

a. The OiC ASG/OHRM reconsidered each Applicant for permanent appointment in accordance with the directions contained in the Appeals Tribunal Judgments and the applicable legal framework;

b. In assessing the Applicants' suitability for permanent appointments, the Administration took into account the likelihood that each Applicant could have been transferred to an alternative position in the Secretariat upon closure of the ICTY;

c. Each Applicant received an individual reasoned decision. The Applicants were not rejected *en masse*. Similar outcomes for Applicants sharing similar characteristics are consistent with the principle of equal treatment, and do not constitute the denial of any right;

d. The Administration was required to weigh the individual merits of the Applicants together with the operational realities of the Organization and its interests. It did not place an overwhelming weight on the fact that the Applicants were serving in a downsizing entity;

e. As to General Service Applicants, the Administration also took into account the Staff Regulations and Rules that limit the authority to transfer this category of Applicants outside of The Hague, their duty station;

f. In addition, the General Service Applicants do not refer to any information from 2011 that would suggest that they would have found a position in the MICT. Furthermore, the MICT is not part of the Secretariat and, as such, the OiC ASG/OHRM had no authority to transfer the Applicants to this entity located in The Hague;

g. As to Professional language Applicants, each of them was found not suitable for a permanent appointment as they did not possess the required skills in United Nations official languages and/or had not passed the required LCE;

h. The Administration did not consider budgetary constraints in the contested decisions and there is no indication in this respect; and

i. The Respondent requests the Tribunal to dismiss the applications.

Consideration

Legal framework

34. The starting point for the Tribunal's review of the legality of the contested decisions is the considerations of the Appeals Tribunal in its Judgments *Ademagic et al. and McIlwraith* 2013-UNAT-359 and *Ademagic et al.* 2016-UNAT-684, which remanded the decisions on the conversion of the Applicants' fixed-term appointments to the ASG/OHRM for reconsideration (see, e.g., *Ademagic et al.* 2016-UNAT-684, para. 29).

35. The Appeals Tribunal prescribed the following in *Ademagic et al.* 2016-UNAT-684 (at para. 58) with respect to the reconsideration exercise that had to be undertaken by the ASG/OHRM upon remand:

> Upon remand, we expect the Administration to strictly adhere to our directives in the Appeals Tribunal Judgment and to our further instructions herein, where we explicitly instruct the ASG/OHRM to consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills when determining each of *Ademagic et al*.'s applications for conversion to a permanent appointment and not to give predominance or such overwhelming weight to the consideration of the finite mandate of ICTY/MICT so as to fetter or limit the exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member.

36. The operative parts of this Judgment, together with the Appeals Tribunal's previous Judgment *Ademagic et al. and McIlwraith* 2013-UNAT-359 ordering the first remand, provide the following additional guidance:

a. Former ICTY staff members are entitled to full and fair consideration of their *suitability* for conversion of their fixed-term appointments into permanent appointments. Their eligibility is no longer at issue (*Ademagic et al. and McIlwraith* 2013-UNAT-359, para. 39 and at p. 22 quoting *inter alia* paras. 66 and 67 of Judgment *Baig et al*. 2013-UNAT-357; see also in particular *Ademagic et al.* 2016-UNAT-684, para. 30);

b. The reconsideration shall be based on the relevant circumstances as they stood at the time of the first impugned refusal to convert the Applicants' appointments, namely in autumn 2011 (*Ademagic et al. and McIlwraith* 2013-UNAT-359, para. 39 and *Ademagic et al.* 2016-UNAT-684, para. 34);

c. The Administration shall make an individual and considered assessment of each candidate for permanent appointment. In doing so, "every reasonable consideration" shall be given to the staff members' "proficiencies, competencies and transferrable skills" (*Ademagic et al. and McIlwraith* 2013-UNAT-359, p. 22 quoting paras. 66 and 67 of Judgment *Baig et al*. 2013-UNAT-357, and *Ademagic et al.* 2016-UNAT-684, para. 35);

d. "The major reason why [the Appeals Tribunal] remanded the cases was for the ASG/OHRM to specifically take into account each staff member's transferrable skills when considering his or her suitability for permanent appointment" (*Ademagic et al.* 2016-UNAT-684, para. 38);

e. The information contained in the dossier of each candidate shall be given "substantive consideration" (*Ademagic et al.* 2016-UNAT-684, para. 35);

f. The limitation of the staff member's appointments to service with the ICTY does not preclude them from being granted permanent appointments. The Administration could elect to grant ICTY staff members permanent contracts not limited to service with the ICTY/MICT and would then be free to reassign them without impediment (*Ademagic et al.* 2016-UNAT-684, paras. 39 and 50);

g. The ASG/OHRM is "entitled to take into consideration ICTY's finite mandate and downsizing situation, and appropriately referenced former Staff Rule 104.13 and Section 2 of ST/AI/2009/10 as the legal bases for giving due weight to 'all interests of the Organization'". Likewise, the "operational realities of the [Organization]" may also be legitimately considered, in accordance with General Assembly Resolution 51/226 (*Ademagic et al.* 2016-UNAT-684, para. 51); and

h. The Administration cannot solely rely on ICTY/MICT's finite mandate to deny the staff members permanent appointments: "'all the interests of the Organization' encompasses the interests of ICTY, as an institution established by the General Assembly, not merely as a downsizing entity. As such, the ICTY has an interest in maintaining in its employ staff members who meet the 'highest standards of efficiency, competence and integrity established in the Charter' in order for it to carry out its mandate" (*Ademagic et al.* 2016-UNAT-684, para. 53).

37. Essentially, the focus of the Tribunal's review is to ascertain whether the contested decisions, as expressed in the individual letters sent to the Applicants, were made in conformity with the above-directions given by the Appeals Tribunal.

38. The Tribunal shall also take into account, where necessary to supplement or clarify these directions, the provisions of ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009), in particular its sec. 2 on the criteria for granting permanent appointments, which reads:

> In accordance with staff rules 104.12 (b) (iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the highest standards of efficiency, competence and integrity established in the Charter.

39. In application of this provision, the ASG/OHRM adopted on 29 January 2010 Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 ("Guidelines"), which relevantly provide in secs. 7 to 10:

> 7. In determining the interests of the Organization for the purpose of granting a permanent appointment, the operational realities of the Organization shall be taken into account, in accordance with Section 2 of ST/SGB/2009/10.
>
> 8. In determining whether the staff member has met the high standards of efficiency and competence, the most recent five performance evaluations on record of the staff member will be reviewed. When this record shows ratings of "fully successful performance" or "fully meets performance expectations" or higher, the requirement will be met.
>
> 9. In determining whether the staff member has demonstrated suitability as an international civil servant and has met the high standards of integrity established in the Charter, any administrative or disciplinary measures taken against the staff member will be taken into account.
>
> 10. Where the appointment of a staff member is limited to a particular department/office, the staff member may be granted appointment similarly limited to that department/office. If the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed.

40. In view of the foregoing, the Tribunal will examine:

a. Whether the Administration discriminated against the Applicants in tying their suitability for permanent appointments exclusively to future service outside the ICTY;

b. Whether the Administration erred or abuse its discretion in limiting its examination of the Applicants' transferrable skills to positions in the Secretariat outside the ICTY and the MICT;

c. Whether the Administration erred in taking into account the limitations in the Staff Rules related to the recruitment of staff in the General Service category; and

d. Whether the Administration committed errors in the consideration of specific individual cases by misstating the facts or not taking into account relevant facts.

Did the Administration discriminate against the Applicant in tying their suitability for permanent appointments exclusively to future service outside ICTY?

41. The Applicants take issue with the fact that they were treated differently from other staff members considered for permanent appointments during the 2009 conversion exercise, on the basis that they were working for a downsizing entity and that such difference in treatment amounts to discrimination. They claim that they should have been applied the same "check box approach" as any other staff member and be given a permanent appointment once it was found that (1) they had met or exceeded their performance goals during the most recent five years and (2) they had no record of any administrative or disciplinary measures taken against them, as per the Guidelines. The Applicants argue that for all those serving in non-downsizing entities who met these two suitability criteria, the ASG/OHRM automatically considered that granting them permanent appointments was in the interests of the Organization.

42. There can be no doubt that the Administration, from the initial conversion exercise conducted in 2011 onwards, took into account the fact that the Applicants were serving in a downsizing entity when considering their suitability for permanent appointment. The template form for considering each candidate's suitability for permanent appointment, attached to the Guidelines, contained three questions:

a. Whether the staff member has received ratings indicating that [he/she] has successfully met or exceeded performance expectations during [the relevant] period;

b. Whether the staff member has no record of any administrative or disciplinary measure taken against [him/her]; and

c. Whether the staff member is currently serving in an entity which is downsizing or expected to close on [date].

43. The interests of the Organization were intertwined with the nature of the entity within which the staff member was serving.

44. The statistics produced by the Respondent show that 4,091 out of the 5,909 staff members reviewed during 2010-2011 were granted permanent appointments. All 4,091 staff members who were granted permanent appointments were working in non-downsizing entities. According to the statistics provided by the Respondent, 14 eligible staff members were denied permanent appointments on the ground that they did not meet or exceed performance expectations and 18 were denied permanent appointments due to administrative or disciplinary measures. The Respondent could not confirm if the remaining 1786 staff members were all serving in downsizing entities but he stated that this expression was interpreted broadly and included staff members who were deemed not to be suitable based "on operational realities of their assignment and their individual circumstances". Absent any other reason provided for their denial of permanent appointment and given the three criteria relied upon to examine the staff members' candidacies, it is reasonable to assume that most of these 1786 staff members, if not all, were denied a permanent appointment on the ground that they were serving in downsizing entities. Conversely, those staff members who were working for non-downsizing entities and met the performance and conduct requirements were granted permanent appointments without any further consideration.

45. In the reconsideration exercise conducted in 2016 that led to the contested decisions, the OiC ASG/OHRM required the Applicants to demonstrate that they possess "transferrable skills" qualifying them for positions within the Secretariat and outside the ICTY. The Applicants are correct to say that they were required to fulfil requirements that were not applied to staff members working in non-downsizing entities. But this does not, in and of itself, amount to discrimination.

46. The Appeals Tribunal held in its Judgment *Ademagic et al.* 2016-UNAT-684 that "the ASG/OHRM was entitled to take into consideration ICTY's finite mandate and downsizing situation", in accordance with former staff rule 104.13 and sec. 2 of ST/AI/2009/10, which provide legal bases for giving due weight to "all interests of the Organization" (para. 51). The Appeals Tribunal found, however, that the Administration could not solely rely on the finite mandate of the ICTY to deny permanent appointments to the Applicants and had to consider "their respective qualifications, competencies, conduct and transferrable skills" (para. 53).

47. It follows that the Appeals Tribunal clearly allowed the Administration to establish a distinction between staff members serving in downsizing entities and those who do not. The consideration of "transferrable skills" for staff members serving in downsizing entities stems from their more limited immediate career prospects within the entity where they are currently serving. The Appeals Tribunal insisted that the reconsideration upon remand had to focus on the Applicants' transferrable skills (see para. 38). This matter is *res judicata* and the Administration was thus bound to examine the Applicants' transferrable skills, without regard to the fact that other staff members serving in non-downsizing entities were considered differently.

48. In the Tribunal's view, the issue at stake is not whether the Administration was allowed to examine the Applicants' transferrable skills but whether its review complied with the Appeals Tribunal's instructions.

Did the Administration err or abuse its discretion in limiting its examination of the Applicants' transferrable skills to positions in the Secretariat outside the ICTY and the MICT?

49. The Appeals Tribunal first introduced the notion of transferrable skills in its Judgment *Ademagic et al. and McIlwraith* 2013-UNAT-359, where it held that (emphasis added):

> There is a statutory obligation on the Administration, in the context of the best interests of the United Nations, to give "every reasonable consideration" to those ICTY staff members demonstrating the proficiencies, competencies and *transferrable skills which render them suitable for career positions within the Organization*.

50. The Appeals Tribunal then referred to this notion again in its Judgment *Ademagic et al.* 2016-UNAT-684 where it insisted that the ASG/OHRM "specifically take[s] into account each staff member's transferrable skills when considering his or her suitability for permanent appointment" (para. 38).

51. The Appeals Tribunal Judgments did not detail what a review of the Applicants' transferrable skills entails concretely, thereby leaving some margin of discretion to the Administration. The Appeals Tribunal's holding, however, echoed the approach previously suggested by the Secretary-General to the General Assembly in respect of the granting of permanent appointments, where he insisted that the long-term need for the staff members' services was a determinant factor. In his report A/64/267 of 7 August 2009 on the Administration's strategic approach to staffing, the Secretary-General explained that (see para. 12, emphasis added):

> The long-term need for a staff member's services would be reviewed with respect to:
>
> (a) The need in the Organization for the particular functions performed by the staff member at the time of review;
>
> (b) The need for the services of a particular staff member as it relates to his or her qualifications and past experience and training, that would demonstrate that he or she might have *transferable skills with a potential to also perform long-term functions that may be different from those of the post he or she occupies at the time of review*.

52. The Secretary-General proposed a dual approach to assess the long-term need for staff members' services, either based on the continuity of the particular functions they were performing at the time of review or on their potential to perform other long-term functions within the Organization. The examination of transferrable skills was clearly associated with the potential to perform long-term functions within the Organization.

53. Consistent with this approach, the Secretary-General insisted in his subsequent report A/65/305 of 2 September 2010 on the human resources management reform to the General Assembly, that "workforce planning is the first element in the talent management framework, aiming to provide the Organization with a forecast of vacancies based on the Organization's mandates and required

skills, so it can take action to fill those staffing needs." Between the end of 2010 and 2011, OHRM undertook a full mapping of all posts in the Secretariat, classified by occupational groups and with specifics for each, as testified by the former Chief, Section III, OHRM.

54. It is not disputed that the Administration limited its examination of the Applicants' transferrable skills to existing positions in the Secretariat as of 2011 outside the ICTY and the MICT, using the mapping exercise mentioned above (see para. 53). No consideration was given to the possibility to retain the Applicants, or some of them, in the ICTY, or to transfer them to the MICT.

55. It appears from the contested decisions that the Administration was of the view that the Applicants' career prospects at the ICTY were too limited to be taken into account given its expected closure at the end of 2014. In this connection, the contested decisions state:

> Taking into account your individual background, qualifications and skills, as at September 2011, it was unlikely that your services would be required by the Organization beyond the needs for your services at the ICTY. Specifically, it was not expected the Organization would be in a position to retain you to perform the functions you were performing beyond the end of the year 2014/early 2015, when the ICTY was scheduled to close. Whereas this period may have extended for more than three years, it does not justify a career appointment. For these reasons, I do not consider that your individual qualifications and skills make you suitable for conversion to permanent appointment.

56. The background documentation on the 2016 reconsideration exercise also suggests that the MICT was not considered either to offer any career prospect to the Applicants, but the reasons for such conclusion are less clear.

57. The memorandum from OHRM to the Central Review Committee in respect of Professional staff suggests that the Administration maintained its views expressed in the two previous rounds of litigation before this Tribunal and the Appeals Tribunal that the MICT was meant to absorb the remaining work of the ICTY, which was itself coming to an end, and thus did not offer any long term prospect of employment that could justify the granting of permanent appointments

to the Applicants. The only reference to the MICT in the reconsideration of the Professional staff is to be found in para. 17 of OHRM's memorandum to the Central Review Committee, which states that:

> On 22 December 2010, the Security Council adopted Resolution 1966 (2010), requesting the ICTY to complete all remaining work by 31 December 2014 and prepare for closure and transition to the International Residual Mechanism for Criminal Tribunals ("Mechanism") (S/RES/1966 (2010) para. 3). On 18 May 2011, the President of ICTY and the Prosecutor of the ICTY provided their bi-annual reports to the Security Council, confirming that all trials would be completed by 2014 (S/2011/316, Annex I, para. 4; Enclosure VII) and all appeals, except for one, by 2015 (Enclosure VII). Accordingly, in September 2011, the ICTY was mandated to complete its work by 2014, and it was projected that most of its work would be completed by this time.

58. In turn, OHRM's memorandum to the Central Review Panel in respect of General Service staff states that the reason for not considering employment opportunities at the MICT was that this entity does not fall under the authority of the Secretariat:

> Upon closure of the ICTY, there will be no positions within the Secretariat for General Service Staff in The Hague. Other United Nations bodies in The Hague, such as the International Court of Justice (ICJ) and/or the … MICT, do not fall under the authority of the Secretariat and staff contracted to the Secretariat must apply and be appointed to these bodies. The Secretariat cannot transfer staff members to these bodies.

59. The Respondent presented a more nuanced approach in his reply, stating in respect of the General Service staff members that:

> Concerning the United Nations Mechanism for International Criminal Tribunals (MICT), the Applicants do not refer to any information from 2011 that would have suggested to ASG/OHRM that they would have found a position in the MICT. As per the Appeals Tribunal, circumstances related to the MICT that post-date September 2011 are irrelevant. In 2011 the resource needs of the MICT was for one General Service language assistant (see paragraphs 130 to 134 of S/2009/258). This created a low likelihood of any particular language assistant being appointed to the MICT. Furthermore, the MICT is not a Secretariat entity. The ASG/OHRM cannot transfer ICTY staff members to the MICT, even if it is located in the same duty station as the ICTY.

60. There is no evidence however that the specific needs of the MICT were actually considered by the OiC ASG/OHRM in the 2016 reconsideration exercise.

61. The Tribunal finds that it fell within the ambit of the Administration's discretion to decide whether or not to consider positions in the ICTY or the MICT in its examination of the Applicants' transferrable skills. The Administration has consistently expressed the view that none of these entities offered career prospects to the Applicants given their finite mandate and this was not considered to be an error by the Appeals Tribunal neither in the first nor the second round of litigation. Rather, it appears that the Appeals Tribunal accepted that the ICTY and the MICT both fulfilled the same finite mandate and thus did not offer career prospects to the Applicants (see, e.g. *Ademagic et al.* 2016-UNAT-684, paras. 53 and 58).

62. Moreover, the directions of the Appeals Tribunal for the Administration to look at the Applicants' "transferrable skills" imply the need to look beyond the position occupied by each Applicant at the ICTY, in line with the Secretary-General's report A/64/267 (see para. 51). It is also reasonable to conclude that the reference to transferrable skills did not necessarily require the Administration to consider positions within the MICT, given that the Appeals Tribunal assimilated the two entities (see, e.g. *Ademagic et al.* 2016-UNAT-684, paras. 53 and 58) and the positions at the MICT would, by nature, be similar to those at the ICTY. There would consequently be no issue of "transferrable skills" *per se* in this context, but rather considerations similar to those involved in a retention exercise. The issue of transferrable skills rather comes into play when looking at the Applicants' career prospects in other parts of the Secretariat.

63. In any event, the Tribunal finds that it has not been demonstrated that the Administration's view that the ICTY and the MICT did not offer career prospects to the Applicants was based on an erroneous application of the facts or disregarded relevant facts, as they were available in autumn 2011. It has been established before the Appeals Tribunal that based on the documents available in 2011, the ICTY was scheduled to close at the end of 2014 or early 2015 (see, e.g. *Ademagic et al*. 2016-UNAT-684, p. 5). As to the MICT, it had not yet commenced its operations but it was foreseen to be a small temporary entity with a very limited staffing table.

The first budget of the MICT for 2012-2013 provided for 13 Professional positions and 10 General Service positions for The Hague branch. These previsions may have proven to be unrealistic in hindsight, but since they were the only ones recorded on the official reports and budgets available at the time, it was not an error for the Administration to rely on them.

64. In these circumstances, the Tribunal finds that it was not an unreasonable exercise of discretion nor contrary to the Appeals Tribunal's directions for the Administration to exclude positions in the ICTY and the MICT from the pool of positions "required on an ongoing basis" taken into account for assessing the Applicants' transferrable skills during the reconsideration exercise.

65. The Tribunal is also of the view that by expanding its review of the Applicants' career prospects beyond the ICTY, the Administration fulfilled its obligation to take into consideration the interest of the ICTY to maintain in its employ staff members who meet "the highest standards of efficiency, competency and integrity established in the Charter" to carry out its mandate, as directed by the Appeals Tribunal in its Judgment *Ademagic et al.* 2016-UNAT-684 (see para. 53). The Appeals Tribunal's statement did not *per se* create an obligation on the Administration to examine the Applicants' career prospects within the ICTY or the MICT, but rather to consider in the exercise of its discretion the benefits that measures aimed at retaining staff members until completion of the ICTY's mandate may present, even for a downsizing entity. By giving the Applicants the opportunity to be granted permanent appointments based on the foreseeable needs for their individual skills within the Organization after the closure of the ICTY, the Administration struck a balance between the operational realities of the ICTY as a downsizing entity and its interests to provide reasonable incentives to its staff members to stay on board for as long as possible.

Did the Administration err or abuse its discretion in taking into account the limitations in the Staff Rules related to the recruitment of staff in the General Service category?

66. It is not disputed that all General Service Applicants were denied permanent appointments on the basis, *inter alia*, that they could not be considered for positions outside The Hague due to their local recruitment status, and that there was no entity of the Secretariat in The Hague where they could be transferred after the closure of the ICTY.

67. The Appeals Tribunal's Judgment does not contain any specific instruction as to how the transferrable skills of General Service Applicants had to be assessed in the reconsideration exercise, in particular whether their status as local recruits had to be taken into consideration in examining alternative positions to which they could be transferred. The Dispute Tribunal did not address it either, save for a brief remark when it considered the general limitation of the Applicants' appointment to service with the ICTY. The Dispute Tribunal held that the Applicants' limitation of service, which applied to both Professional and General Service staff, did not constitute an absolute legal bar for the ASG/OHRM to move any of the Applicants to a different entity "even conceding that locally recruited staff are subject to specific geographical restrictions" (*Ademagic et al.* UNDT/2015/115, para. 88). The Appeals Tribunal endorsed this reasoning without any further development (*Ademagic et al.* 2016-UNAT-684, para. 50). Since this question was left open, it is understood that the Administration retained discretion as to how to assess the transferrable skills of locally recruited staff members.

68. The General Service category consists of functions to be undertaken by people that may be readily recruited from local labour markets. It is a long-standing policy of the Organization to recruit staff members in this category locally and not to expect them to be mobile, as explained by the International Civil Service Commission at its 83rd Session (see ICSC/83/R.6, Use of categories of staff in the United Nations common system, Section III, Rationale, definitions and characteristics of various staff categories).

69. Staff rule 4.4(a) provides in this connection that "[a]ll staff in the General Service and related categories, except as stipulated in staff rule 4.5 (c) … shall be recruited in the country or within commuting distance of each office, irrespective of their nationality and of the length of time they may have been in the country."

70. Staff rule 9.6(f), in turn, limits the right of retention of General Service staff holding permanent appointments to "consideration for suitable posts available within their parent organization at their duty station".

71. The Organization's retention obligation in case of post abolition is less stringent for General Service staff than for Professional staff. For the latter, the Organization's obligation to look for alternative positions extends to "suitable posts in which their services can be effectively utilized", without any geographical limitation or reference to the parent entity, as provided by staff rule 9.6(e).

72. It follows from staff rules 4.4(a) and 9.6(f) that the appointments of General Service Applicants were tied up to their duty station, The Hague. If these Applicants were to be granted permanent appointments, the Organization's obligation upon the abolition of their posts at the ICTY would be limited to considering them for available positions within the Secretariat located in The Hague. If no position was available, the Organization would be liable to pay the Applicants termination indemnities.

73. The Tribunal acknowledges that the staff rules provide some flexibility for the Organization to redeploy its staff members and do not bar the possibility of transferring a locally recruited staff member to another duty station. For example, staff rule 4.5(c) provides that "[u]nder special circumstances and conditions determined by the Secretary-General, staff who have been recruited to serve in posts in the General Service and related categories may be considered internationally recruited". This provision could afford a legal avenue for the Organization to consider General Service Applicants for positions outside The Hague after the abolition of their posts at the ICTY. However, its application is discretionary and it bears important financial implications for the Organization given the benefits and entitlements payable to internationally recruited staff members. The General Service Applicants do not have any legal entitlement to a change of their locally

recruited status to internationally recruited, nor can the Tribunal impose an obligation on the Organization to grant it.

74. The Applicants also argue that staff rule 4.18 would constitute another legal avenue to overcome the purported barrier raised by the Administration in requiring service subsequent to the ICTY. The Applicants claim that if they were required to resign from their position at the ICTY in order to be re-employed at another duty station, as asserted by the Respondent, staff rule 4.18 would allow for the possibility to reinstate them, resulting in continuous service.

75. Staff rule 4.18 provides that "[a] former staff member who held a fixed-term or continuing appointment and who is re-employed under a fixed-term or a continuing appointment within 12 months of separation from service may be reinstated if the Secretary-General considers that such reinstatement would be in the interest of the Organization".

76. The Tribunal acknowledges that staff rule 4.18 could indeed be a possibility to avoid a break in service and ensure that General Service Applicants keep their status as permanent appointees if they are relocated to another duty station. However, this does not solve the issue of the international transfer of the General Service Applicants in case of abolition of their posts. The Administration could not force the General Service Applicants into an international transfer without any of the benefits and entitlements associated to it. It is even doubtful that the General Service Applicants could waive these benefits if a new position was offered to them by the Organization upon the abolition of their post instead of being paid a termination indemnity. In any event, this proposition supposes that the General Service Applicants would voluntarily resign and relocate to another duty station at their own expense, subject to a different local salary and without any of the benefits associated with an internationally recruited status. The General Service Applicants' consent to this hypothetical scenario cannot be presumed, neither by the Organization nor by this Tribunal. This is, thus, not deemed a viable option for reaching a conclusion that the General Service Applicants could be transferred to positions outside their duty station after the abolition of their posts at the ICTY, when considering them for permanent appointments.

77. The Tribunal finds that the legal framework governing the administration of the General Service Applicants' appointments is a relevant consideration in assessing the interests of the Organization to grant them permanent appointments. The Administration did not exercise its discretion unreasonably when looking at the manner in which the General Service Applicants' individual skills could be used by the Secretariat at their duty station in considering them for permanent appointments.

78. Contrary to the Applicants' assertion, the consideration of the General Service Applicants' mobility does not amount to the addition of a new criterion for assessing their suitability for permanent appointments. It is an element taken into consideration in assessing their transferrable skills. The examination of transferrable skills intrinsically implies the consideration of positions to which the staff members may be transferred. The issue of mobility is relevant in this context.

79. According to the Respondent, there was no other entity in The Hague where the General Service Applicants could be transferred as the two United Nations entities based there, namely the MICT and the International Court of Justice, are not part of the Secretariat. Thus the ASG/OHRM did not have authority to transfer the Applicants to these entities.

80. The Applicants do not contest that the International Court of Justice is not part of the Secretariat, but they challenge the assertion that the MICT is not. They assert that the MICT offered them career opportunities.

81. The Tribunal has already found that the Organization did not err or abuse its discretion in determining that the MICT did not offer career opportunities to the Applicants (see para. 64). Given the Tribunal's finding, the authority of the ASG/OHRM to transfer the Applicants to the MICT is not material to the determination of the matter at stake. Hence, the Tribunal does not find it necessary to address this issue (see, e.g., *Dualeh* 2011-UNAT-175, para. 17; *Bofill* 2011-UNAT-174, para. 26).

82. In view of the foregoing, the Tribunal finds that the Administration did not err or abuse its discretion in deciding that it was not in the interests of the Organization to grant the General Service Applicants permanent appointments based on their lack of career prospects at their duty station, which in the context amounts to a lack of transferrable skills.

Did the Administration commit errors in the consideration of specific individual cases by misstating the facts or not taking into account relevant facts?

83. The Applicants allege in their common brief that "on numerous occasions the Administration failed to take into consideration relevant individual facts and took into consideration irrelevant individual facts". They do not provide any specifics but generally refer to the personal statements completed by each Applicant, where they were asked whether their individual decision letters contained errors.

84. Given its above finding in respect of the General Service Applicant's lack of transferrable skills (see para. 82 above), the Tribunal considers that it is not appropriate to examine whether the OiC ASG/OHRM committed factual errors in the consideration of their individual cases. The Tribunal will thus limit its examination of the errors alleged by the Professional Applicants.

Applicant Mrs. Chatterjee-Mars

85. The Applicant states that some of her experience as translator was ignored in the contested decision. Even if her assertions are correct, this does not change the outcome as the reason why she was not granted a permanent appointment is that she had not passed the LCE, which is a pre-requisite for the employment of Professional language staff in the Secretariat. The factual errors she alleges have no bearing on this finding.

Applicants Mrs. Chauvin, Mrs. Colley, Mrs. Pejcinovic and Mrs. Poujade

86. The Applicants state that the Administration erred by failing to take into account that they had passed the ICTY selective examination for translators when they joined the ICTY, and that the LCE was not a pre-requisite for the employment of professional language staff in the ICTY. The Tribunal finds that it fell within the ambit of the Administration's discretion to take into account the specific

requirements for Professional language staff in the Secretariat as they applied in 2011 when assessing the Applicants' transferrable skills. Since the Applicants did not meet them, there was no factual error in the Administration's decision not to grant them permanent appointments.

Applicant Mrs. Ciric

87. The Applicant claims that the Administration failed to take into account her experience within the United Nations other than as a Professional language staff. She vaguely refers to her "vast experience in the UN, at various grades and various positions, from clerical to managerial". The Tribunal finds that this Applicant did not identify any specific error in the consideration of her experience nor adduce any evidence of additional experience that would not have been properly considered.

Applicant Mrs. Cvetkoska

88. The Applicant alleges a number of factual errors in the consideration of her language experience and the timing of her joining the ICTY. However, none of these are material to the conclusion that there were no ongoing positions for translators from English to BCS, or vice versa, and that she had not passed the LCE, thus not meeting the requirements for Professional language positions in the Secretariat. The Applicant also claims that the jobs she held between 2000 and 2005 included various administrative duties, despite being language posts. These experiences were reflected in the contested decision and the allegations made by the Applicant are not sufficiently precise to identify any specific error in the consideration of her transferrable skills. The Applicant also refers to her experience at the MICT since 2015, but this is after the relevant period to be considered, that is prior to autumn 2011.

Applicant Mrs. Hasanagic

89. The Applicant claims that the Administration erred by stating that she had not passed the LCE, alleging that she had passed the LCE for Russian translators. The Applicant states that she cannot find her certificate and thus does not have an exact date but she believes it was "long before September 2011". The Tribunal notes that no evidence has been adduced to demonstrate that the Applicant indeed passed the

LCE in Russian nor that this information had been submitted to the OiC ASG/OHRM.

Applicant Mrs. Jahic

90. The Applicant claims that the contested decision failed to mention her working experience at the International Rescue Committee, without any specifics. The Applicant did not identify how this would affect the contested decision, which is based on the fact that there were no ongoing positions for translators from English to BCS and that she had not passed the LCE.

Applicant Mr. Lojen

91. The Applicant claims that the contested decision fails to consider his work experience from 1992 to 1995 "for BBC World Service on translating and presenting news and current affairs", erroneously stated that he joined the ICTY in September 1997 instead of March 1997 and that he is qualified to translate and interpret between Croatian and English in both directions. The Tribunal notes that the contested decision generally refers to the Applicant's experience from August 1991 to March 1997 as a free-lance interpreter, translating from BCS into English and vice versa. This statement may not entirely reflect the Applicant's alleged experience in "presenting news", but the Applicant did not demonstrate how this aspect of his work would qualify him for positions in the Secretariat other than language ones. He also did not adduce any evidence that this information was submitted to the OiC ASG/OHRM. The Applicant did not allege any fact that would put into question the conclusion that he did not meet the requirements for Professional language positions in the Secretariat, which is the basis of the contested decision in his respect.

Applicant Mr. Rosandic

92. The Applicant claims that the contested decision failed to take into account his work on translations from/into French, Albanian and other languages and his transferrable skills as "a team leader, supervisor and project manager which can be used in any UN department" (along with [his] highly developed computer skills)". The Tribunal notes that the contested decision appears to accurately reflect the Applicant's experience as a team leader, referring to him as the "Head, References,

Terminology & Document Processing Unit" and his role in "organizing and managing the work of [the unit]. However, there is no reference to his role on translations in other languages than BCS. Limiting the examination of the Applicant's transferrable skills to "positions for translators and/or document processing experts managing translations from English to BCS" thus appears to be too narrow and not fully capture the breath of the Applicant's experience. Nevertheless, the Applicant's professional experience is in language services and there is no indication that the Administration erred in holding that the pre-requisite for the employment of Professional language staff in the Secretariat is that they pass the LCE, which the Applicant had not.

Applicant Mrs. Saracini

93. The Applicant claims that the contested decision contains a number of errors in respect of her professional experience in language services and her language abilities. The fact that the Applicant may have provided translations from Macedonian and Albanian to English, rather than the opposite, is not material to the conclusion in the contested decision that there were no ongoing positions for translators from English to Macedonian, Albanian or BCS. Likewise, the fact that the contested decision misstated that she was fluent in French and Italian, whilst she is not, may indicate some level of negligence on the consideration of her background but it ultimately has no bearing on the contested decision.

Applicant Mr. Scekic

94. The Applicant claims that the contested decision failed to take into account his experience as a finance officer in the commercial sector which, he argues, may be used in any United Nations office. It is noted that it is for the Applicant to provide evidence to support the claims made. This was made clear at the Case Management Discussions held. The Applicant has failed to produce any evidence of this experience, to show that this experience was adduced to the OiC ASG/OHRM and to demonstrate how this would qualify him for positions within the Secretariat. He also alleges that the contested decision erroneously states that he had passed the French LCE, whilst he has not taken the exam. The Tribunal finds that although this error may show some negligence in the consideration of the Applicant's

background, this error does not have any bearing on the conclusions of the contested decision and thus is insufficient to rescind it.

Applicant Sodan, Damir

95. The Applicant, a translator (P-3), claims that the contested decision erroneously stated that he holds a "Bachelor's degree in English Language and Comparative Literature", whilst he holds in fact "a double major – BA in English Language and History". He claims that his degree in History would make him suitable for a research/analyst position. He also claims that the contested decision failed to take into account his experience as an administrative assistant in the Transport Section of the UNPROFOR Mission in the former Yugoslavia in 1993-1995. Again, it is noted that it is for the Applicant to provide evidence to support the claims made. This was made clear at the Case Management Discussions held. The Applicant has failed to produce the evidence required.

Applicant Mrs. Sodan, Majda

96. The Applicant, also a translator (P-3), claims that the contested decision erroneously states that she holds a "Master of Arts degree in Development Studies" while she in fact holds a "Master of Arts degree in Human Rights, Development and Social Justice", and that it failed to refer to her Bachelor of Arts degree in Political Science. In view of the fact that the Applicant does not claim to have any professional experience in any of these fields, there is no indication that this error in the statement of her educational background would qualify her for positions other than language ones and, thus, has any effect on the contested decisions. Academic qualifications are not sufficient to qualify for Professional posts at the P-3 level. As to the Applicant's claim that the fact that she had not passed the LCE should not be a predicament for her conversion into permanent appointment, this argument has already been addressed above at paragraph 86.

Applicant Mr. Vujica

97. The Applicant states that the contested decision failed to take into account that from December 2003 to September 2011, he was the head of the BCS Translation Unit, with significant organizational and managerial duties beyond translating and revising. He alleges that the contested decision erroneously stated

that he is confident in German, while he only has a basic knowledge of it. The Tribunal notes that the contested decision essentially refers to the Applicant's functions in providing translations and revisions from English to BCS and does not specifically refer to his managerial role. However, it remains that the Applicant's professional experience is in language services and it has not been demonstrated that the Administration erred in concluding that the Applicant did not meet the requirements for Professional language positions in the Secretariat as he had not passed the LCE. In turn, while the contested decision may contain a minor error concerning the Applicant's proficiency in German, this does not show any negligence in the examination of the Applicant's transferrable skills as he asserted.

Applicant Mr. Vukosavlkevic

98. The Applicant claims that the contested decision misstated his experience for Radio Yugoslavia as starting in June 1996 whilst he in fact started in February 1992. He also claims that the contested decision focused on his translation of specialized medical texts whilst he was also translating all other sorts of texts. The Tribunal finds that neither the length of the Applicant's work for Radio Yugoslavia nor his experience in translating various texts have any bearing on the contested decision. The nature of the texts translated by the Applicant had no impact on the conclusion that there were no ongoing positions for translators from English to BCS. Although the length of his experience for Radio Yugoslavia may have been incorrect, there is no indication that ten years of experience instead of six would have any impact on the consideration of the Applicant's transferrable skills. As to the Applicant's claim that he had never been asked to pass the LCE and that this should not be a predicament to be granted a permanent appointment, this argument has already been addressed above at paragraph 86.

99. In summary, it has not been demonstrated that the Administration failed to comply with the Appeals Tribunal's instructions when reconsidering the Applicants' suitability for permanent appointment. The Administration did not consider irrelevant facts nor did it give undue weight to the finite mandate of the ICTY and the MICT. Contrary to the previous rounds of litigation, the Administration did not solely rely on the fact that the ICTY was a downsizing entity in considering the interests of the Organization but, given ICTY's limited mandate, it looked at further

employment opportunities for the Applicants within the Secretariat through the examination of their transferrable skills, as directed by the Appeals Tribunal.

100. Given the discretion left to the Administration in the reconsideration exercise, it was not unreasonable for the Administration to examine each of the Applicants' transferrable skills in the light of ongoing positions in the Secretariat as of September 2011 to which they could possibly be transferred, taking into account the nature of their appointment as internationally or locally recruited staff members, as applicable. This does not amount to discrimination against ICTY staff members, but caters for the reality that they were serving in a downsizing entity, an element that the Administration was allowed to take into account in pondering the interests of the Organization in respect of whether to grant the Applicants permanent appointments pursuant to sec. 2 of ST/SGB/2009/10.

101. It is without dispute that the Applicants meet the highest standards of efficiency, competence and integrity as established in the United Nations Charter and that their services were essential to successfully fulfil the mandate of the ICTY. However, the granting of a permanent appointment is not automatic and is subject to some level of discretion by the Organization, who shall take into account all its interests. The Applicants were entitled to individual, "full and fair" consideration of their suitability for conversion to permanent appointment and there is no evidence that this right was violated in the 2016 reconsideration exercise.

Conclusion

102. In view of the foregoing, the Tribunal DECIDES that the applications are rejected.

(*Signed*)
Judge Rowan Downing
Dated this 20th day of February 2019

Entered in the Register on this 20th day of February 2019
(*Signed*)
René M. Vargas M., Registrar, Geneva

List of Applicants
Case No.
UNDT/GVA/2017/016

	Name
1	Agic
2	Agoli
3	Ajas
4	Alic
5	Ammeraal
6	Azdajic
7	Baier
8	Bajnoci
9	Barsony
10	Bashir
11	Battley
12	Becker
13	Begovic
14	Bialek
15	Blazevic
16	Boereboom
17	Borja
18	Bouwknecht
19	Bowden
20	Bowden, Taryn
21	Brand
22	Broeshart
23	Brouwer
24	Brukx
25	Buckely
26	Casals
27	Chamnankool
28	Chatterjee-Mars
29	Chauvin
30	Choucair
31	Cikara
32	Ciric
33	Colleye
34	Cottam
35	Culjak-Vasic
36	Cvetkoska
37	Dalgaard
38	De Rijk
39	De Ru
40	Delic
41	Demiraca
42	Dicks
43	Divkovic

	Name
44	Djiguemde
45	Djuleska
46	Djuliman
47	Djuricic
48	Djcinovic
49	Dowling
50	Draskovic
51	Dudunov
52	Duffy
53	Ebeo
54	Fimmers
55	Flaton
56	Foley
57	Fracassetti
58	Frendrup
59	Freney
60	Gal
61	Galicia
62	Galinier, Pierre
63	Galinier, Yvonne
64	Galura
65	Gashi
66	Gavaz
67	Gavin
68	Gerrgelin
69	Gllava
70	Golder
71	Gray
72	Grubic
73	Hasanajic
74	Henry-Frijlink
75	Hofman
76	Hondebrink-Hermer
77	Houniet
78	Ibrahimovic
79	Imamovic-Ivanov
80	Jahic
81	Javier-Bobby
82	Jeffery, Marc
83	Jeffery, Natasa
84	Johansson-Narva
85	Kakela
86	Kalisvaart

	Name
87	Kaloh
88	Kamphuis
89	Kerewaij
90	Koops
91	Kopriva
92	Kovacevic
93	Kralt
94	Lambert
95	Laugel
96	Lay
97	Lee
98	Lijsenaar
99	Lojen
100	Los
101	Loveranes
102	Maasland
103	Maksimovic
104	Markovic
105	Matete-Wabusaba
106	McCutcheon
107	McIlwraith
108	McInerney
109	Memisevic
110	Mehwa, Michael
111	Mehwa
112	Milic
113	Mirkovic
114	Mitas
115	Mulashani
116	Mwakitalu
117	Nafawa
118	Nikitovic-Drinjakovic
119	Ovcina
120	Pejcinovic
121	Perez
122	Perks
123	Podrug
124	Poujade
125	Prendergast
126	Pun
127	Queguiner
128	Quiniou
129	Reinders

	Name
130	Roberts-Walsh
131	Roest
132	Rosandic
133	Rosenkrands
134	Royes De Jong
135	Sadiku
136	Salcinovic
137	Saracini
138	Scekic
139	Schooneman
140	Simwaba
141	Slijepcevic
142	Sodan, Damir
143	Sodan, Majda
144	Stankovic
145	Stasyuk
146	Stojanovic
147	Stretton
148	Tanner
149	Tomic-Van Dieren
150	Toonen
151	Totton
152	Valenzuela Garcia
153	van Bijsterveld
154	van der Eerden
155	Van der Heijden
156	van der Laan
157	Van Dijk-Grujin
158	Van Es
159	van Oosterom
160	Van Rooijen
161	Velican
162	Verdijsseldonk
163	Verheijen
164	Vujica
165	Vuk
166	Vukosavlkevic
167	Vukovic
168	Vuksa
169	Walker
170	Waweru
171	Wessel
172	Williams, Brian

	Name
173	Williams, Rupert
174	Zaki
175	Zenunovic
176	Zijderveld
177	Zivkovic
178	Zoric
179	Zurzulovic