



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

RODRIGUEZ-PIÑERO ROYO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

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

---

**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Kara Nottingham, HRLU

## **Introduction**

1. By application filed on 8 September 2016, the Applicant, a Human Rights Officer, Office of the High Commissioner for Human Rights (“OHCHR”), requests suspension of action pending management evaluation of (i) the decision to laterally transfer him to the OHCHR Country Office in Guatemala and (ii) the decision to laterally transfer another staff member from Guatemala to the post currently occupied by the Applicant, which will be moved from Geneva to New York.
2. The application was served to the Respondent on 13 September 2016, being the first working day after the filing of the application, and he submitted his reply on 14 September 2016. In his reply, the Respondent requested that the matter be decided on receivability first.
3. On 14 September 2016, the Applicant submitted additional evidence.
4. On 15 September 2016, the Respondent filed a motion for leave to file additional evidence, together with a document submitted *ex parte* as it contains confidential information.

## **Respondent’s motion to submit additional evidence**

5. The Respondent seeks leave to submit evidence concerning the possibility of harm to the other staff member scheduled to be laterally transferred from Guatemala to New York if the decisions are suspended.
6. The Tribunal is mindful that suspending the decisions is likely to impact on this other staff member who may be expecting to move to New York to the Applicant’s current position. However, when examining an application for suspension of action, the Tribunal must examine whether the matters set forth in art. 2.2 of the UNDT Statute are satisfied, as more amply discussed below, and potential harm to another staff member is not one of them. Therefore, the Tribunal finds that the proposed evidence is not relevant for the current proceedings and it rejects the Respondent’s motion.

## **Facts**

7. In 2015, the High Commissioner for Human Rights (“High Commissioner”) launched a plan to restructure OHCHR called *Change Initiative*, which entailed redeployment of resources from Geneva to the field and New York, to be closer to its partners and stakeholders. Through this initiative, various post and staff movements were envisioned.

8. As a first step in the restructuring, affected staff members were informed that their posts would be moved and that they would be consulted as to whether they wished to move with their post or to opt into a post-matching exercise, consisting of a compendium of available posts. As part of this process, staff members were requested to indicate their preferred locations and were then matched with certain posts globally.

9. On 10 September 2015, the Applicant was informed that his post in the Sustainable Development Goals (“SDG”) Section in Geneva would potentially be moved to OHCHR New York. The Applicant was informed that, as the incumbent of the post, he would be expected to move with his post. However, if he did not want to move with his post, he could opt into the internal matching exercise whereby he would be matched to another post in line with his selected preferences.

10. By email of 22 September 2015, the Applicant informed OHCHR that he decided to opt into the internal matching exercise, identifying his current post as one of his preferences, and two positions in Guatemala as his fourth preference.

11. By letter of 9 December 2015 from the Chief of Programme Support and Management Services, OHCHR, the Applicant was informed of “the High Commissioner’s decision, pending receipt of the necessary budget approvals from the General Assembly, to laterally transfer [him] to the post [he] expressed as one of [his] preferences, namely that of Human Rights Officer in the OHCHR Country Office in Guatemala”.

12. By letter of 15 January 2016, the Chief of Programme Support and Management Services, OHCHR, followed up on his previous memorandum of 9 December 2015 “advising [the Applicant] of the High Commissioner’s decision regarding [his] potential lateral transfer”. He informed the Applicant as follows:

As you are by now aware, the General Assembly decided to delay action on the approval of OHCHR’s proposals in the context of the Change Initiative, pending consideration of a detailed report to be presented to the seventy-first session of the General Assembly later this year. Given this outcome, it will not be possible to proceed with the implementation of those decisions.

The report we will present in September this year provides us with the opportunity to lay out in greater detail the full breadth of the Change Initiative for the future.

In the meantime, further consideration is now being given to options for proceeding with those aspects of the Change Initiative within the authority of the High Commissioner, which we hope will provide opportunities for some movements of posts/staff. This will require a fresh look at the staffing implications, for which the successfully managed matching process will be used as a point of reference. This will, of course, be subject to full consultation with the concerned staff.

13. In April 2016, discussions were held within OHCHR about the potential move of the Applicant’s post to New York, together with other posts from the SDG Section.

14. On 17 April 2016, the Applicant received an email from the Director, Thematic Engagement, Special Procedures and Right to Development Division, OHCHR, which discussed the possible move of his post to New York in the Summer of 2016, together with another P-3 post in the SDG Section. The email stated:

On the move of the SDG Section, we recommended and the SMT agreed that the section will move in two groups. Two of the three posts will move this summer, and the remainder of the posts will move in the first quarter of 2017, when the D-1 post will also move. Our suggestion is that the P-3 post that you occupy move to New York this summer. However, there is some uncertainty about whether the people matched to both P-3 posts are still interested in moving. If one of them is not willing, it might be possible for you to move to New York with your post instead. It would be good if

we could discuss this next week and I could hear your preferences. In the next few days, we will be trying to talk to all 4 people involved (the 2 SDG staff and the 2 staff who were matched to the posts), and to clarify the situation as soon as possible.

15. On 18 April 2016, the Applicant met with the Director of the Thematic Engagement, Special Procedures and Right to Development Division and indicated his preference to move with his post.

16. By memorandum of 23 May 2016 from the Chief of Programme Support and Management Services to the Programme Planning and Budget Division, Office of Programme Planning, Budget and Accounts (“OPPBA”), OHCHR requested approval of the move of four regular budget posts from Geneva to New York from 1 September 2016, three of which being in the SDG Section.

17. By email of 30 June 2016 from a Human Resources Officer, the Applicant was informed that “[his] move to Guatemala [was] confirmed as [they] ha[d] received green light from OPPBA on the NYO positions” and asked to advise them “when [he] ha[d] agreed on [his] release and actual move date”.

18. By email of the same day to the Human Resources Officer, the Applicant responded that “[his] preferred option was no longer Guatemala” and that he was “no longer in a position to agree with the move”.

19. On 7 July 2016, the Applicant wrote to the Chief of Programme Support and Management Services, reiterating his disagreement to be transferred to Guatemala and his desire to move with his post to New York.

20. On 11 July 2016, the controller approved the High Commissioner’s request of 23 May 2016 to “authorise administrative redeployment of post resources (2 P-4 and 2 P-3 posts) from Geneva to New York as from 1 September 2016”.

21. By email of 12 July 2016, the Chief of Programme Support and Management Services, responded to the Applicant’s email of 7 July 2016, recalling that the Applicant had originally been provided the possibility to move to New York with his post, and that he voluntarily opted into the matching exercise, which resulted in him being matched with Guatemala following a

decision of the High Commissioner that had been communicated to him at the time. The Applicant was further informed that since he had originally declined to move with his post to New York, another staff member had in turn accepted this placement and would be moving to New York on the post.

22. By memorandum of 22 July 2016 from the Chief of Programme Support and Management Services, the Applicant was informed that the High Commissioner's decision of 9 December 2015 concerning his transfer to Guatemala would be implemented. The Chief of Programme Support and Management Services stated in his memorandum:

As discussed and noted in my email message to you dated 12 July 2016, the Controller has approved the move of posts in the OHCHR Sustainable Development Goals (SDG) Section to New York from 1 September 2016, allowing for the implementation of the High Commissioner's lateral move decisions. You will recall that, having initially declined to move with your post to New York, you were matched through the internal review process last year to a P-3 post in OHCHR Guatemala country office. In this respect, therefore, I hereby confirm your lateral transfer to P-3 post [No.] 30515074 in Guatemala. As international moves are anticipated to be completed within two months of the official decision, you will be expected to effect the move on or before 23 September 2016.

23. By memorandum of 19 August 2016 to the Chief of Programme Support and Management Services, the Applicant requested "the revocation of the lateral transfer communicated in [the Chief of Programme Support and Management Services'] memorandum of 22 July or, alternatively, the suspension of that decision until [he] had the opportunity to discuss the issue with the Deputy High Commissioner".

24. By memorandum of 29 August 2016, the Chief of Programme Support and Management Services reiterated that the High Commissioner's decision of 9 December 2015 to laterally move the Applicant to Guatemala, re-confirmed on 30 June 2016, would be implemented. He also informed the Applicant that administrative arrangements had been made for another staff member who had accepted to be placed on the Applicant's post to move to New York.

25. By memorandum of 31 August 2016 from a Human Resources Officer, the Applicant was informed that “[i]n accordance with the decision of the High Commissioner under the OHCHR change initiative ... [he] will be reassigned within [the] department to position [No.] 30515074 in the OHCHR Office, Guatemala City, effective 23 September subject to medical clearance and any visa formalities”.

26. On 7 September 2016, the Applicant requested management evaluation of the decision of 22 July 2016 to transfer him to Guatemala.

### **Parties’ contentions**

27. The Applicant’s primary contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. The High Commissioner’s decision of 9 December 2015 to transfer him to Guatemala is no longer valid as:

i. It was conditional upon the General Assembly’s approval of the OHCHR restructuring plan, which did not occur;

ii. The Applicant was informed on 15 January 2016 that the High Commissioner’s decision would not be implemented; and

iii. The Organization cannot unilaterally reverse his decision of 15 January 2016 as it affects the Applicant’s rights and interests;

b. The decision of 22 July 2016 to laterally transfer the Applicant to Guatemala lacks a legal basis as the High Commissioner ceased to have authority to approve lateral moves following the entry into force of ST/AI/2016/1 on Staff selection and management mobility system on 1 January 2016;

*Urgency*

- c. The Applicant has been requested to move to Guatemala on or before 23 September 2016;
- d. The same deadline is expected to apply to the staff member who would move to the post currently occupied by the Applicant, which is being moved to New York;

*Irreparable damage*

- e. Given that the Applicant had legitimate expectations that the decision of 9 December 2015 to transfer him to Guatemala was no longer valid, he took a number of professional, personal and family decisions, including administrative arrangements concerning a prospective move to New York; and
- f. The implementation of the contested decision implies that a staff member of OHCHR Guatemala will occupy the Applicant's post in the SDG Section in New York and, as such, irreversibly prevent him from continuing to perform the responsibilities of his current post.

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

*Receivability*

- a. The application is time-barred as the decision to laterally transfer the Applicant to Guatemala was taken and notified to him on 9 December 2015 and confirmed on 30 June 2016, which would have required the Applicant to submit his request for management evaluation no later than 30 August 2016 for the matter to be receivable;
- b. The decision to transfer another staff member to New York has already been implemented and, thus, it is not possible to suspend it;
- c. The Applicant does not have standing to contest the administrative decision concerning the transfer of another staff member;



*Prima facie unlawfulness*

d. The contested decision was taken by the High Commissioner on 9 December 2015 pursuant to his power under Staff Regulation 1.2(c);

e. The Applicant was consulted in the process of his reassignment and he voluntarily chose not to go to New York with his post but, instead, opted into the internal matching exercise; the resulting decision to transfer him to Guatemala was a direct result of the Applicant's choice of the OHCHR Office in Guatemala as an option for placement;

*Urgency and irreparable damage*

f. As the decision to transfer another staff member on the Applicant's post has already been implemented, it is no longer possible to suspend it;

g. The Applicant will suffer no irreparable harm if he is laterally transfer to Guatemala as he will be eligible for a new rotation in the near future under the newly implemented managed mobility scheme contained in ST/AI/2016/1.

**Consideration**

29. Pursuant to art. 2.2 of its Statute and art. 13.1 of its Rules of Procedure, the Tribunal is competent to hear and pass judgment on an application filed by an individual requesting the Tribunal:

[T]o suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

30. The three aforementioned requirements are cumulative and must all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)). Each of them will be analysed in turn.

31. As a preliminary matter, the Tribunal shall examine whether the application is receivable.

*Receivability*

Timeliness of the request for management evaluation

32. An application for suspension of action pending management evaluation may only be granted if the underlying request for management evaluation is itself receivable.

33. Staff Rule 11.2(c) provides that a request for management evaluation shall be receivable if it is filed “within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested”.

34. In the present case, the parties disagree as to the date of the contested decision. The Applicant argues that it was notified to him on 22 July 2016 through the memorandum he received from the Chief of Programme Support Management Services. The Respondent rather argues that it was notified to the Applicant on 9 December 2015 or, at the latest, on 30 June 2016 through the email of the Human Resources Officer.

35. At the outset, it is clear from the Applicant’s submissions and the factual background of the case, that the Applicant does not seek to challenge the High Commissioner’s decision of 9 December 2015. As of 15 January 2016, he was informed that this decision would not be implemented and, therefore, had no reason to challenge it.

36. As to the email of 30 June 2016 from a Human Resources Officer, which informed the Applicant that “his move to Guatemala [was] confirmed” and asked him to advise the Human Resources Management Section “when [he] ha[d] agreed on [his] release”, this cannot be seen as an administrative decision but only as a preparatory step, especially in the light of the memorandum of the Chief of Programme Support and Management Services that followed on 22 July 2016. It is also noted that on 30 June 2016, the High Commissioner had yet to obtain the

controller's approval for the move of the Applicant's post to New York, which was a pre-requisite for the Applicant's lateral transfer to Guatemala.

37. A reading of the memorandum of 22 July 2016 from the Chief of Programme Support and Management Services leaves no doubt that it constitutes the official notification to the Applicant of the decision to transfer him to Guatemala. The Chief of Programme Support and Management Services stated in this memorandum: "I hereby confirm your lateral transfer to P-3 post [No.] 30515074 in Guatemala. As international moves are anticipated to be completed within two months of the *official decision*, you will be expected to effect the move on or before *23 September 2016*" (emphasis added).

38. The memorandum also makes reference to the fact that the Applicant's transfer was a consequence of the Controller's approval of the move of posts in the SDG Section to New York, which only occurred on 11 July 2016. There is no reference in this memorandum to the email of 30 June 2016.

39. It follows that the contested decision was notified to the Applicant on 22 July 2016. The Applicant requested management evaluation on 7 September 2016, within the 60-day deadline provided for in Staff Rule 11.2(c). The request for management evaluation was, therefore, timely.

#### Applicant's standing

40. The Respondent argues that the Applicant does not have standing to challenge a decision concerning the transfer of another staff member.

41. The Tribunal finds that this argument is entirely without merit. The Applicant does not challenge the transfer of another staff member to a post he seeks to obtain, but the transfer of another staff on the post he currently occupies and seeks to preserve. The decision to transfer another staff member on the Applicant's post not only has the effect of depriving him of his own post but also triggered his transfer to another post in Guatemala. There can, therefore, be no doubt that the decision to transfer another staff member on the Applicant's current post "has direct legal consequences" on his rights as a staff member (*Andronov*

Judgment No. 1157 (2003); *Andati-Anwayi* 2010-UNT-058; *Nwuke* 2010-UNAT-099), and that the Applicant has standing to challenge this decision. As the Respondent himself recognises, “all staff movements in the present case are interconnected”.

#### Implementation of the contested decision

42. It is established that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

43. There is no doubt that the Applicant still occupies his position, and that the decision to transfer him to Guatemala has not been implemented yet. The Respondent argues, however, that the decision to transfer another staff member on the Applicant’s post has been implemented as “administrative arrangements have already been made for the other staff member and her family to move to New York”.

44. In view of the fact that a position can only be filled by one staff member and that the Applicant still occupies the disputed post, it follows that the decision to move another staff member on the Applicant’s post cannot be considered as having been implemented. The assignment of the other staff member to the Applicant’s post is contingent upon the post being available, which it is not currently the case. Furthermore, the fact that administrative arrangements have been made to move another staff member to New York is insufficient to conclude that the decision has actually been implemented.

45. Therefore, the Tribunal finds that the application for suspension of action is receivable.

#### *Prima facie unlawfulness*

46. With respect to the first condition, the Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see *Hepworth*

UNDT/2009/003; *Corcoran* UNDT/2009/071; *Corna* Order No. 90 (GVA/2010); *Berger* UNDT/2011/134; *Chattopadhyay* UNDT/2011/198; *Wang* UNDT/2012/080; *Wu* Order No. 188 (GVA/2013)).

47. In this respect, the Tribunal held in *Corna* Order No. 90 (GVA/2010) that:

[T]he combination of the words “appears” and “prima facie” shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt. This was echoed in *Corcoran*, UNDT/2009/071, in which the Tribunal held that “since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that prima facie [unlawfulness] in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision”.

48. In the present case, the Applicant challenges, *inter alia*, the High Commissioner’s authority to laterally transfer him to Guatemala following the entry into force of ST/AI/2016/1 on 1 January 2016.

49. In this respect, the Tribunal notes that prior to 1 January 2016, the High Commissioner had authority to laterally transfer his staff members under Staff Regulation 1.2(c), which provides that “[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations”.

50. However, ST/AI/2016/1 introduced a new mobility system which, as the Respondent recognises, “limit[s] the authority of the head of the office to conduct lateral transfers”. In particular, this Administrative Instruction provides for a new procedure for advertising positions in bi-annual compendiums, evaluating the candidates and matching them with available positions. Pursuant to sec. 21.3 of ST/AI/2016/1, placement decisions under the managed mobility system are made by “the Secretary-General and the Assistant Secretary-General for Human Resources Management on the basis of the recommendations (...) received from the Senior Review Board and the Job Network Boards”.

51. Sec. 24 of ST/AI/2016/1 clearly states that as a transitional measure until 31 December 2017, the heads of departments and offices retain their authority to laterally transfer staff members within their respective department or office “without advertisement of a job-opening or review by a senior or central review body” only “during periods of surge, start-up or humanitarian emergency, in instances of the abolition of posts and the reduction of staff or to implement a restructuring approved by the General Assembly”. The Respondent does not argue that the impugned decision falls under the ambit of sec. 24 of ST/AI/2016/1.

52. The parties agree that the High Commissioner had authority to laterally transfer his staff members on 9 December 2015 pursuant to Staff Regulation 1.2(c), but that he lost such authority with the entry into force of ST/AI/2016/1 on 1 January 2016. As per the parties’ submissions, the *prima facie* lawfulness of the contested decision essentially depends on whether the decision of 22 July 2016 merely implemented the High Commissioner’s decision of 9 December 2015 to laterally transfer the Applicant to Guatemala or whether it constitutes a new decision.

53. In this respect, the Tribunal notes that the High Commissioner’s decision of 9 December 2015 to transfer the Applicant to Guatemala was subject to the necessary budget approval by the General Assembly at the end of 2015, which did not occur. Accordingly, the Applicant was formally notified on 15 January 2016 that his “potential lateral transfer” to Guatemala would not be implemented. The Applicant was even informed that any further decisions on possible movements of posts or staff members would be subject to full consultation with the concerned staff.

54. In these circumstances, it appears that the decision of 9 December 2015 ceased to have effect on 15 January 2016 and, therefore, it was no longer possible to implement it. Furthermore, the Tribunal has serious doubts that once the Organization had explicitly advised the Applicant that the decision of 9 December 2015 would not be implemented, it could unilaterally decide otherwise. In fact, it appears that the effect of the decision on 22 July 2016 by the High Commissioner to laterally transfer the Applicant to Guatemala, relying upon

his previous decision of 9 December 2015, had the practical effect of circumventing the new managed mobility system provided for in ST/AI/2016/1.

55. In view of the above, it is dubious that the decision of 22 July 2016 could be considered as an implementation of the decision of 9 December 2015. It rather appears to be a new decision by which the High Commissioner laterally transferred the Applicant to another post.

56. Accordingly, the Tribunal finds that the case raises serious and reasonable doubts about the contested decision's compliance with the requirements of ST/AI/2016/1. This procedural flaw appears *prima facie* to vitiate the contested decision.

#### *Urgency*

57. If not suspended, the Applicant's lateral transfer to Guatemala and the loss of his current position will become effective on 23 September 2016. The urgency is therefore obvious. Further, the Tribunal is satisfied that the urgency is not self-created, and that the Applicant promptly contested the decision once it had been notified to him.

#### *Irreparable damage*

58. There can be no doubt that the Applicant's transfer to a different post, in a different duty station, entails significant repercussions on his personal and professional life.

59. The Tribunal is particularly concerned with the personal implications stemming from the Applicant's move from Geneva to Guatemala. It goes without saying that an international move of this nature requires a number of practical arrangements to reorganise one's life and generates emotional reactions. Once such a move has been done, it is difficult to revert back. In this context, the Respondent's argument that the Applicant will suffer no irreparable damage if the contested decision is implemented as he will be eligible for a new rotation in the near future is misplaced.

60. Furthermore, the Tribunal is mindful that should the decision to move another staff member to the Applicant's current position be implemented, it may no longer be possible for him to go back on this post. This entails professional consequences for the Applicant, who has occupied his current post for two years and expressed the desire to continue working on ongoing projects.

### **Conclusion**

61. In view of the foregoing, it is ORDERED that the decisions:

- a. To laterally transfer the Applicant to the OHCHR Country Office in Guatemala; and
- b. To laterally transfer another staff member to the post currently occupied by the Applicant in the SGD Section, which will be moved from Geneva to New York

be suspended pending the outcome of the management evaluation.

*(Signed)*

Judge Rowan Downing

Dated this 19<sup>th</sup> day of September 2016

Entered in the Register on this 19<sup>th</sup> day of September 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva