



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

FINNISS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Marisa MacLennan, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 12 October 2016, the Applicant, contests his non-selection to the position of Director (“D-2”), Investigations Division, Office of Internal Oversight Services (“ID/OIOS”), advertised under job opening, No. 15-ING-OIOS-51498-D-New York (G).
2. The application was served on the Respondent, who filed his reply on 16 November 2016.
3. After examining the file, the Tribunal considered that it was not necessary to hold a hearing to make a determination of the issues arising from the case since they were of a purely legal nature. Therefore, by Order No. 240 (GVA/2017) of 5 December 2017, the Tribunal directed the parties to file comments, if any, to the matter being determined without holding a hearing. On 7 December 2017, both parties filed submissions agreeing to having the matter determined based on the pleadings on file.

Facts

4. The Applicant currently serves as a Deputy Director (D-1), ID/OIOS, Vienna, a position he has held since 1 August 2013.
5. The Applicant was appointed by the Assistant Secretary-General (“ASG”), OIOS, to act as Officer in charge (“OiC”), ID/OIOS, from 8 October through 7 December 2015, after the departure of the Director, ID/OIOS. From 8 December 2015 to 5 February 2016, the then Deputy Director, ID/OIOS, Nairobi, was to act as OiC, ID/OIOS.
6. On 31 December 2015, the position of Director, ID/OIOS, was advertised. According to the internal documents, a total of 180 applications were received, out of which seven candidates—including the Applicant—were short listed for an interview.

7. After the assessment of the seven candidates, the Under-Secretary-General, OIOS (“USG/OIOS”), in an interoffice memorandum dated 27 April 2016, submitted her recommendation for filling the post of Director, ID/OIOS, to the Chairperson, Senior Review Group (“SRG”). Her recommendation contained three candidates, namely, the Applicant, the then Deputy Director, ID/OIOS, Nairobi, and an external candidate.

8. In an interoffice memorandum dated 24 May 2016, the Chairperson, SRG, informed the Secretary-General that the SRG had endorsed the recommendation of the USG/OIOS and that the three candidates’ names were submitted for his consideration.

9. On 2 June 2016, the Executive Office of the Secretary-General (“EOSG”) informed the Chairperson, SRG, that the Secretary-General had approved the appointment of the then Deputy Director, ID/OIOS, Nairobi, as the new Director, ID/OIOS. On the same date, the then Secretary, SRG, informed the USG/OIOS of the appointment.

10. The Applicant was informed of his non-selection on 2 June 2016 and he filed an application for suspension of action on 3 June 2016, seeking suspension of the decision not to select him. The Tribunal, on 8 June 2016 through Order No. 116 (GVA/2016), found the contested decision to appear to be *prima facie* illegal and suspended the implementation of the selection decision pending the outcome of management evaluation.

11. On 14 July 2016, the Management Evaluation Unit informed the Applicant that the contested decision was upheld and on 12 October 2016, the Applicant filed the application subject of this Judgment.

Parties’ Submissions

12. The Applicant’s primary contentions can be summarized as follows:

- a. The Secretary-General acted *ultra vires* when he made the decision regarding the selection exercise of the Director, ID/OIOS;

b. The USG/OIOS had no authority to “surrender” to the Secretary-General the delegation of authority to appoint staff members at D-2 level;

c. Within OIOS, selection decisions to the D-2 level are to be made upon advice of the OIOS Review Body and not the SRG; therefore, the act of the USG/OIOS of submitting the recommendation for filling the contested post to the SRG rather than to the OIOS Review Body is in contradiction with the relevant Administrative Instruction ST/AI/401, as amended by ST/AI/2003/4;

d. The General Assembly recognized the importance of the independence of OIOS when it determined that the Secretary-General could not be involved in filling OIOS posts, as to do so would compromise the impartiality of the Office and with it, the overall integrity of the United Nations system;

e. The establishment of OIOS was implemented by ST/SGB/273, which under paragraph 2 reiterates that OIOS shall exercise operational independence under the authority of the Secretary-General;

f. The application of ST/SGB/2015/1 on delegation of authority in the administration of the Staff Regulations and Staff Rules, which the Respondent relies on to justify the legality of the decision, is not applicable in cases of “reverse delegation of authority” and;

g. But for the unlawful procedural irregularities, the Applicant had a significant chance of being selected for the contested position.

13. The Respondent’s main contentions can be summarized as follows:

a. The contested decision is lawful because the Secretary-General has a broad discretion in matters of appointment and promotion which is derived from article 101(1) of the Charter of the United Nations;

- b. General Assembly Resolution 54/244 emphasised the operational independence of OIOS in relation to the performance of its oversight functions and that the recruitment and promotion of OIOS staff shall be in accordance with provisions of the United Nations Charter and the Staff Regulations and Rules of the Organization;
- c. The selection and promotion of staff governed by ST/AI/2010/3 on Staff Selection System provides that selection decisions for positions at the D-2 level are to be made by the Secretary-General;
- d. ST/SGB/2015/1 on delegation of authority in the administration of the Staff Regulations and Staff Rules provides that the authority to select staff members at the D-2 level, following review by the SRG, is reserved to the Secretary-General without exception;
- e. The appropriate body to review the selection process was the SRG since the post was at the D-2 level; therefore, the USG/OIOS followed the correct procedure by submitting the list of recommended candidates to the SRG;
- f. Where authority is not specifically delegated to the USG/OIOS, through an administrative issuance, it is retained by the Secretary-General; and
- g. The involvement of the SRG, rather than an OIOS Review Body, made no difference to the Applicant's chances of selection. The Applicant suffered no harm. The SRG fully endorsed the process, and submitted the Applicant's name to the Secretary-General for consideration.

Legal Issues

14. The main issue in this case is the lawfulness of the impugned selection decision, specifically, whether the Secretary-General had the authority to take it. The Tribunal further has identified the following legal points:

- a. The scope of judicial review in non-selection cases;
- b. Legal nature and scope of delegated authority; and
- c. Functional independence of OIOS *vis-à-vis* the authority of the Secretary-General.

Consideration

The judicial review by the Tribunal in non-selection cases

15. It is well-established case law that in cases of staff selection, the Tribunal cannot substitute its assessment to that of the Administration and, as a consequence, its role is to evaluate the procedure and verify whether the Applicant was given full and fair consideration.

16. The United Nations Appeals Tribunal in *Ljungdell* 2012-UNAT-265 held that:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

17. However, in the case at hand, the Applicant does not directly submit that he was not given full and fair consideration, rather, he argues that the appointment decision of the Director, ID/OIOS, should not have been made by the Secretary-General but by the USG/OIOS, to whom this competence was delegated.

18. On the other hand, the Respondent argues that selection decisions for positions at the D-2 level rest with the Secretary-General and that the delegation of powers to the USG/OIOS can always "revert" to the former.

The lawfulness of the decision not to select the Applicant

Legal nature and scope of delegated authority

19. When evaluating the lawfulness of the decision not to select the Applicant to the position of Director, ID/OIOS, the Tribunal first has to assess who, according to the legal framework, was the competent authority to make that selection decision.

20. The Secretary-General, as the Chief Administrative Officer of the United Nations, holds the primary authority and is accountable for the Administration of the Staff Rules and Regulations.

21. The highest authority of the United Nations hierarchy of norms is the United Nations Charter. Its article 101.1 provides that staff members shall be appointed by the Secretary-General, under regulations established by the General Assembly.

22. The General Assembly, by its resolution 48/218B, at paras. 4 and 5, decided to establish the OIOS under the authority of the Secretary-General and headed by an Under-Secretary-General, with the Office exercising operational independence under the authority of the Secretary-General in the conduct of its duties.

23. According to para. 4 of ST/SGB/273 on the establishment of OIOS, issued on 7 September 1994, the operational independence of OIOS means that it shall carry out its functions, including investigations, without any hindrance or prior clearance and/or approval. Thus, the Secretary-General can neither interfere with the mandate of OIOS, nor have access to the content of its investigations or otherwise influence them in any way.

24. In this context, the operational independence of OIOS is of a functional nature and cannot be interpreted as precluding the original authority of the Secretary-General, as the Chief Administrative Officer of the Organization, to fulfil his internal oversight responsibilities.

25. Para. 35 of ST/SGB/273, *inter alia*, provides that:

With respect to the staff of the Office, the Under-Secretary-General for Internal Oversight Services shall have powers of appointment, promotion and termination similar to those delegated by the Secretary-General to the heads of programmes, funds or subsidiary organs enjoying special status in these matters.

26. The OIOS was established to assist the Secretary-General in fulfilling internal oversight responsibilities in respect of resources and staff of the Organization. However, the original source of authority to perform such oversight lays with the Secretary-General. Pursuant to sec. 3.1 of ST/SGB/2002/7 on Organization of the OIOS, the USG/OIOS is (emphasis added):

[A]ccountable to the Secretary-General, but exercises operational independence as provided for in section A of General Assembly resolution 48/218 B of 29 July 1994 and General Assembly resolution 54/244 of 23 December 1999.

27. From the above provisions, it is clear that OIOS has an operational independence that allows it to function without interference from the Secretary-General.

28. The Applicant avers that the Secretary-General had delegated the appointment of staff members at the D-2 level within OIOS to the USG/OIOS, by virtue of ST/SGB/273 and that, therefore, he could not make the selection decision in the present case. The Tribunal has to examine whether that delegation of authority to the USG/OIOS, which was relied upon in *Appleton*, still existed at the time of the contested decision.

29. In this respect, the Tribunal finds it noteworthy that in relation to functional delegation of authority, the person in whom authority is vested by virtue of his/her position/function has the power to delegate that authority. However, such delegation does not equate to the delegator definitively ridding himself/herself of the powers and authority that he or she delegates. Legally, a delegator continues to maintain the powers and authority that he or she has delegated, and such delegation is thus revocable at any time. Therefore, both parties' arguments that the

USG/OIOS could or should have “surrendered” her delegation back to the Secretary-General are flawed. Rather, the Secretary-General may simply revoke a prior delegation of authority at any time.

30. The delegation of powers to hierarchically subordinated organs (as in the present case) presents several defining juridical features:

- a. It is an entitlement established and delimited by legislation whereby an organ or an authority is enabled to transfer (partially) the exercise of its competencies to a subordinated organ;
- b. It is contingent regarding the specific domains for which it is being delegated, i.e., the delegating authority may choose to delegate certain matters of its competence but not others; and
- c. The delegator continues to be the authority legally bestowed with the competence, not the delegate, who can only exercise the authority on behalf of the delegator¹.

31. The Tribunal recalls that on 9 April 2015, the Secretary-General promulgated ST/SGB/2015/1 on delegation of authority in the administration of the Staff Regulations and Staff Rules, which relevantly provides as follows:

The Secretary-General, for the purpose of strengthening accountability in the United Nations Secretariat and addressing the current delegation of authority system through the promulgation of well-defined roles and responsibilities at all levels to whom authority is delegated, and taking into consideration General Assembly resolution 64/259 of 29 March 2010, entitled “Towards an accountability system in the United Nations Secretariat”, promulgates the following:

...

¹ See, CARDONA, F. *The Delegation of Administrative Decision-Making Powers: A tool for better public performance*, available online at the following link: <https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf>.

Section 3

Reserved and delegated authority in the administration of the Staff Regulations and Staff Rules

3.1 The matters reserved exclusively for the Secretary-General's decision are set out in the annex to the present bulletin. ...

3.2 With the exception of the matters reserved exclusively for the Secretary-General or as otherwise indicated in the annex, ...

...

Section 4

Existing delegations of authority

...

4.2 Notwithstanding section 3.2, the delegations of authority which currently exist through administrative issuances, memorandums or other written communications shall continue to be applicable unless (a) such authority is retained by the Secretary-General or as otherwise indicated through this bulletin; ...

32. The annex to ST/SGB/2015/1 lists the authorities that have been reserved exclusively for the Secretary-General's decision. Relevantly, while referring to staff regulations 4.1, 4.3 and 4.5(a) related to appointment and promotion, the annex to ST/SGB/2015/1, *inter alia*, provides that:

Selection of staff members at the D-2 and above levels (following review by the Senior Review Group where required) and renewal of appointments of staff at the ASG and USG levels.

33. The above provisions do not contain any exception to any selection at the D-2 level as being exempted from appointment by the Secretary-General. Also, while with respect to investigations, the annex specifies under footnote "f" that "the authority of [OIOS] to initiate and conduct investigations is not impacted by this delegated authority", no such footnote is made under the above quoted provision with respect to selections at the D-2 level. One could have expected that, if the Secretary-General had intended to leave the authority for appointments to the D-2 level within OIOS with the USG/OIOS, that would have been explicitly referred to, e.g. by way of a footnote, in the annex. This is not the case.

34. Thus, the Tribunal cannot but conclude that the Secretary-General's authority to select staff members to positions at the D-2 level applies across the board to any appointment to positions at that level, without any exception. It follows that by virtue of the above extract of the annex to ST/SGB/2015/1, any prior delegation of appointments to the D-2 level within OIOS to the USG/OIOS was revoked by the "retention", as per the above-referenced sec. 4.2(a) and annex 1 of ST/SGB/2015/1.

35. Furthermore, according to the principle of hierarchy of norms, ST/SGB/2015/1, which is also a specialized norm, prevails over Administrative Instructions ST/AI/40I amended by ST/AI/2003/4 (see *Villamorán* 2011-UNAT-160).

Functional independence of OIOS vis-à-vis the authority of the Secretary-General

36. The Applicant contends that the selection procedure was unlawful, because the recommendation for the post in question was done by the USG/OIOS, and reviewed by the SRG instead of the OIOS Review Body.

37. The scope of responsibilities of the Secretary-General and the USG/OIOS, in personnel matters, is defined in ST/AI/401 on personnel arrangements for OIOS as amended by ST/AI/2003/4.

38. Pursuant to para. 6 of ST/AI/401 as amended by ST/AI/2003/4, the Secretary-General, in consultation with the USG/OIOS, shall establish an OIOS Review Body to advise the USG/OIOS on the appointment, promotion and termination of all staff members up to and including at the D-2 level. Also, paragraph 6 sets forth that the functions and procedures of the OIOS Review Body shall be comparable to those of the other United Nations central review bodies. Nonetheless, this framework is only to be applicable when it is the USG/OIOS who makes the appointment, since the OIOS Review Body was specifically established to advise the USG/OIOS.

39. Since the USG/OIOS was not the one making the appointment decision, and did not have the authority to do so, the present selection exercise ought not to be submitted to the OIOS Review Body.

40. Rather, according to ST/AI/2010/3 on Staff Selection System, the review had to be done by the Senior Review Group. Indeed, secs. 2.1, 2.4 and 3 of ST/AI/2010/3 relevantly provide that:

2.1 The present instruction establishes the staff selection system (the “system”) which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

...

2.4 Selection decisions for the positions at the D-2 level are made by the Secretary-General when the Senior Review Group is satisfied that the applicable procedures were followed.

3. ... The process leading to selection and appointment to the D-2 level shall be governed by the provisions of the present instruction. For positions at the D-2 level, the functions normally discharged by a central review body shall be discharged by the Senior Review Group, prior to selection by the Secretary-General.

41. The recruitment process in the case at hand was conducted in accordance with ST/AI/2010/3 and, since the post in question was at the D-2 level, the USG/OIOS correctly referred the matter of selection and appointment to the SRG for further action, before the selection decision being made by the Secretary-General.

42. As examined in detail above, after the coming into force of ST/SGB/2015/1, the Secretary-General retained the authority for all selections of staff members at the D-2 level, after review by the SRG, if required. This is what happened in the case at hand.

43. Therefore, since the decision-maker in this instance was the Secretary-General, the OIOS Review Body had no role to play in this selection exercise.

44. In light of all of the above, the Tribunal reaches the conclusion that the Secretary-General had the authority to make the selection decision for the post of Director, ID/OIOS.

45. Finally, the Tribunal finds that the Applicant's reliance on the Judgment in *Appleton* is not relevant in the current case for two main reasons. Firstly, the set of factual circumstances in both cases are completely different and, secondly, the legal framework has changed with the coming into force of ST/SGB/2015/1.

46. In *Appleton*, the original decision-maker was the USG/OIOS and the applicable legal framework was ST/AI/40I as amended by ST/AI/2003/4, whereas, in the present case, it was the Secretary-General who made the decision to select a candidate at the D-2 level, under a new legal framework—ST/ SGB/2015/1.

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

The application is dismissed.

(Signed)

Judge Teresa Bravo

Dated this 27th day of February 2018

Entered in the Register on this 27th day of February 2018

(Signed)

René M. Vargas M., Registrar, Geneva