



**Before:** Judge Francesco Buffa

**Registry:** Geneva

**Registrar:** René M. Vargas M.

OLIVEIRA DA COSTA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for Applicant:**

Shubha Naik, OSLA

**Counsel for Respondent:**

Bettina Gerber, LPAS/UNOG

Adrien Meubus, LPAS/UNOG

## **Introduction**

1. On 1 November 2019, the Applicant filed this application for suspension of action pursuant to article 2.2 of the Tribunal's Statute and article 13 of its Rules of Procedure, challenging the decision to remove her lien on the post she encumbered as a Human Rights Officer/Deputy Regional Representative in Bishkek, Kyrgyzstan, with the Office of the High Commissioner for Human Rights ("OHCHR"), and to advertise said post.

## **Facts**

2. The Applicant is an OHCHR staff member who served in Bishkek, Kyrgyzstan from September 2012 to September 2016. She served as a Human Rights Officer at the P-4 level and then, on a temporary assignment, as Regional Representative at the P-5 level from September 2014 to May 2016.

3. From September 2016 to July 2017, the Applicant took up a temporary assignment as Human Rights Officer at the P-4 level in New York.

4. Starting on 1 August 2017, at the Applicant's request, the Administration granted her special leave without pay ("SLWOP") for a period of one year in order for her to undertake a Master's programme in Japan. The SLWOP was subsequently extended for the same purpose from 1 August 2018 to 31 July 2019.

5. By an email dated 13 March 2019, the Administration informed OHCHR staff members that liens against specific posts are granted for a two-year period only and up to five years to the Office.

6. On 5 April 2019, the Applicant, with the aim to attend an intensive Russian language course, requested an extension of her SLWOP for three months, which was granted by the Administration until 31 October 2019.

7. By email dated 12 April 2019 to the Chief of Human Resources ("CHR"), OHCHR, the Applicant inquired about "the opportunity for a lateral transfer towards the end of [2019]". She also indicated that she had started applying for positions that fit her "profile and interest".

8. By email dated 9 May 2019, the CHR replied to the Applicant that “[a]ll is OK here with regard to your return and not to Bishkek” and asked her for a list of posts she had applied for or was interested in for follow up.

9. By email dated 20 June 2019 to the CHR, the Applicant indicated she had applied for other Human Rights Officer posts within OHCHR, and, among others, for a post in Geneva, and that she was quite keen on posts in Europe.

10. In follow up emails on 3 and 10 September 2019, the CHR informed the Applicant of her placement in a location other than Bishkek upon her return to service on 1 November 2019. With respect to the Applicant’s lien on the post she encumbered in Bishkek, the CHR informed her that since she had been away for more than two years, “a lien to the office is given rather than to your position” and that Bishkek would be kept as an option.

11. On 1 October 2019, the post of Human Rights Officer at the P-4 in Bishkek was advertised by way of Job Opening No.19-Human Rights Affairs-OHCHR-123905-R-BISHKEK (G) with a closing date for applying of 14 November 2019.

12. On 16 October 2019, the Applicant was informed of her placement on the post of Human Rights Officer with the Universal Periodic Review (“UPR”), Human Rights Council Branch at OHCHR Headquarters in Geneva. On the same day, the Applicant indicated her disinterest in the UPR post and her willingness to return to Bishkek in the absence of lateral transfer options.

13. After discussions with the Administration, the Applicant informed the CHR on 31 October 2019 that although she didn’t believe her profile matched the requirements of the UPR post she was ready to start the UPR post on 25 November 2019 and would give her best to the job while keeping her options open, including a challenge to the transfer.

### **Considerations**

14. Applications for suspension of action are governed by art. 2.2 of the Tribunal’s Statute and art. 13 of its Rules of Procedure, which provide that the

Tribunal may 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.

15. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- b. The contested decision has not yet been implemented;
- c. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

16. In the present case, while no issue has been raised about conditions a) and b) mentioned above, the Respondent asserts that the application is not receivable because the Applicant has not identified a reviewable administrative decision.

17. According to the jurisprudence of the United Nations Appeals Tribunal (“UNAT”), administrative decisions are characterized by the fact that they are taken by the Administration, are unilateral and of individual application, and carry direct legal consequences for a staff member’s terms and conditions of appointment.

18. The Tribunal is aware that the mere expiration of a lien with a specific post may not be seen as an administrative decision (*Lee 2015-UNAT-583*), but in the present case, the Administration made two discreet and unilateral decisions: the removal of the lien of the Applicant’s to her previous post and the advertisement of

the job position she formerly encumbered. These decisions directly impacted on the Applicant's terms of appointment and effectively extinguished any possibility of the Applicant's return to post in question. The Tribunal therefore finds the application receivable.

19. As to the merit, the Applicant's case is that the impugned decisions are *prima facie* unlawful because there was no agreement, written or otherwise, between her and the Administration indicating that specific return rights to her post would be lost after two years. She alleges she was not informed of OHCHR's 13 March 2019 new policy on liens on posts and that if she had been informed of the lien on her post being lost, she would not have extended her SLWOP beyond two years. Consequently, she argues that she had a legitimate expectation of a right to return to her post in Bishkek at the end of her SLWOP.

20. The Respondent's case is that the decisions were lawful and taken in accordance with all applicable rules, having considered the Applicant's absence from the post and her willingness to move elsewhere from Bishkek.

21. The Tribunal does not find the impugned decisions to be *prima facie* unlawful for the reasons outlined below.

22. The administrative decisions are in compliance with the OHCHR policy of 13 March 2019, which clearly defined the Organization's rule on liens on specific posts, providing that liens on specific posts are granted for a maximum period of two-years. Beyond this time limit, the Administration will grant a general return to a position in the Office for up to five years. In the present case, the Applicant's SLWOP lasted more than two years, without interruptions.

23. The policy is applicable to all OHCHR staff and they were informed of this by email sent on 13 March 2019.

24. Given that it is for staff members to know the rules governing their work relationship, there is no requirement in the policy for the administration to give staff in advance formal advice about the future possible loss of lien on a post subsequent to a SLWOP of more than two years that was motivated by personal reasons. In addition, the Applicant appears not to have specifically followed up at any time

during her placement on SLWOP as to whether or not she maintained a lien on her post, and, if so, for what period of time.

25. The Administration did not create any expectation that the Applicant would return to the post in Bishkek, and, on the contrary, the CHR, already in May 2019, and more clearly later in September 2019, immediately after the two years term elapsed, informed the Applicant that her lien with the post in Bishkek was over.

26. As the Respondent observes in a convincing manner, it was not reasonable for the Applicant to believe that she had been granted an indefinite lien on the post she encumbered and from which she was absent for more than two years.

27. Moreover, the emails submitted by the parties showed a keenness by the Applicant to leave her post in Bishkek upon her return from SLWOP. In fact, the record shows that she not only consistently followed up on the possibility of a lateral transfer upon her return to service but she also applied for other Human Rights Officer posts within OHCHR in different duty stations, including Geneva. She indicated to the Administration her willingness to take another P-4 position that would keep her growing in her career.

28. The above-mentioned context is different from the one considered by UNAT in *Hamayel* (2014-UNAT-459) as recalled by the Applicant in her application. In the present case, the Applicant was absent from the post for a considerable time period and given her widely open choices to move to other positions all over the world, the decision by the Administration to advertise the position in Bishkek is not unjustified. On the contrary, the decision seems to be taken in good faith and in compliance with the applicable rules. The Tribunal notes that by the time the Administration advertised the position in Bishkek, the Applicant's lien to the position was formally over and the Applicant was already made aware of it.

29. Finally, it should be clarified that the application concerns only the decisions about the lien on the Applicant's former post and its advertising and that the Applicant does not challenge any decision in relation to the position that has been offered to her in Geneva.

30. Since the Tribunal does not find the impugned decisions to be *prima facie* unlawful, it will not address the issues of urgency and irreparable damage.

### **Conclusion**

31. The application for suspension of action is rejected.

*(Signed)*

Judge Francesco Buffa

Dated this 8<sup>th</sup> day of November 2019

Entered in the Register on this 8<sup>th</sup> day of November 2019

*(Signed)*

René M. Vargas M., Registrar, Geneva