



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ARANGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Evelyn Kamau, OSLA

Counsel for the Respondent:

Elizabeth Brown, UNHCR

Francisco Navarro, UNHCR

Background

1. On 19 February 2018, the Applicant filed an application challenging his non-selection for a United Nations High Commissioner for Refugees (UNHCR) P-3 Resettlement Officer position in Brasilia, Brazil.
2. The case was assigned to Judge Nkemdilim Izuako who was previously serving with the Tribunal.
3. On 23 February 2018, the Respondent sought leave to submit his reply, limited to the issue of receivability, without addressing the merits of the application.
4. On 13 March 2018, Judge Izuako invited the Applicant to file his response to the 23 February motion by 23 March 2018 and the deadline for filing the reply to the application was postponed to 23 April 2018.
5. On 23 March 2018, the Applicant filed his response to the motion.
6. On 20 April 2018, the Respondent filed a motion for summary judgment. In it, the Respondent also sought an extension of the deadline to file his reply on the merits of the application in the event the Tribunal determined that the application was receivable.
7. On 23 April 2018, the Applicant was invited to provide his response to the motion for summary judgment which he did on 4 May 2018.
8. On 10 October 2019, the parties were informed that the case has been assigned to the present Judge.
9. On 16 October 2019, upon careful consideration of the submissions by both parties, the law and relevant jurisprudence on the question of receivability, the Tribunal made a finding that the application is receivable, reserving the reasons for the finding to be given in the judgment on the merits and invited the Respondent to file submissions on the merits, in the following terms:

Upon careful consideration of the parties' submissions and having recourse to UNDT Rules of Procedure; art. 19 on case management and art. 35 on waiver of time limits, the Tribunal finds that the application is receivable and that the reasoned decision on receivability will follow in the Judgment on the merits.¹

10. On 7 November 2019, the Respondent in partial compliance with Order No. 154, filed submissions raising again the issue of receivability on the ground that Order No. 154 did not give reasons why the Tribunal had found that the application was receivable.

11. At a case management discussion held on 2 December 2019, the Applicant drew the Tribunal's attention to the fact that he was opposed to the Respondent's reference to the question of receivability which was already resolved and requested the Tribunal to strike out from the Respondent's reply any reference to the issue of receivability since the matter was resolved and the Respondent had the option to appeal.

12. The Tribunal offered the Applicant an opportunity to raise his objection in written submissions for the Tribunal's consideration.

13. This judgment is addressing the question of receivability, providing reasons which were previously reserved as part of ensuring expedience in determination of matters especially where the decision is not final in order to save time by avoiding repetition and also avoiding pre-empting the hearing process on the merits which would inevitably touch on the same issues that render this application receivable.

14. However, since the Applicant rightly pointed to the fact that Respondent had an option to appeal the decision on receivability, it is only fair that the reasons for the decision be given to allow the Respondent an opportunity to appreciate the decision and have a basis on whether or not to appeal.

¹ Order No.:154 (NBI/2019)

Considerations

15. The Applicant was a former employee of UNHCR. While working as a P2 Associate Protection Officer, he fell ill and a medical determination was made in January 2015 limiting his employment, at that time, to certain duty stations. He then separated from UNHCR. Over two and half years later, the Applicant applied for a temporary appointment as a P-3 Resettlement Officer in Brasilia and was advised that he was the selected candidate and that his candidature would be forwarded to the Division of Human Resources Management (“DHRM”) to finalize the recruitment². The Applicant was subsequently informed that he could not be offered the temporary appointment due to the January 2015 medical determination, a determination given while he was an employee of UNHCR.

[...] As discussed, [the Applicant] was previously hired by UNHCR under the Entry-Level Humanitarian Programme (EHP). After serving for two months in the deep field, a pre-existing medical condition came to light and he had to leave the duty station. He was subsequently subject to a medical constraint limiting his deployment to H, A, B and C duty stations only. This information is confidential and field offices, including Brasilia, do not have access to it. A copy of the memorandum by the Medical Section Board dated 27 January 2015 was nevertheless provided to [the Applicant].

UNHCR’s Recruitment and Assignments Policy, HCP/2017/2, provides at paragraph 9 that delivering on UNHCR’s mandate for persons of concern requires a workforce that is “committed to being present where persons of concern are, particularly in hardship, high-risk and non-family duty stations”. Pursuant to paragraph 19 of the Policy, “UNHCR’s International Professional staff members are required to rotate. Rotation is designed to meet corporate and operational needs, to provide opportunities for career development through exposure to different operations and functions, in respect of service in remote and hardship duty stations, including high-risk, as well as to ensure burden-sharing.” In addition, paragraph 37 provides that staff members “serve at the discretion of the High Commissioner and are committed to the principle of rotation in the interest of persons of concern and organizational priorities”.

² Annex E UNDT Application

Therefore, re-recruiting [the Applicant] to a position in the international professional category would, in our view, be inconsistent with several principles and standards in the Policy.³

16. The Respondent's case is that since there had been no contractual relationship between the Applicant and UNHCR for more than two years, the Applicant has no standing to contest his non-selection for the temporary post in Brasilia. The Respondent asserts that the contested decision has no bearing on the Applicant's former status as a staff member.

17. The Tribunal is in full agreement with the Applicant that the withdrawal of his candidature for the position in Brasilia was directly connected to the confidential medical status of 27 January 2015 compiled by the Medical Section Board ("MSB") restricting duty stations the Applicant could work in at that time.

18. The issues relating to the recruitment policy and procedures of UNHCR raised by the Respondent in his reply are of no relevance at this point in the adjudication of this application. The UNHCR through its agents or staff resorted to a procedure that gave the Applicant a legitimate expectation of employment and he would have been employed based on the chosen mode of recruitment had it not been for the adverse and alleged misrepresentation of a confidential medical condition which was improperly taken into consideration without affording the Applicant an opportunity to be heard on it or indeed subjecting him to undergo a fresh medical examination as a pre-requisite in such recruitments.

19. To put the matters into perspective, in an email dated 5 July 2017, Ms. Gomez informed the Applicant, copying the UNHCR Representative for Brazil, Isabel Marquez, that he had been selected for the temporary P-3 Resettlement Officer post in Brasilia. Below is what was expressly communicated to the Applicant:

Thank so much for your reply and for confirming your interest in the position. So that we are clear-we would like to retain for [sic] this position so considered [sic] yourself selected!

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The request to proceed with your candidacy has been sent to the relevant colleagues in human resources, and I understand you should be contacted shortly.⁴

20. Instead, on 9 August 2017, Ms. Marquez informed the Applicant that they were unable to select him for the position as they had received information from the UNHCR DHRM that he had not been cleared to be re-hired. On the same date, the Applicant requested Ms. Marquez to inform him of the reasons why he could not be re-hired. She informed him that the reasons had not been disclosed to her and that he should contact DHRM directly.⁵

21. The United Nations Appeals Tribunal (“the Appeals Tribunal”) in *Shkurtaj* held that a former staff member had standing to contest an administrative decision concerning him or her if the facts giving rise to his or her complaint arose, partly arose, or flowed from his or her employment⁶. The Tribunal also noted that there must be a sufficient nexus between the former employment and the impugned action.⁷

22. The Tribunal finds that the facts in the present case are covered by the above cited jurisprudence and is bound to find that this Tribunal has jurisdiction to hear and determine this application on the merits.

23. The Tribunal having found the application to be receivable, makes the following order:

Order

24. The parties shall comply with Order No. 219 (NBI/2019) dated 16 December 2019 that:

Should the Tribunal find that the application is receivable, the parties shall immediately, as from the date of the order on receivability, comply with the directions in paragraphs 3 (c) to (g) agreeing amongst themselves on time limits within which to file and exchange submissions including final submissions bearing in mind that the Judge seized of this case’s deployment expires on 31

⁴ Ibid., page 4.

⁵ Ibid., page 1.

⁶ Para 29

⁷ Para 29

March and that she is desirous of disposing of this case before then”.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 13th day of January 2020

Entered in the Register on this 13th day of January 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi