



**Before:** Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

NATTA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Elizabeth Brown, UNHCR

John Stompor, UNHCR

## **Introduction**

1. By application filed on 15 May 2015, the Applicant, a staff member of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision by the High Commissioner not to promote him from the P-4 to the P-5 level during the 2013 Promotions Session.

2. It is noted that the facts and grounds of appeal in this matter are very similar to those in Case No. UNDT/GVA/2015/165 (*Rodriguez-Viquez*), which was heard jointly with the present case. Parts of Judgment *Rodriguez-Viquez* UNDT/2016/030, delivered on 14 April 2016, are repeated in this Judgment.

## **Facts**

3. The Applicant joined UNHCR in July 1988 as Assistant Programme Officer at the P-1 level in Kuala Terengganu, Malaysia. In July 1990, he was promoted to the P-2 level and began serving as Associate Programme Officer. In June 1991, he was assigned as Associate Programme Officer (L-2) in Danane, Côte D’Ivoire. In November 1992, he began a mission as Head of Field Office (L-3) in Podgorica, then Federal Republic of Yugoslavia, and received a Special Post Allowance (“SPA”) until he was promoted to the P-3 level in July 1993.

4. In September 1997, he was assigned as Head of Sub-Office (L-4), also in Podgorica, and he began to receive an SPA. In February 1999, he was assigned as Senior Protection Officer (L-4) in Kyiv, Ukraine. In January 2000, he was assigned as Representative (P-4) in Bratislava, Slovak Republic. In April 2007, following several months of special leave with full pay and in between posts, he was assigned as Senior Legal Officer (P-4) with the Bureau for Asia and the Pacific in Geneva, Switzerland. From 29 November 2012 to 23 January 2013, he was on a mission as Senior Legal Officer (P-4) in Yangon, Myanmar. In February 2013, following a brief period of paid leave of absence pending posting, he was temporarily assigned as Assistant Representative (Protection) (P-5) in Kabul, Afghanistan. He was subsequently confirmed in the position and began to receive Remuneration At the Level of Post (“RALP”) in April 2013.

5. On 5 February 2014, the High Commissioner promulgated the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) (“Promotions Policy”). In essence, the Promotions Policy provides for the High Commissioner to make available a number of promotions slots to the P-4, P-5 and D-1 levels, and to award these to the most meritorious staff members based on recommendations made by a panel composed of senior UNHCR staff members, known as the Senior Promotions Panel (“SPP”) insofar as promotions to the P-5 and D-1 levels are concerned, which follows three rounds of evaluations of eligible staff members.

6. On 4 April 2014, UNCHR’s Division of Human Resources Management (“DHRM”) informed the Applicant that he was eligible to be considered for promotion to the P-5 level during the 2013 Promotions Session, and that he met the criteria for the First Round evaluation as he had twice the minimum seniority in grade. Consequently, he was also advised that his candidacy would be forwarded automatically to the Second Round for evaluation by the SPP. The Applicant was asked to ensure completion of his personal appraisal document, also known as an “e-PAD”, and accuracy of all data contained in his fact sheet by 14 April 2014. This deadline was subsequently extended to 24 April 2014.

7. From 30 June 2014 to 4 July 2014, the SPP members gathered in Geneva to conduct their individual comparative assessment of the candidates who had advanced to the Second Round. The individual rankings given by each SPP member were then aggregated by the DHRM, and consolidated lists of assessment rankings were compiled, separately, for female and male candidates.

8. The six SPP members gave the Applicant the following “rankings” among the male candidates for promotion to the P-5 level: 13, 33, 55, 76, 118 and 119. The DHRM calculated that the arithmetic mean of the six individual rankings was 69.00 and established that the Applicant received a consolidated ranking of 62 out of 170 male candidates for promotion to the P-5 level. As his consolidated comparative ranking did not place him among the top 56 male candidates, the Applicant’s candidacy did not advance to the Third Round.

9. On 4 July 2014, namely towards the end of the Second Round comparative assessment, the High Commissioner announced that 240 slots would be available for promotions to the P-4, P-5 and D-1 levels during the 2013 Promotions Session and, in particular, that 56 slots would be available for promotion from the P-4 to the P-5 level, which, he decided, would be equally shared between female and male staff members.

10. By memorandum dated 17 October 2014 and distributed to all the UNHCR staff members via email on 20 October 2014, the High Commissioner published the list of promoted staff members. The Applicant was not among them.

11. By email of 29 October 2014, the Applicant requested DHRM to provide him with the documentation considered by the SPP regarding his candidacy.

12. On 30 October 2014, the DHRM provided the Applicant with a copy of his fact sheet as reviewed by the SPP. The DHRM also reiterated the steps of the promotions process, as described in the Promotions Policy, and stated that “the Second Round individual evaluations by the six [SPP] Members ... resulted in an overall ranking that placed [him] outside the group of candidates who proceeded to the Third Round ... [which] corresponded to 200% of the number of slots allocated for promotions to the P-5 level”.

13. On 17 November 2014, the Applicant submitted a recourse application.

14. On 19-20 January 2015, the SPP conducted the recourse session.

15. By memorandum dated 2 March 2015 and distributed to all the UNHCR staff members via email on 3 March 2015, the High Commissioner announced his decisions following the recourse session. The Applicant was not among the candidates promoted upon recourse.

16. On 22 March 2015, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the decision not to promote him to the P-5 level.

17. On 6 May 2015, the Applicant received an interim response informing him that his request for management evaluation was still under consideration. He did not receive any further response.

18. The Applicant filed his application with the Registry of this Tribunal on 15 May 2015. At the time, he was self-represented.

19. The Respondent submitted his reply on 17 June 2015.

20. On 10 December 2015, the Applicant filed a consent form appointing the Office of Staff Legal Assistance to represent him in the present case. With leave from the Tribunal, the Applicant submitted additional submissions on 18 December 2015, and the Respondent made comments on it on 6 January 2016.

21. From 21 to 26 January 2016, the Tribunal held a hearing on the merits of the instant case, jointly with six other cases challenging contemporaneous decisions and raising similar issues, namely Cases Nos. UNDT/GVA/2015/076 (Tsoneva), UNDT/GVA/2015/157 (De la Varga Fito), UNDT/GVA/2015/158 (Landgraf), UNDT/GVA/2015/163 (Spannuth Verma), UNDT/GVA/2015/165 (Rodriguez Viquez) and UNDT/GVA/2015/166 (Muftic). Four witnesses from the DHRM were heard: the Head of the Human Resources Policy and Planning Service, a Human Resources Officer in the Assignments and Promotions Section who served as the SPP Secretary for the 2013 Promotions Session, the Head of the Assignments and Career Management Service, and a Performance Management Associate in the Performance Management Unit.

22. On 29 January and 5 February 2016, the Respondent and the Applicant, respectively, filed additional submissions, with leave from the Tribunal.

23. During the course of the proceedings, the Respondent filed a number of documents *ex parte*, which contain confidential information. The Tribunal made all these available to the Applicant, with redactions as necessary and on an under seal basis.

## **Parties' submissions**

24. The Applicant's principal contentions are:

- a. The UNHCR promotions mechanism entails that the UNHCR staff members, who focus on their work rather than on advancement, cede a degree of control over their career, which other staff members retain fully in organizations with a rank in post system. In return, it is incumbent upon the UNHCR to put in place effective, fair and transparent procedures for reviewing its staff members' candidacy for promotion;
- b. By failing to sufficiently define the three evaluation criteria for the Second Round, namely "performance", "managerial achievements" and "exemplary leadership qualities", set objective standards and align itself with the performance appraisal policy, the Promotions Policy did not allow for a fair and transparent comparative assessment of the candidates;
- c. The arbitrariness resulting from the failure to define the evaluation criteria was exacerbated by the review mechanism, which entailed that each of the six SPP members had to review the fact sheet of 170 eligible male staff members, thus having to read thousands of pages, and rank them in order against each other over the course of only a few days;
- d. The DHRM's decision to divide candidates by gender in the Second Round did not conform with the Promotions Policy and may have prevented the Applicant from advancing to the Third Round;
- e. The DHRM's decision not to provide the SPP members with the candidates' e-PADs or e-PADs ratings prevented them from taking into account relevant information, and constitutes a procedural error in the implementation of the Promotions Policy;
- f. By advising the SPP members to consider as a determinative factor in their ranking the candidates' suitability for placement to a post at a P-5 level in their respective area of responsibility, the DHRM introduced an additional criterion not reflected in the Promotions Policy;

- g. The DHRM's suggestion to the SPP members to inform their rankings with personal knowledge of the candidates, and to embark on enquiries where they considered that relevant information was missing from the documents before them lead to an unequal treatment of the candidates;
- h. The consolidated table of rankings for P-4 male candidates displays enormous disparity between the rankings provided by different SPP members for the same candidate, although based on the same information; this cannot but indicate an arbitrary decision-making process and, in some instances, bias from the SPP members. To avoid such situation, the process should have been anonymised;
- i. Furthermore, the consolidated tables of rankings display multiple errors in the application of the ranking system suggested by the DHRM, which allowed for multiple candidates to obtain identical rankings, and contain several other anomalies; despite significant and obvious errors, the DHRM did not take any remedial action and, as such, failed to exercise the required level of care and attention in the implementation of the Promotions Policy;
- j. Neither an average of the rankings given by the six SPP members, nor the existence of a Third Round can cure the arbitrariness of the individual rankings given by the SPP members and the errors they committed;
- k. The UNHCR failed to consider the mathematical and statistical implications of the ranking system suggested by the DHRM, which allowed for SPP members to have a different input in the candidates' overall average, and the conversion of the individual rankings into a numerical value by way of an arithmetic mean;

l. UNHCR failed to take into account relevant facts to his application, including:

i. The grade of the duty station for his first assignment to Malaysia (1988-1991), which was officially Kuala Terengganu but, *de facto*, the island refugee camp of Pulau Bidong, which bears consequences on the point system for promotions;

ii. An emergency mission to Myanmar from 28 November 2012 to 22 January 2013 as Senior Legal Advisor, which demonstrates his negotiation, managerial and leadership skills but for which he received no evaluation; and

iii. His experience as Assistant Representative Protection (P-5) in Kabul, for which his mid-term evaluation states that he demonstrated his negotiation, managerial and leadership skills, and which lead him to be OiC at the D-1 level and to discuss with high level diplomat and state representatives; and

m. The UNHCR failed to provide reasons for its decision not to promote the Applicant, thus preventing him from identifying ways to strengthen his candidacy, and having elements in support of his claim to have the Tribunal review the Organization's exercise of discretion;

n. Accordingly, the Applicant requests:

i. Rescission of the contested decision and retroactive grant of promotion;

ii. In the alternative, compensation equivalent to the difference in salary between his current salary and his salary on promotion, for a two-year period counted as of the time of the contested decision;

iii. Compensation for moral injury in the amount of one month net base salary for grave breaches of staff rights and emotional distress; and

iv. Pre-judgement and post-judgement interests on pecuniary damages.

25. The Respondent's principal contentions are:

a. The Secretary-General has broad discretion in matters of promotion; accordingly, review of administrative decisions regarding promotions involves an examination of "(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration";

b. The Respondent has "minimally shown" that the Applicant's candidacy for promotion was given full and fair consideration as the six SPP members separately reviewed his fact sheet, which included the narrative of his performance appraisals during the five years preceding 31 December 2013, and only three of them ranked the Applicant's candidacy among the 56 top male candidates who advanced to the Third Round. The presumption of regularity stands satisfied and it is incumbent upon the Applicant to show, through clear and convincing evidence, that he was denied a fair chance of promotion;

c. In turn, the Applicant failed to establish that the contested decision was unlawful, for the reasons set forth below;

d. Firstly, the Tribunal has no authority to review the Promotions Policy itself. In any event, the comparative assessment of the candidates for promotion at the P-5 level complied with the requirements of fairness and transparency, as it was conducted individually by six independent senior staff members appointed by the High Commissioner, upon nomination by the DHRM and the Staff Council, who relied on set criteria and were provided with clear guidance;

e. Secondly, the Applicant failed to demonstrate any procedural error in the implementation of the Promotions Policy that would warrant rescission of the contested decision; in particular:

- i. The SPP members' conduct of the comparative assessment and ranking based on the narrative part of the e-PADS as reproduced on the candidates' fact sheet, to the exclusion of the ratings contained in the e-PADS, was consistent with sec. 5.9.1 of the Promotions Policy. It was also justified by the need to ensure fairness to all candidates given the important variations in the use of ratings by individual managers;
- ii. The promotions process has been implemented in compliance with the gender provisions of the Promotions Policy, which provided that at least 50% of the promotion slots had to be awarded to female staff and did not prevent separate review of female and male candidates during the Second Round. Even if this constituted a procedural error, it did not have any impact on the Applicant's candidature as there was a number of male candidates equivalent to 100% of the available slots for promotion that advanced to the Third Round;
- iii. The DHRM did not introduce an additional criterion of evaluation by suggesting to the SPP members to take into account their operational requirements, rather it merely provided an example to illustrate the rationale of the Promotions Policy as stated in sec. 3 thereof;
- iv. Although there is a certain degree of variation in the Applicant's rankings, these are not indicative of an arbitrary process or bias as the Promotions Policy allowed for different views among SPP members, based on their various experiences. Furthermore, three of the six SPP members ranked the Applicant above the threshold of 56 for advancing to the Third Round, and his consolidated ranking of 62 placed him 6 places above said threshold;
- v. Although errors were committed by SPP members in the ranking of candidates, these had no impact on the Applicant's chances to be promoted;

vi. The process provided a number of safeguards that limited the element of subjectivity, which cannot be totally eliminated from a competitive selection process, and possible human errors as the six individual rankings provided by each SPP member were averaged by the Promotions Secretariat. The number of candidates retained for the Third Round amounted to 200% of the available slots for promotions at the P-5 level. The Third Round provided an opportunity to probe the reasons for discrepancies in the Second Round rankings;

vii. The Applicant did not adduce any evidence of bias and his allegations in this respect are no more than speculative;

f. Thirdly, the Applicant's contention that the SPP failed to take into consideration relevant information about his working history and professional experience is without merit as:

i. The category of his duty station in Malaysia has no bearing on the review of his candidacy during the Second Round;

ii. The Applicant's mission to Myanmar being less than two months, it was not required to be the subject of a separate appraisal pursuant to sec. 3 of Annex 1 to the Policy for the UNHCR Performance Management & Appraisal System (IOM 087/2008—FOM 089/2008) ("PAMS"), which was applicable at the relevant period under review;

iii. The Applicant's assertions about the skills he demonstrated during his assignment in Afghanistan does not demonstrate a flaw in the contested decision, which entails a comparative assessment of several candidates;

iv. The Promotions Policy does not guarantee that staff members who are serving on a post at the P-5 level will be promoted to the personal grade level of P-5; furthermore, the Applicant had only nine months of service recognized at the P-5 level through the receipt of a RALP during the period ending on 31 December 2013, which fails to satisfy the requirements of the Promotions Policy;

g. The Applicant was provided with sufficient reasons for the contested decision as he was:

i. informed that his overall ranking placed him outside the 200% margin of the number of slots allocated for promotion to the P-5 level; and

ii. provided with a copy of his fact sheet used by the SPP members for their review of his candidacy;

h. In respect of the remedies sought, the Respondent submits that even if the Tribunal were to find that the promotions process was tainted by any shortcomings, these should not lead to the rescission of the contested decision as the Applicant had no “significant” or “foreseeable” chance for promotion, for the reasons set out above;

i. Furthermore, the Applicant’s claim for compensation equivalent to the difference in salary between his current salary and his salary on promotion for two years is without merit as the Applicant had been receiving a salary at the P-5 level since April 2013;

j. The Applicant’s claim for moral damages is also without merit given that he has adduced no evidence of his alleged emotional distress;

k. Finally, the Applicant’s claim for interests is excessive and unjustified;

l. Consequently, the Respondent requests the Tribunal to reject the application in its entirety.

## Consideration

26. Before examining the alleged errors in the contested decision, the Tribunal considers it appropriate to give a brief overview of the Promotions Policy, which is unique to the UNHCR and stems from its “rank in person” system. This Policy has been applied for the first time in the 2013 Promotions Session and fundamentally departs from the previous policy as staff members are no longer given a point-based scoring but rather subjected to a comparative assessment among each other by a panel composed of senior staff members of the UNHCR. Whilst some of this Tribunal’s previous holdings in respect of the UNHCR promotions sessions remain of relevance, most of these cannot be applied *mutatis mutandis* to the present case.

### *Overview of the Promotions Policy*

27. Unless they serve on an expert post, the UNHCR staff members in the International Professional category who are serving on indefinite and fixed-term appointments are conferred personal grade levels. They apply for assignments at their personal grade level or one level above. These staff members may be promoted to the P-4, P-5 or D-1 levels in accordance with the procedures set forth in the Promotions Policy.

28. The Promotions Policy, adopted on 5 February 2014, introduced a “new methodology and procedures for the promotion of International Professional staff” (sec. 1). Pursuant to this Policy, the High Commissioner determines each year the number of available promotion slots at the P-4, P-5 and D-1 levels, upon recommendation from the Joint Advisory Committee (sec. 4.1.2). He then receives recommendations for promotion by the SPP, for promotions to the P-5 level, following its review of the eligible candidates as outlined in the Policy (sec. 4.1.1).

29. The Promotions Policy establishes the eligibility criteria, namely that the candidate “must meet minimum seniority-in grade requirements” (sec. 5.1), and the procedures for three potential rounds of evaluation.

30. To advance from the First Round to the Second Round, a candidate must satisfy at least three out of five “Evaluation Criteria, or Green Lights”, namely: language proficiency, number of rotations, service in D, E and/or U duty stations, functional diversity, and performance records (i.e., absence of any gap in e-PADs) (sec. 5.7). Alternatively, candidates with twice the minimum seniority-in-grade at their current level advance automatically to the Second Round, regardless of whether they have sufficient “green lights” (sec. 5.8.4).

31. The Second Round, which is the main consideration of this case, entails a comparative assessment of the candidates by the SPP members based on the following three criteria: performance, managerial accountability and exemplary leadership qualities.

32. More specifically, sec. 5.9.1 of the Promotions Policy provides the following in respect of the Second Round:

5.9.1 A comparative assessment of the staff members who advanced from the First Round will be undertaken in the Second Round evaluation of the promotions procedure. Panel Members will individually conduct a comparative assessment and ranking of the staff members who have passed the First Round based on their evaluation of the following criteria:

- (i) **Performance:** A staff member’s performance during the past five years must be at the minimum “Achieved”, or its equivalent, for overall work objectives and must be at the minimum “Proficient”, or its equivalent, for overall competencies indicating the staff member’s ability and readiness to perform at a higher level as reflected in the narrative of the performance appraisal in the PAR/e-PAD and the Fact Sheet. The highest regard will be given to consistently demonstrated exceptional performance and documented exemplary service, including in emergency operations during the past five years. In addition, service at the higher grade level for one year or longer, during the past five years, recognized through the receipt of a SPA or RALP [Remuneration At the Level of Post] shall be considered.

- (ii) **Managerial Accountability:** For promotion to any level, and particularly to the P-5 level and above, a staff member must have demonstrated a high level of competence and professionalism in the management of human, financial, material resources, programmes or operations. Managerial achievements shall be demonstrated by their reflection in the PAR/e-PAD performance evaluations and Fact Sheet narrative.

5.9.2 For promotion to the P-5 or D-1 levels, the Panel Members will identify staff members who have demonstrated exemplary leadership qualities such as motivating a team, providing a vision and promoting a climate of respect and appreciation in the work place.

5.9.3 The number of staff to be advanced from the Second Round to the Third Round will correspond to the minimum of 150% of the number of slots available for promotions to P-4 and to a minimum of 200% of the number of available slots available for promotion to P-5 and D-1. Based on the Panel Members' assessments, the Panel Secretariat will compile the Second Round assessment rankings and develop a consolidated list of substantially equally meritorious candidates for consideration by the Panel Members in the Third Round.

33. The Third Round entails a collective review of the “substantially equally meritorious candidates” by the SPP, and the making of final recommendations corresponding to the number of available slots (secs. 5.10.1 and 5.10.2). The evaluation is based on the Second Round criteria, and provides for the need to ensure geographical distribution as well as any disciplinary measure, documented reprimand, financial mismanagement or gross negligence during the past five years (sec. 5.10.2). For promotions to the P-5 level, the SPP may request a written assessment of any particular candidate from the respective Director, for staff in Headquarters, or from the respective Representative, for staff in the field (secs. 5.10.3 and 5.10.4).

34. The High Commissioner awards promotions, which are conditional on the staff member obtaining a specific position at the higher level. This condition does not apply to staff members who already serve on a position at the higher level or on an expert post, or are within two years of retirement age (sec. 5.12).

35. Pursuant to sec. 5.10.2, “[a]t grade levels where gender parity had not yet been achieved, at least 50% of the promotion slots will be awarded to substantially equally meritorious female staff”.

36. Finally, staff members may, without prejudice to their right to formally contest the non-promotion decision in the internal justice system, seek recourse “on the basis that some documentation relating to the period under review that may have had an impact on the final recommendation was not available at the time of the review” (sec. 5.13).

*Standard of review*

37. It is well established that the Secretary-General has broad discretion in matters of appointment and promotions. When reviewing such decisions, the Dispute Tribunal shall examine “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration” (*Abbassi* 2011-UNAT-110, para. 23; see also *Majbri* 2012-UNAT-200, para. 35; *Ljungdell*, 2012-UNAT-265, para. 30).

38. More specifically, the Appeals Tribunal held in *Rolland* 2011-UNAT-122 that (para. 21):

All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

39. In *Rolland*, the Appeals Tribunal also distilled the burden of proof for challenges against promotion decisions, holding that (para. 26):

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must

show through clear and convincing evidence that she was denied a fair chance of promotion.

40. Whereas the parties agree that the Tribunal may conduct the type of review set out above, they disagree on whether the Tribunal may go any further and entertain challenges to the Promotions Policy itself. Seeking to rely on the jurisprudence of this Tribunal dealing with comparative assessments conducted in the context of downsizing exercises, the Applicant argues that the Tribunal shall not be limited to reviewing errors in the *implementation* of the Promotions Policy but also examine, *inter alia*, whether the procedures in place for the comparative review of candidates for promotions at the UNHCR were “fair and transparent”, and whether the comparative review of the candidates was based on “fair objective criteria as part of an impartial process”. The Respondent argues that the Tribunal should not engage in a review of the Policy, and should limit itself to the standard of review set out by the Appeals Tribunal in respect of promotion exercises as described above.

41. Having reviewed the jurisprudence and the submissions of the parties, the Tribunal is of the view that the standard of review for decisions in the context of downsizing exercises is substantially the same as that for appointments and promotions. For instance, in *Hersh* 2014-UNAT-433, which concerns a downsizing exercise, the Appeals Tribunal held that it had to examine if the applicable rules were followed and applied in a fair, transparent and non-discriminatory manner. In *Adundo* UNDT/2012/118, the Dispute Tribunal held that procedures in place for the comparative review of candidates, in the context of post reductions, had to be based on fair objective criteria as part of an impartial process. However, in *Adundo* the Tribunal was dealing with an *ad hoc* competitive process conducted outside the framework of any applicable procedure; hence, a situation that is different from the one at hand. In none of the cases cited by the Applicant did the Dispute Tribunal engage in a review of applicable rules.

42. In the context of a promotion exercise conducted under a specific policy, such as in the present case, the Tribunal's review is essentially focused on the implementation of the policy (see *Bofill* 2013-UNAT-283). It is not the Tribunal's role to examine whether a policy adopted by the Administration is well-founded or appropriate. This does not mean, however, that the Tribunal may not entertain challenges to the legality of the policy in respect of non-compliance with a higher norm, insofar as the irregularity may result in a staff member not being given fair and full consideration for promotion. For example, a promotion policy setting out a discriminatory criterion would lead to an unlawful decision even if it were correctly applied. Whereas there is no doubt that the Tribunal has no authority "to amend any regulation or rule of the Organization" (*Mebtouche* 2010-UNAT-045, para. 11), a decision may be rescinded if it is taken pursuant to a policy which does not comply with a higher norm. In this context, the Tribunal may also "point out what it considers to be a deficiency" in a policy and "recommend a reform or revision" (*Mebtouche* 2010-UNAT-045, para. 11; see also *Nguyen-Kropp and Postica* UNDT/2015/110).

43. In view of the foregoing, the Tribunal will examine whether:

- a. The procedure as laid down in the Promotions Policy was followed;
- b. The Applicant was given fair and adequate consideration for promotion to the P-5 level; and
- c. The Applicant was provided sufficient reasons for the contested decision.

44. The Applicant's arguments related to the design of the Promotions Policy will be addressed under the second prong of the Tribunal's review, as per the standard set out above.

*Whether the procedure as laid down in the Promotion Policy was followed*

45. The Tribunal will examine, in turn, each of the alleged errors in the implementation of the Promotions Policy.

Separate consideration of male and female candidates

46. The Applicant takes issue with the fact that male and female candidates were evaluated separately during the Second Round, and awarded an equal share of the available places for consideration in the Third Round, instead of being evaluated in a single group of candidates. The Respondent argues that the Promotions Policy, in line with the UNHCR's Gender Policy, mandates that the available slots for promotion be awarded equally among female and male candidates and that, to achieve this purpose, candidates could be evaluated separately from the Second Round onwards as nothing in the Promotions Policy prevented it.

47. It has been established that male and female candidates for promotion were considered in two separate groups in the Second and Third Rounds, leading the SPP to recommend, and ultimately the High Commissioner to select, an equal number of female and male staff members. More specifically, it appears that after having identified the candidates who had passed the First Round, the DHRM established separate lists of candidates for female and male candidates, which it submitted to the SPP members for their comparative assessment during the Second Round. The SPP members were instructed to rank the female and male candidates separately as, in the DHRM's view, "one group does not compete with another, [and] these are separate exercises".

48. At the hearing, the Head of the Human Resources Policy and Planning Service, UNHCR, explained that candidates for promotion were separated by gender from the Second Round onwards as the High Commissioner had decided that the available slots would be equally shared between female and male staff members. In this respect, the evidence shows that the High Commissioner indeed made this decision but only after the DHRM had already instructed the panel members to consider candidates separately by gender. In his memorandum of 4 July 2014 to the Co-Chairpersons of the Joint Advisory Committee, the High Commissioner announced that:

Pending the conclusion of the comprehensive review of the UNHCR Gender Policy, [he] ha[d], therefore, decided that the available slots for promotion this year shall continue to be equally shared between female and male staff members, which is in line with paragraph 5.10.2 of the [Promotions Policy].

49. The Tribunal notes that the Promotions Policy, which establishes the methodology for a three-round evaluation of candidates and sets out the evaluation criteria for each round, does not provide for the separate consideration of male and female candidates at any stage, nor does it refer to gender as being a factor for consideration in the evaluation of candidates. There is no reference to gender consideration in the Promotions Policy until the very end of the process, where sec. 5.10.2 provides that “[a]t grade levels where gender parity has not yet been achieved, at least 50% of the promotion slots will be awarded to substantially equally meritorious female staff”.

50. Significantly, the Promotions Policy consistently refers to the comparative assessment and ranking of a single pool of candidates. In this respect, secs. 5.9.1 and 5.9.3 provide that in the Second Round, the SPP shall conduct “[a] comparative assessment of the staff members who advanced from the First Round”, following which “the Panel Secretariat will compile the Second Round assessment rankings and develop *a consolidated list of substantially equally meritorious candidates* for consideration by the Panel Members in the Third Round” (emphasis added). Then, secs. 5.10.1 and 5.10.2 provide that in the Third Round, “[p]anel members will collectively review *the list of substantially equally meritorious candidates* as retained after the second round review and make final recommendations”, which “are not to exceed the number of slots available at each grade level” (emphasis added).

51. The fact that the DHRM had already instructed the SPP members to consider female and male candidates separately before the High Commissioner had announced his decision to divide equally the promotion slots between the two groups raises serious doubts about the whole decision-making process in respect of gender consideration for the application of the Promotions Policy, and is indicative of a lack of transparency of process.

52. In any event, the Tribunal finds that although the Administration may have sought to achieve the High Commissioner's objective to award an equal number of promotions to female and male candidates, its separation of candidates by gender for consideration during the Second Round review was in violation of the Promotions Policy. Not only did it introduce a new criterion for consideration during the Second Round, but it was also entirely inconsistent with the terms of the Policy itself, which clearly envisaged a single pool of candidates for their comparative assessment and ranking by the SPP at this stage. All candidates who had passed the First Round were required to be assessed on their merits as one group in the Second Round to produce a list of "substantially equally meritorious" candidates for consideration by the SPP in the Third Round.

53. Furthermore, the Tribunal is of the view that the High Commissioner's decision to set the available number of promotion slots for female and male candidates before the actual promotions session was completed, rather than at the time of awarding promotions, also raises some concerns.

54. The High Commissioner's power to set the number of available promotion slots is defined in sec. 4.1.2 of the Promotions Policy, which provides:

[The] Division of Human Resources Management (DHRM) will submit to the Joint Advisory Committee (JAC), at least 10 working days prior to the relevant promotions session, its recommendations on the number of available promotion slots using relevant statistics on positions and staffing, including but not limited to, distributions by grade level, expected separation and recruitment and trends in inter-agency exchanges. The number of promotion opportunities, reflected quantitatively as promotion slots, will be decided by the High Commissioner, taking into account the advice of the JAC.

55. Absent any reference in this provision to gender considerations, the High Commissioner's discretion is limited, at this stage, to determining the number of available slots for promotion at each level, based on the UNHCR's staffing table and staff movements prognostics. Although the High Commissioner may have sought to achieve gender parity in setting in advance the number of slots available for each gender group, which is most certainly a commendable and lawful objective in light of the UN Charter and the "Policy on Achieving Gender Equity

in UNHCR staffing” (IOM 018/2007—FOM 019/2007) of 8 March 2007 (“Gender Policy”) (see *Mebtouche* UNDT/2009/039, para. 17), he ended up making a predetermination of issues that had to be addressed at a later stage, that is, at the time of awarding the promotions, after the evaluation of the candidates had actually taken place.

56. In this respect, the Tribunal stresses that the Promotions Policy does not provide for promotion quotas based on gender, as seemed to be considered by the High Commissioner. Rather, it provides for a *minimum* of 50% of the available slots to be awarded to “substantially equally meritorious female staff”. Hence, the number of promotion slots that are to be awarded to women is clearly not limited to 50%, and ultimately depends on the merits of the candidates, in line with art. 101.3 of the UN Charter, which provides that “[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity”. The intended consequence of sec. 5.10.2 of the Promotions Policy is so apparent from the face of it that there can be no question as to its meaning. As the Appeals Tribunal stated in *Scott* 2012-UNAT-225:

28. The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

57. The Tribunal stresses that it was open to the High Commissioner to establish a promotion mechanism that entailed a separate consideration of female and male candidates in order to achieve gender parity, insofar as it otherwise complied with the UN Charter requirement that promotions be based on merit. However, this had to be done through the adoption of clear rules to this effect, as previously underlined by this Tribunal in *Mebtouche* UNDT/2009/039. Indeed, in

that ruling related to the UNHCR 2007 Promotions Session, the Tribunal emphasized that any effort towards achieving gender parity must comply with the requirement of the UN Charter that promotions be based on merit and materialise through the adoption of clear rules for promotions that reconcile these two principles before the annual promotion session, rather than through a request to the DHRM to apply quotas.

58. In view of the foregoing, the Tribunal finds that the separation of female and male candidates for their comparative assessment and ranking at the Second Round constitutes a fundamental error in the implementation of the Promotions Policy, and cannot be justified by the High Commissioner's decision to award an equal number of promotions to female and male staff members which was, in any event, announced towards the end of said Round. The Promotions Policy had to be implemented as written, and not as the High Commissioner or the DHRM may have wanted it to be.

Failure to provide the SPP members with the candidates' e-PADs

59. The Applicant also challenges the fact that the SPP members were provided only with the candidates' fact sheet, to the exclusion of their e-PADs. The Respondent recognises this but argues it was in line with the Promotions Policy as the staff members' fact sheet reflected their e-PADs.

60. The evidence before the Tribunal was that the fact sheet displays the staff members' working history and part of their performance appraisal, namely the narrative section of their e-PADs. It does not include, however, the numerical ratings for the appraisal of each objective and competency contained in the e-PADs, and the overall ratings for such.

61. In this connection, it is recalled that the PAMS, introduced in 2008, governed the appraisal system in use during the performance assessment period relevant for the 2013 Promotions Session, namely 1 January 2009 to 31 December 2013.

62. In brief, the PAMS provided for an assessment of whether staff members had achieved their agreed work objectives, and demonstrated the competencies required for their post by the UNHCR based on a ten-point rating scale. More specifically, each work objective had to be rated pursuant to the scale below, and the scores for each objective were then combined by the system to generate an overall work performance rating on work objectives:

- |                            |         |
|----------------------------|---------|
| i. Not Achieved            | 1, 2    |
| ii. Partially Achieved     | 3, 4, 5 |
| iii. Achieved              | 6, 7, 8 |
| iv. Exceptionally Achieved | 9, 10   |

63. The same principle applied for the rating of competencies, which were assessed pursuant to the following scale:

- |                              |         |
|------------------------------|---------|
| i. Not proficient            | 1, 2    |
| ii. Partially Proficient     | 3, 4, 5 |
| iii. Proficient              | 6, 7, 8 |
| iv. Exceptionally Proficient | 9, 10   |

64. The ratings were to be accompanied by comments from the staff member's supervisor and, where applicable, from multi-raters (see secs. 25, 40, 50(b) of the PAMS).

65. At the hearing, the Head of the Human Resources Policy and Planning Service, UNHCR, testified that the experience had shown that some supervisors were more prone to give high rankings than others, causing what he referred to as a "rating inflation". He expressed the view that the ratings were "unreliable" and meaningless if not supported by comments. The Administration therefore considered that only the narrative part of the e-PADs should be disclosed to the SPP members for their assessment of candidates during the Second and Third Rounds, as they would give a better picture of the performance and abilities of any staff member under consideration.

66. The Head of the Human Resources Policy and Planning Service further explained that the UNHCR was not satisfied with the appraisal system established by the PAMS and reviewed it in 2014, notably to modify the rating scale, and to require that exceptional ratings be the subject of review, in order to remove the arbitrariness contained in the previous appraisal system. He also stated that the Promotions Policy was drafted in the light of the forthcoming new performance appraisal policy, and intended, from its inception, to exclude the e-PADs from the SPP members' review. The Chief of the Assignments and Promotions Section, DHRM, UNHCR, further testified that the SPP members were specifically advised in a briefing session that "e-PADs ratings [were] not to be disclosed" to them.

67. The Respondent also submitted documentary evidence showing that from 2009, following the first appraisal exercise pursuant to the PAMS, disparities in ratings among various managers and offices were noted with concern. In a broadcast email message of 4 June 2010, the then Director of DHRM, UNHCR, informed all staff members that "across offices around the world and in headquarters, there is a lot of variation in the ratings; and at the individual level, ratings and narratives sometimes do not correspond". He impressed upon the fact that measures would be taken to remedy the problem in the next appraisal cycle and that DHRM would, upon its review of the individual e-PADs, "revert to staff members and managers with comments, and also draw lessons learned to improve practice in general". The DHRM also undertook to "a) update the guidance on the rating scale; b) introduce standards for the quality assurance of e-PADs; and c) provide guidelines to managers and Reviewing Officers on how to calibrate ratings". In the meantime, he announced that "all completed e-PADs will be accepted in the system but for purposes of reporting, the fact sheets of all staff members will include only the narratives for 2009". However, he specified that the e-PADs, including the ratings, could be "referred to by DHRM as needed, for example in cases of contract extensions or non-extensions, personal promotions, conversions or non-conversions".

68. A similar broadcast was sent on 18 May 2011 by the then Director, DHRM, although some improvements were noted. In particular, it was reported that “[a]s for the overall ratings, the vast majority of the e-PADs are in the range of 5.1 to 8.0 (‘proficient’/‘achieved’). So far, 19% of the completed e-PADs have at least one overall ‘exceptional’ rating, compared to 29% in 2009. This trend is reflected in all regions and at Headquarters, which points to a positive tendency to improved validation and calibration of ratings”. The DHRM reiterated its commitment to ensure quality of the 2010 performance appraisals and stressed that “Guidelines on preparing a good performance evaluation” were available on the intranet.

69. At the outset, the Tribunal notes that the ratings, although they appear to have been considered as presenting some problems of consistency from the early years of the application of the PAMS, continued to be at the core of the appraisal system for the five years under review during the 2013 Promotions Session. The PAMS was not modified during that period, rather it was decided to work with the managers to ensure consistency. Managers continued to be asked and expected to evaluate their supervisees by providing them a rating, together with comments. Irrespective of the DHRM’s assessment of the ratings’ value, they were an integral part of the staff members’ e-PADs from 2009 to 2013 and formally part of the UNHCR’s legal framework. Any reference to an e-PAD during that period included both the narrative and the ratings contained in the performance appraisal document, irrespective of the fact that only the comments were reproduced in the staff members’ fact sheet. For the current Promotions Session, the Promotions Policy must be read in the light of the PAMS, which was the applicable administrative issuance regarding performance appraisal at the relevant period.

70. The Promotions Policy, at sec. 5.9.1(i) and (ii), explicitly refers to both the candidates’ fact sheet and e-PADs for consideration by the SPP in the Second Round. The reference to two separate documents clearly indicates that both were to be provided; otherwise, the mention of PAR/e-PAD would be meaningless.

71. In particular, sec. 5.9.1(i) provides that the SPP shall assess a staff member's "ability and readiness to perform at a higher level as reflected in the narrative of the performance appraisal in the PAR/e-PAD and the Fact Sheet". This provision also contains a footnote referring directly to the ratings contained in e-PADs, stating that "[p]erformance appraisal ratings may change during the validity of this Policy" and that "[g]uidance will be provided in assessing equivalencies".

72. In turn, sec. 5.9.1(ii) states that "[m]anagerial achievements shall be demonstrated by their reflection in the PAR/e-PAD performance evaluations and Fact Sheet narrative". The performance evaluation is without any doubt the one found in the e-PAD, which consists not only of the narrative, but also of the ratings of work objectives and competencies. The Tribunal notes that the structure of the obligation under sec. 5.9.1(ii) to consider material is different from that in section 5.9.1(i). Rather than referring to the consideration of the narrative in both the e-PAD and the fact sheet, sec. 5.9.1(ii) contains a clear distinction between that which is reflected in the PAR/e-PAD performance evaluations and that reflected in fact sheet narrative. The words "performance evaluation" attach to the PAR and the e-PAD, while the word "narrative" attaches to the fact sheet. Clearly, in light of the unambiguous wording of this provision, it is from both the e-PAD performance evaluations and the fact sheet narrative that the assessment had to be made in respect of the "managerial achievements".

73. The Respondent's argument that sec. 5.9.1 should be interpreted in such a way that the e-PAD and the fact sheet refer to the same document, namely the fact sheet alone, must be rejected as it has been clearly established that the fact sheet does not entirely reflect the e-PADs because it does not reproduce the ratings contained in the latter. If it had been intended to refer only to the narrative, then the Promotions Policy had to be drafted to so specify this. It is also clear from the Promotions Policy that the information contained in the e-PADs, including the ratings, was directly relevant to the SPP members' assessment during the Second Round.

74. Firstly, sec. 5.9.1(i) required the SPP members to assess whether the staff member's performance met the minimum threshold of "Achieved" or its equivalent for overall work objectives, and "Proficient" or its equivalent for overall competencies. These performance thresholds directly refer to the ratings reflected in the e-PADs, as per the PAMS. Without being provided such ratings, the SPP members were not in a position to verify if the minimum requirements set forth in sec. 5.9.1(i) were met.

75. The Respondent sought to provide explanations during the hearing as to how satisfaction of these performance requirements was verified. After vague and ambiguous testimonies from two witnesses, who suggested that the DHRM undertook a review of the eligible candidates to identify if any of these did not meet the minimum performance standard prior to the panel's review, it was ultimately established that it was following the SPP members' express "queries about performance" that the SPP Secretary took action in this respect.

76. The documentary evidence shows that on 1 July 2014 the SPP Secretary asked the Performance Management Unit, DHRM, UNHCR, to identify among the eligible candidates for promotion to the P-5 and D-1 levels those who "received at least one 'Not/Partially Achieved' and/or 'Not/Partially Proficient' rating on their e-PADs covering the period from 1 January 2009 to 31 December 2013", and to indicate by an asterisk if those ratings had been provided more than once. A Performance Management Associate in the Performance Management Unit then generated a report from the UNHCR's Enterprise Resource Planning System, and identified "those e-PADs in which the rating for overall objectives and/or the rating for overall competencies for at least one e-PAD during the period 2009-2013 was below 5.1, which was the lowest possible 'Achieved'/'Proficient' rating under [the PAMS]". He identified four candidates for promotion to the P-5 level who received a rating of less than "Achieved" or "Proficient", and conveyed this information to the SPP Secretary by email. The Tribunal is not entirely sure how this information was ultimately conveyed to the SPP, but it seems to have been done orally.

77. The Tribunal considers that these explanations as to the methodology adopted by the DHRM to implement the Promotions Policy are worrisome in several aspects. First, it appears that it was not anticipated, prior to the SPP session, that a review of the candidates' e-PADs was necessary to, *inter alia*, verify if the performance standard was met. This, in turn, raises doubts about how the DHRM envisaged undertaking the assessment of the evaluation criterion set forth in sec. 5.9.1(i), which is certainly one of the most determinative criterion of the entire process.

78. Then, it seems that the Performance Management Associate who did the verification exercise used the wrong indicator by identifying those who had an overall score below 5.1 for competencies and objectives. In this respect, the PAMS established a scale where "Achieved" and "Proficient" corresponded to a score of 6 to 9 (see paras. 62 and 63 above), which technically means that a staff member must have a score of at least 6 to minimally meet these standards. In turn, Annex 2 to the PAMS entitled "Background and overview of the PAMS Process" provides in its sec. 16 that "Achieved" and "Proficient" correspond to a rating between 5.1 and 8.0, which also seems to be the position adopted by the DHRM, as per the broadcast sent on 18 May 2011 (see para. 68 above). The Tribunal cannot reconcile these two apparently contradictory provisions of the PAMS and, given that it is not determinative of the present application, will limit itself to recommending the Administration to look into the matter. As a result, it is well possible that staff members who did not even meet the minimum performance threshold advanced to the Third Round.

79. Finally, and most importantly, it turned out that it was the DHRM that assessed part of the performance criterion under sec. 5.9.1(i), instead of the SPP, in contravention with the explicit terms of the Promotions Policy, under which the authority to make that assessment clearly falls on the SPP. In this respect, the information provided by the DHRM to the SPP was not sufficient to conclude that the SPP members ultimately made their individual assessment of the evaluation criterion as per the terms of sec. 5.9.1(i). The apparent decision of the DHRM to keep the ratings from the SPP meant that the SPP members were, thus, not

personally able to ascertain the correctness or otherwise of the information in the considerations under sec. 5.9.1(i) of the Policy even though the Policy required that they had to be personally satisfied that the criterion had been met.

80. Additionally, the ratings given to the candidates by their supervisors in respect of the achievement of their work objectives and their level of competencies was certainly a useful, if not necessary, indicator to compare the various candidates' performance, managerial achievements and leadership qualities. It provided a quantitative measure that would possibly allow the SPP members to identify strengths and weaknesses in the various staff members' candidacy, and compare them against one another. For instance, ratings of "Exceptionally Achieved" or "Exceptionally Proficient" were most certainly relevant to the SPP's consideration of, *inter alia*, whether candidates had "consistently demonstrated exceptional performance and documented exemplary service", as per sec. 5.9.1(i) of the Promotions Policy. As the Respondent acknowledged in his reply, the expression "exceptional performance" refers directly to the PAMS, in which the best level of performance was rated as "Exceptionally Achieved" or "Exceptionally Proficient". If the SPP members had been provided with the e-PADs, they could possibly have identified outstanding candidates by their ratings, with the assistance of the comments provided by the supervisor. Although there may be some concerns as to the reliability of the ratings, they nevertheless constituted the essence of the appraisal system at the relevant period, and provided quantitative values possibly useful to distinguish candidates in a pool of 170.

81. Furthermore, the Tribunal is of the view that while the Administration may have found it more appropriate not to disclose the candidates' performance ratings to the SPP due to the so-called "rating inflation", providing the SPP only part of the candidates' performance appraisal presented more important intrinsic dangers. Under the PAMS, staff members were essentially evaluated based on a scoring system, for which the policy provided strict and specific guidance (see, for example, secs. 10, 23, 25, 30-45, 50 of the PAMS). Amongst others, sec. 52 of the PAMS stated that the Reviewing Officer had to provide "substantive comments

for extreme ratings”, thereby putting in place a review mechanism to avoid unjustified high rankings. Whereas comments were also part of the evaluation, they were meant to support/complement the score given. No guidance was provided for the narrative part of the appraisal. As the Head of the Human Resources Policy and Planning Service testified, narratives varied depending on the commitment of each supervisor. Most certainly, the e-PADs were not completed during the relevant period with a view that only the comments, or “narrative”, provided thereto would be taken into account. In other words, the scoring and the comments constituted a whole under the relevant appraisal process. Thus, providing only the narrative part of the e-PAD to the SPP members gave them an incomplete picture of the candidates’ performance evaluation.

82. The Tribunal cannot emphasise enough the importance of the Promotions Policy being in perfect alignment with the performance appraisal policy at the time under review in the context of the UNHCR’s current promotion mechanism, due to the fact that promotion is essentially based on performance appraisals during the five preceding years. Whilst the Head of the Human Resources Policy and Planning Service, DHRM, UNHCR, attempted to explain the decision not to disclose the ratings by reference to flaws in the PAMS and the then proposed adoption of a new appraisal policy, the Tribunal finds no support in the wording of the Promotions Policy itself for such contention.

83. It goes without saying that any change in the appraisal policy, as appears to have happened as of 10 November 2014 with the entry into force of the new “Policy on Performance Management” (UNHCR/HCP/2014/12), does not and cannot impact upon prior performance appraisals and, as such, cannot be taken into account when making a comparative assessment of the performance of candidates for promotion under the current Promotions Policy when years prior to 2015 are under review. If the e-PADs produced in application of the PAMS were found to be not representative of the staff members’ performance, the Promotions Policy should not have been drawn in such a way that they are made the centrepiece of the promotions exercise. Also, if the intent was that the new

Promotions Policy was to be applied in conjunction with a new appraisal policy, then transitional measures should have been foreseen and implemented.

84. Lastly, the Tribunal notes with surprise that the SPP members were presented, for their signature, with a copy of the consolidated list of candidates under review during the Second Round. This was prepared by the DHRM and contains the following certification: “I herewith confirm that I have reviewed the fact sheets and performance appraisals of the staff members contained in the above ranking, which reflects my comparative assessment of them in line with paragraph 5.9.1 of the [Promotions Policy]”. Inexplicably, the SPP members all signed this document despite not having been provided the e-PADs. The Tribunal finds that this apparently incorrect confirmation created an appearance of compliance with the Promotions Policy.

85. In view of the foregoing, the Tribunal finds that the exclusion of the e-PADs from the SPP members’ comparative assessment of the candidates during the Second Round constitutes another fundamental procedural error in the implementation of the Promotions Policy. The exclusion of the candidates’ numeric ratings, which were central to the appraisal system from 2009 to 2013, deprived the SPP of essential information for their consideration of the performance, managerial achievements and leadership qualities criteria under sec. 5.9.1 of the Promotions Policy. It also prevented them from personally assessing whether the minimum performance standard set forth in sec. 5.9.1(i) was met, as they were required to do. Again, it appears that the DHRM sought to apply the Promotions Policy in the way it thought it was intended to be and, as such, it contravened its actual plain wording.

#### Establishment of an additional evaluation criterion

86. The Applicant submits that the DHRM introduced an additional evaluation criterion by inviting the SPP members to take into account the candidates’ suitability for placement in higher level positions as the deciding factor in the ranking they provided. The Respondent argues that the DHRM did not introduce a new criterion but rather sought to illustrate the rationale of the Promotions Policy.

87. It has been established that on 25 June 2015, the DHRM held a briefing session by video conference with the SPP about the Second and Third Rounds' evaluation process. During this briefing, the then Deputy Director of DHRM advised the SPP members as follows, as recorded in a document entitled "Talking Points" produced by the Respondent:

At every stage, refer back to what you are doing—recommending those who have a proven ability to contribute at a higher level of responsibility, in effect the "Rationale" of the policy (para. 3). The ones you recommend should be easily place-able [sic.] at the higher level. Ask yourselves if you (as a senior manager) would, based on the documentation and from what you know, give him/her a position/function in your area of responsibility. One negative, often criticised, outcome of the previous exercise was that it was too mathematical and yielded results that the Organization was not able to subsequently handle.

88. The Head of the Human Resources Policy and Planning Service, UNHCR, testified that this excerpt of the notes used to brief the SPP reflects so much his idea that he may well have written it. As the designer of the Promotions Policy, he explained that the new Policy sought to depart from the mathematical exercise conducted under the previous one, and shift towards a subjective review by the most senior managers, who are in a position to assess whether candidates could ultimately be placed in positions at a higher level. He impressed upon the subjective character of the Second Round evaluation, and on the fact that the SPP members were expected to consider if the candidates were suitable for placement at a higher post "in light of their life and personal experience".

89. It is not entirely clear to the Tribunal how the SPP members received the advice or instruction as the Respondent did not call any as witnesses to provide an explanation. The testimonies of those staff members from the DHRM who participated in the briefing and the Promotions Session suggest that the SPP members did not raise any particular concern or opposition in this respect. What is certain, however, is that the DHRM conveyed a clear and consistent message to the SPP members that they should consider this factor in their comparative assessment of the candidates, including in the Second Round.

90. The Tribunal recalls that the three evaluation criteria for the Second Round are clearly set out in sec. 5.9.1 of the Promotions Policy, and are limited to an assessment of the candidates' performance, managerial qualities and exemplary leadership qualities. These criteria all refer to the merits of the candidates. There is no reference to considerations relating to suitability for placement in a specific post in the Second Round. Rather, the Promotions Policy is built in such a way that this placement factor plays a role at a later stage of the process. In this respect, sec. 5.12.1 provides:

Promotion to the P-4 level and above will be subject to the staff member obtaining a position at these levels. Staff members will be considered for positions at the higher grade level in the compendium following the announcement of the relevant promotions session results, whilst respecting all other eligibility conditions.

91. Secs. 5.12.2 to 5.12.6 then go on to set the effective date of promotion, depending on whether the staff member was already serving at the higher level or not, serving on an expert post or was within two years from retirement.

92. The Tribunal finds that suitability for placement in a specific post at a higher level was not a relevant evaluation criterion during the Second Round pursuant to the Promotions Policy. Although it is acknowledged that the Promotions Policy calls for an element of subjectivity in the comparative assessment of candidates in the Second Round, there is a significant difference between comparing the candidates' individual ability to perform at a higher level, and the Organization's capacity to place them in such a higher level (here: P-5) position. Whilst the former purely depends on the candidates' work history and performance record, the latter essentially depends on the Organization's operational needs at a specific point in time.

93. The advice provided by the DHRM went further by asking the SPP members to consider to whom they would give a position in their "area of responsibility", hence making the assessment subject to the particular needs of the section in which the SPP members were working, at that point in time. Depending on whether a candidate fitted with the specific needs of an SPP member's section,

he would have, or not, a better chance of receiving a high ranking. In this respect, it is further noted that three SPP members were selected by the Administration and three by the staff members. Although these were senior staff members and were most probably generally aware of the operational requirements of the Organization, there is no indication that, among the six, they covered all the various areas of work of the UNHCR, nor that they had a specific knowledge of the Organization's needs at the P-5 level at that particular time and within the Organization as a whole.

94. The Tribunal does not question the appropriateness of taking into account organizational requirements in the grant of promotions. However, it stresses that the Promotions Policy sets in place a process whereby, in the context of the UNHCR's rank in person system, staff members are awarded conditional promotions purely based on merits, and then effectively promoted when their profile corresponds to a particular need of the Organization. This is evidenced from the fact that the High Commissioner is bound to set a quantitative number of promotion slots, without any reference to specific areas of expertise, and from the evaluation criteria for each of the three rounds of evaluation, which solely relate to the candidates' personnel records. As abstract as the comparison of candidates may be without reference to any specific post, it is clear that the Promotions Policy does not envisage a matching exercise until the very end of the process, which is the effective grant of promotion upon the promoted staff's actual appointment to a specific post at the higher level (secs. 5.12.1, 5.12.2 and 5.12.3).

95. In view of the foregoing, the Tribunal finds that in advising the panel members to take into account the suitability of the candidates for appointment in positions at a higher level, the DHRM introduced an extraneous criterion for consideration during the Second Round which had the potential to subvert the whole promotion exercise, shifting from a merit-based consideration to an operational one. Given the DHRM's role in providing "technical advice and guidance on rules, regulations, policy and methodology" to the SPP (see sec. 4.2.5 of the Promotions Policy), the mere provision of its advice to the SPP constitutes an error in the implementation of the Promotions Policy, irrespective of whether

or not the panel members did actually consider this criterion in their comparative assessment of the candidates. The presumption of regularity attached to the acts of the Administration has been rebutted, and it was for the Respondent to adduce evidence that the panel members did not take into account this irrelevant evaluation criterion. Not only the Respondent did not adduce evidence in this respect, but he rather insisted that this was a proper factor for consideration.

#### Use of personal knowledge

96. The Applicant takes issue with the fact that the DHRM invited the SPP members to take into consideration their personal knowledge of the candidates rather than strictly relying upon the documentation before them. The Respondent claims that it is clear that the SPP members were directed to refer to the candidates' fact sheet, as per sec. 5.9.1 of the Promotions Policy.

97. The evidence shows that the SPP members were invited by the then Deputy Director of DHRM, UNHCR, to inform their ranking with their personal knowledge of the candidates. The Talking Points used for the teleconference with the SPP members invited them to “[l]ook for proof where available (fact sheets, assignment records and performance records) and ask for proof where you may know of facts that are not borne out in the documentation. You may need this for Round 3.” The Chief of Assignments and Promotions, DHRM, UNHCR, who participated in the drafting of these Talking Points, explained in her testimony that if SPP members knew information about staff members as a result of having worked with them or supervised them, they were encouraged to inquire with the DHRM if said information was reported “somewhere”, for example in a current performance report. The SPP Secretary further confirmed that it was expected that the SPP members' rankings would be informed by their personal knowledge of various candidates, in both a positive and a negative way. He added that the DHRM was at the SPP's disposal to provide additional information. However, he was not aware of any information having been so requested.

98. Again, the Tribunal is not in a position to ascertain how the advice given by the DHRM influenced the SPP members' assessment of the candidates. The assertion that no information was requested must be considered with circumspection, as the testimony of the SPP Secretary in respect of the DHRM's interaction with the SPP members was on some aspects directly at odds with documentary evidence later presented, as discussed above (see paras. 75 and 76 above). Also, it could not be certain that the SPP members did not ask information from someone else within the DHRM.

99. The Promotions Policy explicitly states, at sec. 5.9(i) and (ii), that the SPP must base their comparative assessment of the candidates on their fact sheets and e-PADs. In turn, sec. 4.7 states that "[t]he Panels shall ensure that conclusions are not influenced by any unsubstantiated information provided orally or in writing by any person or authority external or internal to the UNHCR, including by, or on behalf of, staff members whose cases are under review", thereby specifically preventing the taking into consideration of information not reflected in the documents provided to the whole panel. Likewise, the Promotions Policy does not envisage any role for the DHRM to provide additional information to SPP members but solely to provide technical advice and guidance on the applicable rules (see sec. 4.2.5).

100. The Tribunal finds that there is no room in the Promotions Policy for the SPP members to inform their rankings with additional information they may know about but that is not reflected in the documents subject to their review. Otherwise, candidates may be advantaged or disadvantaged based on the fact that they are known to some of the SPP members, opening the door to nepotism and bias.

101. The Tribunal acknowledges that SPP members may have known some of the candidates, for having previously worked with them or supervised them and, to some extent, may be influenced by their personal knowledge of the candidates' performance. This is unavoidable and, indeed, implicitly allowed by the Promotions Policy which did not preclude SPP members to assess candidates they may know, unless if they were their current supervisor. Although the Promotions Policy could have provided for an anonymous review during the Second Round to

possibly alleviate the risk of bias, as suggested by the Applicant, this is not the way the policy has been drawn. Since this policy decision falls within the purview of the Administration's discretion and is not illegal, the Tribunal cannot intervene.

102. That said, there is a difference between being influenced by some personal knowledge of the candidates, and engaging in an inquiry to bring in information that was not contained in the documents under review. As part of a fair and transparent process, and in compliance with the Promotions Policy, any information that is not included in the documents before the SPP must be considered as irrelevant for the purpose of the candidates' comparative assessment.

103. In view of the foregoing, the Tribunal concludes that, irrespective of whether or not the SPP members actually used information that was not reflected in the candidates' fact sheet, the DHRM's advice to take into account information not reflected in the documents submitted to the collegial review of the SPP was improper and constitutes a procedural irregularity in the implementation of the Promotions Policy.

#### Ranking methodology

104. The Applicant has highlighted significant issues with the ranking methodology proposed by the DHRM, the individual rankings provided by the six SPP members and their treatment by the DHRM when it "crunched the data", as one witness stated. The Respondent argues that the methodology used was proper but acknowledges that there have been some mistakes committed by the SPP members in applying the suggested methodology. He argues, however, that these had no impact on the Applicant's candidacy as a corrected grid shows that he would not have advanced to the Third Round in any event.

105. It has been established that the DHRM advised the panel members that "[a]t times, two or more fact sheets may be indistinguishable", in which case they could "rank them the same". The DHRM explained the methodology for ranking in this scenario by way of examples. For instance, if the first three candidates of a

list had indistinguishable fact sheets, they were all three to be ranked number one, and the candidate after them was to be ranked number four.

106. The consolidated table of rankings for male candidates for promotion to the P-5 level shows that all six SPP members gave the same ranking to one or more candidates at some point. Indeed, whereas three panel members gave the same ranking to more than one candidate only in a few occasions, three others did it systematically, *de facto* engaging in a grouping exercise. Errors in following the suggested methodology were identified in the course of the present proceedings by the DHRM, the Applicant and the Tribunal in the rankings provided by each of the six SPP members, some being of very serious concern.

107. For example, one SPP member gave identical rankings to a number of candidates on several occasions, but without taking it into account when giving the next rank. He ranked two candidates number 7 and the next one number 8, whilst the ranking for the latter should have been number 9 according to the DHRM's suggested methodology. The SPP member in question systematically repeated this procedure, which resulted in the ranking of 146 candidates between number 1 and 127. Then, this SPP member started to rank a group of candidates at the bottom end, ranking 21 of them number 170. This left three candidates to be ranked between number 127 and 170; these three candidates were mysteriously ranked numbers 159, 160 and 169. This appears to be an unusual grouping and may be indicative of a random action by that panel member. Most certainly, it did not comply with the DHRM's suggested methodology whereby, for example, the 21 last candidates should have received a ranking of 149, not 170. This may have a significant impact on their average.

108. A second SPP member appears to have engaged in a pure grouping exercise by ranking, for example, 147 candidates among a group of 3 candidates or more: 8 candidates number 1, 3 candidates number 6, 5 candidates number 12, 7 candidates number 17, 6 candidates number 24, 20 candidates number 34, 16 candidates number 59, 7 candidates number 76, 7 candidates number 83, 11 candidates number 90, 17 candidates number 106, 7 candidates number 124, 11 candidates number 137, 4 candidates number 145, 10 candidates number 154, and

8 candidates number 163. In this process, he committed several errors in the application of the suggested methodology, by not assigning correctly the next ranking. He ranked almost all candidates within a group, which causes the Tribunal to wonder what exact criteria this panel member was applying.

109. A third SPP member also engaged in a similar grouping exercise by ranking, for example, 136 candidates within a group of four candidates or more: 4 candidates number 14, 8 candidates number 21, 4 candidates number 35, 4 candidates number 39, 8 candidates number 43, 4 candidates number 51, 5 candidates number 55, 9 candidates number 61, 11 candidates number 77, 19 candidates number 88, 12 candidates number 107, 4 candidates number 119, 8 candidates number 123, 7 candidates number 131, 11 candidates number 138, 7 candidates number 149, 4 candidates number 146, and 7 candidates number 160. Almost all candidates are ranked within a group. Mysteriously, the first eight candidates and the last three were ranked individually.

110. The other three SPP members generally gave individual rankings, and ranked two candidates the same only on a few occasions. However, they all committed mistakes in this process. For example, one of them gave number 75 to two candidates and number 76 to the next one, and did not attribute anybody ranking 169, for no obvious reason. Another one of these three SPP members ranked one candidate number 171, whilst there were only 170 candidates.

111. None of these errors were detected prior to the present proceedings. The evidence shows that the DHRM collected the individual rankings from each SPP member, an Administrative Assistant reproduced these in a consolidated list, and calculated the average ranking of each candidate; then, the SPP members were asked to sign the consolidated ranking table, which they apparently did without any further questioning.

112. The Tribunal recalls that the Promotions Policy provides for a “comparative assessment and ranking” of the candidates. The plain meaning of such expression is that candidates must be compared to one another and given a consecutive ranking, from the first to the last. There is no provision for the giving of the same

ranking to more than one candidate, let alone to engage in a grouping exercise. The Tribunal notes that the impact on the consolidated ranking of an SPP member attributing the same ranking to more than one candidate, for instance by giving the privilege of the best ranking to eight candidates, is different from that of an SPP member ranking candidates individually and consecutively. Similarly, it is obvious that if 21 people are given the bottom ranking by one SPP member, this SPP member will cause an anomaly in the rankings compared to other fellow SPP members. Surprisingly, it appears that the DHRM did not consider how its suggested methodology could distort the candidates' consolidated ranking, neither at the time of proposing their methodology nor when it "crunched the data". No statistician was consulted, although it appears necessary to get a professional advice given the potential impact of the proposed methodology on the candidates' overall ranking.

113. Even more worrisome is the fact that the DHRM developed the consolidated list of candidates who advanced to the Third Round based on the numbers provided by the SPP members which displayed, on their face, blatant errors. Amongst others, the grouping of candidates by three SPP members should have reasonably caused concern as to the procedures adopted, as should have the impossible rank of 171 given by one panel member. Whereas it may well be that panel members may, at times, have difficulties to differentiate some candidates, the systematic grouping undertaken by three panel members, of up to 21 candidates, suggests the application of a different methodology. As the Respondent has provided no explanation, it is not possible to speculate about the exercise in which the SPP members thought they were involved. However, these should reasonably have caused some concern to the DHRM and lead to further enquiries. In this respect, the Tribunal notes that sec. 6 of the Promotions Policy provides that "compliance with this policy will be monitored by the Director of DHRM, as appropriate". Most surprisingly, it appears on the evidence before the Tribunal that no one from the DHRM made any review of the consolidated table. If such a review was in fact made, it certainly did not result in any action being taken.

114. The Respondent submitted that the Tribunal should not be concerned by the errors in rankings as they had no impact on the Applicant's chances to advance to the Third Round. The DHRM prepared a corrected consolidated ranking table, where, it asserts, it correctly applied its suggested methodology for the ranking of "undistinguishable" candidates. These corrected tables were prepared for the purpose of the present proceedings and are not signed by the SPP members. They show slight variations in the consolidated ranking of a number of candidates, which would not affect their passing or not to the Third Round, except for one candidate, who was previously ranked 60<sup>th</sup>, and ended up being ranked 55<sup>th</sup> upon correction. This staff member, who did not advance to the Third Round, should have, pursuant to the DHRM's suggested approach.

115. The individual who actually undertook this correction process was not produced as a witness. The precise manner in which the recalculation was undertaken is thus unclear. Most surprisingly, the Respondent called as a witness to explain the correction grid the current Head of Assignments and Career Management Service (D-1), UNHCR, although she was not involved in the 2013 Promotions Session and did not prepare the correction grid herself. In her written statement, she stated:

I have reviewed the aggregate table of the male candidates for promotion to the P-5 level that was prepared by the Panel Secretariat during the Second Round of the 2013 Promotions Session. I found that there were a number of divergences from the instructions on ranking in cases in which an SPP member awarded identical individual rankings to more than one candidate. For example, one SPP member awarded eight candidates the ranking of 1, and then awarded the next three strongest candidates the ranking of 6. Pursuant to the instructions, the next three candidates should have been ranked 9, rather than 6. I further found that another SPP member awarded 21 candidates the ranking of 170, which was the lowest possible ranking as there was a total of 170 male candidates. Pursuant to the instructions, these candidates should have been ranked 150, rather than 170. Another SPP member had mistakenly awarded a candidate the ranking of 171, even though there were 170 male candidates. This candidate should have been ranked 170, rather than 171.

116. She was unable to provide any further explanation during her testimony before the Tribunal.

117. The problem with this correction exercise is that it assumes that the methodology for ranking “undistinguishable” candidates suggested by the DHRM was binding or, at best, that the SPP members intended to follow it. Firstly, as these “instructions” were not the subject of an administrative issuance, they cannot be considered as binding upon the SPP members. One witness, indeed, referred to the methodological suggestion as in fact being no more than that, a suggestion, as it could not be more. Secondly, absent any evidence from the SPP members, who were not involved in the correction exercise, it cannot be presumed that they intended to follow the DHRM’s suggested approach. Indeed, most of them did not, notably when they elected to proceed by grouping. In these circumstances, the Respondent’s *post factum* reconstruction is purely speculative and of no assistance. The Tribunal is therefore not in a position to assess the impact of the numerous errors and dubious methodology adopted by some SPP members on the Applicant’s chances for promotion.

118. In view of the foregoing, the Tribunal concludes that the random application of a grouping methodology by the SPP members, upon suggestion from the DHRM, had no basis in the Promotions Policy and constitutes a procedural error in its implementation. Such methodology could not be reasonably introduced without an administrative issuance, and after due consideration of its potential impact on the consolidated ranking of candidates. Furthermore, the numerous and significant errors in the rankings provided by SPP members raises serious concerns as to their reliability and questions as to the methodology that some SPP members adopted, which remained unquestioned and unexplained by the DHRM.

*Whether the Applicant was given fair and adequate consideration for promotion*

Arbitrary process

119. The Applicant argues that the whole process was arbitrary due, *inter alia*, to the lack of objective evaluation criteria and the scale of the task the SPP members were asked to accomplish within a short amount of time. He highlights important

disparities between rankings provided by different SPP members to the same candidate and asserts that these are indicative of an arbitrary decision-making process and, in some instances, bias. The Respondent submits that the Tribunal may recommend changes to the Promotions Policy if it is contrary to the Staff Rules and Regulations, but cannot order them. He submits that he has “minimally demonstrated” that the Applicant was given full and fair consideration for promotion as his fact sheet has been reviewed by the panel members and evaluated against others pursuant to the criteria set forth in the Promotions Policy. He argues that these evaluation criteria were sufficiently defined and in line with the PAMS to allow for a comparative assessment of the candidates. The Respondent asserts that disparities in rankings were expected and intrinsic to the nature of the process, which involved a subjective review by the various SPP members.

120. At the outset, the Tribunal agrees with the Applicant that the consolidated table of ranking for male candidates for promotion to the P-5 level displays significant divergences in the ranking provided by different SPP members to the same candidate. One candidate was ranked first by one SPP member and last by another, thereby being ranked at the two extremities of the spectrum among a wide pool of 170 candidates. Extreme variations between SPP member rankings for the same candidate are demonstrated throughout the table. For instance, one candidate was ranked number 1 and number 119. Another one was ranked number 5 and number 132. The table displays, at times, a total disagreement in respect of some candidates amongst the six SPP members. For instance, one candidate was ranked numbers 3, 6, 11, 33, 73 and 101. Another one was ranked 1, 17, 22, 42, 86 and 107. A fourth one was ranked 6, 21, 54, 58, 88 and 168. The Applicant was ranked numbers 13, 33, 55, 76, 118 and 119.

121. At other times, the table points towards some consensus but with significant outliers. For instance, one candidate was ranked numbers 12, 14, 18, 18, 25 and 101. Another one was ranked numbers 21, 106, 108, 112, 149 and 170. Ultimately, the SPP members were only unanimous in ranking 13 candidates among the top 56 who would advance to the Third Round.

122. The Tribunal considers that the discrepancies in the ranking table deserved some explanations. It is beyond understanding that applying the same criteria, which all refer to the candidates' own personnel record, and supposedly reviewing the same information, two SPP members would disagree to such an extent as to rank one candidate at the two extremities of the spectrum among a wide pool of 170 candidates. While there is no doubt that the exercise involves an element of subjectivity, it is reasonable to assume that there would be at least some consensus within the group as to whether a candidate is outstanding or whether he or she would rank among the less meritorious. The Tribunal finds that the variations are such as to raise serious concerns as to the whole process. Most surprisingly, no query was made by those administering the process. It seems particularly incongruous that the DHRM, which was so concerned about an unevenness in respect of appraisal scoring in the e-PADs, found that such variations of assessment in the rankings by the SPP members was entirely acceptable and could proceed without comment.

123. Instead of questioning the methodology and being concerned with the actual validity of the comparative assessment made by the SPP, the Respondent sought to argue before the Tribunal that the divergence of rankings, even if extreme, was expected and, indeed, part of the review exercise. In this respect, the Head of Human Resources Policy and Planning Service, UNHCR, stated in his witness statement:

11. In order to fulfil the aim [of identifying staff members who have a proven ability to contribute to the work of UNHCR at a higher level of responsibility], a comparative assessment of the candidates by senior staff members in whose divisions the candidates could work in the future was made the centrepiece of the Second and Third Round of evaluation. The six senior staff members on the SPP during the 2013 Promotions Session were at the D-1 and D-2 levels. Half were nominated by DHRM and half were nominated by the Staff Council.

12. In addition, the Promotions Policy allows for each of the SPP members to have a different perception of a candidate's ability to contribute to the work of UNHCR at a higher level of responsibility. This can be based on the different professional experiences of each of the SPP members. For example, it is possible that one SPP member might accord greater weight to the

performance of a candidate during an emergency than would another SPP member.

13. The differences between the SPP members become apparent during the Second Round in which they individually conduct their comparative assessments and rankings of the candidates for promotion. A purpose of having the SPP members individually conduct their comparative assessment and rankings during the Second Round was to allow each SPP member to retain independence and to bring forth these differences.

124. This line of explanation appears to reflect the Head of Human Resources Policy and Planning Service's misconception that the SPP members could take into account candidates' suitability for placement at the higher level with reference to actual placement opportunities. If this explanation for the lack of consensus is indeed accurate, it would appear that not only the DHRM but also the SPP members misconstrued the review exercise as being one involving the SPP members picking those among the groups that they considered would be most needed at the P-5 level, or perhaps even in their own area of work, rather than comparing the candidates on their own merits, as required by the Promotions Policy. This may be a possibility, which would then lead to the conclusion that the procedural error identified above concretely distorted the candidates' rankings.

125. The Applicant also alluded to other possibilities, more specifically to the SPP members' taking into consideration their personal knowledge of candidates, to a failure to sufficiently define the evaluation criteria and to the scale of the task. The Tribunal has already addressed the first factor, which indeed could possibly explain some outlier rankings and demonstrate that this advice by the DHRM generated tangible problems. The Tribunal will now examine the two additional suggested factors in turn.

126. As recalled above, it is not the Tribunal's role to engage in a review of the Promotions Policy unless it is alleged that it does not comply with a higher norm. This is not the case in the instant application. The three evaluation criteria for the Second Round, that is, performance, managerial achievements and exemplary leadership qualities, are in line with staff regulation 1.1(d), which provides that "[t]he Secretary-General shall seek to ensure that the paramount consideration in

the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity”. The Promotions Policy provides further particulars for each criterion, which are also in line with staff regulation 1.1(d).

127. Regarding performance, it provides for a minimum standard “indicating the staff member’s ability and readiness to perform at a higher level” and for consideration of “consistently demonstrated exceptional performance and documented exemplary service, including in emergency operation” and of “service at the higher grade level for one year or longer ... recognized through the receipt of a[n] SPA or RALP” (see sec. 5.9.1(i)).

128. Regarding managerial accountability, it provides that “a staff member must have demonstrated a high level of competence and professionalism in the management of human, financial, material resources, programmes or operations” (see sec. 5.9.1(ii)).

129. Regarding exemplary leadership qualities, sec. 5.9.1(iii) refers to qualities such as “motivating a team, providing a vision and promoting a climate of respect and appreciation of the work place”.

130. Given the discretion vested in the Administration for the establishment of its policies and procedures, it is not for the Tribunal to go any further and examine whether the evaluation criteria were fit for purpose or otherwise sufficiently defined. In any event, the difficulties encountered in the promotions exercise under review appear to stem not from the evaluation criteria themselves, but from the methodology to assess them in a comparative fashion.

131. Turning to the task the panel members were asked to undertake, the Tribunal notes that there is little guidance, if any, in the Promotions Policy about the procedure or methodology to be used to fulfil the highly complex exercise that the Second Round evaluation involves. No administrative issuance was provided either. Instead, the DHRM attempted to devise the methodology to be followed.

132. It has been established that on 17 June 2014, the DHRM convened the SPP to the Promotions Session to be held in Geneva from 30 June 2014 to 11 July 2014, for consideration of all eligible candidates for promotion to the P-5 and D-1 levels, male and female. There were 170 male and 161 female eligible candidates for promotion to the P-5 level, in addition to those to the D-1 level for which the Tribunal is unaware of the number. The SPP members were, at that time, given access to all the candidates' fact sheets. From 30 June to 4 July 2014, the SPP members gathered in Geneva to conduct their individual assessment of all the candidates, in a controlled environment, away from any distraction. Upon arrival, the SPP members were provided with a computer, a hard copy of all the fact sheets, divided by gender and grade level, and the four lists of candidates to use as a template for their ranking. The DHRM provided the panel members another briefing, where the following suggestion was made as to the methodology for the comparative assessment of the candidates:

We may suggest that you start off with a first review of the individual piles [referring to the four piles of candidates for promotion to the P-5 and D-1 level, separated by gender] and further sub-divide each into three: a) your most definite (a number not exceeding the number of slots); b) the not-at-all (not yet) list; and c) don't know (maybe) list.

Ranking is not scoring. Ranking is a comparative exercise. If A is better than B, then A gets a higher rank. You will have to play with the order in each pile until you come to a definitive place for each.

133. Panel members were also encouraged to “annotate any observations that highlight the merits of the staff member on the template provided to facilitate the ranking” as “[t]hese observations may prove useful for future reference, either when determining the final individual ranking of staff members or during the 3<sup>rd</sup> round review”. According to the SPP Secretary, there was no further discussion among the panel members as to the methodology for their comparative assessment of the candidates. The SPP members, who were initially allocated three days for their overall review plus an additional one if needed, appear to have completed their review within four days. The fifth day was reserved for the DHRM to consolidate the data, so the Third Round could proceed the following week.

134. There is no doubt that the SPP members' task was enormous and highly complex, considering the large number of candidates that had to be assessed in a comparative fashion and the documents at their disposal. Comparing and ranking 170 candidates based on their performance, managerial skills and leadership qualities was, by nature, a highly complex exercise. The Applicant's fact sheet, for instance, contains 17 pages of densely condensed information about his languages skills, academic background, employment records, performance evaluations, and development and learning events.

135. The Tribunal recalls that the fact sheet contains no quantitative value such as performance ratings by a supervisor. For the relevant period, the fact sheet merely contains, in the "Performance Evaluations" section, the staff member's work objectives and the comments of his or her supervisor divided as follows:

- a. "Manager Comments on Values, Core Competencies, and Managerial Competencies;
- b. "Manager Comments on Cross-Functional and Functional Competencies"; and
- c. "Manager Overall Competencies Comments".

136. These rubrics are very general and there are no specific comments, for instance, on managerial achievements and leadership qualities. The comments, which were not meant to serve as a specific appraisal of the candidates' capacity to perform at the P-5 level, are either very general or, at times, focus on particular projects that are not directly relevant for the present exercise. The SPP members were required to compare 170 fact sheets within a day or two, to do the same for the 161 female candidates to the P-5 level, and then for the candidates to the D-1 level. The whole review was completed within four days.

137. Having reviewed the Applicant's fact sheet and some others in similar applications before it, the Tribunal cannot but wonder how the panel members could possibly, reasonably and properly compare the 170 male candidates' performance, managerial achievements and leadership qualities in the face of the

information displayed in their fact sheet alone, and undertake the same task for the 161 female candidates and then the D-1 candidates in such a short period and without any further guidance. The difficulty is particularly acute given that the candidates are not competing for a specific post where particular experience or competencies may be of significant import, but compared on the basis of their ability to perform at a higher level in their respective area of expertise.

138. In the Tribunal's view, the ratings contained in e-PADs were not only explicitly required by the Policy, but also crucial to give the panel members some comparative measures. The comments provided by the supervisors do not provide enough information to constitute the basis of the envisaged comparative exercise and, in any event, were not designed or intended to provide it.

139. In view of the foregoing, the Tribunal finds that the Respondent failed to demonstrate, even minimally, that the Applicant was fully and fairly considered for promotion. The consolidated table of rankings displays significant divergences in the rankings given to the same candidate by different SPP members, which cannot be simply explained by reference to the fact that this review exercise entailed an element of subjectivity. Not only did the Respondent fail to provide any satisfactory explanation for these divergences, but he also failed to demonstrate that the Applicant's candidacy for promotion was, indeed, properly compared with that of the 169 other candidates by the six SPP members based on the established evaluation criteria.

140. Given the failure to provide the panel members the e-PADs' ratings, which were necessary to compare the candidates in light of the evaluation criteria, the invitation to take into account operational requirements as well as personal knowledge of candidates, and the way the review was conducted, the Tribunal finds that the presumption of regularity has been rebutted, and that there are strong indicators that the Second Round review was carried out in an arbitrary manner.

Safeguards embedded in the process

141. When issues with rankings were addressed with the witnesses called by the Respondent, they repeatedly answered that any imperfections in the process were cured by the fact that the number of candidates who proceeded to the Third Round was equivalent to 200% of the number of available slots for promotion, so the Third Round offered the SPP members an opportunity to collectively probe their individual assessment. Furthermore, they asserted that averaging the individual SPP members' rankings smoothed out individual errors or inconsistencies and diluted outliers rankings. The Applicant argued that the presence of a Third Round review can only cure errors in respect of candidates who advance to this stage. He further submitted that the averaging of the SPP members' rankings is similarly insufficient to smooth out the issues identified.

142. Firstly, the Respondent's argument that the Third Round constitutes a safeguard mechanism does not withstand judicial scrutiny, and this misconception seems to have caused the Administration to unjustifiably take a lax approach during the Second Round. It goes without saying that errors in rankings or any other procedural errors in the implementation of the Promotions Policy committed during the Second Round evaluation cannot be cured during the Third Round in respect of those staff members, such as the Applicant, who did not advance to that stage. The constitution, in the Second Round, of a larger pool of candidates than the actual available promotion slots is meant to allow the panel to collectively select the top 56 among the "substantially equally meritorious candidates", not to cure procedural defects committed earlier. If some candidates were included in the pool by mistake and others excluded, the SPP members were no longer comparing "substantially equally meritorious candidates".

143. Secondly, the Tribunal notes that there is no provision in the Promotions Policy in respect of the methodology for consolidating the individual rankings provided by each of the six SPP members. The evidence shows that the DHRM elected to take an arithmetic mean of the individual rankings provided by each SPP member. By taking an arithmetic mean, the candidates' rankings were *de facto* converted into numerical values, which were then ranked from the lowest to

the highest. None of the witnesses presented by the Respondent could provide any cogent explanation as to why this methodology was chosen. The evidence disclosed that no statistical advice was sought or obtained in respect of the appropriate methodology to be used.

144. The Tribunal recalls that the new version of the Promotions Policy, applied for the 2013 Promotions Session, is substantially different from the previous policy as it entails a ranking process rather than a scoring one. The consolidation process became even more complex with the allocation of the same ranking to various candidates, as explained above, and in the presence of extreme rankings. Whilst the methodology adopted may ultimately be an acceptable way to proceed, the Tribunal is concerned that no consideration appears to have been given to the impact of taking an arithmetic mean rather than, or in conjunction with, a median or a mode for instance. The possibility of excluding extreme rankings from the average also appears not to have been considered. Given the small number of SPP members, the impact of an outlier was potentially determinative of the final rank given to a candidate. For instance, one candidate who was ranked between 59 and 95 by five SPP members, nevertheless advanced to the Third Round as he was ranked number 26 by a sixth one. If this outlier ranking had been discarded, this candidate would not have been among the 56 candidates who advanced to the Third Round, which also means that someone else would have.

145. In these circumstances, the Tribunal is not convinced by the Respondent's argument that taking an arithmetic mean of the six individual rankings cured all the significant problems in the rankings highlighted above. Rather, it appears that the complexity of the statistical exercise involved has been underestimated.

#### Failure to take into account relevant information

146. The Applicant claims that the UNHCR failed to take into account the following information, which he considers relevant to the consideration of his candidacy for promotion:

- a. The grade of the duty station for his first assignment to Malaysia (1988-1991);

b. An emergency mission to Myanmar from 28 November 2012 to 22 January 2013 as Senior Legal Advisor, which was not reflected in any performance evaluation;

c. His experience as Assistant Representative Protection (P-5) in Kabul, and the fact that his temporary assignment in Kabul will end in July 2015.

147. The Respondent argues that these elements are either irrelevant for the consideration of the Applicant's candidacy in the Second Round or do not demonstrate a flaw in the contested decision, which entails a comparative assessment of several candidates.

148. The Tribunal agrees with the Respondent that the grade and exact location of the Applicant's first duty station, in 1988-1991, are irrelevant for the consideration of his candidacy for promotion in the Second Round, which entails a review of his performance appraisals during the past five years. Furthermore, it belongs to the Applicant to ensure that his fact sheet accurately reflects his working history, which he was given the opportunity to do prior to the Promotions Session.

149. As to the Applicant's emergency mission to Myanmar, it is noted that this mission is reflected in the section entitled "U.N.H.C.R. Experience" of his fact sheet, but it does not appear to have been the subject of a separate performance appraisal. Pursuant to sec. 3 of the PAMS, a separate e-PAD was not required for an assignment of less than two months, which was the case here. That said, part of the period where the Applicant was on mission in Myanmar, namely from 29 November 2012 until 31 December 2012, is covered in his overall assessment for the period from 1 October 2011 until 31 December 2012, although it makes no direct reference to this specific assignment.

150. As pointed out by the Respondent, the Applicant did not make any comment to highlight his mission to Myanmar, nor did he challenge the fact that such mission was not reflected in his evaluation. The Tribunal emphasises that the Second Round review of the Promotions Session is based on the performance appraisals of the staff member, as they stand at the time of such review. This is

not the time to challenge performance appraisals or the lack thereof. Such challenge must be brought at the appropriate time pursuant to the provisions of the applicable appraisal policy.

151. Lastly, as to the Applicant's service as Assistant Representative (Protection) (P-5) in Kabul, the Tribunal notes that this appointment started as a temporary appointment on 9 February 2013, and that the Applicant started to receive a RALP from April 2013. Given that this appointment had not reached one year at the end of 2013, there was no requirement in the Promotions Policy for the SPP to give it particular consideration under sec. 5.9.1(ii). Service at the higher level does not guarantee promotion, although it is a factor to take into consideration when it lasted for a period of over a year and it is recognised through the granting of SPA or RALP.

152. Furthermore, the Applicant's service in this position was duly recorded in his fact sheet and the comments in respect of his performance appraisal are reflected thereto. As the Tribunal already found above, the fact that the SPP was not provided with the Applicant's ratings by his supervisors prevented them from having the full picture of the Applicant's performance. This issue, however, is not particular to that post, nor to the Applicant, and has already been identified as an error in the implementation of the Promotions Policy. The fact that the Applicant received positive feedback for his work performed at the P-5 level but nevertheless did not advance to the Third Round is not, in and of itself, indicative of a failure by the SPP members to take into account his experience and performance on that post, as the review entails a comparative assessment of a large number of candidates.

153. In view of the foregoing, the Tribunal finds that the Applicant did not demonstrate that the SPP failed to take into account any particular information relevant for his candidacy for promotion besides his e-PADs' rating, as already discussed above.

*Failure to provide reasons for the decision*

154. The Applicant argues that the lack of reasons provided to him for the contested decision also causes it to be illegal as he was prevented from meaningfully challenging it. The Respondent submits that the Applicant was provided with sufficient reasons as he had been informed that he was not ranked within the top 56 candidates who advanced to the Third Round.

155. As part of a comparative assessment, the decision not to promote a staff member automatically entails that he or she was not ranked among the top ones, without the need to provide any further reasons. It would be practically impossible for the Administration to explain to each and every unsuccessful candidate why he or she was not ranked among the top candidates; the only justification that may possibly be provided is the individual and consolidated rankings obtained by a staff member. As the Promotions Policy does not provide for these to be disclosed to the candidates, doing so is therefore left to the discretion of the Administration.

156. In this respect, the Respondent states in his reply that “[i]ndividual and overall rankings were generally disclosed by the Promotions Secretariat upon request”. The Tribunal notes that this statement is not entirely accurate as the evidence shows that among the seven cases related to the 2013 Promotions Session that were heard jointly, the Administration only disclosed to one candidate her overall ranking, following her request. In the six other cases, the Administration disclosed the rankings to candidates, even when they requested them, only in the course of management evaluations or the proceedings before the Tribunal. It appears that the Applicant did not specifically request reasons for the contested decision or his individual rankings. His request for information, dated 29 October 2014, was limited to being provided with the “documentation submitted to and considered by the Panel”. The Applicant was informed of his rankings through the Respondent’s reply in the current proceedings, on 17 June 2015. The Tribunal notes with concern that contrary to other candidates who were informed of their rankings through the Deputy High Commissioner’s response to their requests for management evaluation, the Applicant’s request for management evaluation remained unanswered.

157. Given that the Applicant did not make any request to the Administration to be provided with reasons for the contested decision, that the Promotions Policy provides no positive obligation for the Administration to disclose the rankings, and that the Applicant was ultimately informed of his rankings in the course of the present proceedings, the Tribunal finds that the Respondent has satisfied its legal obligation to provide reasons for the contested decision as set out in the jurisprudence of the Appeals Tribunal. In *Obdeijn 2012-UNAT-201*, the Appeals Tribunal stressed the obligation for the Administration to provide reasons for its decision when a request is made “as part of a formal review process”, as “a failure by the Administration to respond would seriously hamper or preclude the staff member, the Management Evaluation Unit, and the Tribunals from reviewing administrative decisions affecting the contractual rights of staff members”. However, the Appeals Tribunal did not create an independent, positive obligation for the Administration to disclose reasons for its decision beforehand unless otherwise specifically provided for in administrative issuances. Most certainly, the Applicant was ultimately not prevented from meaningfully challenging the contested decision.

158. The Tribunal observes that the Administration’s lack of consistency in disclosing the rankings, coupled with the opacity in the procedures followed by the DHRM and the SPP, may have caused the Applicant not to fully understand the decision reached and the overall process. To alleviate this problem, the Tribunal strongly encourages the Administration to adopt clear and transparent procedures for the implementation of the Promotions Policy.

*Conclusion in respect of the legality of the decision*

159. The Tribunal has identified above several significant procedural errors in the implementation of the Promotions Policy during the 2013 Promotions Session, which may be summarised as follows:

- a. The High Commissioner deciding in advance of the Promotions Session that an equal number of available slots for promotions would be allocated to female and male candidates;

- b. The DHRM separating the candidates by gender for the Second Round evaluation;
- c. The DHRM failing to provide the SPP members with the e-PADs ratings;
- d. The SPP members not assessing compliance with the minimum performance threshold under sec. 5.9.1(i) of the Promotions Policy;
- e. The DHRM advising the panel members to take into account, during their Second Round review, the candidates' suitability for placement in actual positions at the P-5 level;
- f. The DHRM advising the SPP members to take into account their personal knowledge of the candidates;
- g. The DHRM introducing a ranking methodology which permitted the allocation of the same rank to more than one candidate, without any administrative issuance and any consideration of the impact on the candidates' consolidated ranking;
- h. The SPP members engaging in a *de facto* grouping exercise rather than a comparative one, without any consideration of the impact of such methodology on the candidates' overall ranking;
- i. The significant errors in the rankings provided by the SPP members, coupled with a lack of diligence by DHRM in the consolidation of data, which puts into question the reliability of the rankings; and
- j. The extreme divergences in the rankings provided by the various SPP members to the same candidates, for which no satisfactory answer has been provided, and which may suggest that the errors identified above concretely impacted on the results, or that the comparative and ranking exercise was simply impossible to accomplish given the large number of candidates, the information provided to the panel members, which consisted only of the candidates' fact sheet, and the short time for conducting their review.

160. In light of all the foregoing, the Tribunal finds that the contested decision is unlawful.

161. The Tribunal notes that the Applicant was eligible for consideration for promotion in the 2014 Promotions Session, which the Tribunal understands is in its final stage, and will continue to be eligible in future sessions until promoted. By conducting an extensive review of the 2013 Promotions Exercise, addressing each and every procedural irregularity raised by the Applicant, and in line with the Appeals Tribunal's judgment in *Mebtouche* (see para. 42 above), the Tribunal hopes to have provided some guidance as to how the Promotions Policy ought to have been implemented in its current formulation, should the UNHCR decide to continue to use it in future promotions exercises.

162. In addition to insisting on the necessity of implementing the Policy as adopted, the Tribunal recommends to the Administration to "reform" such by supplementing the Policy with an administrative issuance detailing the modalities of its implementation. As noted above, the comparative assessment in the Second Round is highly complex given, amongst others, the number of candidates involved. The methodology for such exercise needs to be thought through carefully, and delineated in fair and transparent procedures, which are to be accessible and binding so that they can be relied upon and be subject to judicial scrutiny.

#### *Remedies*

163. The Tribunal shall consider the remedies sought by the Applicant, listed in para. 24.n above, in light of art. 10.5 of its Statute, which delineates its powers regarding the award of remedies.

#### Rescission of the contested decision

164. It is settled jurisprudence that in respect of the UNHCR's promotions sessions, the Tribunal can only rescind the decision not to grant a promotion if the procedural irregularities uncovered had deprived the applicant of a significant chance for promotion (see *Vangelova* 2011-UNAT-172; *Bofill* 2011-UNAT-174

and *Dualeh* 2011-UNAT-175). The Tribunal shall therefore consider whether the Applicant would have had a significant chance of being promoted if the errors indicated above had not been committed.

165. The Applicant was eligible for consideration for promotion, and met the requirement allowing him to advance from the First to the Second Round of evaluations. As the Second and Third Round involved a comparative assessment of the candidates, rather than eliminatory criteria, the Applicant had a chance to be ultimately promoted. The actual probability of being promoted depended entirely on how he would compare with the other candidates in the course of the Second and Third evaluation rounds.

166. In this respect, the creation of two separate pools of candidates, male and female, creates a first difficulty in assessing the Applicant's ultimate chances for promotion. Because male candidates (totalling 170) and female candidates (totalling 161) were never compared against each other, it is difficult to assess how the Applicant would have performed in a wider pool of 331 candidates, where only 112 were to advance to the Third Round, and 56 were ultimately to be selected.

167. The Respondent's suggestion that the Applicant would not have been selected given that he was ranked 62 out of 170 is purely speculative, as the candidates are not given a score but a rank. Moreover, because of the wide divergence of opinion among the panel members in their assessment of candidates, the rankings that the Applicant received in a pool of 170 male candidates does not predicate the one he would have received in a larger pool of 331 candidates, nor the one he would have received if his candidacy had been collectively reviewed by the SPP members within a pool of 112 candidates in the Third Round.

168. Most importantly, the Tribunal is of the view that the Applicant's consolidated ranking as established by the DHRM, as well as the individual rankings provided by the SPP members, are so unreliable that they cannot serve as a basis for consideration of the Applicant's chance for promotion. How would the

Applicant have been compared against the other candidates if the panel members had been provided with his e-PADs, and if they had not been told to take into consideration information they may know about certain candidates and their suitability for placement in P-5 positions? Would the SPP members who ranked the Applicant as 76, 118 and 119 had agreed with those who ranked him as 13, 33, 55? What would his overall ranking have been if the SPP members had not given the same rank to several candidates and had not committed mistakes in their rankings? How would the Applicant have compared with the top 112 candidates if he had advanced to the Third Round? It is impossible to tell nor should the Tribunal speculate.

169. The errors in the implementation of the Promotions Policy are so significant that their impact on the Applicant's chance for promotion cannot be measured. Most certainly, the Applicant had a real chance for promotion. Furthermore, he had already been assigned to a P-5 level post since February 2013 despite being still graded at the P-4 level.

170. Therefore, the Tribunal rescinds the decision.

#### Specific performance

171. The Applicant requests retroactive grant of promotion, with attendant payment of increased salary and benefits. Alternatively, he requests the Tribunal to remand his candidacy for further consideration, with strict guidance, as he considers that the Promotions Policy currently in place does not provide for reasonable consideration since it depends on the subjective view of a limited number of the UNHCR managers.

172. The Tribunal reiterates that the contested decision is discretionary in nature, and that it is not its role to exercise the discretionary authority vested on the SPP and the High Commissioner by substituting its own assessment for that of the competent official (see *Sanwidi* 2010-UNAT-084; *Abbassi* 2011-UNAT-110). It is part of the concept of discretion that its exercise may lawfully result in decisions that are different from those the Tribunal might have preferred. Therefore, where the judicial review concerns the exercise of discretion, the

Tribunal can order specific performance, such as it has been requested in the present case, solely in the rare hypothesis where the result of the exercise of discretion can be narrowed down in such a way as to only have one legally correct outcome (see *Ademagic et al.* UNDT/2015/115). This is not the case in the application at hand.

173. The Tribunal has concluded that the SPP had not fairly and adequately considered the Applicant's candidacy for promotion to the P-5 level when comparing him with the other candidates. The High Commissioner, who is the competent decision-maker, has not received a proper and meaningful recommendation for making his decision as to whether or not to award one of the 56 available slots for promotion to the P-5 level to the Applicant. Until this exercise has been properly performed, its outcome remains open for the Applicant. If the Tribunal were to grant the Applicant a promotion, it would be tantamount to prejudging the outcome of the comparative assessment of all eligible candidates envisaged in the Promotions Policy, and substituting its assessment for that of the SPP and the High Commissioner, something that the Tribunal is neither allowed nor in a position to do.

174. As to the Applicant's alternative request for his candidacy to be remanded for further consideration with strict guidance, the Tribunal notes that it follows from its decision to rescind the contested decision that the Applicant's candidacy for promotion should be examined anew and compared against that of the other candidates, thus entailing to conduct the 2013 Promotions Session anew from the Second Round onwards.

175. However, the Tribunal reiterates that it does not have the authority to amend the Promotions Policy, and it is not its role to redesign it so as to depart from the system currently in place, as seems to be the Applicant's request. The Tribunal would not even be in a position to recommend any operational amendment to the Policy. Indeed, its implementation during the 2013 Promotions Session under review was so flawed that it is impossible to ascertain whether it would lead to fair and adequate consideration of staff members' candidacy for promotion if properly implemented.

176. Therefore, the Applicant's request for specific performance must be rejected.

#### Alternative compensation

177. Art. 10.5(a) of the Tribunal's Statute provides that "where the contested administrative decision concerns ... promotion ..., 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". The Applicant sought to argue that as he had been eliminated from the process prior to a final decision being made by the High Commissioner, the Tribunal is not required to set an alternative compensation to rescission.

178. The Tribunal considers that this argument is without merit. It is clear that the contested decision concerns a promotion irrespective of the moment when the Applicant's candidacy for promotion was turned down and, ultimately, rejected. The Tribunal shall therefore set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision, in accordance with 10.5(a) of its Statute.

179. In calculating the *quantum*, the Appeals Tribunal has stressed that the determination of the "compensation in lieu" must be done on a case-by-case basis and carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265). In respect of decisions denying promotions, it further held that "there is no set way for a trial court to set damages for loss of chance of promotion and that each case must turn on its facts" (see *Sprauten* 2012-UNAT-219, para. 22; *Niedermayr* 2015-UNAT-603).

180. In similar cases involving rescission of decisions denying promotions under UNHCR previous promotions policies, the Tribunal set the amount of alternative payment to rescission to CHF8,000 (see *Tsoneva* UNDT/2010/178; *Mututa* UNDT/2009/044), CHF9,000 (see *Andrysek* 2010-UNAT-070) and CHF10,000 (see *Andersson* UNDT/2012/091), taking into account that the applicants would be eligible again to be considered for promotion the following year.

181. Along the same lines, the Appeals Tribunal recently awarded USD10,000 for loss of chance of promotion as compensation in lieu of rescission, in a case where it found that the particular circumstances rendered the assessment more complicated than usual. The Tribunal concluded that it “had to assess the matter in the round and arrive at a figure that [was] deemed by [it] to be fair and equitable, having regard to the number of imponderables” (*Niedermayr* 2015-UNAT-603).

182. Considering the extreme difficulties in ascertaining the Applicant’s chances for promotion, the fact that he was eligible again for promotion in the 2014 session, and the previous determinations of the Appeals Tribunal and this Tribunal on the matter, the Tribunal considers, on balance, that it is fair and appropriate to set the amount of compensation in lieu of rescission to CHF6,000.

#### Material damages

183. The Applicant asked, as an alternative to rescission and retroactive grant of promotion, to be compensated for the material damage resulting from the loss of the additional salary he would have received if he had been promoted to the P-5 level, for two years counted as of the time of the contested decision.

184. In examining the Applicant’s claim for material damages, the Tribunal must take into account that he was eligible for promotion again in the 2014 Promotions Session. Hence, any material damage for loss of chance to be promoted would be limited to one year. The Tribunal finds that the Applicant has suffered no loss of salary during this period as a result of the contested decision given that he has been receiving a salary at the P-5 level since April 2013. Therefore, his request for material damages must be rejected.

#### Moral damages

185. Lastly, the Applicant asked compensation for moral injury in the amount of one month net base salary for grave breaches of staff rights and emotional distress.

186. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows:

As part of its judgement, the Dispute Tribunal may *only* 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 *for harm, supported by evidence*, 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. (emphasis added)

187. The question arises as to whether the instant case is governed by this amended version of the Tribunal's Statute given that the High Commissioner's decision not to promote the Applicant predates the amendment, whereas his decision to reject the Applicant's recourse and the present application were issued and filed, respectively, after the amendment.

188. The Applicant argued that his right to claim compensation for moral damages accrued at the time of the fundamental breach of his substantive entitlements, which occurred when the High Commissioner decided not to promote him. The Applicant submits that the contested decision is the decision of 20 October 2014 on promotions, and not the one of 3 March 2015 on promotions upon recourse as the use of the recourse mechanism did not alter the High Commissioner's original decision insofar as the Applicant is concerned.

189. The Tribunal acknowledges that the particular mechanism set forth in the Promotions Policy, which allows for both recourse and administrative review of decisions on promotion, may create some confusion when it comes to identifying

the contested decision in the context of the Organization's internal justice system.

In this respect, sec. 5.13.1 of the Promotions Policy provides:

Staff members have a right to full and fair consideration for promotion. Recourse may be sought on the basis that some documentation relating to the period under review that may have had an impact on the final recommendation was not available at the time of the review. Recourse is not an appeal as per the Staff Regulations and Rules; it is optional, and without prejudice to a staff member's right to formally contest the non-promotion decision in the context of the Internal Justice System.

190. It follows from this provision that when a staff member seeks recourse, the High Commissioner's decision on his or her promotion becomes final only after such recourse has been considered. Since the Applicant sought recourse, the High Commissioner's decision concerning his candidacy for promotion to the P-5 level was finalised only on 3 March 2015, even if he rejected the Applicant's recourse. Should the contested decision be considered as being the one announced on 20 October 2014, the request for management evaluation would have been time-barred (staff rule 11.2) and the instant application irreceivable *rationae materiae* (art. 8(1)(d)(i)(b) of the Tribunal's Statute; see, e.g., *Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Adjini et al.* 2011-UNAT-108).

191. Even if a fundamental breach of the Applicant's procedural or substantive rights had occurred earlier, the Applicant's moral damage, if any, did not crystallise until the decision on his candidacy for promotion was finalised. Any right to compensation could not accrue before that time. As both the contested decision and the application were issued and filed after the entry into force of the amendment to the Tribunal's Statute, there is no doubt that the Applicant's request for moral damages must be determined pursuant to art. 10.5 of the UNDT Statute, as it stood amended on 18 December 2014.

192. The Applicant's request for moral damages is based on an asserted fundamental breach of his due process rights, which he claims does not need to be supported by evidence based on *Asariotis* 2013-UNAT-309, even if the Tribunal were to apply the amended version of art. 10.5 of its Statute.

193. In *Asariotis*, the Appeals Tribunal held that:

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

194. The Tribunal understands from this Appeals Tribunal's holding that a moral injury could be inferred from the fact that a staff member has sustained a fundamental breach of his or her substantive or due process entitlements. However, it was clear that it was ultimately necessary that a moral injury be established, by inference or direct evidence, for the Tribunal to award compensation for moral damages.

195. By requiring that harm be supported by evidence for the Tribunal to award damages, including moral damages, the amended version of the Statute prevents the Tribunal from drawing an inference of moral injury from the fundamental breach of entitlements or due process rights. Under the amended version of art. 10.5 of the Tribunal's Statute, the Tribunal may only award compensation for moral injury if the applicant sufficiently substantiates the moral harm suffered as a result of the contested decision. In this respect, the Tribunal emphasises that it is not compulsory for the Applicant to submit *viva voce* evidence of harm; such fact

can be gathered and/or inferred from the pleadings and documents produced by a party (see *Dahan* UNDT/2015/053; *Gueben et al.* UNDT/2016/026). The Tribunal must therefore examine if the Applicant's claim for moral damages is substantiated by any evidence.

196. Despite being expressly invited by the Tribunal to adduce evidence of moral injury during the hearing, the Applicant did not do so, claiming that the fundamental breach of his entitlements in itself gave rise to a claim for moral injury. In view of the foregoing, this argument must be rejected.

197. The Tribunal has also carefully examined the pleadings and documents submitted by the Applicant but there is no allegation of moral harm. The only allegation in this respect is to be found in the conclusion of the application, where the Applicant claims compensation for "breach of staff rights and emotional distress, per 2013-UNAT-309 (*Asariotis*) at paras 36(i) or (ii)". This alone is not sufficient to substantiate a moral injury.

198. The Tribunal stresses that the requirement to adduce evidence of moral injury should not come as a surprise in the present case as it was amply debated at the hearing, and the Applicant was provided with ample opportunities to submit any evidence in this respect, had he wished to do so.

199. The Tribunal notes that it would reach the same conclusion even if it were to consider that the right to claim compensation for moral damages arose from the High Commissioner's initial decision on promotions of 20 October 2014, as it is of the view that applications filed after the publication date of the amendment to art. 10.5 of the Tribunal's Statute are governed by it.

200. The Tribunal is mindful of the well-settled principle that changes in law may not be retroactively applied (see *Robineau* 2014-UNAT-396; *Nogueira* 2014-UNAT-409; *Hunt-Matthes* 2014-UNAT-444). This principle has been applied by the Appeals Tribunal to avoid that substantive rights be affected by amendments to the rules. The situation is different here, as the amendment to art. 10.5 of the Statute does not affect the staff members' substantive right to remedy for moral injury, but merely requires them to substantiate it in the course of the proceedings

before the Dispute Tribunal. In other words, the amendment modifies the rules of evidence in respect of a claim for moral injury.

201. Resolution 69/203, which introduced the amendment to art. 10.5 of the Tribunal's Statute, does not contain any provision as to the modalities of its entry into force or transitional measures. Likewise, neither the Tribunal's Statute nor its Rules of Procedure contain any provision governing the entry into force and applicability of changes to procedural rules before the Tribunal.

202. In this context, the Tribunal is of the view that proceedings before it are in principle governed by the procedural rules in force at the time of their institution, unless expressly otherwise provided. In this respect, the Tribunal notes that it is generally recognized that applying "the *tempus regit actum* principle to procedural laws" does not infringe upon the principle against non-retroactivity application of the law (see European Court of Human Rights, *Scoppola v. Italy* (No. 2), Application no. 10249/03, Judgment, 17 September 2008; Supreme Court of Canada, *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, [2005] 2 R.C.S. 473; House of Lords, *Wilson and others v. Secretary for Trade and Industry*, [2003] UKHL 40, [2003] 3 WLR 435, per Lord Earlsferry; Court of Cassation (France), Chambre civile, No. 10-10223, 9 December 2010). Thus, applying the amended version of art. 10.5 of the Statute to proceedings introduced thereafter does not have a retroactive effect.

203. The Applicant's claim for moral damages must therefore be rejected.

### **Conclusion**

204. In view of the foregoing, the Tribunal DECIDES:

- a. The contested decision denying the Applicant a promotion to the P-5 level is hereby rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant CHF6,000;

- c. The aforementioned compensation in lieu of rescission shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- d. All other claims are rejected.

*(Signed)*

Judge Rowan Downing

Dated this 18<sup>th</sup> day of April 2016

Entered in the Register on this 18<sup>th</sup> day of April 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva