Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

XU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Ming Wu

Counsel for respondent:
Stephen Margetts, ALU/OHRM

Background

1. Between 1 March 1997 and 29 December 2000, the Applicant was engaged on various short term contracts by the United Nations. On 10 April 2001, she joined the Division of Conference Services at the United Nations Office at Nairobi (UNON), as a Chinese Translator at the P-3 level. On 1 June 2004, she was promoted to the post of Chinese Reviser at the P-4 level. The Applicant is contesting the decision not to select her for the position of Chinese Reviser, 08-CON-DGACM-418629-R-New York at the P-4 level (hereinafter referred to as "the post").

Facts

2. On 18 September 2008, the post was advertised on Galaxy with a deadline for applications of 17 November 2008. On 18 September 2008, the Applicant applied for the post which is within the Chinese Translation Service (CTS) in the Documentation Division, Department of General Assembly and Conference Management (DGACM).

3. The Applicant was entitled to be considered at the 15-day mark in accordance with paragraph 5.4 of ST/AI/2006/3 – *Staff Selection System*. The Programme Manager for the vacancy announcement determined that the applicant was not suitable for assessment at this first stage and that candidates eligible at the 30-day mark should also be considered. The Applicant was included in the list of 30-day candidates.

4. On 24 October 2008, the Applicant and 8 other candidates were invited for a competency based interview and were also requested to submit two pieces of work for technical evaluation. Following the interview and the assessment of her work, all four panel members concluded that the applicant should not be recommended for the post.

5. On 12 February 2009, the Applicant addressed a letter to the Secretary-General requesting administrative review of the decision not to select her for the post. On 6 April 2009, the Acting Chief of the Administrative Law Unit, Office of Human Resource Management, informed her that the records indicate that the decision not to select her for the post was made in accordance with the provisions of the relevant rules and policy of the Organization. The Applicant was also advised that the letter constituted the administrative review of the decision not to select her for the post and that should she not be satisfied with the review, she could appeal it within one month pursuant to staff rule 111.2(a) (i) which was applicable at the time.

6. Thereafter on 5 May 2009, the Applicant filed a statement of appeal with the Nairobi Joint Appeals Board (JAB) to challenge the decision not to select her for the post. On 8 July 2009 and 30 July 2009, the applicant and the representative of the Secretary-General were informed that the matter had been transferred to the United Nations Dispute Tribunal, Nairobi Registry in accordance with ST/SGB/2009/11 – *Transitional Measures Related to the Introduction of the New System of Administration of Justice.*

7. On 13 October 2009, counsel for the Respondent filed a Motion for *extension of the time limit to file and serve a reply*, which reply was supposed to have been filed by 5 July 2009. The Registrar of the Nairobi UNDT on 19 October 2009 informed the Respondent's counsel that the Judge assigned to the case had perused the Motion and required further and better particulars. The further and better particulars were subsequently filed on 21 October 2009 and on 23 October 2009, the Tribunal granted the Motion for filing of a late reply and informed the parties that the reply was deemed to have been duly filed on that date. On 29 October 2009, the parties were notified of a status conference for 4 November which was aimed at ensuring the readiness of the case for hearing.

Issues

8. At the said status conference on 04 November 2009, counsel for the Respondent was absent but explained later that he had miscalculated the time difference between Nairobi and New York. Pleadings having been closed, the following issues for determination were formulated on the part of the Applicant:

(i) That there has been a breach of the UN selection procedures and criteria, specifically;

(a) There has been a violation of the Applicant's right to be considered at the 15-day mark.

(b) That the gender equality principle of the UN in the interview and selection process was not observed.

(ii) In considering the issues of breaches as outlined above, the proper construction to be placed on section 7 of ST/AI/2006/3 and the relevance of ST/AI/1999/9 to this case.

(iii) That the Applicant was discriminated against on the grounds of being from the Nairobi duty station rather than New York where the post is located.

(iv) That the failure to inform the Applicant of the selection process constituted a violation of her rights.

9. For the Respondent who sent in his list later, the issues were:

(i) That the Applicant was fully and fairly considered for the post she had applied for.

(ii) That the Applicant was accorded all priority due to her as a lateral move candidate.

(iii) That there was a competitive assessment conducted in accordance with the relevant provisions and practices of the Organization leading to the selection of a candidate other than the Applicant.

HEARING NOTICES

10. On 3 December 2009, the Registrar served hearing notices on the parties informing them that the matter had been set down for hearing on 18 December 2009 at 1600 hours Nairobi time.

HEARING

11. The Tribunal commenced hearing in this case at about 16.30 hours Nairobi time on 18 December after several attempts made to contact the Respondent's counsel and secure his attendance by audio conference had proved unsuccessful. The Applicant did not call any witnesses but her counsel made an oral address to the Tribunal.

12. On the issue that the Applicant's right to due process was violated because she was not considered at the 15-day mark, the Applicant's counsel referred the Tribunal to the provisions of section 7.1 of the Administrative Instruction on Staff Selection System ST/AI/2006/3. He argued that the section requires that first priority be given to lateral move candidates who are eligible to be considered at the 15-day mark. Counsel submitted that being a rostered candidate who had applied for a lateral move to another P4 position, the Applicant was entitled to be considered in a separate pool from 30 day mark candidates. Instead, he continued, she was assessed and interviewed with 30-day mark candidates and was not considered at the 15-day mark.

13. Applicant's counsel submitted further that the Programme Manager acting for the Respondent has failed to produce whatever information she relied on to decide that the Applicant was not a suitable candidate at the 15-day mark. She has only produced the results of the interview at the 30-day mark in which the Applicant had been made to participate.

14. On the claim that the gender equality principle was not observed in the selection process, counsel argued that being a rostered candidate necessarily implies that the Applicant meets the standard for the advertised position. He continued that the Applicant's qualifications are at least equal or even superior to that of the male candidate who was selected at the 30-day mark. He then submitted that the gender equality principle should have then become operative and the Applicant ought to have been selected.

15. As to the allegation of discrimination on the grounds that the Applicant is from the Nairobi duty station rather than New York, counsel argued that it is a common phenomenon that candidates from duty stations other than New York are marked down in preference to candidates already serving in New York. He submitted that there is a pattern of excluding others and that Nairobi candidates are often excluded from taking up posts in New York as the former is a recognised hardship station with security challenges and high vacancy rates.

16. The Applicant's counsel also canvassed the issue of the failure of the Programme Manager to inform the Applicant of the outcome of the selection process in the instant post.

17. He referred to section 9.5 of ST/AI/2006/3 and argued that the Applicant's right to be informed of the outcome of the selection had been breached. He continued that had the Applicant been duly informed, she would have been in a better position at the earliest opportunity to consider other choices open to her. It is the Applicant's

contention that not being informed of the outcome of the selection process placed her under psychological pressure and resultant damage.

18. At the close of submissions by the Applicant, fresh efforts were made to contact counsel for the Respondent, Mr Stephen Margetts, who at the start of proceedings could not be located. Eventually, the phone was answered at the Administrative Law Unit (ALU) by Ms Susan Maddox. Ms Maddox advised the Tribunal that she would hold brief for Mr Margetts, asking only for a brief standing-down while she located the case file. The Tribunal granted the application to stand down the matter to give Ms Maddox time to locate the case file and peruse it.

19. The Tribunal then read out the issues raised at the hearing by the Applicant and the arguments and submissions made on the said issues to Ms Maddox. She in turn responded to the issues canvassed by the Applicant.

20. On the matter of not considering the Applicant at the 15-day mark, counsel argued that being rostered does not mean that a candidate is suitable for a vacancy which has been issued. The rostered candidate would still need to be assessed for suitability for the specific post, she argued. In reply to a question by the Tribunal, counsel submitted that a review of the rostered candidate's Personal History Profile (PHP) and Performance Appraisal (EPAS) by the Programme Manager satisfies the requirement of 'consideration' at the 15-day mark as required by the ST/AI/2006/3.

21. On the claim that the gender equality principle was not observed, counsel submitted that the Applicant's candidacy was clearly not substantively equal to that of the selected male candidate thus making the gender equality principle an irrelevant factor.

22. On discrimination, counsel submitted that no evidence or proof of this allegation has been tendered before the Tribunal so that no discrimination of any sort could properly be found.

23. Counsel for the Respondent conceded that the Applicant has a right to be informed about the outcome of the selection process but submitted that no award ought to be made on this score as no proof of damage had been established.

Motion for Retrial

On 18 December 2009, Stephen Margetts, counsel for the Respondent, brought an application for the re-trial of this matter on the ground that the Respondent was not notified of the hearing dates..

24. According to counsel, a notice of hearing was sent both to him and the Administrative Law Unit (ALU) by the UNDT on 2 December 2009 but due to a technical defect, he did not receive the email although the ALU received it. An earlier email sent by the UNDT on 19 November 2009 to Mr Margetts had suffered the same fate as counsel did not receive it but the ALU did.

25. Specifically, in paragraph 7 of the application, counsel for the Respondent states as follows:

> As stated above, the ALU were copied on the emails and received the emails. However due to the fact that the name of the Respondent's counsel appeared in the "To" window, other members of the ALU did not forward this email to the Respondent's counsel, reasonably concluding that he had received the email and was aware of the hearing date.

26. Mr Margetts argued in his application that although the ALU had received the hearing notices, there was no real notice of hearing to the Respondent. He continued that his colleague Ms Maddox also of the ALU who held his brief at the hearing did not have carriage of the case on behalf of the Respondent, had no notice of the hearing and was not prepared to present the Respondent's submissions. He argued

further that this being the case, full equality was not accorded the parties at the hearing.

27. Mr Ming Wu, counsel for the Applicant objected to the application for re-trial. He recalled that the Respondent's counsel had earlier in the life of this case brought a motion for extension of time more than three months after he was supposed to file a response due to what the said Respondent's counsel had described as "a breakdown of communication between the Nairobi and New York offices".

28. He pointed out also that the Respondent's counsel did not attend the status conference scheduled in this case on 4 December 2009. In spite of that, the said counsel for the Respondent had requested a hearing date for after the second week of December which was granted by the Tribunal.

29. The Applicant's counsel then submitted that the application for a re-trial ought not to be granted as it is brought in bad faith and is an abuse of process of the Tribunal.

30. In considering the application for a re-trial, I am minded to restate that the Registrar of the UNDT has a duty to serve notices on the parties to a case informing them of the date and time for hearing. It is not contested that this rule of procedure was duly complied with by the UNDT Registrar in Nairobi in this case.

31. The Secretary-General as the Chief Administrative Officer of the United Nations is the Respondent in all cases filed before the UNDT by individual staff members or persons representing them. The Secretary-General is represented at first instance trials before the UNDT by the Administrative Law Unit (ALU). In other words, the ALU has the responsibility of providing legal representation for the Secretary-General when his case is before the Tribunal. In its internal arrangement, the ALU may assign cases it has responsibility for to its individual officers. Evidently this case had been assigned to Mr Margetts.

32. The argument that when the ALU is served with the processes of this Tribunal, such would not constitute service on the Respondent for the purposes of responding to the proceedings before the Tribunal is untenable. The ALU is the lawful agent of the Respondent and I hold that service on the ALU is good service.

33. Additionally, where due to some technical error, Mr Margetts did not receive the notice of hearing emailed to him by name, did he not receive also the same email sent to the ALU since he is a member of the Unit? Clearly, in sending the same processes to both counsel and the ALU as usually requested by the Unit, the Tribunal's Registrar seeks to avoid the mischief of the processes not reaching the intended destination.

34. The internal administrative arrangements of the ALU whereby the office would receive communication in respect of a matter in which it represents the Secretary-General and fail to act on it because the said office assumes that the particular officer to whom the matter is assigned has received the same information leaves much to be desired. It is proper to recall that the ALU could not respond to the Applicant's pleadings within time because in their own words "there was breakdown of communication between the New York and Nairobi offices." In that instance, in spite of the obvious lack of diligence on their part, this Tribunal allowed the Respondent's reply out of time.

35. A re-trial would be unduly wasteful of time and resources. I am of the view that the Respondent was adequately represented especially as no oral evidence was tendered by the Applicant and the issue of cross-examining a witness did not arise. Full equality was accorded the parties in the circumstances. For the foregoing reasons, the application for a retrial is refused.

Findings

36. I now come to review the documentary evidence, relevant legislation and the written and oral submissions of counsel on both sides. I will do so by posing questions which I consider critical to arriving at a just determination of the issues raised and argued and finding answers to them.

(i) **Was the Applicant, a lateral move candidate for the position to which she had applied, considered at the 15-day mark? Did a breach of the United Nations selection procedures occur in this regard? Were the Applicant's rights violated in the process of selecting a candidate?**

37. It is pertinent to examine at this stage the provisions of section 7.1 of ST/AI/2006/3 referred to by the Applicant and for ease of reference I hereunder reproduce the said provisions as follows:

> In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidates can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.

38. Section 5.4(a) which is relevant for our purposes in turn provides:

> The following staff members shall be eligible to be considered for a lateral move at the 15-day mark:
>
> (a) Internal candidates whose appointment is not limited to service with a particular office may be considered for any vacancy at their level. Staff whose appointment is limited to service with a particular office may be considered for vacancies at their level in that office only. Staff in the

> Professional category and above who do not have geographic status may be considered for vacancies at their level at the 15-day mark in respect of posts that are not subject to geographical distribution;

39. Additionally, in evaluating new candidates and roster candidates at the 15-day, 30-day or 60-day mark, section 7.4 states that the programme manager does so ***"on the basis of criteria pre-approved by the central review body."***

40. It is clear from the foregoing that section 7.1 imposes the requirement that a programme manager must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark. Both parties are agreed that the Applicant was a 15-day mark candidate at all times material to this application. While the Applicant contends that her candidacy was not considered at the 15-day mark as required by the rules, the Respondent has submitted that it was.

41. According to paragraph 6 of the Respondent's reply of 13 October 2009:

> "upon receiving notification that the Applicant was listed for the position as a 15-day candidate, Ms Yanan Xu assessed the suitability of the Applicant for the post as required by paragraph 7.1 of ST/AI/2006/3. On the basis of previous assessments of the Applicant's performance it was determined that she was not suitable for appointment at this first stage of assessment and that candidates eligible at the 30-day mark should also be considered."

42. Further, at paragraph 11, the Respondent again states:

> As set out at paragraph 6 above, the Programme Manager Ms Yanan Xu, in accordance with paragraph 7.1 determined that on the basis of information available to her, the Applicant was not a suitable candidate and proceeded to consider 30-day candidates.

On 29 May 2009, the Programme Manager herself in responding to the Executive Officer DGACM in regard to the Applicant's complaints stated thus in part:

> VA 418629 (1 P4 post) was posted on Galaxy on 18 September 2008. When the 15-day list came out, I was on official mission in Beijing and I did not come back until October 13, only a few days away from the due date for a 30-day list. In addition, there were only two applicants on the 15-day list for VA 418629, namely Ms. Zhengfang Xu and Mr. Ming Wu. Mr Wu was just transferred from Nairobi to Geneva effective 1 September 2008 and he did not apply for the post in relation to VA 418629. Judging from evaluation of the suitability of Ms. Zhengfang Xu to the post done on several occasions in the recent past, the panel decided to wait until the 30-day mark list came.
>
> On 24 October 2008, I got a list of 10 applicants including Ms. Zhengfang Xu and Mr. Ming Wu. I then formed an interview panel (Ms. Yanan Xu, Chief of the Chinese Service, Ms. Monika Torrey, Chief of the German Service, Mr Bok-kow Tsim, Training Officer of the Chinese Service, and Mr Sheng Sheng, Programming Officer of the Chinese Service) and informed 9 candidates (excluding Mr. Wu) of the interview arrangements."

43. In reviewing the submissions and evidence proffered by the Respondent, the Tribunal finds it disturbing that a responsible Programme Manager would embark on official mission or on any travel at all after posting a vacancy announcement and return "**only a few days away from the due date for a 30-day list**." What did she expect to happen to 15-day mark candidates who would be due to have their candidacy considered while she was on mission? Did she make adequate arrangements for an Officer-in-Charge to undertake the process of consideration of 15-day mark candidates? Clearly the answer is no! Was this because the career of

staff under her unit who might be adversely affected meant nothing to her? Or was it because, as she strives to point out in her response, the Applicant was the only candidate at the 15-day mark, the only other such candidate having been selected to take up a position in Geneva?

44. She states also that the Applicant had been evaluated for the advertised post "on several occasions in the recent past" What occasions were those? Why was evidence of such evaluations not tendered before the Tribunal? Is it because they do not exist?

45. The Programme Manager's explanation that "the panel decided to wait until the 30-day mark list came out" is not borne out by any facts. Which "panel" was she referring to? Is it the one she formed after receiving on 24 October 2008 the list of 30-day mark candidates? I have no doubt in my mind that this explanation was both a lie and an after-thought made up to cover the blunders of an officer who ought to have known better.

46. She iterates also that when she returned from official mission on 13 October, it was "only a few days away from the due date of the 30-day list." From 13 – 24 October is a difference of eleven days and not a few days! The Tribunal is not told when the 15-day list came in. Quite probably about four days before the Programme Manager arrived from the official mission? Did she then not have enough time to properly evaluate the 15-day mark candidate seeing that there were still eleven days before the 30-day mark list would be reach her from OHRM?

47. Since section 7.4 requires that both new and rostered candidates shall be evaluated on the basis of criteria pre-approved by a central review body, was the Applicant evaluated on such a basis at the 15-day mark? Where is the evidence of pre-approved criteria by a central review body in the evaluation of the Applicant as a 15-day mark candidate?

48. The onus lies on the Respondent to show that the provisions of ST/AI/2006/3 had been complied with in this case in order to prove that the Applicant was fully, fairly and properly considered. This onus has not been discharged.

49. Rather the Respondent's submissions are that section 7.1 of ST/AI/2006/3 permits a Programme Manager to use "previous assessments" or "information available to her" in satisfying the requirement for consideration of a candidate in the selection to a vacancy announcement. I am not persuaded by this submission. If indeed the option of selecting candidates by use of available information or previous assessments is a viable one, why did the 30-day mark candidates not receive similar treatment? If, as is being urged upon the Tribunal, the Applicant had been fully and fairly considered at the 15-day mark through previous assessments, why was she in addition considered with 30-day mark candidates? Would that not then amount to considering her twice for the same post? And is this the contemplation of section 7.1 of ST/AI/2006/3?

50. It is my finding of fact that the Applicant's candidature was not considered at the 15-day mark as required by the relevant Administrative Instruction. There were no pre-approved criteria properly set for evaluating her candidacy at the 15-day mark. This failure to consider the Applicant at the 15-day mark constitutes a breach of the United Nations staff selection procedures and a violation of the Applicant's rights to due process in the selection exercise.

ii) **Was the UN Administrative Instruction on special measures for the achievement of gender equality breached?**

51. The submission on this issue on the part of the Applicant is that being a rostered candidate, her qualifications were higher or at least at par with that of the selected male candidate and that the UN gender equality principle should have operated to have her selected in place of the male candidate. The Respondent had

countered that the candidacy of the Applicant was not substantially equal to that of the selected male candidate and so the ST/AI/1999/9 was not relevant.

52. The results of the selection interviews and the scores of the candidates exhibited before the Tribunal show that the Applicant's scores were below that of the selected candidate. The Applicant is not challenging the scores awarded her although she alleges that the Programme Manager out of all the examiners gave her the lowest scores. The Tribunal is not in a position to substitute any scores with that of the panel that tested and interviewed the candidates.

53. I find that no provision of ST/AI/1999/9 was breached in the circumstances as it was never relevant at any stage of the selection process.

iii) **Was the Applicant discriminated against because she is of the Nairobi duty station?**

54. In reviewing the submission that staff members from the Nairobi duty station and other duty stations which are not New York are usually discriminated against in appointments to posts in New York, I am totally unconvinced by any arguments in support of this submission. There are neither reliable statistics nor relevant evidence to back up this claim and I find this submission completely without merit.

55. The Tribunal is however deeply troubled by the Applicant's submission that she was the only candidate who was interviewed over the telephone and, that despite the line being bad, her numerous requests to have questions repeated to her were simply refused. The Respondent did not address this serious contention in their written or oral submissions. Taken together with the Applicant's submissions on the lack of due consideration at the 15-day mark and the irregularity of the process as a whole, the obvious lack of parity in the conduct of the interview seems to the Tribunal to be, at the very least, improper. What the Tribunal cannot, on the face of

the Applicant's submissions alone, find is that this impropriety was caused by the fact that she was a staff member of the Nairobi duty station.

iv) Did the failure to inform the Applicant of her non-selection amount to a breach of any of the provisions of ST/AI/2006/3?

56. Both parties agree that the Applicant was not informed of the outcome of the selection exercise in which she was a candidate. The Respondent has conceded in both oral and written submissions that the Applicant ought to be informed but blames the failure to do so on administrative oversight. The wordings of section 9.5 of ST/AI/2006/3 are however mandatory. The section states:

> All interviewed candidates who are not selected or placed on the roster ***shall*** be so informed by the programme managers. [Emphasis added]

57. The Respondent even in conceding that there was a duty to inform the Applicant has asked that no award be made on this score as no injury was suffered by the Applicant as a result.

58. I find that the failure of the Programme Manager to inform the Applicant of the outcome of the selection process is both a breach of section 9.5 of ST/AI/2006/3 and a violation of the right of the Applicant to be so informed. I find that this made the Applicant suffer psychologically.

Conclusion

59. On the whole, I find that a clear pattern of non-compliance with administrative issuances on the part of the Programme Manager stands out in bold relief in this case. Although no supporting evidence was tendered and the Tribunal made no finding on an alleged systematic exclusion of the Applicant from the 15-day consideration on at least seven occasions, sufficient concern is raised on the impunity

and lack of accountability of managers within the UN system who bestride their units as if these are personal fiefdoms. Rules, regulations and administrative issuances are not made within the United Nations system to be flouted at will by senior staff members who are managers and whose duty it is to be guided by them and to implement them. Not only must this attitude not be condoned, it must be condemned in the strongest terms.

REMEDIES

60. The Applicant has prayed for the court to order the impugned administrative decision quashed and the payment of one year's salary as compensation for the injuries she has suffered.

61. The powers of the Tribunal in respect of remedies in judgement are governed by Article 10, sub-paragraphs 5-8, of the Statute of the United Nations Dispute Tribunal. The provisions of Article 10(5) are specifically relevant to the instant case in stating that the Tribunal "may order *one or both*" of the following:

> (*a*) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal *shall* also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (*b*) of the present paragraph;
>
> (*b*) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

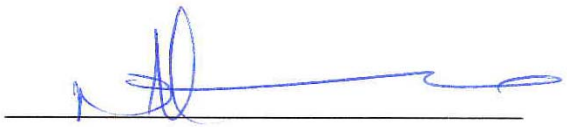
62. In the circumstances of the present case, it is difficult for the Tribunal to envisage a situation in which an order of rescission or specific performance may be effected without the rights of a third party/the incumbent on the contested post being affected. To quash the contested administrative decision in this case could mean only one of two things; that the selection process previously undertaken be nullified so that

the *status quo ante* is restored or that the decision not to select the Applicant is quashed so that she is selected.

63. In the instant case, the latter would be inappropriate given the Tribunal's finding that the Applicant was not properly considered, whereas the former would significantly affect the incumbent. Additionally, Article 10(5)(a) makes it *mandatory* for the Tribunal to also set a compensatory amount which the Respondent may elect to pay as an alternative to rescission or specific performance.

64. In the present case, should the Tribunal decide to make orders pursuant to both Article 10(5)(a) *and* (b), as requested by the Applicant, the court would in effect be awarding the Applicant with two lots of compensation. The Tribunal does not find the facts of this case to warrant this.

65. The Tribunal has however found that the Applicant's rights were injured during the course of the selection process, which in my assessment warrants the payment of **six (6) months net base salary** at the level applicable at the time the decision not to select her was made.



Judge Izuako

Dated this 7th day of January 2010

Entered in the Register on this 7th day of January 2010

Jean-Pelé Fomété, Registrar, UNDT, Nairobi