



**Before:** Judge Francis Belle

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

ROSS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Marisa MacLennan, UNHCR

## **Introduction**

1. On 16 August 2016, the Applicant, a former staff member in the United Nations High Commissioner for Refugees (“UNHCR”) at the P-4 level, filed an application in which he contests “[t]he decision to appoint another candidate to the position of Senior Inter-Agency Coordination Officer, P-4 level, Office of Human Resources Management, Nairobi, job opening 57267 [“the Post”]”. The case was registered with the Dispute Tribunal’s Registry in Nairobi under Case No. UNDT/NBI/2016/060 and assigned to Judge Klonowiecka-Milart.

2. On 14 September 2016, the Respondent filed his reply, contending that the application is without merit.

3. After various case management steps, by email of 19 July 2019, the Nairobi Registry informed the parties that, “to rebalance the Registries’ case load, the Nairobi Registry has been directed to transfer ... this case ... to the New York Registry ... with immediate effect”.

4. On 17 October 2019, the case was assigned to the undersigned Judge.

## **Facts**

5. At an unknown date, the job opening for the Post was advertised. In this job opening, under the heading, “Essential minimum qualifications and professional experience requirement” were, *inter alia*, listed the following: (emphasis added):

- a. “Work experience, including in large field operations, that enables credible representation of UNHCR in the *inter-agency* context and with government partners”; and.

b. “Understanding of recent *inter-agency* developments, notably the IASC [presumably, the Inter-Agency Standing Committee] humanitarian reform”.

6. Regarding the background for the role of the Senior Inter-Agency Coordination Officer, under the heading, “Organization context”, the political and refugee situation in Burundi as per 31 October 2015 was explained and the “Regional Refugee model” was presented. It was also indicated that “[t]he specialist areas span the following: refugee status determination, registration, geographic information systems, resettlement, women and children, public health, HIV/AIDS, reproductive health, nutrition, physical planning, water-sanitation-and hygiene, public information and financial management”.

7. In February 2016, the Applicant applied for the Post. In his motivation letter for the job application, he provided as follows of relevance to the present case:

I hereby apply for the position of Senior Inter-Agency Coordination Officer in the Regional Service Centre in Nairobi. I am a 41 year old German lawyer with significant managerial experience on senior protection positions with UNHCR in the field.

As Senior Protection Officer in Kassala, I have previously coordinated all protection and assistance interventions of UNHCR, implementing partners and other UN agencies for more than 85.000 persons of concern in Eastern Sudan. I therefore believe I would be well suited for the position of Senior inter-Agency Coordination Officer. In addition I have previously worked with IOM [assumedly, an abbreviation for International Organization for Migration] in Geneva and Colombia and thus also possess experience from outside UNHCR, which could be very useful for the position.

Since July 2015, I have been working as Senior Protection Officer on a temporary assignment with UNHCR in Morocco. I have been coordinating all protection interventions of UNHCR in Morocco and supervised Registration, RSD [unknown abbreviation], Community Services and Resettlement. I have also provided legal advice on the draft asylum law and the new government asylum system about to be

established in Morocco. In addition I have regularly acted as officer in charge during absences of the Representative.

Having studied in France and worked in Geneva and Rabat, I am proficient in French and would therefor[e] not have difficulties to work on the Burundi emergency.

After having worked already for several years on Senior Protection Officer positions in Sudan and Morocco, I have recently been promoted to the P4 level.

...

8. UNHCR then assessed the job candidates' suitability for the Post in a "Shortlisting Matrix" of April 2016. The manager first stated that he did not recommend the Applicant for the Post, indicating that the Applicant had "5 years experience with UNHCR in the field of protection and legal affairs" but not "any demonstrated experience and/or competency in inter-agency coordination or in making recommendation on strategies and programme implementation". In the column next to the manager's comments, the Applicant's level was stated as "P3A". In the "[Division of Human Resources Management ("DHRM")] Final Recommendation Meeting Minutes", the Applicant's candidature for the Post was rejected as it was found that he "does not have the inter-agency experience required for this position". It was further indicated that the Applicant has been "serving as Senior Protection Officer in Morocco since July 2015. From January 2013 [to] July 2015 he served as Legal Officer in Nairobi, Kenya and from 2010-2012 as Senior Protection Officer in Kassala, Sudan. In 2008 he joined UNHCR as Legal Officer (Human Resources). He was promoted to [the P-4 level] in 2015".

## **Consideration**

### *Preliminary matters*

#### The Applicant's motion of 17 October 2017 for the manager to appear as a witness

9. In the 17 October 2017 motion, the Applicant requests that “the manager of the position [emphasis omitted] ... be heard as a witness with regard to the question whether he knew that [P-4 level] candidates are to be given preference and whether this made a difference in his assessment of the candidates”.

10. The Tribunal notes that the Respondent has fully admitted that the Applicant's level was mistakenly indicated as at the P-3 level instead of at the P-4 level in the “Shortlisting Matrix” and submitted that this was nothing but an insignificant typographical error. Referring to sec. 79 A of UNHCR's Revised Policy and Procedures on Assignments, UNHCR/HCP/2015/2/Rev.1 (the Policy), the Respondent also submits that, “The operational context related to the particular position should be taken into account. The managers' specific position profile requirements shall be given due consideration”. In this regard, as also follows from the Tribunal's considerations below, the Tribunal notes that according to the “Shortlisting Matrix”, the Applicant's lack of relevant “inter-agency experience” for the specific position as Senior Inter-Agency Officer was the determining factor when rejecting his candidature and not his grade. In addition, in DHRM's final recommendation, it was taken into consideration that the Applicant had been promoted to the P-4 level in 2015.

11. Consequently, since the indication that the Applicant served at the P-3 level had no impact on the outcome of the impugned selection process, the proposed testimony would be irrelevant. The Applicant's motion is therefore rejected.

The Respondent's compliance with Order No. 157 (NY/2019) dated 8 November 2019

12. In Order No. 157 (NY/2019) dated 8 November 2019, the Tribunal instructed the parties to file their closing statements in the following sequential order: the Applicant's principal closing statement (20 November 2019), the Respondent's response (27 November 2019), and the Applicant's final observations to the Respondent's response (2 December 2019). The Tribunal further noted that "[t]he closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage".

13. In the Applicant's final observation, he submits that the Respondent did not abide by Order No. 157 (NY/2019) because he made "entirely new pleadings throughout the entire closing statement". The Applicant contends that "[a]t this late stage the Applicant neither has the chance to properly respond to these new pleadings, nor to provide evidence for facts the Respondent now disputes all of a sudden". The Applicant therefore "strongly objects to these new pleadings and hereby humbly requests these new pleadings to be struck from the record" but "nevertheless hereby responds to these new pleadings in the case the Tribunal decides not to [strike] them from the record".

14. The Tribunal finds that the Respondent's submissions in his closing statement do not add anything new to the case, but as ordered in Order No. 157 (NY/2019), instead solely respond to the Applicant's closing statement. In addition, in the Applicant's final observations, he himself states that he would address the Respondent's submissions from the closing statement.

15. The Tribunal therefore finds that the Applicant has been accorded a full and appropriate opportunity to address the Respondent's submissions in his closing statement, also considering the principle of *audi alteram partem* and the Applicant's right to comment (see, for instance, *Khisa* 2014-UNAT-422, paras. 16-18, and

*Haroun* 2017-UNAT-720, para. 27). As demonstrated by the Applicant's final observations, he did also respond to the submissions in the Respondent's closing statement. The Applicant's request is therefore rejected.

*Issues of the present case*

16. The Appeals Tribunal has held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal has further held that "the Dispute Tribunal may consider the application as a whole" (see *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23).

17. Based on the parties' submissions and the evidence on record, in Order No. 157 (NY/2019), the Tribunal defined the issues of the present case as follows, which neither party has contested in their closing statements (although the Tribunal has slightly modified these definitions to adapt the issues to the submissions presented by the Applicant therein):

a. Did UNHCR conduct a fair assessment of the job candidates' suitability for the Post of Senior Inter-Agency Coordination Officer, including the Applicant's qualifications and professional experience and the conclusion that he "does not have the inter-agency experience required for this position"?

b. With reference to the Appeals Tribunal in para. 48 of *Ross* 2019-UNAT-926, were any of the alleged irregularities in the assessment process of "such a nature that, had [they] not occurred, [the Applicant] would have had a foreseeable and significant chance for [selection]", including with regard to alleged procedural flaws?

- c. In case the contested decision is found unlawful, what remedies are the Applicant entitled to?

*Limitation to the judicial review and the principle of regularity*

18. It is trite law that the Dispute Tribunal's judicial review is limited. In this regard, reference is often made by the Appeals Tribunal to *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as that "the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate". The Appeals Tribunal further held that "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision".

19. Specifically regarding selection and promotion decisions, in light of the Administration's broad discretion in such matters, the Appeals Tribunal has held that these types of decisions are governed by the so-called "principle of regularity". This means that if the Respondent is able "to even minimally show that [an applicant's] candidature was given a full and fair consideration, then the presumption of law stands satisfied". To rebut this minimal showing, the applicant "must [then] show through clear and convincing evidence that [s/he] was denied a fair chance of promotion" in order to win the case (*Lemonnier* 2017-UNAT-762, para. 32).

*Was UNHCR's assessment of the Applicant's candidature proper?*

20. The Applicant submits that the DHRM provided the manager with the "Shortlisting Matrix" in which the Applicant was mistakenly listed as a P-3 level candidate even though the Applicant had been promoted to the P-4 level in November 2015. More than just a clerical mistake, this error was the result of a disagreement between DHRM and the Applicant with regard to whether the Applicant's promotion



was subject to an appointment to a new P-4 level position—only in March 2016 did DHRM agree that this promotion was to be implemented with retroactive effect as of 1 January 2015 in accordance with UNHCR’s promotion policy.

21. The Applicant further submits that the manager was therefore not aware of the Applicant’s promotion to the P-4 level and based his assessment on the assumption that the Applicant served at the P-3 level. As candidates at the level of the post are given priority consideration, the manager only cursorily and superficially assessed the P-3 level candidates as it was unlikely that DHRM would match a P-3 level candidate against the position. DHRM subsequently realized that he was at the P-4 level and therefore shortlisted him together with five other candidates.

22. The Applicant goes on to contend that it is undisputed that the he has inter-agency coordination experience, and despite the fact that he had specifically asserted this in his motivation letter, the manager dismissed his candidature on the basis that he did not have such experience. In his motivation letter, the Applicant had specifically stated that, “I have previously coordinated all protection and assistance interventions of UNHCR, implementing partners and other UN agencies for more than 85.000 persons of concern in Eastern Sudan”. The manager therefore did not properly consider the candidature of the Applicant, otherwise he would have seen that the Applicant did possess the required inter-agency experience. Also, inter-agency coordination was part of the Applicant’s every-day duties in Sudan for two years and because it covered all areas of the Applicant’s work, it was not specifically mentioned in the objectives of the performance management system. If the manager or DHRM had doubts about whether the Applicant’s statement in the motivation letter was correct, they could have easily checked with the Applicant or his former supervisors. Instead, the manager probably did not even read the Applicant’s motivation letter and only summarily reviewed his factsheet. Contrary to what the manager stated, the Applicant also had the required experience in making recommendations on strategies and programme implementation, which also follows from his factsheet.

23. The Respondent, in essence, submits that whereas the Respondent has minimally showed that the decision to reject the Applicant's candidature was correct, the Applicant has failed to show by clear and convincing evidence that he was not given full and fair consideration.

24. The Tribunal notes that in the job opening, UNHCR specifically required that a job candidate should be able to represent UNHCR in the "inter-agency context" and understand "recent inter-agency developments". In DHRM's final assessment in the "Shortlisting Matrix", the Applicant's candidature was then rejected as it was found that he "does not have the inter-agency experience required for this position", and UNHCR specifically referred to some of the job experiences that the Applicant had listed in his motivation letter, including his position as a Senior Protection Officer. While the Applicant submits that this job experience in particular provided him with the necessary "inter-agency experience", the Tribunal finds that UNHCR's explicit mention of this position together with some of his other listed job experiences demonstrates that UNHCR indeed did consider the Applicant previous work history but apparently did not find that any of the functions he had undertaken adequately satisfied the inter-agency role that was specific to the advertised position as Senior Inter-Agency Coordination Officer.

25. The Tribunal therefore finds that by a minimal showing, the Respondent has demonstrated that the Applicant's candidature was given full and fair consideration, noting that, as per *Sanwidi* and *Lemonnier*, it is not for the Tribunal to replace the decision-maker in her/his substantive assessment of the qualifications of the various job candidates against the job profile. When studying the background for role of the Senior Inter-Agency Coordination Officer and comparing it with the Applicant's listed job experiences, in particular his former role as Senior Protection Officer and the fact that the Applicant nowhere explicitly indicated in his motivation letter that he had the necessary inter-agency experience, the Tribunal further observes UNHCR's decision to reject the Applicant's candidature for the Post would not seem to be

manifestly wrong, arbitrary or otherwise unreasonable. It is therefore clear that the Respondent has demonstrated that in the process he assessed,

- a. the Applicant's grade level;
- b. the information regarding the Applicant included in the "Shortlisting Matrix" and the fact sheet;
- c. the Applicant's competencies and job experience; and
- d. applied the Policy to the Applicant's job application for the Post.

26. Under the principle of regularity, it is therefore for the Applicant to demonstrate with clear and convincing evidence that he was denied a fair chance of being selected for the Post. In this regard, the Tribunal observes that according to *Ibrahim 2017-UNAT-776*, "[c]lear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable" (para. 44).

27. In the present case, as follows from the above, the Tribunal finds that the evidence on record does not demonstrate that it is highly probable that the Applicant was improperly denied a fair chance for selection; rather, it shows that his candidature was fully and fairly considered.

28. Regarding the testimony of the manager, which the Applicant has proposed as part of these proceedings, such evidence would have made no difference in this context because, according to the Applicant, it would have concerned the manager's knowledge on whether other P-4 level candidates were given any preferential treatment due to their level and the related circumstances. By this, no further light would therefore have been shed over the pertinent question of whether it was inappropriate that UNHCR found that the Applicant did not have the adequate "inter-agency" experience.

29. In the Applicant's final observations, he submits that if the Tribunal considers evidence for his "inter-agency" experience to be necessary, he requests leave to provide an affidavit from one of his former supervisors in Sudan. The Tribunal notes that no such evidence is necessary at this stage, because what is important is the information that was in front of the decision-maker at the time of the decision and not what is before the Tribunal now. If the Applicant failed to provide some important information in his motivation letter, he cannot expect the manager or the decision-maker to rectify such mistake—it is for a job applicant to present her/his qualifications in his job application in a convincing manner, and not the manager or the decision-maker to do so in their appraisals.

30. Accordingly, the Tribunal finds that the Applicant's candidature for the Post was properly given a full and fair consideration.

*Did the Applicant have a foreseeable and significant chance for selection in light of any alleged irregularities?*

31. The Applicant contends that it is undisputed that the manager based his consideration on the "Shortlisting Matrix", which listed the Applicant's level at the P-3 level although he was at the P-4 level. This shows that the manager was provided with wrong information and, in accordance the relevant legal framework of UNHCR, candidates at the level of the position are meant to be given priority. The fact that the manager did not know that the Applicant was at the P-4 level must have had a significant impact on the manager's considerations and, unlike what is submitted by the Respondent, the manager did not know about the Applicant's promotion to the P-4 level.

32. The Applicant submits that had he been properly considered by the manager and DHRM, he would have had a foreseeable, significant and serious chance for selection because (a) solely two other candidates had the necessary inter-agency experience and one of these two candidates only had limited experience, (b) the

appointed candidate had never served in a P-4 level position, and (c) the Applicant was the only candidate with inter-agency experience at the P-4 level, which he gained when he served as a Senior Protection Officer in Kassala, Eastern Sudan, for two years. The Applicant was therefore one out of six shortlisted candidates and one out of three shortlisted candidates who had the required inter-agency experience. It cannot retroactively be established whether DHRM would have matched the Applicant or the appointed candidate against the Post had the Applicant's candidature been properly considered. It is, however, clear that it would have been the Applicant or the appointed candidate as DHRM had already matched the latter over the other four candidates. DHRM might have considered the Applicant's experience at the P-4 level in a large field operation as more important than the appointed candidate's experience as Executive Assistant at the P-3 level in New York. The Applicant had at least 50 percent chance to be selected for the position.

33. The Respondent essentially contends that no procedural or substantive irregularities occurred in the selection process.

34. Unlike what the Applicant submits, with reference to the above, the Tribunal notes that it has been established that DHRM appropriately found that he did not have the required "inter-agency experience" for the Post and that this led to the rejection of his candidature. The Tribunal further observes that in the "Shortlisting Matrix", this assessment was tied to the functions and positions that he had previously covered and not to his professional level. Accordingly, even if his level would have been correctly indicated as at the P-4 level, the Tribunal finds that it would not have made a difference—either way, he would not have satisfied one of the basic requirements for the Post, namely "inter-agency" experience. Moreover, from the "Shortlisting Matrix", it also follows that the Applicant's promotion to the P-4 level was actually taken into account in the DHRM's final recommendation, which succeeded the manager's preliminary recommendation, as it explicitly stated that the Applicant "was promoted to [the P-4 level] in 2015".

35. Consequently, the Tribunal finds that in accordance with *Ross*, the Applicant had no foreseeable and significant chance for selection had it not been for any of the alleged irregularities.

*Remedies*

36. As the contested decision is lawful, the issue of remedies is moot.

**Conclusion**

37. In light of the above, the application is rejected on the merits.

*(Signed)*

Judge Francis Belle

Dated this 10<sup>th</sup> day of December 2019

Entered in the Register on this 10<sup>th</sup> day of December 2019

*(Signed)*

Nerea Suero Fontecha, Registrar, New York