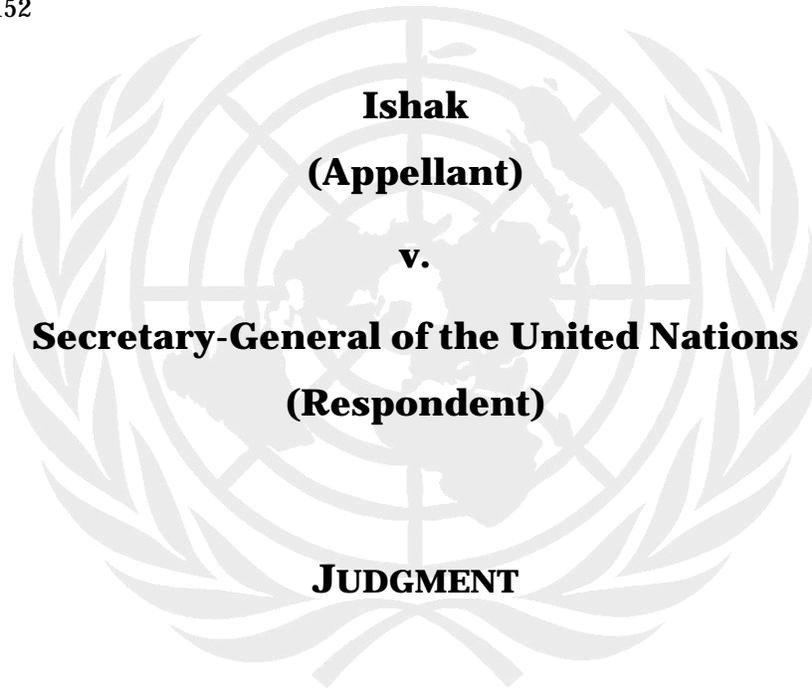




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-152



Before: Judge Kamaljit Singh Garewal, Presiding
Judge Luis María Simón
Judge Mark P. Painter

Judgment No.: 2011-UNAT-152

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Amy Wood

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Nasr Ishak (Ishak) was elected to work on a full-time basis as Chairperson of the Staff Council of the United Nations High Commissioner for Refugees (UNHCR) from 15 June 2007 to 30 June 2008. He was considered for promotion in March 2009 from P-4 to P-5 but was unsuccessful. He filed a recourse application on the basis of which a recourse session was held and Ishak was promoted. No grievance remained, but Ishak sought administrative review and challenged certain actions of the Administration which, according to him, denied him a fair consideration for promotion. But as he had already been promoted before he filed the application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), his application was rightly held to be irreceivable, and dismissed. We find no reason to differ. The UNDT Judgment is therefore affirmed. We also find no reason to differ from the UNDT ordering Ishak to pay 2,000 Swiss Francs (CHF) for manifest abuse of proceedings. This award is also upheld.

Facts and Procedure

2. Ishak joined UNHCR in September 1984 in Pakistan. He served subsequently at different duty stations and missions before he was assigned to the UNHCR's Inspector General Office (IGO) in Geneva in January 2004. He was then at the P-4 level.

3. Ishak was reelected as Chairperson of the UNHCR Staff Council in March 2007. So as to enable him to serve on the Staff Council, Ishak was released from his IGO duties from 15 June 2007 to 30 June 2008. He rejoined the IGO with effect from 1 July 2008.

4. In a letter dated 9 December 2008, the UNHCR High Commissioner thanked Ishak for his participation in the Joint Advisory Committee as Chairperson of the UNHCR Staff Council during the period 2007-2008, and added that Ishak's efforts in that capacity should be reflected in his fact sheet.

5. The UNHCR annual promotion session for 2008 took place from 16 to 21 March 2009. The results were published on 28 April 2009. Ishak was not among the persons promoted. The relevant recourse session was set to start on 22 June 2009.

6. On 16 June 2009, Ishak wrote to the Secretary-General requesting administrative review of i) the decision to convene the recourse session on 22 June 2009; ii) the implied decision of the Director of Division of Human Resources Management (DHRM) to refuse to respond to his questions as to what decision had been taken regarding the criteria for assessing the performance of the Staff Council Chairperson for promotion purposes; and iii) the failure on the part of the Director of DHRM to formulate policy guidance for use by the appointment and promotion bodies when considering the case of the Chairperson of the Staff Council for promotion.

7. Ishak's recourse was considered during the recourse session, which took place from 22 June to 25 June 2009. As a result of his recourse, Ishak was promoted to the P-5 level.

8. Pursuant to the transitional measures related to the introduction of the new system of internal justice, Ishak's request of 16 June 2009 to the Secretary-General for administrative review was transferred on 1 July 2009 to the Deputy High Commissioner (DHC) of UNHCR to be considered as a request for management evaluation.

9. In a memorandum dated 31 July 2009, the DHC advised Ishak of the outcome of the management evaluation. In the view of the DHC, Ishak was seeking the "review of decisions that the administration took in preparation of the 2008 APPB promotions recourse session". But those decisions "do not constitute 'administrative decisions' in the sense of Staff Rule 11.2", because they "were of an organizational nature and formed part of the decision-making process that eventually lead [sic] to the decision of the High Commissioner on [Ishak's] promotion following the 2008 promotions recourse session".

10. After an extension of the time limit, Ishak filed a "provisional" application with the UNDT on 30 November 2009. In that application, Ishak wished to contest i) a number of unspecified and implied decisions intended to deny him the possibility of being recommended for promotion at the 2008 promotion session; ii) the undue interference by the DHC and the Director of DHRM in the election of the 2008 UNHCR Staff Council; iii) the refusal by the Director of DHRM to include in Ishak's fact sheet the favorable information about his performance as Chairperson of the UNHCR Staff Council; iv) the DHRM Director's collusion with other DHRM staff to misrepresent the circumstances of his full-time release as Chairperson of the UNHCR Staff Council; and

v) the outcome of the management evaluation that the DHC conducted, despite his obvious conflict of interest.

11. In Judgment No. UNDT/2010/085 dated 6 May 2010, Judge Cousin discussed the receivability of Ishak's application. After comparing the decisions of which Ishak requested administrative review on 16 June 2009 with those listed in his UNDT application, Judge Cousin concluded that under Article 8(1)(c) of the UNDT Statute, he could only take into account the decisions identified in Ishak's request for administrative review. Turning to those decisions that Ishak had identified, Judge Cousin considered that they were all preparatory decisions connected to the promotion session, but in no way were they capable of adversely affecting Ishak's legal situation since they modified neither the scope nor the extent of his rights. Furthermore, Judge Cousin believed that Ishak had no further interest in contesting a procedure that ultimately led to his promotion at the time of his application to the UNDT. Judge Cousin reviewed Ishak's conduct throughout the UNDT proceedings and was convinced that he had committed a manifest abuse of the proceedings, for which Judge Cousin ordered Ishak to pay CHF 2,000, which corresponded to part of the salaries paid to the UNHCR legal officers for the time and energy devoted to responding to Ishak's abusive application.

12. The UNDT Judgment was rendered in French. Ishak received the English translation of the UNDT Judgment on 8 September 2010. After he was granted an extension of the time limit, Ishak filed an appeal from the UNDT Judgment on 30 November 2010. The Secretary-General filed an answer on 21 January 2011.

Submissions

Ishak's Appeal

13. Ishak reiterates his contentions as presented in his UNDT application.

14. In his request for administrative review and his UNDT application, Ishak contested a number of administrative decisions taken in preparation for the 2008 promotions and recourse session. This fact was not contested by the DHC.

15. The refusal to include in his fact sheet the favorable information that recognized Ishak's dedication and achievements as UNHCR Staff Council Chairperson was detrimental to the review of his case for promotion during the 2008 promotion session.

16. Ishak's request for change of venue was unjustifiably rejected as "outrageous". In contrast, in the case of Raya Meron, a request for change of venue on similar grounds was granted.

17. There were serious procedural irregularities during the UNDT proceedings with respect to the oral hearing, his witnesses and his request for the production of a document. There were also errors, inaccuracies and misrepresentations in the English text of the UNDT Judgment.

18. Ishak requests that this Court set aside the UNDT Judgment and remand his case to the UNDT in New York or Nairobi for reconsideration, or hear his case de novo. He also requests that this Court order the Director of DHRM to implement the decision of the High Commissioner to include the recognition letter in his fact sheet.

Secretary-General's Answer

19. The UNDT's determination that only those decisions that were submitted for administrative review were receivable was consistent with the relevant jurisprudence of both this Tribunal and the UNDT.

20. The UNDT's finding that Ishak's appeal against three decisions identified in his request for administrative review was not receivable as they were preparatory decisions connected to the promotion session, and as such they were not capable of adversely affecting his legal situation. This finding was consistent with the relevant jurisprudence.

21. The UNDT correctly held that Ishak's application was rendered moot as he was promoted to the P-5 level as a result of his recourse, and he had no further interest in contesting a procedure that led to his promotion.

22. Ishak voiced his disagreement with the UNDT Judgment, but failed to establish how the UNDT committed an error of procedure by rejecting his change of venue request

or an error of fact regarding the assessment of evidence so as to warrant a reversal of its Judgment.

23. The Appeals Tribunal is not an appropriate forum for fact-finding, nor does it have power to conduct a de novo hearing with respect to an application. Articles 8(1) and 2(5) of the Appeals Tribunal's Statute set forth a basis for this Court to request the production of a document, but they do not provide a right for the parties to ask this Tribunal to order the production of a document. If this Court were to determine that Ishak's application before the UNDT is receivable, the appropriate remedy would be to remand the case to the UNDT for a determination on the merits.

Considerations

24. It is clear and beyond dispute that Ishak's promotion from P-4 to P-5 came through during the recourse session of UNHCR's annual promotion session for 2008. It is true that he was not among the persons promoted during the main session held between 16 and 21 March 2009. The recourse session was convened three months later and Ishak was promoted. Ishak may have had many grounds to challenge his non-selection or denial of promotion in March 2009. One would imagine that he would have no grievance left after his ultimate promotion in June 2009, during the recourse session. At this stage he should have withdrawn his request for administrative review, and called off the challenges he wished to mount. Ishak did no such thing. We do not have any sympathy for a litigant who pursues a litigious line for the sake of litigation, and then uses the opportunity to make all kinds of wild allegations.

25. To see the unreasonableness of Ishak's demands, a brief background of his case may be necessary. Ishak was elected Chairperson of the UNHCR Staff Council in March 2007 and served on a full-time basis from 15 June 2007 to 30 June 2008. The High Commissioner promulgated an inter-office memorandum dated 17 August 2007, containing safeguards to ensure objectivity of the review of the Chairperson and the First Vice-Chairperson for promotion. Ishak contended that a new methodology containing a points system was introduced for the 2008 promotion session, but without criteria to evaluate persons like him, who while on a full-time release would have neither a supervisor nor a performance appraisal. Ishak also contended that the letter of recognition which he had received from the High Commissioner for his dedication and

achievements as Chairperson of the UNHCR Staff Council was not placed in his official status file and fact sheet. In Ishak's view, the exclusion of this information was detrimental to him for his promotion and for administrative reviews for postings and other purposes in the future.

26. In light of the above, on 16 June 2009 Ishak filed for administrative review of three decisions: the decision to convene the recourse session on 22 June 2009; the refusal of the Director, DHRM, to respond to questions that Ishak had addressed him, and the failure on the part of the Director, DHRM, to formulate a policy guideline for use by the appointment and promotion bodies when considering the case of the Chairperson of the Staff Council for promotion.

27. It is obvious that the recourse session was convened at Ishak's request and it ended successfully for him, for he was promoted from P-4 to P-5. He should have been content with that, but he wanted to over-reach and tell the Administration what to do when the case of the Chairperson of the Staff Council came up for promotion. As the staff member was promoted on the basis of his recourse application, there was nothing left for the Administration to review.

28. We cannot understand why Ishak filed the application before the UNDT. But we do note with great dismay the wild allegations that Ishak made against the fairness of the UNDT Judge when he asked for the case to be transferred to New York or Nairobi because he alleged bias against the UNDT Registrar in Geneva. This request was rightly rejected, as it was baseless.

29. The UNDT also correctly held that Ishak's case was not receivable. Ishak may feel that the decisions of which he sought administrative review denied him a fair consideration for promotion or were discriminatory. But since he was promoted the contested decisions remain inconsequential. A selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT. In the event of Ishak's non-promotion continuing after the recourse session, those decisions may well have become grounds to challenge the administrative decision of non-promotion.

30. We hold that the UNDT's decision to order Ishak to pay the sum of CHF 2,000 was justified because he filed a frivolous application and continued this application to make all kinds of baseless charges against the fairness of the UNDT, something no justice system should tolerate. The award calls for no interference.

Judgment

31. The appeal is without merit and is dismissed, and the UNDT's decision to order Ishak to pay the sum of CHF 2,000 is affirmed.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Simón

(Signed)

Judge Painter

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar