



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

SMOLJAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Karen Farkas, UNHCR

## **Introduction**

1. On 11 April 2013, the Applicant submitted an application for suspension of action, pending management evaluation, of the decision to select an external candidate instead of him (“contested decision”) to the post of Senior Business Analyst at the P-4 level (“contested post”) within the Programme Budget Service (“PBS”) at the United Nations High Commissioner for Refugees (“UNHCR”) Headquarters in Geneva, Switzerland.
2. The application was served on the Respondent on 11 April 2013 with a requirement to file a reply by Monday, 15 April 2013. The Tribunal directed the Respondent in filing the reply to address the following matters:
  - a. Whether the selection of the successful candidate with regard to the contested post had taken place;
  - b. Whether the selected candidate had been informed of this decision; and
  - c. Whether the selected candidate had accepted the offer.
3. The Respondent was also directed not to undertake, as from the date of service, any further steps regarding the recruitment against the contested post until the determination of the suspension of action.
4. On 15 April 2013, the Respondent filed the reply together with the requested documents.

## **Facts**

5. The Applicant is serving as a Registration Officer, at the P-3 level, and contests the decision to select, instead of him, an external candidate for the post of Senior Business Analyst (Budget Systems), Position No. 10001739, Global Analysis and Reporting Unit, PBS, Division of Financial and Administrative Management (DFAM), Job Opening No. 7219, classified as Standard-Specific post.

6. The contested post was advertised internally and externally in the March 2012 Compendium and the Applicant applied for it.

7. Having reviewed the list of the five shortlisted internal candidates, including the Applicant, received from the Department of Human Resources Management (“DHRM”), the Head of PBS requested, by memorandum dated 10 July 2012, the release of the expanded list of applications, since he concluded that none of the short-listed internal candidates met the minimum requirements of the post.

8. In its Final Recommendation Meeting (FRM), which took place between 9 and 13 July 2012, DHRM concluded that it was unable to assess whether the internal applicants fulfill all requirements for the contested post and agreed to release the list of external candidates with the proviso that four internal candidates, including the Applicant, be reviewed together with the external candidates, “under the same conditions in a competency based interview”.

9. A written test for the post was conducted on 18 and 19 October 2012, to which a total of ten candidates, including three internal and seven external, were invited. The three top scoring candidates were retained and interviewed. The Applicant was not among the candidates interviewed for the contested post. Based on the written test and the interview, the Panel recommended an external candidate.

10. The Joint Review Board (JRB), in its meeting from 25 to 28 February 2013, endorsed the recommended candidate, and on 22 March 2013, the “Summary of Decisions of the High Commissioner on Assignments Ref. No.03/2013” was circulated to all staff members via email.

11. On 27 March 2013, UNHCR sent an offer letter to the selected external candidate, describing the major aspects of the appointment, including grade, step and other entitlements. The selected candidate accepted the offer on 2 April 2013, without any conditions.

12. On 11 April 2013, the Applicant requested management evaluation of the decision to select an external candidate against the contested post.

**Parties' contentions**

13. The Applicant's main contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The selection of an external candidate is contrary to UNHCR *Policy and Procedures on Assignments* ("PPA"), by virtue of Inter-Office/Field Office Memorandum IOM/FOM/033/2010 of 14 June 2010 and PPA on Simplification Measures IOM/025-FOM/026/2011 dated 1 April 2011, since internal and external candidates were considered together in a competitive process, without clearly prioritizing suitable internal candidates.

*Urgency*

b. The decision may yet have to be implemented. Consequently, the contested decision may still be suspended pending management evaluation before the ongoing recruitment process of the selected candidate comes to an end.

*Irreparable damage*

c. The implementation of the decision would affect his career prospects and represent a financial loss;

d. He would have to continue applying for other positions and be forced to accept positions in non-family duty stations. This would cause harm to him and his family, also given that he has a special constraint relating to his wife's health status.

14. The Respondent's primary contentions may be summarized as follows:

*Receivability*

a. The Application is not receivable, because the contested decision has already been implemented.

*Prima facie unlawfulness*

- b. The selection process for the contested post was properly conducted in accordance with the PPA, i.e. Inter-Office/Field Office Memorandum IOM/FOM/033/2010 of 14 June 2010 and PPA on Implementation IOM/FOM/050/2010 dated 4 August 2010; and
- c. The Applicant's candidature received fair and adequate consideration for the contested post.

*Urgency*

- d. The requirement of urgency is moot in the instant case as the contested decision has already been implemented through the valid employment contract between UNHCR and the successful candidate.

*Irreparable damage*

- e. A damage of the Applicant's career prospects is purely speculative;
- f. The Applicant will not suffer irreparable damage when his Standard Assignment Length (SAL) expires, because he is a holder of an indefinite contract and as such will become a staff member in between assignments (SIBA) and will receive all entitlements until reassigned.

**Consideration**

15. Article 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend, during the pendency of management evaluation, the implementation of a contested administrative decision where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

16. It follows from this provision of the Statute that an application for suspension of action can only be granted if the contested decision has not yet been implemented (see *inter alia* *Quesada-Rafaraso* Order No. 20 (GVA/2013),

*Al-Baker et al.* Order No. 99 (NY/2013), *Tiwathia* UNDT/2012/109, *Nwuke* UNDT/2012/116 and *Murnane* UNDT/2012/128).

17. Regardless of different approaches with respect to the determination of the proper date of the implementation of a selection decision, (see *Wang* UNDT/2012/080 and *Nwuke* UNDT/2012/116), it is undisputed that it has to be considered implemented once the Administration receives the selected candidate's unconditional acceptance of the offer of appointment (see *Tiwathia* UNDT/2012/109).

18. In the instant case, the selected candidate was informed on 27 March 2013 of his selection for the contested post. He unconditionally accepted the offer of appointment on 2 April 2013. Consequently, the Tribunal can only find that the contested decision in this case had already been implemented prior to the filing of the application for suspension of action on 11 April 2013 and the Tribunal is not in a position to order its suspension.

19. In view of the foregoing, it is not necessary to examine if the three statutory requirements specified in art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of procedure are met in the case at hand.

20. Of course, the Tribunal's decision on the application for suspension of action does not entail any assessment with respect to the lawfulness of the contested decision, and the Applicant has the possibility to submit the contested decision for judicial review by way of filing an application on the merits after having awaited the outcome of the management evaluation.

**Conclusion**

21. In view of the foregoing, the application for suspension of action is rejected in its entirety.

*(Signed)*

Judge Thomas Laker

Dated this 17<sup>th</sup> day of April 2013

Entered in the Register on this 17<sup>th</sup> day of April 2013

*(Signed)*

René M. Vargas M., Registrar, Geneva