UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/039/ JAB/2008/080 & UNDT/NY/2009/117
Order No.:	40 (NY/2010)
Date:	3 March 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

RULING ON PRODUCTION OF DOCUMENTS

Counsel for applicant:
Francois Loriot

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. The applicant began service with the United Nations in August 1974. From 1993 to his retirement on 31 July 2008, he held a D-2 post as Director of a Division. His applications separately concern his non-selection for the post of Assistant Secretary-General (ASG) in the Department of Economic and Social Affairs (DESA) in 2007 and the decision to withhold USD13,829 of entitlements upon his retirement in 2008, pending the conclusion of disciplinary proceedings against him, which were instigated based on a report of the Office of Internal Oversight Services (OIOS). This ruling deals with the issue whether the documents concerning his consideration for the ASG post and ultimate non-selection should be produced to the Tribunal and, if so, the extent if any to which he should have access.

Facts and contentions

2. In 2006 and 2007 a number of serious allegations, to which considerable publicity was given, were made about the conduct of the applicant in his official capacity. The truth of those allegations is not a matter for the Tribunal to determine in the current proceedings but it is not contended on behalf of the respondent that they contained any element of truth. (Fairness to the applicant obliges me to observe that lengthy investigations by OIOS found no improprieties.) There was a series of investigations, audits and reviews, which appears to have been accompanied by widespread publicity extremely adverse to the applicant's reputation.

3. In June 2007, the applicant applied for the position of ASG of DESA. He was interviewed by a high-level selection panel constituted by the Under-Secretary-General (USG) of DESA, but was not selected. It is virtually certain that the adverse publicity current at the time the applicant’s candidacy was considered was known to those persons involved in considering the applicant for the ASG post.

4. After the applicant sought administrative review of the decision to select another candidate for the position, the Chief of the Administrative Law Unit responded that he had been included on the shortlist of candidates submitted to the Secretary-General for consideration. Unsatisfied with the outcome of the administrative review, the applicant appealed to the Joint Appeals Board (JAB) and the representative of the Secretary-General adopted, in effect, the same position. However, it now appears that the applicant was not shortlisted for consideration by the Secretary-General. That such a seriously misleading statement could be made on behalf of the Administration about a very important matter easily capable of verification is a troubling feature of the case, all the more so since it arose in the context of an attempt by the applicant to exercise his rights to administrative review, and thereafter appeal to the JAB.

5. The applicant's case is that he was innocent of any wrongdoing, and that it would have been inappropriate for the selection committee to have considered his candidacy on any other basis. As a secondary issue, he contends that it would also have been inappropriate for the selection committee to have been influenced by the adverse publicity itself or by the fact that he was subject to such publicity.

6. The applicant contends that his qualifications for the appointment were so evident, at least by comparison with those of his competitors, that it is reasonable to infer that the selection committee failed to shortlist him, either because they did not treat him as completely innocent of any wrongdoing or because they were affected by the publicity surrounding the investigations. In order to make this case, he seeks access to the documents evidencing the deliberations of the committee and its report to the Secretary-General together with the documents prepared by officials in the Executive Office of the Secretary-General (EOSG). The respondent contends that these documents should not be disclosed on the grounds that they are irrelevant as the issue is not justiciable, and confidential and immune from disclosure on the grounds of privilege. I deal with each of these contentions separately below.

Relevance

7. The respondent says that the documents the applicant seeks discovery of are, in the first instance, irrelevant, as the issue is not justiciable. Counsel for the respondent characterised the applicant's case as a challenge to the "level of consideration given to his application to the position of ASG/DESA", but stated that "he does not challenge the lawfulness of the process generally." This characterisation is mistaken. In answer to the directions of the Tribunal to identify the issues in the case, counsel for the applicant specified –

> 3) Unfairness of the 8 February 2008 appointment decision to the ASG/DESA post: the SG decision was hasty, influenced by extraneous considerations and by inaccurate media report. He denied Mr Bertucci's right to the presumption of innocence and lawful and fair consideration of his candidature.

This ground is consistent with the applicant's identification of the administrative decision appealed to the JAB, contained in the applicant's preliminary statement of appeal, identified as –

> SG decision to disregard my short listed candidature and to appoint a less qualified candidate to the ASG position at DESA, a decision influenced by extraneous considerations and by an unjustified and unduly prolonged investigation at OIOS.

Although (no doubt in reliance on the wrong information from the Chief of the Administrative Law Unit) these grounds assumed that the applicant had been shortlisted for consideration by the Secretary-General, the fundamental complaint was articulated clearly enough, namely, that the relevant decision was affected by extraneous considerations, in particular, the adverse publicity.

8. As it appears, the applicant was not shortlisted for consideration by the Secretary-General, and it does not follow that, in fact, the Secretary-General of his own initiative did consider whether the applicant should be appointed and decided that he should not be upon the basis of the publicity of which the applicant complains.

The doubts about this question arise from the way in which, on behalf of the Secretary-General, the Administrative Law Unit approached the facts, making at an early stage what is now said to be an untrue statement.

9. It seems to be self-evident that the documentary material sought will disclose whether or not the publicity was a material factor in the decision not to shortlist the applicant, and thus the decision of the Secretary-General not to appoint him. I can understand the concern of the respondent that, because of the need to prove a negative, it might need to disclose material which, for a number of good reasons, including the privacy of the persons involved, should be kept confidential. However, this concern can be addressed – as conventionally occurs in domestic jurisdictions – by production of the documents in question to the court, so that the judge can inspect the material and determine whether it is capable of assisting the party seeking its production. In this case, if the documents are not capable of disclosing that publicity was taken into account, then it would be proper for the Tribunal to refuse access to them by the applicant since, in that event, they would be of no assistance to him. This procedure is further discussed below.

10. Accordingly, since it is at least reasonably possible that the documents in question are relevant to the issues in the case, they should be produced unless there is good reason for not doing so.

11. I should mention a further submission made under this head by the respondent, which is in the following terms –

> A decision of this nature is an example of the exercise by the Secretary-General of his discretionary powers. It is comparable to the power of a Head of State to appoint cabinet level officials and take decisions and enter into agreements in matters relating to diplomatic and international affairs. In this regard, Heads of State are accountable, politically, not judicially and so, by analogy, is the Secretary-General. The decision to appoint one cabinet official as opposed to another is not justiciable. The appointment of ASGs and USGs is comparable. Thus, any evidence concerning a decision about how a *particular candidate's candidacy* to the post of ASG/DESA was

> treated can never be relevant, as such a decision is not one that is open to challenge. [emphases in original]

The first sentence of this astonishing submission is correct. It is the only sentence that is. Not surprisingly, no authority was cited. It also misstates the issue in the case. It is not a question of whether one candidate was better than another. It is whether legally irrelevant considerations were brought into account in not appointing the applicant. In this respect, the relevant legal issues concerning the process of the appointment of an ASG by the Secretary-General do not differ *in principle* from those concerning the process of appointment by any other lower-level official. Although it is self-evident that the factors relevant to any appointment vary according to the responsibilities and functions of the position, the process of appointment must comply with legal requirements. The Secretary-General has wide powers, but they must be exercised within the legal bounds of his authority or else, in respect of any administrative decision affecting the employment of a staff member, they will constitute a breach of the contract between that staff member and the United Nations, which is required to be remedied by this Tribunal upon application by an applicant. The attempt to carve out a "no-go" area for the Tribunal by confining it, at this stage, to decisions to appoint ASGs or USGs is not based on any logical distinction and the argument, if allowed, cannot logically be limited to such decisions.

12. If it were not for the grave consequences that would follow from acceptance of the respondent's submission, its quotation and the above discussion would be sufficient to refute it. However, it is necessary, this being the first time such a contention has been proffered to the Tribunal, to take a little trouble to demonstrate its fundamental error. I was reminded, when I read the submission, of the celebrated passage from the dissenting speech of Lord Atkin in *Liversidge v Anderson* [1942] AC 206, a case which concerned whether the Minister of State was empowered to make decisions just because he thought they were reasonable, whether they were in fact reasonable or not: "In this case I have listened to arguments which might have been addressed acceptably to the Court of Kings Bench in the time of Charles I", a

time when the King asserted absolute power and the judges could be dismissed at the royal whim.

13. The position of the Secretary-General was made clear by the Charter itself in article 97: he is the *chief administrative officer* of the Organization. He is no doubt an important official but his office is not in any respect analogous to that of a Head of State. In respect of his functions, though he has a wide discretion, he is as subject to the rules, regulations and administrative issuances as any staff member and he is answerable to the Tribunal in respect of any administrative decision he makes affecting the employment of a staff member of any level. The Statute of the Tribunal makes this clear beyond argument. This is not to say, of course, that the Tribunal will exercise the discretion of the Secretary-General for him. But, to suggest that the Tribunal has no jurisdiction to determine whether a discretion which has been personally exercised by the Secretary-General has been lawfully exercised in respect of an administrative decision because his status is akin to that of a Head of State, is to attempt to fundamentally change the plain language of the Statute which creates the Tribunal and confers its jurisdiction, in which no distinction whatever is drawn between administrative decisions of the Secretary-General and administrative decisions made by other officials.

14. The administrative decisions of the Secretary-General, like those of any other decision-maker, must be made lawfully. At the most fundamental level, this means that his discretion, where it exists, must be exercised reasonably for the purpose for which it is conferred. Although usually stated as additional requirements, the following legal prerequisites are really instances which apply this fundamental rule: the decision must not be marred by extraneous or irrelevant considerations; it must take into account all significant relevant matters; it must not be affected by a mistake of significant fact or law; and it must not be such that no reasonable decision-maker would make it. (For convenience, I refer to these requirements as "the rules of propriety".) I observe that, although these rules are also expressed in administrative law contexts, they follow by necessary implication by reposing in the Secretary-

General (and all officials of the Organization) powers defined by legal instruments and administrative issuances that form part of the contract with the Organization's employees.

15. Counsel for the respondent urged on me the relevance of administrative law notions in determining the content of the contractual rights and obligations applicable to staff members of the United Nations. I have discussed this issue elsewhere (see *Wasserstrom* Order No. 19 (NY/2010)) and do not intend to repeat what I there said except to point out that the notions of administrative law were developed in the context of mediating between the State on the one hand and the subject on the other. In no sense whatever is a staff member a subject of the United Nations. The relations between State and subject are fundamentally different from the contractual relationship of employer and employee, in which – in law – each party is on the same level, with the rights of one reflected in the obligations of the other, and determined by a Tribunal in which the lowest grade General Service employee stands equal in every sense with the United Nations itself.

16. At all events, counsel for the respondent did not refer to any principle of administrative law that illuminates the present issue. Of course, questions of privileged communications often arise in administrative law cases, but they are not resolved by the application of administrative law principles, but by general principles which are applicable across the common law. I did not, by making a remark as an aside during argument suggesting the irrelevance of administrative law, intend to provoke a submission on the point although, of course, I am happy to receive anything that deals with a matter actually in issue.

17. I deal below with what I regard as the appropriate approach to the conditions of the contract of employment between the Organization and its staff members concerning issues which, elsewhere, attract the language of public policy. For the present it is enough to say that no right or obligation deriving from an employment contract with the United Nations can be affected by any notion of public policy. In

its character *as an employer* the United Nations is simply a corporation although, it may be, incorporated by international law and thus not accountable to any legal system but its own. The Tribunal is not concerned with the role of the United Nations in international affairs; it is concerned with the rather more humble question of the rights and obligations created by its contracts of employment. Unless some particular matter is part of those contracts, it might be interesting but it is irrelevant.

18. The decision to appoint or, more pertinently, not to appoint a person as an ASG is an administrative decision, and it falls within the purview of the Tribunal to determine whether it is lawful and not. It may well be that special considerations apply to such an appointment, for example that it is outside the specific provisions of the legal instruments governing other appointments (see General Assembly resolution 51/226), and there are a wide range of processes which may legitimately be adopted for the purpose of deciding it. But that does not mean, and it does not logically follow that, in making his decision, the Secretary-General acts outside the legal limits applying to all administrative decisions affecting staff members. If the choice and application of the process is marred by the failure to comply with the rules of propriety, the decision will be unlawful as being outside the authority conferred on the Secretary-General by the Charter and contrary to the contract of employment of which the Charter is a part. That this analysis must be correct is easily demonstrated by a simple example: suppose that an otherwise suitable candidate was not considered for appointment for racist or sexist reasons, or that the process for identifying candidates excluded persons upon the basis of their race or sex; could it be seriously argued that such a decision or the choice of such a process was within the proper discretion of the Secretary-General? It is clear that the answer must be in the negative, since this would be to breach the fundamental norms of the United Nations itself, which are binding on the Secretary-General and govern the legally authorised extent of his administrative authority in respect of the appointment of any staff member. It follows that such a decision is not only inherently justiciable, it falls squarely within the jurisdiction of the Tribunal to determine.

19. The respondent does not seek to make the argument, at least at this point of the proceedings, that taking into account adverse but unjustified publicity reflecting unfairly on the reputation of the applicant as a significant factor tending against the applicant being considered as suitable for appointment was nevertheless lawful. (For obvious reasons, it is at least fairly arguable that it is, depending on the way it was done.) The respondent's argument is far more fundamental: whatever the Secretary-General took into account to reject the applicant's candidacy, however unreasonable, irrational or affected by immaterial prejudice is irrelevant, since the issue is not justiciable and he is politically but not judicially answerable for his decision. This argument is utterly and fundamentally wrong and must be firmly and unqualifiedly rejected.

20. Another basic problem with the respondent's submission is that it is conceded that the Secretary-General did not consider the applicant's candidacy, since his name was not on the shortlist of candidates recommended by the selection committee. If this be true, the crucial decision is whether the applicant was excluded from the shortlist by the selection committee for an irrelevant or extraneous reason. It does not seem to be submitted, as I understand it, that the selection committee is in the same position as that of a Head of State. Accordingly, the respondent seems to have taken the high ground upon an irrelevant mountain. Even so, because of the importance of the point, it was necessary to deal with it. I add, for completeness, that I do not think that a selection committee can be regarded, in any relevant sense, as akin to a Cabinet or that either the situation of the committee or officials of the EOSG advising the Secretary-General is analogous to a senior civil servant advising a Minister.

Confidentiality and immunity from disclosure

21. This is a more substantial point. The respondent puts the argument thus –

> 16. The Secretary-General and his close advisers must have the ability to engage in a candid interchange amongst themselves to fulfill their duties and to carry out decision-making without risking any potential chilling effect that may result from the fears of senior officials and the

> Secretary-General himself that such exchanges and decision-making may later be compelled to be disclosed.
>
> 17. Such considerations extend to communications made by the Secretary-General's advisers in the course of preparing advice for Secretary-General in the exercise of his discretion. Those charged with the responsibility of making decisions about high level appointments must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny. Otherwise, interview panels and others charged with providing the Secretary-General with advice might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from providing difficult or controversial advice.
>
> 18. The appointments process for senior-level posts works best when the Secretary-General and his advisers are free to express themselves unreservedly.
>
> 19. The cumulative effect of these factors, the Respondent submits, is to weigh the balance of public interest in favour of non-disclosure.

It will be seen that this claim of confidentiality does not depend upon the content of the material of which production is sought. Rather, it is contended that the very nature of the discussions, concerning, as they do, the appointment of ASGs and USGs require them to remain confidential, whatever might be their content.

22. I requested counsel for the respondent to include as part of their submission on this question an analysis of relevant legal authorities in both domestic and international tribunals. If I may say so, counsel have provided me with a very useful submission, identifying this learning and extracting relevant parts of the judgments. Not surprisingly, the submission as to the status of the Secretary-General includes cases from England and Canada dealing with disclosure of Cabinet deliberations. In light of the conclusion already stated that the Secretary-General is in no way analogous to a Head of State or a Head of government (nor, by parity of reasoning, to a Minister of State), these judgments are of little assistance. However, the submission also helpfully refers to judgments of the Administrative Tribunal of the International Labour Organisation (ILOAT), to which I now turn.

23. In *Ali Khan* (1983) ILOAT 556 the complainant, who occupied a P4 post, unsuccessfully applied for a vacant P5 position and submitted an "internal" complaint to the Director-General which, it appeared, covered both his disappointment and a number of grievances concerning his career with the Organization. His complaint was rejected. He sought from the Tribunal an order for disclosure of: (a) the full text of the inquiry into his internal complaint, as well as any other relevant papers and the Director-General's decision; (b) the report of the selection board and all documents, submitted to it; (c) a statement of the reasons for his elimination; (d) the report or reports of the Administrative Committee to the Director-General and his decisions on them; (e) all reports of the juries in competitions which he had entered since 1964; and (f) the "secret file" maintained by the Office on the complainant.

24. The Tribunal found that, in relation to (a), no such document existed. In relation to (b), the Tribunal noted that the Organization had produced a report by the selection board, with all names other than the complainant's obliterated, which gave as the reason for his elimination "lack of actual socio-economic research experience" and stated –

> 4. … The complainant may not obtain any further explanation. In particular he has no right to know the identity of all the candidates who were eliminated, who may have good reason to wish to remain anonymous. Nor is he entitled to consult any record there may be of discussion by the selection board. Members of selection boards would not feel free to discuss candidates independently in future if they were at risk of having their personal views divulged.

Access to further information as to the reasons for the complainant's elimination was also denied upon the same basis.

25. Objection was also taken to production of the material in (d) upon the basis that it was confidential and added nothing to what the complainant already knew. However, production was ordered, as the Tribunal "[felt] bound to verify this contention", then having determined to decide whether it would be included in the dossier of the case. As to (e), the documents were found to be immaterial.

26. One of the difficulties with applying the principle of confidentiality enunciated in this judgment is that it is unqualified. In particular, no distinction is made between producing the documents to the Tribunal on the one hand and giving access to the staff member on the other, a well-established technique in domestic jurisdictions for ensuring that justice can be done whilst maintaining essential confidentiality. Nor is there any discussion of the rights of the staff member to a decision which is properly arrived at or of the jurisdiction of the Tribunal in respect of those rights. Not surprisingly, as will be seen, *Ali Khan* has not received significant support in later jurisprudence of the ILOAT.

27. In *Omokolo (Nos 1 and 2)* (1991) ILOAT 1115, the complainant was refused a permanent appointment, and a base salary step increase was withheld, essentially, because of alleged misconduct. The negative work reports were said to justify a non-extension of his employment. These decisions were appealed and the complainant, alleging improper communications designed to influence the Director-General against him, sought disclosure of notes taken of conversations between the Director-General and the Permanent Representative of the applicant's country and of correspondence between his employing Organization and the Permanent Mission. In respect of the notes, the Organization claimed that none had been made. As to the correspondence, the Organization claimed privilege from production to the applicant, but did not object to the Tribunal seeing it for the purpose of ruling on the plea of privilege. Having read the material, the Tribunal upheld the claim of privilege, saying that they were "formal letters … and as such should be protected by privilege". There was no need to consider the question of privilege in relation to the notes.

28. In *Der Hovsepian* (1992) ILOAT 1177 an external candidate was selected for a post in the International Postal Union, despite the complainant having been ranked higher by the Appointment and Promotion Committee than any of the external candidates. He sought disclosure of these ratings. The respondent refused to disclose them, claiming that the Committee's discussions are privileged and also refused to disclose the report of the appeal committee, which he had declined to follow. The Tribunal rejected that assertion and ordered disclosure, stating –

> An item that forms part of the decision may not be withheld from the Tribunal's scrutiny. That holds good for the Joint Appeals Committee's report as well … There shall therefore be further submissions to complete the case records, the Union being required to supply the reports of the Appointment and Promotion Committee and of the Joint Appeals Committee.

29. In *Morris (No.2)* (1994) ILOAT 1323 the complainant alleged that he was not fairly considered for positions to which he should have been appointed, having regard to his priority as a displaced employee. After a number of unsuccessful applications, he was passed over for a post at his grade because the successful candidate's "qualifications and experience were more suited to the job". The respondent refused to provide particulars of the person selected but eventually disclosed he was an external candidate. To justify its claim of privilege, the Organization relied mainly on a memorandum of 28 March 1983 by the Director-General which said, inter alia –

> … [Members] of Selection Committees should be free … to state their views frankly and without constraint so that the most qualified and best candidate is selected. They must therefore feel assured that their views are expressed, recorded and protected as privileged material. Full confidentiality of such internal documentation and discussions must also be guaranteed in order to protect the interests of third parties, ie, other candidates for the vacancy.

The Tribunal ordered disclosure, stating –

> The Tribunal does not accept that the disclosure of a candidate's identity and qualifications may be properly regarded as likely in any way to inhibit the free expression of views by members of selection committees or to prejudice the interests of other candidates. In this case the external candidate's qualifications were of essential importance to the selection committee in making its choice and to any appeal against the appointment made. As was held in Judgment 1177 (*In re Der Hovespan*), an item that forms part of the proceedings that led to the impugned decision may not be withheld from the Tribunal's scrutiny. The Organization's plea…[that the external candidate was superior] fails because of the utter lack of evidence to suggest that the external candidate was better qualified than the complainant.

30. The Tribunal applied similar reasoning in *Malhotra* (1994) ILOAT 1372 where the Selection Committee documents were sought by the relevant Board of Appeal (though not by the complainant). The Organization claimed privilege upon the grounds set out in the same memorandum as had been tendered in *Morris (No 2).* The judgment set out the relevant paragraph in full. The Organization's contention reads –

> It is essential and in the best interests of the Organisation that, when assessing candidates and submitting recommendations for selection, supervisors and members of selection committees should be free – within the selection committee's scope and terms of reference – to state their views frankly and without constraint so that the most qualified and best candidate is selected. They must therefore feel assured that their views are expressed, recorded and protected as privileged material. Full confidentiality of such internal documentation and discussions must be guaranteed in order to protect the interests of third parties, ie other candidates for the vacancy.

31. Dealing with this contention, the Tribunal held –

> Only from examining the documents sought by the regional Board in this case would it have been possible to determine whether, as the complainant was contending, the shortlist had been improperly stretched to favour the successful candidate and due weight had not been given to comparison of seniority, performance and experience as between him and the successful candidate. For example, if a member of the ad hoc selection committee had dissented, the reasons for the dissent might well have had some bearing upon those contentions. The factor-rating sheets, too, and the minutes and recommendation of the selection committee, including any dissenting note, were all part of the proceedings. When the Organization declined on the grounds of privilege to disclose the information and documents called for by the regional Board it withheld items that formed part of the proceedings leading up to the impugned decision and prevented determination of what the headquarters Board rightly called the one central issue, namely "the factor rating and listing procedures applied by the [ad hoc selection committee] in reaching their decision".

32. The Tribunal adopted the reasoning in *Der Hovespan* and *Morris (No.2)* saying –

> 11 … [An] item that forms part of the proceedings that led to the impugned decision may not be withheld from scrutiny by the Tribunal. That holds good for any appellate body. So the Administration ought to have disclosed to the … Board the documents it required to enable it to take up the complainant's appeal properly.
>
> 12 That rule applies equally to the views expressed by members of the ad hoc selection committee. Since there was a right of appeal against the selection based upon the committee's recommendation, both the regional and the headquarters Boards were entitled to review the reasons of the selection and for the recommendation so as to ascertain whether there had been some fatal flaw, such as an error of fact or law, personal prejudice or arbitrariness. The failure to disclose the views expressed by those who had made the recommendation frustrated the appeal proceedings.

33. Accordingly, the Tribunal concluded that there was no proper examination of the complainant's appeal by the regional or headquarters Boards and required them to take up the appeal anew in light of the full records of the ad hoc selection committee's proceedings.

34. No reference was made in *Der Hovespan, Morris (No.2)* and *Malhotra* to *Ali Khan* although it is clear that the claim of privilege made by the respondent used identical language to that of the Tribunal in *Ali Khan* (and similar to the rejected contention of the respondent in *Malhotra*) as requiring rejection of the claim to production.

35. Lastly, in *Fauqex* (1996) ILOAT 1513 the applicant, a supply officer whose position was abolished, claimed that the Organization had promised to give her priority of appointment to another suitable position, in particular, against the appointment of someone else as a supply officer. She applied for a vacant post as a supply officer but, though she was shortlisted and interviewed, another candidate was chosen. She appealed her non-selection on the basis of the claimed promise and sought production of the records of discussions of the selection committee that had considered her application. At the request of the Board of Appeal, the Organization submitted to it a copy of the

selection committee's report, but objected to disclosure to the complainant on the ground that the committee's records were privileged. In this respect, the Tribunal stated –

> 6. As a general rule, a complainant may not be entitled to consult any records that may have been made of discussions by a selection committee: members of such committees would not, feel free to discuss candidates independently in future if they felt at risk of having their own views divulged: see *Ali Khan*.
>
> 7. The Tribunal is satisfied that the plea of privilege can be sustained. The documents which were before the Selection Committee and which referred to the complainant consisted of documents she had herself submitted. There were also reports on the interviews with her on 21 April 1994, and they are privileged for the reason set out in 6 above. The privilege that protects the Committee's actual deliberations must cover also interviews held in preparation for its meeting.

36. It seems clear that the thrust of these judgments is, at least, that the relevant material should be provided to the Tribunal, if not to the staff member. *Ali Khan* does not refer to this distinction but, as I think, cannot be regarded as contrary authority, having regard to its silence on the point. Moreover, if the rule stated in that case were absolute, it would effectively destroy the ability of a staff member to appeal a decision of appointment or promotion. More fundamentally, it would undermine the jurisdiction of the Tribunal to make determinations of the lawfulness of such decisions, which is an obviously important part of the work entrusted to it by the General Assembly.

37. There are three other relevant considerations. The first is that the administration of justice necessarily involves the ascertainment of the truth where to do so is necessary in the interests of a just outcome, and this means that all relevant information should be provided to the Tribunal unless the circumstances are truly exceptional and the Tribunal is unable to make adjustments to satisfy considerations of confidentiality or privacy. The second consideration is that a staff member must be entitled to a fair hearing and to present a case which brings to bear all the facts that favour, or might favour, the conclusion for which he or she contends. Although in

other jurisdictions these considerations might be described as "public policy", it is not necessary to base them on such a concept within the United Nations justice system. They are inherent in the system itself and necessarily implied by the creation of the jurisdiction of the Tribunal by its statute. Accordingly, they are part of the bundle of legal rights and obligations forming the contractual conditions of employment. This is both a necessary and sufficient basis for the application of these considerations by the Tribunal.

38. The third consideration is more directly concerned with the process of selection and deals with the knowledge of the members of the committee that their deliberations and reports might be disclosed to the Tribunal and, potentially, to staff members. Those deliberations and reports might contain critical, even harsh, references to candidates, which it could well be embarrassing to disclose and which the committee members would wish to be kept confidential, because it might be that, in the future, they have to deal with a staff member who is the subject of this criticism. This risk is very real where those members are chosen from within the Organization and sometimes within the very office in which candidates work and may be compounded where the selection of senior staff is concerned. It may readily be accepted that members might well feel inhibited from candidly expressing their opinions if they fear that they might be disclosed to the person affected and I accept without difficulty the contention that this inhibition is contrary to the good administration of the appointment and promotion process. Selection of staff members for posts is a difficult process, requiring exercise of good judgment and necessarily involving matters of impression. It is an inherent feature of using committees to make recommendations that the Organization has the benefit of shared judgment, so that a possibly unfair or mistaken impression from one member will be corrected or balanced by the impressions of the others, each bringing to the discussion the particular insights derived from their knowledge and experience.

39. It is obvious, therefore, that committee members must be free to discuss candidly the attributes, both positive and negative, of the candidates for selection, and

that confidentiality is therefore an essential part of the process. At the same time, it is also essential that the process not be marred by procedural or substantive errors and that staff members be entitled to a determination by an independent Tribunal of a complaint that the decision which affected them erred in these ways. Such a determination must depend upon the ascertainment of the relevant facts and, accordingly, of what was done by the committee, as well as the advice tendered to and relied on by the decision-maker. This is not to say that there are not significant advantages in the committee members appreciating that since, if litigation should ensue, their deliberations – at least so far as they have been recorded – will be seen at least by the Tribunal and possibly by the staff member affected. This will help to ensure that what is said is measured and reasonable and does not contradict or undermine the fundamental values of the Organization. If what is said is measured and reasonable no member need fear the risk of embarrassment from disclosure of the records to the Tribunal.

40. It follows that all such relevant material will always be required to be produced to the Tribunal, since such production does not breach any relevant confidentiality or privilege and the Tribunal, it goes without saying, will keep confidential all that material which, in its opinion, should remain so. It is a fundamental feature of the administration of justice that the decision as to what material is relevant and should be produced and what part of it, if any, should remain confidential, is for the Tribunal, and the Tribunal alone, to determine. It is not necessary for present purposes to identify the relevant principles applicable to the latter question. It is enough to say that it cannot be for the respondent to decide.

41. Hitherto, as I understand it, the Administration has invariably produced documents relevant to a selection, including those recording the deliberations of a selection committee, to a JAB considering a staff member's appeal against non-selection, where they were material, with irrelevant content excised. I assume that, if the JAB so requested, some or all of the excised material would also be provided. It

also appears that the same material would usually be made available to the staff member.

42. It is perhaps important to have regard to the legal context in which a staff member's appeal against non-selection falls to be considered and which explains why the selection committee documents were usually provided. In *Williamson* (1986) UN Administrative Tribunal 362 the UN Administrative Tribunal said –

> VII. The Respondent seeks to show that the Administration fully considered the Applicant for the Deputy Directorship of Shipping notwithstanding the absence of a vacancy announcement. The Respondent was well aware of the various recourse procedures instituted by the Applicant, during this period, all of which had failed. The Respondent observes that the Applicant had repeatedly sought promotion and that his persistence in this respect was well known to the UNCTAD Administration. The Respondent therefore asserts that "Applicant has not demonstrated that he had not been considered …" As to this particular assertion, the Tribunal holds that since the staff member has a statutory right to have "the fullest regard" given to his candidature, the burden of establishing the Administration's failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave "the fullest regard" to it.

This approach had been followed consistently by the Administrative Tribunal, although not always explained in quite the same language: see, for example, *Shamapande* (1997) UN Administrative Tribunal 828, *Abbas* (1989) UN Administrative Tribunal 447, *Agbele* (2004) UN Administrative Tribunal 1188. It is obviously difficult to make even a "minimal showing … of good faith", if no documentation explaining the decision is produced.

43. The nature of the burden on the Administration, with particular reference to the distinction between the ultimate and the evidentiary burden of proof, was discussed by me in *Sefraoui* UNDT/2009/095, and it is not necessary to repeat that discussion here. I wish simply to point out that, at least, the respondent bears the evidentiary burden of proving the propriety of the selection process including, in

particular (for the purposes of the present case), of establishing that irrelevant matters were not taken into account. The absence of evidence capable of satisfying this burden has obvious consequences for the outcome of the case and it matters not that it has not been produced because it is privileged.

44. Of course, only that part of the material which is relevant to the particular issue in the case needs to be disclosed to the applicant. It must be established at the outset that there is at least a reasonable possibility that the material sought is relevant to the issues in the case and capable of assisting the staff member. Where there is an issue about this, the material must first be produced to the Tribunal to be examined by the judge. If the judge finds that it irrelevant, or does not assist the applicant, access to the staff member should not be granted and only that part which does assist the applicant's case should be disclosed.

45. It is not altogether clear whether the respondent argues in this case that the privilege against production, formulated as an absolute rule against production even to the Tribunal, applies to all appointment or promotion cases or only those of ASG and USG. I am unable to see any difference in principle between the requirements of confidentiality in the ordinary case and those applying at the senior level. These officials are staff members and applicants for these posts are entitled to the same rights as all applicants for any post. Nor is there any difference in the obligation of the Organization and the Secretary-General to comply with the rules of propriety. There is nothing in the Charter, the regulations, the rules or any administrative issuance that suggests any such difference in legal obligations.

IT IS THEREFORE ORDERED THAT —

46. The respondent is to produce to the Tribunal by close of business Friday, 5 March 2010 the documents considered by the Selection Committee, the records of the deliberations of the Committee and any communication by it to the Secretary-General together with the documents prepared by officials in the EOSG relating to the appointment of the ASG/DESA.

47. I will then determine what parts, if any, should be disclosed to the applicant and under what conditions. Before granting access, if any, the respondent will be notified of those parts intended to be disclosed and invited to make a confidential submission giving particular reasons why, it is contended, access to an identified part should not be granted.

(*Signed*)

Judge Adams

Dated this 3rd day of March 2010