UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2019/069
Judgment No.:	UNDT/2020/190
Date:	6 November 2020
Original:	English

Before: Judges Teresa Bravo, Joelle Adda and Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

ANDRYSEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Marisa Maclennan, UNHCR
Jan Schrankel, UNHCR

Introduction

1. The Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision to place him on Special Leave Without Pay ("SLWOP") effective 11 June 2019. The Tribunal, by majority decision with Judge Buffa dissenting, dismisses the application.

Procedural background

2. On 27 November 2019, the Applicant filed his application along with a motion for interim measures pending proceedings requesting the suspension of said decision.

3. By Order No. 111 (GVA/2019) of 5 December 2019, the Tribunal granted the Applicant's motion and ordered the suspension of the contested decision until the completion of proceedings in the present case.

4. On 10 December 2019, the UNHCR Staff Council submitted a motion to file a friend-of-the-court brief, which was granted by the Tribunal by Order No. 6 (GVA/2020) of 22 January 2020.

5. On 30 December 2019, the Respondent filed his reply to the application.

6. By Order No. 008 (GVA/2020) of 23 January 2020, the Tribunal informed the parties that a three-Judge Panel had been appointed to review the present case and that it had been decided *inter alia* to split the hearing in two parts.

7. On 28 January 2020, the Tribunal held a case management discussion with the participation of the Applicant, his Counsel and Counsel for the Respondent.

8. By Order No. 12 (GVA/2020) of 4 February 2020, the Tribunal addressed all the outstanding issues in preparation for the hearing including a motion filed by the Applicant in relation to the hearing date. The Tribunal decided *inter alia* to hold the first part of the hearing on 25 and 26 February 2020 and the second part on 20 March 2020.

9. On 5 February 2020, the Applicant filed *inter alia* a consolidated motion for production of documents.

10. On 11 February 2020, the Respondent filed *inter alia* his comments on the Applicant's motion for production of documents and a motion for leave to file additional documents.

11. By Order No. 20 (GVA/2020) of 19 February 2020, the Tribunal addressed the outstanding motions filed by the parties and determined *inter alia* the schedule for the hearing.

12. On 24 February 2020, the Applicant filed his written statement pursuant to Order No. 8 (GVA/2020).

13. The first part of the hearing took place from 25 to 27 February 2020.

14. By Order No. 34 (GVA/2020) of 16 March 2020, due to major developments related to the COVID-19 outbreak, the Tribunal decided to postpone the second part of the hearing, which was initially scheduled to take place on 20 March 2020.

15. On 4 June 2020, the Applicant filed a motion seeking an in person hearing of his evidence which was rejected by Order No. 67 (GVA/2020) of 15 June 2020.

16. On 24 June 2020, UNHCR Staff Council provided a friend-of-the-court brief and, on 1 July 2020, the parties filed their comments on the brief.

17. The second part of the hearing took place on 14 July 2020, by video conference, due to the exceptional circumstances related to the COVID 19 outbreak.

18. The parties filed their respective closing submission on 7 August 2020.

19. On 17 August 2020, the Respondent filed a motion for leave to file an objection in relation to the "new evidence" filed by the Applicant in his closing submission.

Facts

20. The Applicant joined UNHCR in August 1990 at the P-2 level. He has served on various positions during his 30 years with UNHCR, including at the P-5 and D-1 level. He holds an indefinite appointment which contains a special conditional clause, commonly referred to as the "undertaking", which states that "[t]he High Commissioner undertakes not to terminate [the] appointment except by applying the termination criteria provided in Staff Regulation 9.1(a) relating to the termination of a permanent appointment".

21. On 1 January 2011, the Applicant was assigned to Kyiv as Regional Representative at the D-1 level. His initial five-year standard assignment length ("SAL") was shortened to 28 February 2015. This position was the Applicant's last regular assignment.

22. Effective 9 March 2015, the Applicant was temporary reassigned as Deputy Regional Representative, at the P-5 level, in Sarajevo for a six-month period.

23. From 1 July 2015 to 30 September 2015, the Applicant assumed temporary functions as Senior Regional Protection Adviser, at the P-5 level, in Sarajevo.

24. From 1 October 2015 to 17 July 2016, the Applicant's administrative status was that of a staff member in between assignments ("SIBA"), receiving his full salary and entitlements.

25. From 18 July 2016 to 1 January 2017, the Applicant was assigned temporarily to UNHCR Budapest Office as Senior Staff Development Officer, at the P-5 level.

26. From 2 January 2017 to 25 November 2017, the Applicant was again placed on SIBA status, receiving his full salary and entitlements.

27. On 15 August 2017, UNHCR promulgated its Recruitment and Assignments Policy ("RAP", UNHCR/HCP/2017/2) and its Recruitment and Assignments Administrative Instruction ("RAAI", UNHCR/AI/2017/7), which were circulated to its staff on the same day. They contained provisions regarding UNHCR staff on SIBA status.

28. From 26 November 2017 to 26 September 2018, the Applicant was on certified sick leave.

29. On 21 June 2018, the Applicant received a letter dated 12 June 2018 informing him that the rules governing SIBA status had been changed such that, from 1 January 2018 staff members holding an indefinite appointment would be placed on special leave with full pay ("SLWFP") for a maximum cumulative period of nine months (195 working days) and, thereafter, on SLWOP.

30. The Applicant was further informed that as of 1 January 2017 he had been "administratively placed on SLWFP" pending his next assignment (under the old policy) and that in view of the new policy, his SLWFP would only "continue for a maximum cumulative period of nine months starting on 1 January 2018".

31. The Applicant was declared fit to work in September 2018, but he was granted a Medical Constraint on 3 October 2018, such that he can only be assigned to H, A and B duty stations (not C, D and E duty stations).[1] This medical constraint was extended on 30 August 2019 through 31 October 2021.

32. From 27 September 2018 to present, the Applicant has been on SIBA status.

33. By email dated 24 April 2019, the Applicant was informed that as per UNHCR records, he would reach the nine cumulative months of SLWFP on 10 June 2019, and that he would be placed on SLWOP on 11 June 2019, should he not have any assignment or leave to suspend the cumulative period. He was encouraged to apply for all suitable vacancies, and he was specifically asked whether he would accept assignments at a lower grade, while continuing to receive his salary and entitlements at his grade. There is no response on record.

[1] All United Nations duty stations are categorized by the International Civil Service Commission in one of six categories: H (which comprises headquarters duty stations and other duty stations in similar locations where the United Nations has no developmental or humanitarian assistance programmes or in member countries of the European Union) and A to E (a scale that assesses the difficulty of working and living conditions with A being the least difficult and E the most difficult.

34. By letter dated 27 May 2019, the Applicant was reminded that his SLWOP would commence on 11 June 2019 unless he was to undertake an assignment, mission or request annual leave in the meantime. He was further informed that any approved annual leave, sick leave or short-term assignment would temporarily suspend the nine-month period for the duration of that leave or assignment and that any regular assignment will reset the nine months period to zero.

35. On 11 June 2019, the Applicant was placed on SLWOP.

36. On 12 June 2019, the Applicant received a memorandum from the Head of Unit, Personnel Administration Section, UNHCR, regarding administrative details of his SLWOP status. The letter indicated, *inter alia*, that during the first nine months of SLWOP, UNHCR would continue to disburse his and the Organization's contributions to the United Nations Joint Staff Pension Fund ("UNJSPF"), as well as his and the Organization's "components to the UN Staff Mutual Insurance Society against Sickness and Accident (UNSMIS)".

37. On 19 July 2019, the Applicant requested management evaluation of the decision to place him on SLWOP.

38. On 30 August 2019, the Applicant received the response to his request for management evaluation upholding the contested decision.

39. Between March 2015 and December 2019, the Applicant applied for 93 positions (41 at the P-5 level and 52 at the D-1 level).

40. DHRM proposed the Applicant for 22 temporary assignments including two assignments for which external candidates were selected, namely Emergency Coordinator, at the P-5 level, in Cox's Bazar, Bangladesh, and Senior Partnership and Durable Solution Adviser, at the P-5 level, in Kabul.

Parties' submissions

41. The Applicant's principal contentions are:

a. The Applicant holds an indefinite appointment, and he should be considered for placement on a "preferred or non-competitive" basis;

b. He has a right to be given work to do in order to earn his salary;

c. Unilateral placement of staff members on SLWOP is only possible in exceptional cases as per staff rule 5.3(f). However, the contested decision was not discretionary, it was the application of a promulgated rule (RAAI para. 139) to the Applicant's circumstances;

d. Indefinite appointment holders with an undertaking clause are placed in a disadvantaged situation because they are not afforded the protection of termination indemnity and are instead placed on SLWOP until they secure assignment or resign;

e. The situation of SIBA staff members with an undertaking clause being placed on SLWOP is analogous to that of a staff member facing termination;

f. The Applicant is confronted with a constructive termination and as such, he should qualify for priority placement on any suitable available vacant post under staff rule 9.6(e);

g. The Director of the Division of Human Resources Management ("DHRM") and the High Commissioner have failed to exercise their discretion to place the Applicant on a post commensurate with his skills and experience despite such discretion being specifically provided for in the rules (para. 133 and 134 of the RAAI) to address exactly the Applicant's situation;

h. The Administration failed to assist the Applicant in seeking assignments while on SIBA. Since his last posting in Budapest, he has only been interviewed for one position without success and no temporary assignment has been offered to him;

i. The Applicant did not act in bad faith in his applications; and

j. The Applicant has been blacklisted by a former supervisor which has blocked his career progression.

42. The Respondent's principal contentions are:

a. The contested decision is lawful. The placement of a staff member on SLWOP is a power vested in the Secretary-General and authorised by staff rule 5.3(f);

b. The RAP and the RAAI define exceptional circumstances in terms of staff rule 5.3(f) as applied in the unique situation of SIBAs;

c. The placement of a SIBA staff member on SLWOP is used on "exceptional circumstances". In fact, the Applicant is one of only two staff members who have been placed on SLWOP;

d. The placement on SLWOP of SIBAs who have exceeded nine months of SLWFP is in the interest of the United Nations as per staff rule 5.3(f);

e. Staff rule 9.6(e) is not applicable since the Applicant's placement on SLWOP is not akin to a termination or constructive dismissal;

f. The Applicant still enjoys standing as an internal staff member, he can continue to apply to internally advertised positions, he can continue to accrue pension contributions and continuity of service;

g. The Organizations is still covering his pension contributions and health insurance as well as health insurance for his adult daughter, for a period of nine months;

h. The Applicant has deliberately "sabotaged" his placement on another post as he has mainly applied for positions at a grade higher than his own and when he applied to positions at his grade, he did so for positions for which he was evidently unsuitable;

i. The right to work does not entitle the Applicant to be transferred to vacant positions or temporary functions in preference to other staff members, where he is not considered suitable or does not express any interest or motivation undertaking the relevant functions;

j. Paragraphs 133 and 134 of the RAAI do not oblige UNHCR to transfer SIBAs staff members to available positions irrespective of whether they are fully competent to perform the functions and irrespective of the relative competence of any competitors; and

k. The Applicant has not met his burden of proof to show that the contested decision was tainted by improper motives.

Consideration

Preliminary issue

43. The parties filed their respective closing submission on 7 August 2020. Along with his closing submission, the Applicant filed two "up to date" medical reports in support of his claim for moral damages. Thereafter, the Respondent filed a motion objecting to the newly filed evidence and requesting the Tribunal to strike out the late filed evidence.

44. The Tribunal finds that the Applicant had ample opportunities to file evidence prior to the hearing and that the filing of such evidence at the final stage of the proceedings deprives the Respondent from his right to question it. Therefore, the Tribunal decides to grant the Respondent's motion and to strike out the medical reports filed by the Applicant with his closing submission.

Merits

45. After having carefully heard the evidence at the hearing and analysed the documents and submissions made by the parties and the friend-of-the-court brief, the Tribunal has identified the following legal issues to be addressed in this case:

a. Contested decision and scope of judicial review;

b. Applicable legal framework and burden of proof; and

c. Review of the contested decision:

i. Is the contested decision consistent with staff rule 5.3?

ii. What is the effect of the "undertaking clause"?

iii. What are the obligations of the Organization and the Applicant?

iv. Have the parties fulfilled their respective obligations?

v. Has the discretionary authority for placement been properly exercised?

vi. Has the Applicant's right to work been breached?

vii. Is the contested decision tainted by improper motives?

d. Lawfulness of the contested decision; and

e. Remedies.

Contested decision and scope of judicial review

46. In the context of judicial proceedings, it is incumbent on the Tribunal to interpret and define the scope of its jurisdictional review based on the application, the management evaluation request and the documents on file.

47. In the current case, the Tribunal finds that the contested decision is clearly identified in the application and the management evaluation request as the decision to place the Applicant on SLWOP after having exhausted the nine months period on SLWFP. Therefore, the Tribunal will limit the scope of its review to said decision.

48. The Tribunal will not review issues related to the alleged unlawfulness of the recruitment procedures for the regular and temporary posts for which the Applicant unsuccessfully applied, as these procedures were not contested before the Tribunal and are only collaterally relevant for the adjudication of the present case.

49. As such, the applications made by the Applicant for other posts within UNHCR will only be addressed, as they may be deemed relevant, for the purpose of assessing his obligations and those of UNHCR in securing alternative placement for the Applicant.

50. Moreover, due to the limited scope of the Tribunal's jurisdiction, it will not undertake a full review of the SIBA situation *per se* but only in relation to the provisions of the RAP and the RAAI which are applicable to the merits of the case.

Applicable legal framework and burden of proof

51. Prior to addressing the merits of the case, the Tribunal will identify the applicable legal framework in the Staff Regulations and Rules and the UNHCR's internal policies.

<u>On special leave</u>

52. Staff rule 5.3(f) on special leave provides "[i]n exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization".

53. The RAP in its para. 34, limits to nine months the period for SIBA staff members on SLWFP. It also provides that a temporary assignment or mission "suspends the nine-month period until the completion of that assignment or mission, following which the count continues" and that a regular assignment "reset[s] the nine-month period, which will begin anew should the staff members again become [SIBA] after the regular assignment".

54. The RAP in its para. 35 also states that "staff members remaining without an assignment following the expiry of the nine-month period will be separated from UNHCR or placed on [SLWOP], depending on their contractual status".

55. The RAAI provides in para. 139(c) that holders of indefinite appointments containing the so-called "undertaking" "will be placed on SLWOP as from the first day of the tenth cumulative month without an assignment until assignment or separation from the Organization".

56. The RAAI further states in para. 140 that a staff member who has been placed on SLWOP in accordance with para. 139 above "will only return to pay status upon assignment to a regular position or temporary function of at least two months".

On selection and assignment

57. Article 101.3 of the Charter of the United Nations provides that "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

58. Staff regulation 1.2(c) states the authority of the Secretary-General to assign staff members to any of the activities or offices of the United Nations.

59. The RAAI provides in relevant parts as follows:

> 126. UNHCR's highly dynamic rotation and mobility system may result in situations where international Professional staff members are not reassigned before the end of their SALs. Avoiding and mitigating such situations is a shared responsibility of the Organization and the concerned staff member.
>
> ….
>
> 132. DHRM will continue to ensure that short-term external recruitment is undertaken only after DHRM, in coordination with the requesting manager and the functional unit if applicable, documents that no suitable staff member in-between assignments is available.
>
> 133. The Director of DHRM may temporarily assign staff members in-between regular assignments to vacant positions where their skills and experience are required […]
>
> 134. The High Commissioner may assign a staff member in-between regular assignments to any suitable position, subject to recognized special or medical constraints, irrespective of whether the staff member applied for that position. Assignments to lower level positions require the staff member's agreement.

60. The Tribunal is also mindful of the reference made by the Applicant to staff rule 9.6(e) on termination for abolition of posts and reduction of staff. However, the Tribunal will review the applicability of said rule at a later stage.

<u>Burden of proof</u>

61. It is well established case law from the Appeals Tribunal that administrative decisions taken by the Organization benefit from a presumption of regularity (see *Rolland*, 2011-UNAT-122).

62. Therefore, the burden of proof of the alleged unlawfulness shifts to the Applicant, who must argue and demonstrate the specific irregularities of the contested decision.

63. In the present case, the Tribunal notes that the Applicant's arguments in support of his claim of unlawfulness of the contested decision are mainly threefold:

a. Breach of staff rule 5.3(f), which provides for the unilateral placement of a staff member on SLWOP only in exceptional cases;

b. Alleged inaction of the Organization to find him an alternative position within UNHCR and the alleged breach of his right to work; and

c. Lack of "legal protection" in relation to his indefinite appointment with an undertaking clause and the alleged constructive termination.

64. The Tribunal will consider the legality of the contested decision in light of the arguments put forward by the Applicant.

Review of the contested decision

<u>Is the contested decision consistent with staff rule 5.3?</u>

65. The Applicant was placed on SLWOP effective 11 June 2019 in accordance with para. 139(c) of the RAAI after nine months on SLWFP without an assignment.

66. The Applicant argues that UNHCR may not legislate for exceptional circumstances and that the wording of staff rule 5.3(f) implies a discretionary element that is absent in the contested decision. He further argues that the RAAI provides only for a mechanical placement on SLWOP and that this is inconsistent with exceptional circumstances.

67. The Respondent claims that para. 139 of the RAAI is an expression of a legitimate exercise of discretion, in a manner consistent with staff rule 5.3 and that it only applies to "exceptional cases".

68. The Tribunal recalls that in *Parker* 2010-UNAT-012, the Appeals Tribunal considered that the practice to place staff members on SIBA was against the interest of the Organization and recommended it "to put a ceiling on the duration within which a staff member can remain in such a position", that is, receiving salary and other benefits though no work is available for him/her to do.

69. Having considered the evidence on record, the Tribunal finds that, indeed, the circumstances for the placement of SIBAs on SLWOP are *per se* exceptional and, consequently, the text of para. 139 of the RAAI is consistent with staff rule 5.3.

70. Staff rule 5.3(f) sets the general principle that a staff member can be exceptionally placed on SLWOP when the interest of the Organization so requires, whereas para. 139(c) of the RAAI simply materialises the conditions under which a SIBA staff member can be placed on SLWOP in the specific context of UNHCR. Therefore, there is no contradiction between these two provisions.

71. Furthermore, the evidence shows that since the entry into force of the RAAI, only two staff members have been placed on SLWOP after having reached the nine-month maximum period on SLWFP. The other staff member who was placed on SLWOP returned to paid status in the meantime and the Applicant is the only SIBA who remains on SLWOP. Therefore, the Applicant's argument in this regard fails.

What is the effect of the "undertaking clause"?

72. The Applicant argues that since he holds an indefinite appointment with an undertaking clause, he should be considered for vacancies on preferred or non-competitive basis. He claims that the situation of a SIBA staff member with an undertaking clause is analogous to that of a staff member facing termination and that staff rule 9.6(e) should apply.

73. The Respondent claims that staff rule 9.6(e) is not applicable since the Applicant's placement on SLWOP is not akin to a termination. He emphasized that the Applicant still enjoys standing as an internal staff member and that the Organization is covering his pension contributions and health insurance, as well as health insurance for his adult daughter, for a period of nine months.

74. Staff rule 9.6 reads in relevant part as follows:

> (e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members *shall be retained* in the following order of preference:
>
> (i) Staff members holding continuing appointments;

75. Staff rule 13.1(d) provides in relevant part that:

> If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service.

76. The Applicant's indefinite appointment includes an undertaking clause providing that "[t]he High Commissioner undertakes not to terminate [the] appointment except by applying the termination criteria provided in Staff Regulation 9.1(a) relating to the termination of a permanent appointment".

77. The Tribunal notes that the RAP and the RAAI indicate the nine-month maximum duration of placement on SLWFP, and the RAAI specifically addresses the conversion to SLWOP for staff members who have exhausted nine cumulative months on SLWFP. However, neither the RAP nor the RAAI contemplate a finite period for a SIBA to be on SLWOP.

78. Paras. 139(c) and 140 of the RAAI basically provide that a SIBA staff member will be placed on SLWOP until assignment to a regular position or to temporary functions for at least two months or until separation from the Organization.

79. On the length of the Applicant's placement on SLWOP, the Tribunal refers to article 21 of the UNJSPF Regulations, which provides in relevant part as follows:

> (a) Every full-time member of the staff of each member organization shall become a participant in the Fund:
>
> …
>
> (b) Participation shall cease when the organization by which the participant is employed ceases to be a member organization, or when he or she dies or separates from such member organization, except that participation shall not be deemed to have ceased where a participant resumes contributory service with a member organization within 36 months after separation without a benefit having been paid.
>
> (c) Notwithstanding the provisions of (b) above, *a participant is deemed to have separated when he or she has completed (i) a consecutive period of three years on leave without pay without concurrent contributions having been paid in accordance with article 25 (b)*. To re-enter the Fund, such former participant would have to satisfy the requirements for participation set out in (a) above. (emphasis added)

80. The Tribunal notes that the Organization has decided to pay the Applicant's pension contributions and health insurance, as well as health insurance for his adult daughter, for a period of nine months following his placement on SLWOP.

81. However, when the nine-month period elapses, the Applicant may find himself without pension contributions or health insurance coverage until his retirement or separation. Pursuant to article 21(c) of the UNJSPF Regulations, the Applicant would then be considered separated upon reaching a consecutive period of three years on SLWOP without payment of contributions.

82. Therefore, while termination is not the contested decision in the present case, it is indeed a possible outcome in the long term and should be taken into consideration to determine the obligations of the Organization and SIBA staff members placed on SLWOP when their contract contains the undertaking clause.

83. The Appeals Tribunal in *Timothy* 2018-UNAT-847 clarified the Organization's obligations *vis-à-vis* its staff members, as well as the latter's responsibility in finding an alternative position.

84. While the Tribunal is mindful that in *Timothy*, the Appeals Tribunal focused on the requirements imposed on the Administration and the staff member in the specific context of abolition of posts due to a restructuring exercise, the Tribunal is of the view that this jurisprudence provides important guiding principles that are relevant to determine the obligations of both parties in the present case.

85. In fact, as a result of the internal mobility policy, UNHCR's international staff members may often find themselves without an assignment before the end of their SAL. Even though this situation is not equivalent to the abolishment of posts in the context of a restructuring exercise, similarities can still be identified in relation to the duties of both UNHCR and its staff members holding indefinite appointments. Indeed, as per *Timothy* a principle of shared responsibility applies.

86. The Tribunal will therefore determine the duties of the Organization and the Applicant and then examine whether they have complied with their respective obligations.

<u>What are the obligations of the Organization and the Applicant?</u>

The Organization's duties

87. In *Timothy*, the Appeals Tribunal held that staff rule 9.6(e) creates an obligation on the Administration to make reasonable and good faith efforts to find suitable placements for the redundant staff members whose posts have been/are going to be abolished.

88. The Appeals Tribunal stated in *Timothy* that the "Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts" and that "[w]here there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given".

89. In practical terms, as per *Timothy*, the Administration should demonstrate that it has made good faith efforts to find a suitable post for the affected staff member by:

a. Considering the staff member concerned for available suitable posts;

b. Assigning the affected staff member holding continuing or indefinite appointment on a preferred or non-competitive basis, which requires determining his or her suitability for the post; and

c. Making efforts to find an alternative post for the affected staff member at his or her grade level, or even at a lower grade if in such case the staff member has expressed an interest.

90. That said, in *Timothy* (see in particular para. 38) the Appeals Tribunal held that while the Administration is required to consider the relevant staff members on a preferred basis for the available suitable posts, "this requires, as per the clear language of this provision, determining the suitability of the staff member for the post, considering the staff member's competence, integrity and length of service, as well as other factors such as nationality and gender. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position".

The Applicant's duties

91. Following the reasoning of the Appeals Tribunal in *Timothy*, the Applicant, is required to cooperate fully in the process leading to secure alternative employment. He should do so in good faith and show an interest in new positions by timely and completely applying for vacancies.

92. Therefore, as the Appeals Tribunal stated, "if the Administration informs the affected staff member that they are expected to apply for suitable available positions, they are obliged to fully cooperate and make a good faith effort in order for their applications to succeed. This includes a duty to apply within the deadlines and to respect the formal requirements".

93. It is clear from *Timothy* that the staff member is required to be fully competent for the alternative post where he or she is to be retained. To hold otherwise would compromise the highest standards of efficiency, competency and integrity required in selecting the best candidate for staff positions under art. 101 of the United Nations Charter.

94. It is therefore evident that in the process, the Organization must act fairly and transparently, and the staff member must be proactive by applying to vacant posts and respecting applicable deadlines and formal requirements.

Have the parties fulfilled their respective obligations?

Regular positions

95. Between March 2015 and December 2019, the Applicant applied for 93 positions (41 at the P-5 level and 52 at the D-1 level). He made no applications at the P-4 level.

96. According to the evidence on file, between 1 March 2015 and 24 April 2019, that is, the period between the Applicant's last regular assignment in Kyiv and the date of the email informing him that he would be placed on SLWOP on 11 June 2019, he applied to 29 out of 585 positions that were advertised at the P-5 level. Eight of the vacancies for which he applied were cancelled and he was screened out for eligibility requirements in 11 selection processes.

97. The Tribunal notes that while the Applicant has not been successful in his applications for regular positions, he has not contested the outcome of any of those selection processes. Moreover, he has not identified the regular positions for which he believes his candidacies were not duly considered. Therefore, the presumption of regularity of those selection processes applies.

98. On the side of the Administration, the evidence shows that the Deputy Director, DHRM, UNHCR, offered support and advice to the Applicant concerning his applications. He personally encouraged him to apply to all suitable vacancies, including at a lower grade.

99. It is not contested that the Applicant missed the application deadline for the September 2019 compendium and that, nevertheless, the Organization accepted his late applications.

100. During his testimony, it became clear that the Applicant was preferably looking into D-1 positions. The Applicant explained that this was a legitimate expectation for a senior staff member with his experience and skills in UNHCR and that he felt frustrated that he has not been successful in securing one of those positions.

101. While the Tribunal sympathises with the Applicant's views, it goes without saying that his "alleged preferences" also had a negative impact on his chances of success and partially explain why he is still the only SIBA staff member who has not found an alternative post.

102. In addition, the Tribunal is particularly concerned about the way in which the Applicant has written some of his motivation letters for positions at the P-5 level, which clearly shows that he was not truly interested in those positions and that he did not apply in good faith.

103. Furthermore, the Tribunal notes that the Applicant applied for positions without possessing the required language, such as positions in Tunis requiring Arabic and in Luanda requiring Portuguese.

104. It was also evident at the hearing that the Applicant has limited UN official languages skills (English and Russian) as well as rotation history, and that his experience is focused in Europe, whereas the nature of UNHCR operations requires that personnel rotate and develop operational experience in the field.

105. Since October 2015, the Applicant has taken a total of 193 certified sick leave days. He was on certified sick leave from 26 November 2017 to 26 September 2018. While the Tribunal is mindful that the certified sick leave shall not impact negatively on the staff member's employment status, it is reasonable to consider that this period of absence has made it difficult for him and the Organization to find an alternative position.

106. The Tribunal notes that the Applicant was declared fit to work in September 2018 but he was granted a medical constraint on 3 October 2018, such that he can only be assigned to H, A and B duty stations (not C, D and E duty stations), which has limited considerably his opportunities for placement.

107. The Tribunal considers that the overall set of factual circumstances, that is, the Applicant's medical constraint, his limited UN official languages skills and rotation history, as well as the relatively small number of his applications prior to his placement on SLWOP, combined with his reluctance to be appointed to P-5 level positions and the number of limited vacant positions at the D-1 level, had undoubtfully a negative impact in his chances of being successfully chosen for another position.

108. Bearing in mind the Appeals Tribunal jurisprudence and the facts of the case as shown above, the Tribunal is not persuaded that the Administration has failed in its obligations. The evidence rather shows that the Applicant has not made good faith efforts to find an alternative position. Indeed, the Tribunal is persuaded that the Applicant bears a significant share of the responsibility for the situation he is currently in.

Temporary assignments

109. The Applicant argues that no temporary assignment has been offered to him and that preference should be given to him over external candidates. He particularly claims that he should have been given preference for the temporary assignments of Emergency Coordinator in Cox's Bazar and Senior Partnership and Durable Solution Adviser in Kabul, both assignments at the P-5 level.

110. The Tribunal notes that in accordance with para. 132 of the RAAI, external candidates can only be selected for temporary assignments after DHRM documents that no suitable SIBA staff member is available.

111. It results from the available evidence that there are limited temporary assignment opportunities at the D-1 and P-5 level that do not require very specific profiles.

112. Also according to the evidence on record, DHRM proposed the Applicant for 22 temporary assignments. However, ten requests for temporary assignment were subsequently cancelled or withdrawn for operational reasons, four temporary assignments were filled by other internal candidates, one temporary assignment was downgraded to the P-4 level and a candidate was taken on a reimbursable loan, two temporary assignments were filled by external candidates, one temporary assistance request was filled through a consultancy for operational reasons and two temporary requests were still open at the time of the reply. The Applicant was not selected for the remaining two other temporary assignments and no further evidence was provided to the Tribunal in this regard.

113. The Tribunal notes that the temporary assignments for which an external candidate was selected related to temporary needs for an Emergency Coordinator at the P-5 level in Cox's Bazar, Bangladesh, and for a Senior Partnership and Durable Solution Adviser at the P-5 level in Kabul.

114. Concerning the position in Cox's Bazar, the evidence on record shows that upon receipt of the temporary assignment request, the Emergency Response and Temporary Staffing Needs Unit ("ERTS") in DHR proposed a list of eight eligible available SIBA candidates at the P-5 level, including the Applicant.

115. Upon review of the fact sheets of the candidates proposed, the Human Resources Officer in Bangladesh informed ERTS that "unfortunately none of the candidates [were] suitable". He explained that "[t]his is a very special role, ideal candidate needs very strong emergency coordination background – staff who may have worked as Field coordinator/Natural disaster responses etc. Also needs high

energy level to sustain a protracted around [six] month consecutive natural disaster emergencies within the existing L3 emergency".

116. ERTS contacted again the requesting Office insisting in the review of the suitability of the SIBA candidates proposed. The evidence shows that the respective Manager assessed the Applicant's suitability and considered him not suitable mainly because his "work experience ha[d] primarily been in Headquarters and his last posting in Budapest was not relevant for the functions of the role required". The requesting Office pointed out that the position required "experience in leadership and management of emergencies; and a flexibility to work in a highly complicated inter agency context, dealing with a variety of partners" and that the comments on the Applicant's performance appraisal as Regional Representative in Ukraine "[were] not encouraging for a complex deployment where it might require sitting in a Government Office". An external candidate with the required profile was ultimately selected.

117. Concerning the position in Kabul, the evidence on record shows that the Human Resources Officer in Afghanistan submitted to ERTS a temporary assignment request along with a Personal History Form of a suitable candidate identified by the operation. ERTS responded to the Afghanistan operation clarifying that their request could not be processed as ERTS had "available internal candidates with relevant profile". ERTS then proposed five SIBA candidates, including the Applicant, and requested the operation to assess their suitability.

118. The evidence shows that the respective Manager assessed the suitability of the SIBA candidates proposed and considered that none of the five candidates were suitable for the assignment. The Manager's feedback in respect of the Applicant was *inter alia* that "there [was] no clear indication that he would have the capacity to lead and perform senior managerial responsibilities for an innovative community-based protection response involving IDPs, returnees and host communities, within an operation as complex as Afghanistan" and that "[h]aving not worked in the South-West Asia region previously, he would not have a sufficient knowledge of the politics, cultures and conflicts dynamics in Afghanistan which impact adversely on programme delivery and access, or the necessary

familiarity with the protection environment and risks to be mitigated". An external candidate with the required profile was selected.

119. In light of the above, the Tribunal finds that the Applicant was not selected for the temporary assignments in Cox's Bazar and Kabul because he was not found suitable for those assignments. Furthermore, the Tribunal considers that the Organization fulfilled its obligation by (i) proposing SIBA candidates, including the Applicant, with the requesting operations after receiving the temporary assignment requests; (ii) making sure that the suitability of the SIBA candidates proposed was assessed for the temporary assignments; and (iii) ensuring that external candidates were only considered after the respective managers had duly reviewed all the SIBA candidates and assessed them as unsuitable.

Has the discretionary authority for placement been properly exercised?

120. The Applicant argues that the fact that both the Director of DHRM and the High Commissioner have not exercised their authority to place him in an alternative position (commensurate with his skills and experience) renders the decision of placing him on SLWOP unlawful, as per paragraphs 133 and 134 of the RAAI.

121. Indeed, para. 133 state that the Director of DHRM "may" temporarily assign SIBAs to vacant positions and para. 134 provides that the High Commissioner "may" assign a SIBA to any suitable position, irrespective of whether the staff member applied for that position.

122. The Respondent argues that said paragraphs do not oblige UNHCR to transfer SIBAs to available positions irrespective of whether they are considered fully competent to perform the functions and irrespective of their relative competence or integrity.

123. The Tribunal is of the view that to interpret paragraphs 133 and 134, it must take into consideration not only the wording enshrined therein by the internal legislator (*literal interpretation*) but also, the overall context of the RAAI.

124. The Tribunal considers that the use of the word "may" indicates that assignment of staff in SIBA status remains a possibility at the discretion of the Organization. As such, it cannot be interpreted as a compulsory action imposed on the Director, DHRM or the High Commissioner.

125. Furthermore, the RAAI in paragraph 8 provides that "[t]he paramount consideration in selecting candidates for appointment and assignment is the necessity of securing the highest standards of efficiency, competence and integrity in UNHCR's workforce in accordance with corporate and operational needs and priorities, taking into consideration the personal and professional needs of individuals to the extent possible". This is indeed one of the legal principles guiding recruitment and selection processes in UNHCR, which finds its basis at the highest level in article 101.3 of the United Nations Charter.

126. Even applying the standard set out in *Timothy*, a staff member only benefits from consideration on a preferential or non-competitive basis for positions if he or she is determined to be fully suitable for the position and he or she has made good faith efforts to apply and secure a position.

127. As a consequence, the Tribunal finds that it was not the legislator's intention to turn the "assignment" of SIBA staff members to regular positions or temporary assignments into an automatic prerogative of said staff members as it would go against the *rationale* and the main principles that guide the recruitment processes in the Organization.

128. The Tribunal will now assess whether the Applicant's right to work has been breached.

<u>Has the Applicant's right to work been breached?</u>

129. The Applicant argues that his SIBA status violates his right to work. He refers *inter alia* to *Lauritzen* 2013-UNAT-282, which provides that "[i]t is the moral right of a staff member to be given work to do in order to earn his or her salary".

130. The Respondent does not challenge the right to work recognised in *Lauritzen*.

131. The Tribunal notes that while, indeed, it is the moral right of a staff member to be given work to do to earn his or her salary as the Appeals Tribunal stated in *Lauritzen*, the evidence in the present case shows that the Applicant is not working because he has not been successful in getting an alternative position after the end of his SAL. Nonetheless, the fact that he has not secured a position does not entail an immediate breach of this subjective right.

132. The right to work is an essential element of the working relationship and it is also an obligation of the employer towards the employee. However, the different dimensions of this "right to work" need to be considered bearing in mind the context of the case, the applicable legal framework and the nature of UNHCR's mandate.

133. Even applying the standard set out in *Timothy*, for the reasons we have extensively explained above, which show that the Applicant has not engaged meaningfully in the process to secure an alternative position, the Tribunal does not consider that his right to work has been breached.

Is the contested decision tainted by improper motives?

134. The Applicant claims that his former supervisor in Ukraine, who is a senior manager within UNHCR, has "blackballed" him and basically blocked his career progression in UNHCR.

135. The Tribunal notes that both the Applicant and his former supervisor had strong disagreements in relation to the managerial aspects of the humanitarian crisis in Ukraine, where the Applicant worked from January 2011 to February 2015.

136. However, the issue at stake is not whether the Applicant handled the crisis in Ukraine well but rather whether he was blackballed thereafter. In this regard, the Tribunal finds that the preponderance of the evidence does not demonstrate that said supervisor has undermined the Applicant's reputation and chances of success. The testimony provided by the Applicant's witnesses was mainly based on hearsay and, as such, it does not serve to prove the alleged bias against him.

137. The Tribunal finds that it was not possible to establish a clear connection between the Applicant's lack of success in his applications and the alleged undue interference of his former supervisor in his career progression.

Lawfulness of the contested decision

138. For the above-mentioned reasons, the Tribunal finds the decision to place the Applicant on SLWOP lawful.

139. However, the Tribunal is concerned with the lack of time limit in the UNHCR legal framework for the placement of SIBA staff members on SLWOP. On this issue, the Tribunal refers to the reasoning mentioned above in relation to the limitation of three consecutive years of SLWOP without concurrent contributions having been paid (see paras. 79 to 81 above) imposed by art. 21 of the UNJSPF Regulations. While in the present case, the Administration exceptionally agreed to pay such contributions as well as the health insurance contributions for a period of nine months, the Tribunal regrets the lack of clarity in the RAP and the RAAI in this respect and encourage the Respondent to take corrective action. It appears that in the case of staff members with indefinite appointments containing the undertaking clause, such placement could, in theory, last indefinitely, while keeping the affected staff members in a *limbo*.

140. The Tribunal finds it unreasonable not to establish a finite period in the RAP or the RAAI, at the end of which, a staff member may be terminated and entitled to the correspondent benefits.

141. The Tribunal also notes that not to include the payment of health insurance coverage and pension contributions in the applicable legal framework for those SIBA staff members who are placed by the Administration on SLWOP creates a heavy financial burden on the affected staff members who find themselves without a salary but yet with important contributions to be paid.

Remedies

142. Having found that the decision to place the Applicant on SLWOP is lawful, the Tribunal will not assess the merits of his claim in relation to remedies. It only notes that, by virtue of the interim order, the contested decision has been suspended until the completion of the present proceedings.

Conclusion

143. In view of the foregoing, the Tribunal decides by majority with Judge Buffa dissenting to reject the application.

144. Judge Buffa appends a dissenting opinion.

(*Signed*)
Judge Teresa Bravo

(*Signed*)
Judge Joelle Adda

Dated this 6th day of November 2020

Entered in the Register on this 6th day of November 2020
(*Signed*)
René M. Vargas M., Registrar, Geneva

DISSENTING OPINION by Judge Francesco Buffa

1. While I agree with the majority judgment ("the judgment") with regard to the relevant facts, the applicable legal framework, the scope of the judicial review (in particular, paras. 48 and 50) and the legal questions to be addressed for the adjudication of the case (in particular, para. 45), I dissent on the outcome of the case for the following reasons.

2. As my fellow colleagues have expressed in the judgment, the legitimacy of the contested decision is connected to the Administration proving the objective absence of available suitable positions and temporary assignments that could have been assigned to the Applicant who is on SIBA status.

3. I share with the majority the conclusion, well expressed and motivated in the judgment (see paras. 72-90), that, on the one hand, protection under the undertaking clause and staff rule 9.6(e) and, on the other hand, the parties' obligations laid down by the Appeals Tribunal in *Timothy* 2018-UNAT-847 and in *El-Kholi* 2017-UNAT-730 are applicable to the administrative decision to put SIBA staff members on SLWOP, being the placement on SLWOP for an undefined period a situation very similar to a constructive termination, a stage "en route to separation" (see also *Balestrieri* 2010-UNAT-041 and *Koda* UNDT/2010/110).

4. In particular, I agree with the statement in para. 84 of the judgment that although in *Timothy* the Appeals Tribunal focused on the requirements imposed on the Administration and the staff member in the specific context of the abolition of posts due to a restructuring exercise, this jurisprudence provides important guiding principles that are relevant to determine the obligations of both parties in the present case, leading to the conclusion that the Administration must offer SIBA staff suitable available posts/assignments before placing said staff on SLWOP.

5. In my opinion, the Tribunal can reach the same conclusion also considering the nature of the placement on SLWOP for SIBA staff (provided by the UNHCR RAP), highlighting that it is exceptional both in relation to the right of the staff member and to the interest of the Organization in the effectiveness of the work to be performed (see *Lauritzen* 2013-UNAT-282 and staff rule 5.3). This

exceptionality implies that the RAP must be interpreted restrictively whenever its provisions could be contrary to the effectiveness of the working performance.

6. In light of the evidence collected and the observations of the amicus curiae, I am also aware that the 2017 modification to the policy was aimed precisely at increasing the powers of managers in the assignment of available positions/assignments; the Tribunal—of course—cannot interfere with this choice, which is of a political-administrative nature.

7. It is however the duty of the Tribunal to verify that the suitability assessment by the hiring managers be effective and rational, based on objective and verifiable elements and that the assignment of positions be in compliance with the pre-established limits (see for instance art.132 RAAI, regarding external recruitment). The extension of the powers of the managers cannot, indeed, mean absolute freedom of action, to the detriment of SIBA staff members' rights.

8. The placement on SLWOP being a consequence of the lack of available posts/assignments in the relevant period, the said exceptionality requires that the assignment of positions to people other than SIBA cannot be dependent from the free will of the managers or the benevolent evaluation of the High Commissioner, being possible only for post/assignments that are not suitable for the concerned SIBA staff.

9. In the same line, I think that, contrary to the majority opinion expressed in para. 122 and following of the judgment, the reference to the powers of the High Commissioner ("may" art. 134 RAAI) in the matter, allows the latter to assign the available post even in the absence of a SIBA staff member's application (provided that the person is suitable for the position), and does not mean, instead, that the High Commissioner has the discretionary power to refuse a suitable position to the SIBA staff member when all the regulatory conditions are met.

10. The parameter that allows a fair balance between the interest of the Organization and that of the SIBA staff member is the suitability of the position, a criterion recalled by the rules (staff rules 9.6 and 13.1) and by the UNAT jurisprudence (recalled at para. 87 of the judgment).

11. I agree with the majority that suitability for available positions/assignments implies as a consequence the right of the SIBA staff to be preferred outside of a competitive procedure; this means that UNHCR's managers, before recruiting other candidates, have to assess the SIBA staff members' skills and competencies, experience, gender and nationality, so that if the requirements are met (so that it is assured that the Organization meets the highest standards of competency and efficiency required by the UN Charter) priority must be given to a SIBA staff, in detriment of others whose link with the Administration is not of the same nature.

12. As per the above recalled principles, the Administration should demonstrate that the staff member holding a permanent/indefinite appointment and having a SIBA status was afforded due and fair consideration, that the Administration has made good faith efforts to find a suitable post for the affected staff member by considering him/her for available suitable posts and assigning him/her on a preferred or non-competitive basis.

13. The application of these principles to the case at hand differentiates my opinion from the majority's position.

14. In my view, notwithstanding the said regulatory framework, the Administration did not provide any evidence that the Applicant did not have the qualification or skill required for the available positions and temporary assignments.

15. As to the regular vacant positions, indeed, the Administration did not demonstrate that the Applicant did not possess the requirements for eligibility for the 93 posts requested (referred to in paragraph 39 of the judgment), limiting itself—only for 11 posts indeed (see paragraph 96 of the judgment)—to state, without any supporting evidence, that the applicant was not eligible.

16. The same can be said—a fortiori—for temporary assignments ("TAs"), given that in general they are not advertised at all. In this respect, the Applicant complained about the opacity of the entire process of assigning TAs, the lack of their advertisement, so that SIBA staff members only come to know (and not

always) of their existence after the outcome of the procedure and their assignment to other people.

17. It results from the file (see in particular paras. 20 and 28 of the Respondent's submission pursuant to Order No. 20 (GVA/2020) ordering disclosure of documents) that, during the period from 1 January 2017 to 21 February 2020, 413 temporary assignments were given by the Administration; 75 were covered by SIBA, 20 by non SIBA, 45 by external candidates, and that the Applicant was proposed for 32.

18. The majority focused only on the latter assignments (see paras. 112-113 of the judgment); even examining only these assignments, I note that at least for 9 assignments certainly available in the period—covered with other personnel or still vacant with ongoing procedures—no allegation of non-suitability of the applicant was made by the Respondent (differently from the allegations concerning the two posts covered with external staff in Cox's Bazar, Bangladesh and in Kabul).

19. In addition, it is to be noted that in these cases the Department of Human Resources Management ("DHRM") put forward the Applicant's candidature, and we can believe that in these situations a presumption of suitability arises; this does not mean that the hiring managers are bound by DHRM's proposals, but it implies that UNHCR must demonstrate the non-suitability of the SIBA staff member for the TAs for which DHRM proposed SIBA staff members. Failing this evidence, we cannot but conclude that managers excluded the Applicant also from positions/assignments he was suitable, operating in conditions where check from central authority was not present or not decisive.

20. Further upstream, I think it is useful to enlarge the perspective beyond the TAs proposed to the Applicant, looking in general to all the TAs covered in the period by the Administration. Among these, the Respondent—who does not indicate the outcome for the totality of the 413 TAs—recognizes that many (20) were covered by non SIBA staff and many more (45) by external candidates.

21. In this respect, we can recall the general observation undersigned by the majority in the judgment (at para. 110) according to which, pursuant to para. 132 of the RAAI, "external candidates can only be selected for temporary assignments after DHRM documents that no suitable SIBA staff member is available". We can consider this rule as an expression of a general principle that excludes the power of the managers to appoint (or to give temporary assignments to) external people if there is a suitable person within the Organization.

22. This principle is coherent with the interpretation of the policy in compliance with the Staff Rules, as above indicated. As SLWOP has to be exceptional, the managers implicitly have the obligation to "pick from the house", so avoiding—as far as possible (and with the limit of the non-suitability)—the placement of SIBA persons in SLWOP.

23. In sum, at the outcome of the procedures, among different and several available and suitable positions, no position /assignment was ever offered to the Applicant, not one! Nor was he invited to retrain to address any purported shortcomings; and some assignments were covered by external candidates too (out of any disclosed and demonstrated reason).

24. For all the above-mentioned available positions or assignments, and with particular reference to each of them individually considered, the Administration should have demonstrated the offer of the job to the Applicant and its good faith efforts in this respect (as already found by this Tribunal in its Order No. 111 (GVA/2019) ruling on the Applicant's motion for interim measures) or it should have proved that the Applicant was not suitable for the positions/assignments in question.

25. Instead, no clarifications or evidence supporting the Applicant's non-selection, and more specifically his non-suitability, was submitted to the Tribunal in respect of the said available positions/assignments. In particular, the Administration did not show any assessment of the Applicant's suitability with reference with the criteria indicated by UNAT (and referred to in paras. 89-90 of the judgment), such as competence, integrity, length of service, nationality and gender.

26. It follows that UNHCR has not met its burden of proof and that the jurisprudential conditions for consideration of the Applicant on a non-competitive basis have not been respected. Consequently, the non-selection of the Applicant, notwithstanding the availability of positions/assignments suitable for him, supports a finding of unlawfulness of the decision to place him on SLWOP.

27. Differently from the opinion of the majority (expressed in paragraph 97 of the judgment), I consider it completely irrelevant, on the one hand, that the outcome of the specific recruitment or selection procedures was not contested by the Applicant, because he never claimed to be the best or that the procedures were flawed, but he just complained about the non-assignment of the posts/TAs on a non-competitive basis.

28. Nor are relevant, on the other hand, the considerations made by the majority about the motivation letters drawn up by the Applicant, his language skills (not possessed for certain posts), the absence from work due to illness and in general his state of health (and the consequent constraints in the assignment to some duty stations). These elements, indeed, which in any event can be referred only to the ordinary recruitment and not to the temporary assignment, are generically recalled by the Administration, but never with specific reference to the available and suitable positions mentioned above.

29. I am aware that the Appeals Tribunal clearly established in its jurisprudence a shared responsibility for the search of alternative employment, so that we can affirm that, while efforts to find a suitable post for SIBA staff with indefinite appointments rests with UNHCR, the person concerned is required to cooperate fully in these efforts. However, in the case at hand, as already mentioned no position/TA was offered to the Applicant, who consequently had no chance—apart, when possible, by only lodging the application with the Administration—to cooperate in finding a suitable post.

30. For the reasons just mentioned, as to regular recruitment, the opinion by the majority that the Applicant was not fully committed to find alternative employment is not substantiated. With reference to temporary assignments, the said opinion is

not founded at all, as in these procedures (where TAs are not advertised) it is incumbent only on UNHCR to offer SIBA staff any available TA.

31. Finally, I do not find necessary to answer the question if the applicant was (or not) black-labelled: apart, on the one hand, any possible assessment of the hearsay evidence and, on the other hand, of the assumption that his former supervisor was able to interfere in all the selection processes that much, the lack of reasons for the exclusion of the Applicant from positions for which he was suitable infringes the lawfulness of the administrative decision as well as the presence of hypothetical improper motives could do.

32. In light of the foregoing, the contested decision is unlawful and should be rescinded.

33. As to remedies, the Applicant should be placed in the same situation he was prior to the contested decision, that is on SLWFP for a period of nine months as of the date that this Tribunal's Judgment becomes executable. During that period, UNHCR and the Applicant are to undertake all efforts to find alternative employment for the Applicant as per the principles outlined above.

34. In this framework, also the claim by the Applicant for damages should be examined, considering however in this respect the duty of the Applicant to mitigate loss.

(*Signed*)
Judge Francesco Buffa
Dated this 6th day of November 2020

Entered in the Register on this 6th day of November 2020
(*Signed*)
René M. Vargas M., Registrar, Geneva