



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MOLLAOGLU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Bettina Gerber, LPAS/UNOG
Adrian Meubus, LPAS/UNOG

Introduction

1. The Applicant, a former Programme Coordinator with the United Nations Office on Drugs and Crime (“UNODC”) in a host country, contests the decision not to extend his fixed-term appointment (“FTA”) beyond its expiry on 19 May 2021.

Facts

2. On 6 April 2021, the Applicant was informed by the Country Representative and Senior Programme Coordinator, UNODC, in the host country, that his contract would not be extended beyond 19 May 2021 because the Applicant had not been able to obtain a visa to join the duty station.

3. On 28 April 2021, the Applicant requested management evaluation of the aforementioned decision.

4. On 20 May, 1 June and 16 June 2021, the Applicant’s FTA was extended pending management evaluation. The last extension was due to expire on 30 June 2021, unless foreshortened due to the completion of the management evaluation.

5. On 17 June 2021, the management evaluation process was completed, and it was decided to uphold the contested decision.

6. On 18 June 2021, the Human Resources Management Service (“HRMS”), Division for Management (“DM”), UNODC, informed the Applicant that the decision not to renew his FTA was going to be implemented immediately. On the same day, the Applicant filed the instant application.

7. On 19 August 2021, the Respondent filed his reply with four *ex parte* annexes and a confidentiality request.

8. By Order No. 96 (GVA/2022) of 25 October 2022, the Tribunal granted the Respondent's request not to have Member States named in the judgment and decided that the Respondent's *ex parte* filings will remain *ex parte*. Furthermore, the Tribunal informed the parties that the case will be adjudicated based on the papers.

Consideration

Preliminary issues

9. In his application, the Applicant raises the issue of the reprimand he was subject to for his alleged failure to disclose relevant facts in his personal history profile ("PHP").

10. However, the Tribunal notes that the Applicant did not request management evaluation of the decision to issue a written reprimand against him, but only contested the decision not to renew his FTA. These are two separate and distinct administrative decisions.

11. In this context, the Tribunal highlights that its powers of judicial review are limited to decisions that have been previously subject to a management evaluation request, or that are exempt from such, pursuant to art. 8.1 of the UNDT's Statute, which provides in its relevant part that:

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required.

12. Since the Applicant did not request management evaluation of the decision related to the reprimand he received, said decision falls outside the Tribunal's scope of review in the present case and, consequently, it will not be addressed.

13. After a careful analysis of the case file, the available evidence, and the parties' submissions, the Tribunal has identified the legal issues to be considered as follows:

- a. Whether the decision not to renew the Applicant's FTA was lawful;
- b. Whether the Organization breached its duty of care vis-à-vis the Applicant; and
- c. Whether the Applicant is entitled to any remedies.

Whether the decision not to renew the Applicant's FTA was lawful

14. The Tribunal is seized of an application where the Applicant contests the decision not to renew or extend his FTA beyond its expiry date, i.e., 19 May 2021.

15. On the one hand, the Applicant argues, *inter alia*, that he was never denied a visa by the host country. Instead, it was the Administration who allegedly failed to submit his visa application. In addition, he claims that the Administration breached its duty of care by choosing to let his FTA expire instead of reassigning him to a different duty station or allowing him to continue to telework from outside the duty station.

16. On the other hand, the Respondent recalls that an FTA carries no expectation of renewal, and that the Organization was in no way obliged to offer another contract to the Applicant due to the impossibility of securing him a visa. Furthermore, it was the host country that refused to grant the Applicant a visa for reasons unrelated to the Applicant's position with the Organization.

17. As a general principle of administrative law, a staff member bears the burden of proving that the contested administrative decision was illegal, arbitrary or tainted by ulterior motives (*Azzouni* 2010-UNAT-081, para. 26, *Hepworth* 2011-UNAT-178, para. 1, *Kule Kongba* 2018-UNAT-849, para. 26).

18. In the case at hand, however, the Applicant was not able to demonstrate that the decision not to renew his FTA beyond its expiration date was illegal, arbitrary or tainted by ulterior motives.

19. First and foremost, pursuant to staff regulation 4.5(c) and staff rules 4.13 and 9.4, an FTA does not carry any expectancy, legal or otherwise, of renewal, and shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. These provisions read as follows:

Staff regulation 4.5(c)

A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.

Staff rule 4.13

Fixed-term appointment

...

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14 (b).

Staff rule 9.4

Expiration of appointments

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

20. According to the evidence on record, the Applicant was selected for the position of Programme Coordinator (Law Enforcement and Drug Control and Crime Prevention) at the UNODC Country Office in the host country on 5 May 2020.

21. As stated by the letter of offer received by the Applicant, obtaining a visa was, indeed, a condition *sine qua non* for his employment with the Organization:

[T]his offer may be withdrawn, or any contract entered into terminated or cancelled in the event that a visa [for the host country] is not granted by the relevant authorities.

22. On 18 May 2020, the Applicant requested to telecommute from outside the duty station, which was approved because of the restrictions adopted to address the COVID-19 pandemic. With the approval, the Chief, Staffing, Diversity and Outreach Section and Deputy Chief, Human Resources Management Service, UNODC, informed the Applicant that:

As soon as the travel restrictions are waived and other pandemic related restrictions are lifted, the staff member is expected to obtain the requisite visa for the country of his duty station and to travel to his duty station as originally envisaged.

23. On 25 August 2020, the Ministry of Foreign Affairs of the host country informed the Organization that no visa would be issued to the Applicant.

24. On 6 April 2021, the UNODC Country Representative confirmed to the Applicant in writing that his FTA would not be extended upon its expiry since the Applicant could not obtain a visa to join the duty station.

25. Having analysed the evidence on record, the Tribunal notes that the reasons for the host country to refuse to issue a visa for the Applicant are of a personal nature and unrelated to the Applicant's position with the Organization. Furthermore, the Applicant has not provided any evidence that he was promised an extension of his contract beyond its expiry date.

26. In addition, the Tribunal underlines that the Respondent has provided credible and reliable evidence demonstrating that the host country's refusal to grant the Applicant a visa cannot be attributed to the Organization's alleged inaction but, instead, to personal issues related to the Applicant himself.

27. The evidence on file is sufficiently clear as to the intentions of the host country in relation to the Applicant, i.e., said country manifestly refused to issue him a visa.

28. In this regard, the Tribunal recalls that matters related to the issuance or renewal of visas are a shared responsibility between the staff member and the Organization (*Coleman 2022-UNAT-1225*, para. 43), and a result of an administrative procedure held by a host country in accordance with its own internal policies.

29. Consequently, the Tribunal concludes that the Organization cannot replace the host country in this regard and, therefore, cannot be held accountable for the refusal of the host country to issue a visa to the Applicant.

Whether the Organization breached its duty of care vis-à-vis the Applicant

30. The Applicant's arguments in relation to the Organization's duty of care are twofold. First, he claims that the Organization violated its duty of care by not requesting his visa to join the duty station at the host country, and second, by not reassigning him to another duty station, as it was allegedly done with other staff members facing similar visa issues, or not allowing him to continue to telework from outside the duty station.

31. After a careful analysis of the case before it, the Tribunal has not identified any breach of the Organization's duty of care towards the Applicant.

32. It is well settled jurisprudence that the Administration has the duty to act fairly, justly and transparently in dealing with its staff members (*Hersh 2014-UNAT-433*, para. 17, *Bali 2014-UNAT-450*, para. 29, *Matadi et al. 2015-UNAT-592*, para. 17). The UNAT has constantly held that:

[A]dministrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion. (*Sanwidi 2010-UNAT-084*, para. 38)

33. Notwithstanding, if an applicant claims that an administrative decision was ill motivated, the burden of proving any such allegation rests with said applicant (*Azzouni* 2010-UNAT-081, para. 26, *Hepworth* 2011-UNAT-178, para. 1, *Kule Kongba* 2018-UNAT-849, para. 26).

34. In relation to the first argument, the Tribunal reiterates what has already been determined in the section above. Given the host country's firm position of not granting a visa to the Applicant, the Organization's decision not to move forward with a visa application was well-reasoned. In addition, by allowing the Applicant to complete his FTA while teleworking from outside the duty station, the Organization did in fact fulfilled its duty of care towards the Applicant.

35. Regarding the second claim, i.e., that the Organization should have reassigned the Applicant to another duty station and/or allowed him to telecommute from outside the duty station, the Tribunal recalls that, under the current legal setting, the Organization is not obliged to do so.

36. The Respondent clarified in his response that the fact that the Applicant entered into duty and was allowed to telecommute from outside the duty station was in line with the extraordinary measures related to the COVID-19 pandemic and travel restrictions. These extraordinary measures did not create, however, a right for the Applicant to perpetually work from outside his duty station or to have his FTA extended, much less created an expectation that the FTA was to be extended.

37. In reality, those were interim measures of an exceptional nature. The Applicant was expected to travel and report to his duty station where his presence was required. The Applicant's physical presence at his duty station was considered essential and telecommuting from abroad was not deemed to be in the best interest of the Organization.

38. As a result, since the Applicant was not able to travel to his duty station as required, the Organization allowed him to serve his FTA until expiry and chose not to renew his FTA, which are decisions well within its managerial and discretionary authority.

39. In relation to the possibility of reassignment, the Organization was under no obligation to secure the Applicant another position at a different duty station. While specific conditions may have allowed for different staff members to benefit from reassignment, as alleged by the Applicant, that does not mean that the Organization had an obligation to reassign him. Indeed, the evidence on record shows that the Organization did all it could to assist the Applicant and cannot be held accountable for a situation that was beyond its control.

40. Therefore, the Tribunal finds that the allegations of violation of the Organization's duty of care are meritless.

Whether the Applicant is entitled to any remedies

41. Since the Tribunal finds the contested decision lawful, there are no legal grounds to grant any of the remedies requested by the Applicant. Accordingly, the claim in this respect is also rejected.

Conclusion

42. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 30th day of November 2022

Entered in the Register on this 30th day of November 2022

(Signed)

René M. Vargas M., Registrar, Geneva