



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

RODRIGUEZ-PIÑERO ROYO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON A MOTION FOR  
INTERIM MEASURES**

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Kara Nottingham, UNOG

## **Introduction**

1. By application filed on 7 March 2017, the Applicant, a Human Rights Officer, Office of the High Commissioner for Human Rights (“OHCHR”), challenges (i) the decision to laterally transfer him to the OHCHR Country Office in Guatemala and (ii) the decision to laterally transfer another staff member to the post encumbered by him.

2. In relation to the above application, the Applicant filed a motion for interim measures on 7 March 2017, asking the Tribunal to suspend the contested decisions.

3. The Respondent submitted his response to the Applicant’s motion for interim measures on 10 March 2017 (“Respondent’s response”), which included as Annex 17 a document submitted *ex parte*, on account that it contains confidential information.

## **Facts**

4. In 2015, the High Commissioner for Human Rights (“High Commissioner”) launched a plan to restructure OCHCR 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.

5. 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.

6. 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.

7. 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.

8. 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”.

9. By resolution of 23 December 2015, the General Assembly declined to approve the budget for OHCHR’s restructuring and requested the Secretary-General to submit a revised proposal.

10. By email of 24 December 2015, the High Commissioner informed all OHCHR staff members that lateral transfers under the matching exercise would have to be reconsidered and that all staff members would be notified individually of the outcome.

11. 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.

12. By a Newsletter of February 2016, OHCHR confirmed the nine transfers which could immediately occur under the matching process conducted in the context of the Change Initiative, irrespective of the delayed approval of OHCHR's budget.

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 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 [Office of Programme Planning, Budget and Accounts] on the NYO positions” and asked to advise them “when [he] ha[d] agreed on [his] release and actual move date”.

17. 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”.

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

19. 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”.

20. By email of 12 July 2016, the Chief of Programme Support and Management Services, OHCHR, responded to the Applicant’s email of 7 July 2016, recalling that the Applicant had originally been provided with 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 to a post in 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.

21. By memorandum of 22 July 2016 from the Chief of Programme Support and Management Services, the Applicant was formally 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.

22. By memorandum of 19 August 2016 to the Chief of Programme Support and Management Services, OHCHR, the Applicant requested the reversal or suspension of the decision. His request was denied on 29 August 2016.

23. By memorandum of 31 August 2016 from a Human Resources Officer, the Applicant was informed of his reassignment effective 23 September 2016.

24. On 7 September 2016, the Applicant requested management evaluation of the decision of 22 July 2016 to transfer him to Guatemala and to laterally transfer another staff member to his current post. On 8 September 2016, he further requested suspension of action of these decisions pending management evaluation.

25. By Order No. 189 (GVA/2016) of 19 September 2016, the Tribunal suspended the contested decisions pending management evaluation.

26. On 27 September 2016, the other staff member originally intended to be transferred to the post encumbered by the Applicant went on a temporary assignment to OHCHR in New York.

27. By memorandum of 8 February 2017, the Chief of Programme Management and Support Service, OHCHR, requested the Assistant Secretary-General, OHRM, to provide clarification concerning the delegated authority for lateral transfers under the Change Initiative. He referenced the previous understanding that had been reached between OHRM and OHCHR in 2015 with regard to the implementation of the Change Initiative following the entry into force of ST/AI/2016/1, pursuant to which “if the decisions regarding the assignments were taken prior to the end of 2015, OHCHR would be authorized to proceed with their implementation in 2016, following approval of the biennium budget proposals”. In reference to the Applicant’s case, the Chief of Programme Management and Support Service, OHCHR, inquired more particularly as follows:

Given that [the Applicant]’s reassignment is grounded in the High Commissioner’s Change Initiative which commenced in 2015, and the decision was arrived through a fully participatory process and communicated to the implicated staff on 9 December 2015, we request your confirmation of exceptional approval to complete this and other remaining reassignments pending under the Initiative at this time.

28. The ASG, OHRM, responded as follows in an email of 16 February 2017:

I note that the lateral reassignments were approved at the end of 2015 and that the General Assembly had deferred its consideration of the proposed regional deployments to 2016. Given that the decisions were made prior to 31 December 2015 when ST/AI/2010/3 was still in place, under which Heads of Departments/Offices retained the authority to laterally reassign staff members, I confirm that the High Commissioner for Human Rights has the proper authority to implement the reassignment of staff members where decisions were made on or prior to 31 December 2015, including that of [the Applicant].

29. By letter of 6 March 2017, the Management Evaluation Unit (“MEU”) rejected the Applicant’s request for management evaluation as irreceivable *ratione temporis*. The MEU also advised that it considered the Applicant’s reassignment to Guatemala to be lawful.

30. By memorandum of 7 March 2017, the Chief of Programme Management and Support Service, OHCHR, indicated to the Applicant that “the UNDT order to suspend action on [his] lateral transfer to Guatemala and on the move of [his] post to New York ha[d] been lifted”. He also informed the Applicant that he was a recommended candidate for a post nearing completion in the POLNET selection process, and that he would therefore continue to perform his functions in the SDG Section in Geneva until at least 31 March 2017.

### **Parties’ contentions**

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

#### *Receivability*

- a. A lateral transfer decision is capable of suspension under art. 10.2 of the Tribunal’s Statute, as it is not considered to be a decision on “appointment, promotion or termination” pursuant to the jurisprudence of the Appeals and the Dispute Tribunals;
- b. The Applicant’s request for management evaluation was timely. The Applicant was notified of the contested decision through the memorandum of the Chief of Programme Management and Support Service, OHCHR, on 22 July 2016. The prior communications he received did not convey any reviewable decision as his transfer was then subject to various conditions, notably to the Controller’s approval;

#### *Prima facie unlawfulness*

- c. 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. It was expressly revoked by the memorandum of 15 January 2016; and



iii. The memorandum of 15 January 2016 and the email of 17 April 2016 clearly state that any further decision to transfer the Applicant would be contingent upon his consent and that of the other staff member involved. It follows that the decision of 22 July 2016 constitutes a new decision and not merely the implementation of a previous one;

d. 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 (Staff selection and management mobility system) on 1 January 2016;

e. The communication of 16 February 2017 of the ASG, OHRM, merely constitutes the expression of an incorrect opinion as to when the contested decisions were taken and whether the High Commissioner had the necessary authority, which has no legal value. In any event, the ASG, OHRM, does not have authority to place staff members in suitable posts;

f. The Applicant had a legitimate expectation that his transfer to Guatemala would not be implemented following the memorandum of 15 January 2016. The Administration could not unilaterally renege on this representation;

g. The Administration failed to consult the Applicant in good faith regarding his lateral transfer as it had committed to, and in contrast to the treatment reserved to other staff members involved in the process;

*Urgency*

h. The memo of 7 March 2017 makes no mention of the post that the Applicant would be assigned to if he is ultimately successful in the recruitment process, nor of any potential transfer of another staff member on the post that he currently encumbers;

i. The position taken by the MEU clearly indicates that the decision to remove the Applicant from his post and place another staff member on it will be taken imminently. The fact that the other staff member slated to take up the Applicant's post has already been moved to New York is further evidence of the Respondent's intent to implement the contested decisions shortly;

*Irreparable damage*

j. As this Tribunal previously held in its Order No. 189 (GVA/2016), the personal and professional repercussions caused by a forced transfer to a different post in a different country would cause damages to the Applicant that cannot be compensated in purely financial terms;

k. Since the Administration intends to transfer another staff member onto the post he encumbers, any attempt to return the Applicant to that post in the event that his application is successful would not be possible;

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

*Prima facie unlawfulness*

a. The decision to move the Applicant's post to New York was lawful, as it was approved by the OPPBA;

b. The Applicant has not yet been informed that he will be transferred to Guatemala given that the POLNET mobility exercise is still underway;

c. The contested decision was taken by the High Commissioner prior to the enactment of ST/AI/2016/1 on 28 December 2015, and authority has been exceptionally granted by the ASG, OHRM, to implement the decisions taken in 2015;

d. 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*

e. The Applicant may be moved to another post shortly, as he is on the recommended list for a P-3 Job Opening which is currently part of the POLNET mobility exercise. If the Applicant is selected, the present case will become moot and it would be futile to suspend the contested decisions pending review of its merits; and

f. Granting interim measures could potentially impact on the other staff member who was supposed to be transferred to the Applicant's post and is currently serving on temporary appointments funded via extra-budgetary resources pending resolution of the matter, thereby placing her and her family in a precarious situation.

**Consideration**

33. Article 10.2 of the Tribunal's Statute states:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

34. The three aforementioned requirements are cumulative and must all be met for an interim relief to be granted (*Nadeau* Order No. 116 (NY/2015), *Awomeyi* Order No. 165 (GVA/2015), *Kazagic* Order No. 20 (GVA/2015), *Auda* Order No. 156 (GVA/2016)).

35. The Tribunal will first examine the receivability of the motion, before addressing the three cumulative conditions for granting the requested interim relief.

*Receivability*

Timeliness of the request for management evaluation

36. The Tribunal has already examined the timeliness of the request for management evaluation in its Order No. 189 (GVA/2016), following the Respondent's challenge to the receivability of the Applicant's application for suspension of action. It is noted that the Respondent did not reiterate his challenge in the present proceedings, despite the fact that the MEU found that the Applicant's request for management evaluation was time-barred.

37. In this context, the Tribunal reiterates its previous findings that the contested decision was notified to the Applicant on 22 July 2016, for the following reasons:

- a. The email of 30 June 2016 from a Human Resources Officer cannot be seen as an administrative decision but only as a preparatory step, given that 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, and in the light of the memorandum of the Chief of Programme Support and Management Services that followed on 22 July 2016; and
- b. 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, and makes explicit 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.

38. Therefore, the Tribunal finds that the request for management evaluation of 7 September 2016 was filed within the 60 day time limit set forth in staff rule 11.2(c).

Jurisdiction to grant the interim relief sought

39. Under art. 10.2 of the Tribunal's Statute, suspending the implementation of a decision related to appointment, promotion or termination goes beyond the jurisdiction of the Tribunal (*Siri* 2016-UNAT-609, *Chemingui* 2016-UNAT-641). The case at hand, however, does not fall under the exclusionary clause set out in art. 10.2 of the Tribunal's Statute, because the decisions at issue, that is, the lateral transfer or reassignment of the Applicant and that of another staff member on the post encumbered by the Applicant, do not constitute a case of "appointment, promotion nor termination".

40. Indeed, the Appeals Tribunal has expressly ruled that a lateral reassignment or transfer decision does not fall within the aforesaid exclusionary clause relating to interim measures (*Siri* 2016-UNAT-609, para. 23; *Chemingui* 2016-UNAT-641, para. 24). The latter had already followed a consistent approach in *Kaddoura* 2011-UNAT-151 and in *Rantisi* 2015-UNAT-528, where it held that rescinding the lateral transfer of a staff member without setting compensation in lieu thereof was not contrary to art. 10.5(a) of the Dispute Tribunal's Statute, which uses, in relevant part, identical wording as art. 10.2, to wit, "appointment, promotion or termination". Similarly, in *Parker* 2010-UNAT-002, the Appeals Tribunal had found that the rescission of an administrative decision involving the placement against certain functions of a staff in-between-assignments, while remaining in employment of the Organization, did not concern the staff member's appointment, promotion or termination.

41. The above is in keeping with the general maxim of law that exceptions must be construed in a restrictive manner. As this Tribunal held in *Allen* UNDT/2010/009, a case that also related to a transfer decision:

[The term “appointment”] has both a broad and a narrow meaning. On the one hand, it may include any movement to a new position. On the other hand, a narrow interpretation of the term would refer exclusively to the initial conclusion of a contract between the employee and the Organization under the UN Staff Regulations and Rules. Notwithstanding the lack of a legal definition of appointment, it should be noted that Article IV of the Staff Regulations, *Appointment and Promotions*, and more specifically staff regulation 4.2, makes a clear distinction between “appointment”, “transfer” and “promotion”, thereby indicating that the terms of “appointment” and “transfer” cover distinct notions.

42. Along the same lines, the Appeals Tribunal stated in *Siri* 2016-UNAT-609 (para. 34) that:

[A]ll matters before the [Dispute Tribunal], in some way, “relate” to appointment, as without an appointment, there is no standing before the Tribunals. However, a matter “related” to an appointment is not the same as a “case of appointment under Article 10(2) of the [Dispute Tribunal] Statute”.

43. As it follows from all the foregoing that the impugned decisions in the instant case do not come within the exclusionary clause of art. 10.2 of its Statute, the Tribunal finds itself competent to examine the motion at hand.

#### *Prima facie unlawfulness*

44. 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)).

45. The gist of the Applicant’s case is that the High Commissioner no longer had authority on 22 July 2016 to laterally transfer him to Guatemala and to laterally transfer another staff member on the post he encumbers, given the promulgation of ST/AI/2016/1. The Tribunal recalls that the two decisions are intrinsically linked, as 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. The Tribunal considers that it is appropriate to focus on an examination of the *prima facie* legality of the decision to laterally transfer the Applicant to Guatemala, for which the Applicant was in a position to submit the relevant documentation, in order to determine the present motion for interim measure.

46. 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) when he first decided to transfer the Applicant to Guatemala, and 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 decision to laterally transfer the Applicant to Guatemala essentially depends on whether the memorandum of 22 July 2016 merely implemented the High Commissioner's decision of 9 December 2015 or whether it constitutes a new decision.

47. The Tribunal previously held in its Order No. 189 (GVA/2016) that it appears *prima facie* that the memorandum of 22 July 2016 constitutes a new decision to laterally transfer the Applicant and not merely the implementation of a previous decision made on 9 December 2015, for the following reasons:

53. [T]he 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.

48. Having reviewed the submissions and the documents filed by the parties in the present proceedings, the Tribunal finds no reason to depart from its previous finding.

49. The Respondent alleged in his response to the Applicant's motion for interim measures that the ASG, OHRM, had exceptionally granted the High Commissioner authority to implement lateral transfers initiated in 2015 in the context of the Change Initiative, relying upon a communication from the ASG, OHRM, of 16 February 2017.

50. From a plain reading of this communication which is reproduced in para. 28 above, the Tribunal cannot discern any expression of a delegation of authority, as claimed by the Respondent. It rather appears to be no more than an expression of opinion by the ASG, OHRM, as to the High Commissioner's authority to implement previous decisions concerning the transfer of his staff members under the applicable rules. In this respect, it is recalled that the High Commissioner's authority to transfer the Applicant after the entry into force of ST/AI/2016/1 is a matter for this Tribunal to determine and the opinion of the ASG, OHRM, is of no relevance in this respect.

51. Even if the communication of 16 February 2017 were to be considered as a delegation of authority that entailed an authorisation to complete the implementation of the Applicant's lateral transfer, it is doubtful that it would be valid. The authorisation of the ASG, OHRM, if any, would be based on the premise that the decision to laterally transfer the Applicant was taken on 9 December 2015, following representations that were made to her by the Chief of the Programme Support and Management Services, OHCHR, in his memorandum of 8 February 2017. The Tribunal is concerned that the Chief of the Programme Support and Management Services, OHCHR, appears to have misrepresented the factual situation or, at the very least, omitted information that would appear *prima facie* relevant to the determination of the question he was asking the ASG, OHRM, to clarify.



52. More specifically, in his memorandum of 8 February 2017, the Chief of the Programme Support and Management Services, OHCHR, stated that the decision to transfer the Applicant was taken in December 2015 and provided to him on 9 December 2015. He represented to the ASG, OHRM, that “[a]lthough the General Assembly deferred its consideration of the proposed regional redeployments to 2016, OHCHR proceeded to implement other elements of the Change Initiative based on the decisions taken during 2015, including the move of posts to New York and related lateral reassignment of staff.”

53. This statement appears to be at odds with the communications issued by OHCHR following the rejection of its budget proposal by the General Assembly. For instance, in a general email of 24 December 2015, the High Commissioner informed all staff members that “[OHCHR] will, in the coming days, review the proposed lateral reassignments to determine which may proceed and which will have to be reconsidered, and ... will notify all involved staff directly”. As recalled above, the Applicant was personally informed on 15 January 2016 by the Chief of the Programme Support and Management Services that the decision to laterally transfer him would not be implemented and that any further decision would be subject to full consultation.

54. In contrast, in a Newsletters of February 2016, the High Commissioner made an announcement of the nine transfers that could be implemented. It therefore appears that the Applicant was not among those for whom a previously announced lateral transfer would be implemented despite the rejection of OHCHR’s budget proposal.

55. Also, in his memorandum of 8 February 2017, the Chief of the Programme Support and Management Services made no mention whatsoever of the exchanges with the Applicant to the effect that the decision to laterally transfer him would not be implemented, thus, giving the impression that nothing had changed between the moment the Applicant was informed of the decision to transfer him, subject to budget approval, on 9 December 2015, and the time he was informed of his transfer on 22 July 2016. As recalled in the Tribunal’s Order No. 189 (GVA/2016), a whole sequence of events happened in between.

56. Likewise, the Chief of the Programme Support and Management Services, OHCHR, did not refer to the fact that this Tribunal had expressed the preliminary view that the High Commissioner's decision of 9 December 2015 ceased to operate in January 2016, and that a new decision was taken to transfer the Applicant on 22 July 2016. He merely stated that the Tribunal considered in its Order No. 189 (GVA/2016) that "the effect of the decision to implement [the Applicant]'s reassignment in July 2016, relying as it did on a previous decision of 9 December 2015, had the practical effect of circumventing the new managed mobility system". This reference to the Tribunal's finding is, at best, incomplete.

57. In light of the above, the reliance of the ASG, OHRM, on incomplete information provided by the Chief of the Programme Support and Management Services, OHCHR, would *prima facie* appear to vitiate any exercise of authority on her part. Furthermore, as her communication of 16 February 2017 clearly states, the authorisation of the ASG, OHRM, would be contingent upon the fact that the lateral transfer of the Applicant communicated to him on 22 July 2016 indeed constituted the implementation of a decision made by the High Commissioner prior to 31 December 2015, which, as recalled above, does not *prima facie* appear to be the case.

58. Accordingly, the Tribunal finds that the case raises serious and reasonable doubts about as to whether the decision to laterally transfer the Applicant to Guatemala complied with the requirements of ST/AI/2016/1. This procedural flaw appears *prima facie* to vitiate the contested decision. This *prima facie* illegality, in turn, casts doubts as to the legality of the decision to transfer the other staff member on the post encumbered by the Applicant. If the decision to transfer the Applicant on another post is *prima facie* illegal, it follows that his post may not be lawfully available to another staff member.

#### *Urgency*

59. The Respondent argues that there is no urgency given the fact that the Applicant was informed by a memorandum of 7 March 2017 that he may be selected for "a post nearing completion in the POLNET selection process" and that the case may become moot imminently. To provide more details on this

selection process, the Respondent seeks to rely on a recommendation memorandum dated 19 January 2017, which he submitted *ex parte* as Annex 17 to his response to the motion for interim measures. The Respondent “explicitly” requested that all of the information contained in this annex remains *ex parte*, which means that it would not be disclosed to the Applicant.

60. The Tribunal recalls its longstanding practice that documents which are not disclosed to the parties, even in a redacted form, cannot be taken into consideration. It would be contrary to procedural fairness and due process rights if the Tribunal would base its decisions or judgments on evidence not available to one of the parties involved. The Respondent cannot have it both ways: if he wants the Tribunal to take into consideration a document submitted in support of his assertions, he must accept that said document be disclosed to the Applicant.

61. In the present case, the Tribunal is not convinced that it is necessary to take into account the recommendation memorandum dated 19 January 2017 in respect of an unidentified post in the POLNET exercise, for the reasons more amply detailed below. Given the Respondent’s explicit request not to disclose the information contained in this document to the Applicant, the Tribunal will not change its *ex parte* classification and, consequently, not take it into account.

62. It is noted that neither the memorandum of 7 March 2017 nor the Respondent’s response indicate if the position for which the Applicant is currently being considered is the one located in the OHCHR Office in Guatemala. It is also unclear what the Respondent means when noting in his response that “it has not yet communicated to the Applicant that he will still be transferred to Guatemala”. In any event, it is uncertain at this stage that the Applicant will be selected for this unknown post. It follows that the Respondent’s argument that the present motion for interim relief does not meet the urgency criteria on account that the issue may become moot shortly is without merit.

63. The evidence on file suggests that there is a real possibility that the decision to laterally transfer the Applicant to Guatemala, as announced to him on 22 July 2016, may be implemented at any time after 31 March 2017. Most certainly, there are strong indications that the decision to transfer the other staff

member on the post encumbered by the Applicant will be implemented imminently, as the Respondent clearly stated that this other staff member is currently working in OHCHR in New York on a temporary appointment funded through extra-budgetary funds while waiting for her formal appointment on the Applicant's post.

64. Given that there is evidence at this stage that the Applicant's lateral transfer to Guatemala and the loss of his current position are likely to be effective at any time after 31 March 2017 if not suspended, the urgency to grant an interim relief is apparent. Further, the Tribunal is satisfied that the urgency is not self-created, and that the Applicant promptly contested the decision once he received notification of the MEU's response to his request for management evaluation.

*Irreparable damage*

65. As this Tribunal previously held in its Order No. 189 (GVA/2016), 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.

66. The Tribunal reiterates that it is particularly concerned with the personal implications stemming from the Applicant's move from Geneva to Guatemala, which cannot be compensated by pecuniary damages alone. 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 decision to transfer him to Guatemala is implemented as he will be eligible for a new rotation in the near future is, again, misplaced.

67. 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 to that 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**

In view of the foregoing, it is ORDERED that:

- a. Annex 17 to the Respondent's response to the Applicant's motion for interim measure remain *ex parte*; and
- b. The decisions to laterally transfer the Applicant to the OHCHR Country Office in Guatemala and to laterally transfer another staff member to the post currently occupied by the Applicant in the SGD Section not be implemented until the consideration of the present application on the merits by the Tribunal be completed.

*(Signed)*

Judge Rowan Downing

Dated this 15<sup>th</sup> day of March 2017

Entered in the Register on this 15<sup>th</sup> day of March 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva