



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/050
(UNAT 1683)
Judgment No.: UNDT/2011/057
Date: 23 March 2011
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

GRIGORYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Steffen Wirth

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. By her application dated 12 January 2009, filed with the former UN Administrative Tribunal, the Applicant must be deemed to be seeking the rescission of the decision whereby the United Nations High Commissioner for Refugees refused to confirm her, at the end of her probationary period, to the post of Protection Officer at the P-3 level. She claims, in addition:

- a. Reinstatement as a Protection Officer at the P-3 level on a probationary basis;
- b. An award of compensation against the United Nations High Commissioner for Refugees (“UNHCR”) for damage suffered in an amount not less than 24 months net base salary at the P-3 level;
- c. Removal from her official status file of all the documents relating to the contested decision.

2. The case, which was pending before the former UN Administrative Tribunal, was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in the General Assembly resolution 63/253.

Facts

3. The Applicant entered the service of UNHCR in January 1999 as a Programme Secretary at the GL3 level on a short-term appointment, in Yerevan (Armenia). In January 2000, she was given an indefinite appointment as Senior Protection Clerk at the GL4 level. In July 2000, she was promoted to the GL5 level. From May 2004 to May 2005, the Applicant took special leave without pay during which she served as a United Nations Volunteer. She then returned to her work in Armenia at the GL5 level. In November 2005, having been selected for the International Professional Roster, she was reassigned as a Protection Officer at the P-3 level to the UNHCR Sub-Office Zahedan, Islamic Republic of Iran, with an appointment for a probationary period of one year.

4. The Applicant's performance was evaluated as "fully effective" in her performance appraisal report ("PAR") for the period from 18 November 2005 to 30 June 2006. However, her supervisor, Head of the UNHCR Sub-Office Zahedan, noted insufficiencies in the PAR in three core competencies, namely flexibility/adaptability, team working and professional and personal behaviour, and in one functional competency, providing legal support and advice, and one of the managerial competencies, leadership. He also stated in his observations that the Applicant needed to improve her interpersonal skills. Her reviewing officer, the UNHCR Representative in Iran, made no observations. The Applicant signalled her disagreement with the evaluation of her core competencies.

5. By letter of 19 September 2006, the UNHCR Representative in Iran informed the Applicant of his reservations about her performance and her professional behaviour. He stated, among other things, that the Applicant had used an official UNHCR vehicle outside working hours for personal purposes, that she had failed to comply with certain instructions and security advisories, and that her personal conduct, in particular the fact that she was sharing accommodation with Mr. B., her new supervisor, was affecting working relations in the office. The UNHCR Representative drew the Applicant's attention to her duty to observe the highest standards of behaviour.

6. By memorandum of 14 November 2006, the UNHCR Representative in Iran informed the Personnel Administration and Payroll Section ("PAPS") that he was not at the present time in a position to propose the Applicant's confirmation to the Professional category post of Protection Officer and that he needed more time to assess her. He added that he had concerns about her suitability for the post and requested a three-month extension of the Applicant's probationary period. He also stated that he had discussed the assessment with the Applicant at a meeting on 8 November 2006 during which he had told her that her managerial skills needed improvement.

7. The Applicant's probationary period was extended from November 2006 to 15 February 2007.

8. The Applicant's performance was rated as "fully effective" in her PAR for the period from 1 July 2006 to 6 February 2007. That evaluation was carried out by Mr. B., Head of the Sub-Office Zahedan. In that PAR, the Applicant's supervisor evaluated her as fully satisfactory in the core competencies, the functional competencies and the managerial competencies, except for that of leadership, which she had only partially demonstrated. In his observations on the Applicant's capacities as a manager, her supervisor stated that, while she had tried her best to improve her behaviour towards the staff during the reporting period, there was still room for improvement. Her reviewing officer, the UNHCR Representative in Iran, made no observations. The Applicant expressed her readiness to improve.

9. On 7 February 2007, the Head of the Sub-Office Zahedan sent a memorandum to PAPS on the Applicant's performance appraisal at the end of her probationary period, in which he proposed that she be confirmed to the Professional category post of Protection Officer. Though the memorandum indicated that the Head of the Sub-Office Zahedan sent it to PAPS through the UNHCR Representative in Iran, the latter did not sign it.

10. By memorandum of 13 February 2007 to the UNHCR Representative in Iran, the Deputy Representative (Protection) expressed reservations about the Applicant's performance and competencies and stressed her reluctance to accept comments by more experienced Protection Officers on her performance.

11. By email of 16 February 2007, the UNHCR Representative in Iran sent PAPS a memorandum dated 13 February 2007 in which he made a negative recommendation with regard to the Applicant's confirmation to the post of Protection Officer. He emphasised that, despite the Applicant's assessment as "fully effective" in her last two PARs, it was quite clear from those reports and from the memorandum by the Deputy Representative (Protection) that the Applicant did not fulfil a number of core, functional and managerial

competencies, such as team working, personal and professional behaviour, protection and leadership. In his memorandum, he stated that, in taking his decision, he had taken into consideration the Applicant's two last PARs, the comments of the Deputy Representative (Protection) in the memorandum of 13 February 2007 and the information contained in the Applicant's fact sheet. He attached the Applicant PARs and the memorandum from the Deputy Representative in support of his refusal to confirm the Applicant to her post.

12. On 16 February 2007, PAPS began the process of reinstating the Applicant in her previous post at Yerevan, Armenia. The Applicant's probationary period was nonetheless extended to 28 February 2007 to allow for the completion of administrative formalities prior to her departure.

13. On 21 February 2007, the Applicant made a request to the Secretary-General for administrative review of the decision of the UNHCR Representative not to recommend her confirmation to the Professional category post of Protection Officer.

14. On 2 March 2007, the Applicant filed a recourse with the Appointments, Postings and Promotions Board ("APPB") against the refusal to confirm her to the post of Protection Officer at the end of her probationary period. The APPB rejected her recourse, and on 19 March 2007, the High Commissioner followed the recommendation of the APPB and refused to confirm the Applicant to the post.

15. By email of 23 March 2007, the Applicant was informed that she was to be reinstated in her former post in Yerevan with effect from 1 April 2007. Her reassignment was later postponed to 30 April 2007.

16. On 1 May 2007, the Applicant resumed her post of Senior Protection Clerk in Yerevan.

17. On 2 June 2007, the Applicant submitted an incomplete statement of appeal to the JAB, which was completed on 5 July 2007. In her appeal, the Applicant contested the decision of the UNHCR Representative in Iran to make a

negative recommendation with regard to her confirmation to the post of Protection Officer, and also the decision of the High Commissioner to follow the recommendation of the APPB to reject her appeal against the refusal of confirmation.

18. The JAB submitted its report to the Secretary-General on 11 June 2008. It found, on the one hand, that the Applicant's right to due process had been respected and that the contested decisions had not been tainted by prejudice or improper motives. The JAB therefore recommended that the appeal be rejected.

19. By letter of 29 September 2008, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to follow the recommendation of the JAB.

20. On 12 January 2009, after obtaining two extensions of time, the Applicant filed an application with the former UN Administrative Tribunal against the Secretary-General's decision. On 23 September 2009, having sought and obtained two extensions of time from the Administrative Tribunal, the Respondent filed his reply to the application. The Applicant, who was granted three extensions of time, submitted observations on 1 March 2010.

21. As the case could not be decided by the UN Administrative Tribunal before its abolition, it was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

22. On 11 March 2011, a hearing was held in the presence of Counsel for the Applicant and Counsel for the Respondent.

Parties' contentions

23. The Applicant's contentions are:

- a. The decision to give a negative recommendation on her confirmation to the post of Protection Officer was not taken based on the established UNHCR procedure but on an irregular procedure. The negative

recommendation by the UNHCR Representative in Iran did not use the standard form provided, and he relied in his recommendation, on a memorandum from the Deputy Representative (Protection) who was not competent to take part in her performance evaluation. That memorandum contained allegations against her that were contrary to the evaluations in her PARs and had, moreover, never before been brought to her attention. She was, therefore, deprived of her right to due process;

b. The UNHCR Representative did not consider all the relevant factors in taking his decision. He ignored her strengths and disregarded the improvements she had made over the probationary period. He furthermore placed particular emphasis on her PAR for the period from November 2005 to June 2006 at the expense of her PAR for the period from July 2006 to February 2007, which was the most recent. According to the latter, she partially demonstrated the leadership competency, which was not a mandatory competency in her post description but one she herself had chosen for her personal development;

c. If the Representative disagreed with the evaluation made by her supervisor in her most recent PAR, he should have stated this in the report itself. However, he did not do so;

d. She was not heard before the UNHCR Representative in Iran issued the negative recommendation. She was thus deprived of the fundamental right enshrined in the case-law of the former UN Administrative Tribunal. The UNHCR Representative did not discuss the content of his negative recommendation with her, as provided in the standard form;

e. The APPB made factual errors in its examination of her PARs and failed to respect her right to due process. The APPB made a *de novo* evaluation of her performance instead of examining the procedure used to arrive at the contested decision;

f. With regard to the letter from the UNHCR Representative of 19 September 2006 to which the Respondent refers, that letter has nothing to do with the negative recommendation made by the Representative.

24. The Respondent's contentions are:

a. The Applicant was properly considered for confirmation and her rights were not violated by the decision not to confirm her to the post of Protection Officer. She had no right to be confirmed to that post. The Administration was exercising its discretionary powers in taking the contested decision;

b. The negative recommendation by the UNHCR Representative in Iran was made in accordance with the APPB Procedural Guidelines. Paragraph 127 of those Guidelines must be interpreted as meaning that a PAR rating of "fully effective" is not itself enough to ensure the confirmation of a staff member to a post in the Professional category. That rating is but one factor for evaluating the suitability of a staff member for the Professional category. Other factors considered include the candidate's core competencies, namely personal and professional behaviour, flexibility/adaptability and teamwork. The overall assessment of a staff member must be based not only on his PARs but also on assessments by other supervisors, in this case the Deputy Representative;

c. The Applicant did not meet the requirements to be confirmed to the post of Protection Officer. The UNHCR Representative considered all the available information on the Applicant's performance in his recommendation, including her PARs, the opinions of her supervisors and the opinion of the Deputy Representative who had in-depth experience in the area of protection work. According to the Applicant's PAR for the period from November 2005 to June 2006, she partially demonstrated three of the six core competencies and one functional competency. According to her PAR for the following period, she partially demonstrated one managerial competency and it was noted that she needed to improve

her behaviour towards other staff members. Moreover, by letter of 19 September 2006, the UNHCR Representative in Iran informed the Applicant of his reservations about her performance and professional conduct, and, by memorandum of November 2006, also expressed his doubts as to her suitability to carry out the functions of the post;

d. The UNHCR Representative in Iran was the supervisor of all staff members in Iran and the Applicant's reviewing officer throughout the entire probationary period. He was, therefore, in the best position to evaluate the Applicant's performance;

e. There was no breach of the Applicant's right to be heard. The question of her performance was raised with her on a number of occasions, both orally and in writing. The Applicant thus had the opportunity to put forward her observations on her performance evaluation;

f. The APPB conducted a thorough, fair and transparent review of the Applicant's performance. The APPB recommendation is supported by evidence;

g. At the end of the probationary period, the Applicant returned to her former UNHCR post on an indefinite contract and remains on the International Professional Roster. Her terms of appointment have therefore not been affected by the contested decision.

Consideration

25. The Applicant, a staff member in the General Services category, contests the lawfulness of the decision refusing to confirm her to a Professional category post on the expiry of the probationary period.

26. Paragraph 127 of the APPB Procedural Guidelines provides: "At the conclusion of the probationary period the staff member will be confirmed to the level of the post, subject to fully effective performance". It is not disputed that the High Commissioner alone has the competence to grant promotion to a UNHCR

staff member and, as a decision refusing to confirm a staff member to a Professional category post at the end of his probationary period concerns promotion, the decision refusing to confirm the Applicant could only be taken by the High Commissioner.

27. The facts as set forth above show that, by email of 16 February 2007, the UNHCR Representative in Iran forwarded to PAPS a memorandum dated 13 February 2007 containing the recommendation not to confirm the Applicant to her post and that, without any other decision in writing, on 16 February 2007, PAPS started the process of reinstating the Applicant in her previous post in Yerevan, while at the same time extending her probationary period to 28 February 2007 to allow the completion of administrative formalities. Therefore, since the Administration has not produced any decision of the High Commissioner dating from that period refusing to confirm the Applicant to the level of her post, nor does it contend that any such decision exists, that decision must have been taken by a person lacking competence and, for that reason alone, it must be rescinded.

28. That said, having on 21 February 2007 made a request to the Secretary-General for administrative review of the decision refusing to confirm her in her post, on 2 March 2007 the Applicant submitted a recourse to the APPB against the refusal of confirmation, and once the APPB had recommended that the High Commissioner reject her recourse, he refused to confirm the Applicant to her post on 19 March 2007.

29. Thus, although the Tribunal has ruled that the first decision refusing confirmation is unlawful and rescinded it, there is a second decision to the same effect, this one taken by the competent authority, the High Commissioner, and the Applicant must be deemed to have intended to contest that, too. In the interests of the proper administration of justice, the Tribunal must therefore rule on whether it was lawful.

30. The Tribunal must first examine whether the High Commissioner's decision is vitiated by any formal flaws. That decision consists of a signature on the back of the recommendation of the APPB, with the word "approved". Since it

was a decision concerning the rights of the Applicant to be confirmed to the level of her post at the end of her probationary period, that decision must give reasons. The Tribunal considers that, in the present case, by appending his signature with the word “approved” on the back of the APPB recommendation, the High Commissioner was endorsing the reasoning contained in the recommendation. Sufficient reasons are, therefore, given for that decision.

31. The Applicant goes on to contest the regularity of the process leading to the High Commissioner’s decision. Given that the Tribunal has already rescinded the first refusal of confirmation, the procedure followed in taking the first decision must be deemed to have been used to take the second as well.

32. The UNHCR has devised a standard printed form for recommendations on confirmation at the end of the probationary period. That form shows very clearly that the Administration intended to impose a duty on the probationer’s supervisor to discuss the content of the recommendation with him in person, and to give him a copy of the printed form together with the performance report.

33. The record shows that on 7 February 2007, the Head of Sub-Office Zahedan, the Applicant’s supervisor, having recommended her confirmation, certified that he had complied with the abovementioned formalities, but that, on the contrary, there is no similar printed form on file completed by the UNHCR Representative in Iran, who, in his memorandum dated 13 February 2007, did not follow the proposal of the Head of Sub-Office Zahedan but refused to recommend the probationer’s confirmation. She, moreover, maintains that the UNHCR Representative in Iran did not discuss with her his intention not to recommend her prior to taking his decision.

34. In the view of the Tribunal, the duty on the probationer’s immediate supervisor to discuss the recommendation with him in person applies with even greater force to the reviewing officer where, as in the present case, he does not follow the original proposal but refuses to recommend the confirmation. The Applicant formally disputes, before the Tribunal, having been given the opportunity to be heard by the UNHCR Representative in Iran before he took his

decision, and she produces, in support of her contention, a copy of an email she sent him on 16 February 2007 stating that only in a telephone call on that very day had he informed her that he was refusing to recommend her. That statement cannot seriously be rebutted by the production of the memorandum of 13 February 2007, paragraph 6 of which contains a statement that its author, the UNHCR Representative in Iran, personally informed her of his proposal, with which, as expected, she disagreed, as that memorandum, while dated 13 February 2007, was forwarded to PAPS only on 16 February 2007.

35. The Tribunal therefore considers that the Applicant has shown that she was not given the opportunity to submit her observations before the decision was taken not to recommend her for confirmation to her post. The Tribunal considers, moreover, that this obligation was a procedural formality required by UNHCR.

36. It remains for the Tribunal to determine whether that procedural flaw is, of itself, such as to lead to the rescission of the High Commissioner's decision. Not all formal requirements laid down by the Administration for the taking of a decision are of such importance that failure to comply with them must necessarily give rise to the rescission of the said decision. In the present case, though, it must be noted that the decision not to recommend the Applicant for confirmation to her post was made by the UNHCR Representative in Iran at a time when her performance had twice during her probationary period been rated as "fully effective" by her direct supervisors, and that the second had recommended her for confirmation in her post. The Tribunal is therefore of the view that, in taking his decision without having discussed it with the Applicant, the UNHCR Representative in Iran deprived her of the fundamental right to state her case, and it is beyond dispute that the refusal of the Representative in Iran to recommend her had a decisive influence on the High Commissioner's final decision.

37. The procedural flaw pointed out above is, therefore, a significant one, and as such it requires the decision refusing confirmation to be rescinded.

38. In the present case, the decision to refuse to confirm the Applicant to the level of her post at the end of her probationary period is a decision concerning a

promotion to the P-3 level, and, as such, governed by Article 10, paragraph 5, of the Tribunal's Statute, which provides that, where the Judge orders rescission of a decision concerning promotion, he 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. In the present case, if UNHCR chooses that option, it must pay the Applicant the sum of CHF15,000.

39. The Applicant has sought compensation for the material damage resulting from the loss of the additional salary she would have received if she had been confirmed to the P-3 level. However, as the Tribunal ruled in its Judgment *Solanki* UNDT/2009/045, the Administration may elect either to implement the Judge's decision rescinding the refusal of confirmation, or to pay the sum determined above. In the first case, the High Commissioner must take a new decision on the confirmation of the Applicant, who may, if she obtains it, claim promotion with retroactive effect to 30 April 2007 and will therefore not suffer any damage; however, if she is not confirmed to her post, she will not be able to claim any compensation unless she contests the new decision refusing confirmation before the Tribunal. In the second case, where the Administration elects to pay the amount set by the Judge instead of accepting the consequences of the rescission, the said sum must be taken as compensating the Applicant for the material damage suffered.

40. The Applicant further claims compensation for the moral damage suffered as a result of the refusal to confirm her to the post. Since the Tribunal has rescinded the contested decision on the sole grounds of a procedural flaw, it must, in establishing the moral damage to the Applicant, assess what her chances of confirmation would have been if the Representative in Iran had met with the Applicant before taking his decision refusing to recommend her. The Tribunal considers, at the outset, that the fact that the Applicant was rated as "fully effective" during her probation was a minimum but not sufficient condition for confirmation to her post, given the broad powers enjoyed by the High Commissioner in terms of promotions. In the present case, the Tribunal considers that the decisive reason why the Applicant was not confirmed in her post was the

refusal of the UNHCR Representative to recommend her. But, in the Tribunal's estimation, given the content of that decision refusing to recommend her, even if the Applicant had been able to state her case to the Representative, her chances of making him change his mind, and thus her chances of being confirmed to her post, were slender. The Tribunal must, therefore, award her the amount of CHF2,000 for moral damage.

41. The Applicant has also asked for all the documents relating to the contested decision to be removed from her official status file. The Tribunal orders the removal from her official status file of all the documents concerning the refusal to confirm her in her post, including the memorandum of the UNHCR Representative in Iran dated 13 February 2007, with the exception of this Judgment and measures subsequently taken by the Administration to execute it.

42. The Judge has set forth above the terms for execution of this Judgment, and under the Statute of the Tribunal, he may not substitute his judgment for that of the Administration and rule that the Applicant be reinstated to the P-3 level for a probationary period. Therefore, the Applicant's request in this regard, must be rejected.

Conclusion

43. For these reasons, the Tribunal DECIDES:

- a. The decisions refusing to confirm the Applicant in a post at the P-3 level are rescinded;
- b. If, rather than implement the decision to rescind, UNHCR elects to pay compensation, it must pay the Applicant the sum of CHF15,000;
- c. UNHCR is ordered to pay the Applicant the sum of CHF2,000 for moral damage;
- d. All documents concerning the refusal to confirm her in her post, including the memorandum of the UNHCR Representative in Iran dated

13 February 2007, shall be removed from the Applicant's official status file with the exception of this Judgment and measures subsequently taken by the Administration to execute it;

e. The abovementioned compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of the said compensation. An uplift of five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;

f. All the other claims are dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 23rd day of March 2011

Entered in the Register on this 23rd day of March 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva