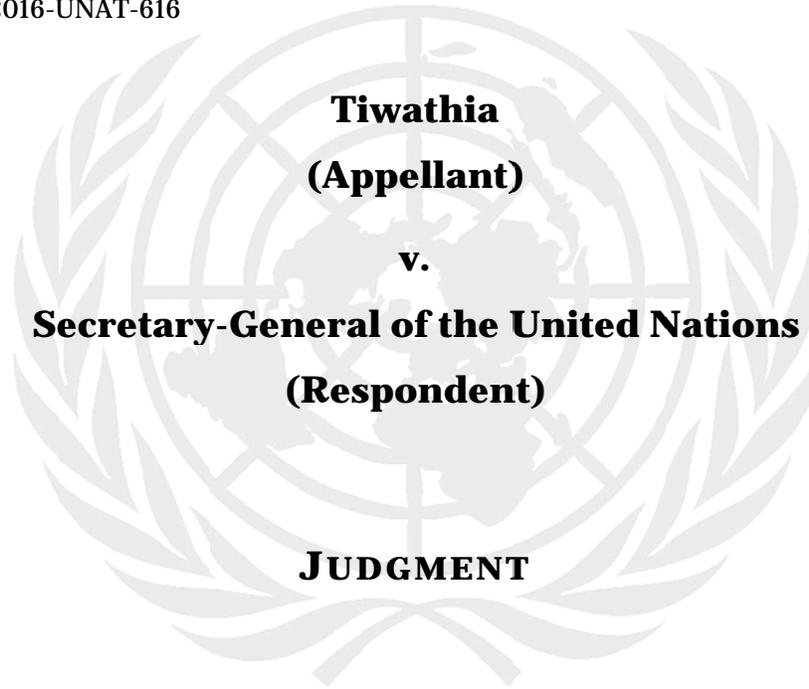




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-616



**Tiwathia
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Luis María Simón Judge Richard Lussick
Case No.:	2015-715
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Ms. Tiwathia:	George G. Irving
Counsel for Secretary-General:	Zarqaa Chohan

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/021, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 17 March 2015. Ms. Adarsh Tiwathia filed her appeal on 15 May 2015 and the Secretary-General answered on 20 July 2015. On 10 November 2015, the Secretary-General filed a motion seeking leave to supplement his answer. Ms. Tiwathia commented on 21 December 2015.¹

Facts and Procedure

2. The following facts are uncontested:²

... The selection decision for the [post of Deputy Director (DD), Medical Services Division (MSD) of the Office of Human Resources Management (OHRM), Department of Management (DM)] [which Ms. Tiwathia challenges,] was made during a period of transition within the division. The Director of MSD, a D-2 level position, resigned in late 2011 to take up a new position and separated from service on 22 January 2012. The incumbent of the DD/MSD post, Dr. Pasquier-Castro, was due to retire in late 2012 and did so on 31 August 2012. Consequently, job openings were issued for both director positions in the division and the posts were advertised simultaneously between 15 December 2011 and 13 February 2012.

... Job Opening 11-MED-DM-OHRM-22070-R-NEW YORK (G) was issued for the DD/MSD post. Under the heading “Assessment Method” the JO listed “Competency based interview”. The requirements for the Professionalism competency were as follows:

Professionalism: Knowledge of Internal medicine, occupational medicine, travel and tropical medicine; first hand knowledge of worldwide health conditions and medical facilities and health-related travel requirements; analytical skills and ability to make timely and appropriate decisions in any medical situation[;] shows pride in work and achievements; is motivated by professional rather than personal concerns; shows persistence when faced with difficult problems or challenges; remains calm in stressful situations.

... Seventy-two applications were received for the DD/MSD vacancy of which 43 were rejected as ineligible. A further 23 candidates were found not suitable. One

¹ On 29 November 2015, Ms. Tiwathia requested an extension of time to file her comments on the Secretary-General’s motion to supplement his answer on the ground that her counsel suffered a heart attack and had been hospitalized and on 21 December 2015, she filed her comments.

² Impugned Judgment, paras. 2-23.

applicant withdrew from the selection process. The remaining five candidates, including the Applicant, were short-listed and invited to take part in a competency-based interview. Four of the five short-listed candidates, including the Applicant and the selected candidate, were found to satisfactorily meet the competencies for the DD/MSD post and were recommended to Ms. Pollard, the then Assistant Secretary-General, OHRM (“ASG/OHRM”) by the panel who conducted the interview (“Interview Panel”).

... The Interview Panel found that the Applicant met the requirements for each of the competencies listed in the job description, namely Communication, Teamwork, Professionalism, Judgement/Decision-making, and Leadership. Her rating for each of the individual competencies, and her overall rating, was “satisfactory”. The selected candidate received the same ratings as the Applicant except on the competency of Professionalism for which he received a rating of “outstanding”. His overall rating was also “satisfactory”.

... Ms. Pollard, ASG/OHRM, conducted second interviews with three of the recommended candidates on 29, 30 and 31 May 2012. The fourth recommended candidate, who had applied for both the D-1 and D-2 posts within MSD, was not interviewed by Ms. Pollard because she was selected for the D-2 post.

... On 4 June 2012, Ms. Pollard submitted a memorandum to the Under-Secretary-General for Management (“USG/DM”), noting that she had interviewed the candidates put forward by the Interview Panel and agreed with the Panel’s conclusion that they should be recommended. After providing a brief summary of the qualifications and experience of the four recommended candidates, she requested agreement from the USG/DM on the recommendation before referring the case to the Central Review Board (“CRB”). She then stated: “... I will send you separately a recommendation for selection for the job opening once the process of selection for the D-2 Medical Director is completed”.

... By memorandum dated 27 June 2012, the recommendations for the DD/MSD post were submitted to the CRB. The memorandum stated that the Assessment Panel consisted of Ms. Lopez, Director, Strategic Planning and Staffing Division (“SPSD”), OHRM; Mr. Mitrokhin, Programme Officer, Division of Regional Operations, Department of Safety and Security; and Dr. Pasquier-Castro, the incumbent of the DD/MSD post. The memorandum included a description of the process by which the substantive assessments determined if applicants were “Recommended” or “Not Recommended”, stating:

At the conclusion of the competency-based interviews, four candidates were recommended to the ASG for Human Resources Management for second interview ... Three of those candidates were interviewed by the ASG ... The fourth candidate ... was not interviewed for the post by the ASG, as she was selected for the D-2 Medical Director post [in MSD/OHRM] ...

... On 5 July 2012, Ms. Tabourian, Chief of the CRB Secretariat, notified Ms. Lopez and Ms. Pollard that the CRB had “endorsed the proposal for filling” the DD/MSD post.

... On the same day, Ms. Lopez, acting as Officer-in-Charge of OHRM, notified the USG/DM that the CRB had approved the recommended candidates, and added that, “[b]ased on the results of the interviews and a thorough review of the personal history profiles of the three recommended candidates”, OHRM wished to proceed with the selection of the selected candidate. She further stated:

In making this proposal, OHRM has taken into consideration the staff member’s previous service as Chief Medical Services in UNAMI (Iraq) where he was responsible for the day-to-day administration of medical staff of the UNAMI Medical Service as well as the fact that he is the most senior P-5 among the three.

... On 10 July 2012, the Applicant was informed by email from Ms. Pollard that she had not been selected for the DD/MSD post but that she had been placed on a roster of pre-approved candidates for consideration for future job openings with similar functions at the same level. Later that day, Dr. Pasquier-Castro informed the Applicant and other colleagues by email that the selected candidate had been appointed as DD/MSD.

... On the same day, Dr. Pasquier-Castro also met the Applicant to discuss the selection decision. The Applicant raised concerns about the geographical diversity of hiring practices within MSD. The Applicant alleges that Dr. Pasquier-Castro then made comments which indicated a geographical bias against doctors from certain countries. In an email to the Respondent, Dr. Pasquier-Castro provided the following summary of the exchange:

Dr Tiwathia stated that the decision amounted to racism, the proof being that all D1s and D2s nominated at MSD [in New York] since its creation had been white people. I proceeded to tell her that, although this was not entirely true, it was in fact mostly true and could probably be explained by the fact that medical positions being a [sic] highly technical ones, it would be logical that most of the best qualified doctors would have come from countries where the field of medicine is most advanced.

Procedural background

... On 12 July 2012, the Applicant submitted a request for management evaluation of the decision not to select her for the post of DD/MSD.

... On 13 September 2012, the Applicant was informed that the Secretary-General had decided to uphold the contested selection decision.

... On 19 November 2012, the Applicant filed the application.

... [...]

... A case management discussion (“CMD”) was held on 1 July 2014 to discuss the claims and issues in the case and to issue any Orders necessary in preparation for a hearing.

... After reviewing the issues with the parties, it appeared to the Tribunal that they would be well advised to explore, with the assistance of the Director of MSD, the possibility of an alternative resolution to the dispute. The Tribunal adjourned the CMD to allow for such discussions to take place.

... [...]

... In a joint submission dated 3 October 2014, the parties advised the Tribunal that mediation efforts had been unsuccessful.

... On 14 November 2014, a second CMD was held to resolve all outstanding issues, including the disclosure of documents filed with the Tribunal on an *ex parte* basis and the prospects, if any, of alternative dispute resolution. At the CMD, the Tribunal agreed to suspend proceedings for one week pending attempts at alternative dispute resolution.

... On 24 November 2014, the parties informed the Tribunal that an informal resolution had not been reached.

... A hearing was held on 3, 4, 5, and 9 December 2014. The Applicant and the following witnesses gave evidence: Mr. Kwon, Chief of Staffing, OHRM; Ms. Lopez, Director, SPSD, OHRM; and Ms. Pollard, ASG/OHRM at the relevant time.

3. On 17 March 2015, the UNDT rendered its Judgment. The UNDT rejected the grounds put forward by Ms. Tiwathia – the involvement of a retiree in the recruitment process; the composition of the interview panel; the comments made by Dr. Pasquier-Castro allegedly suggesting bias; the conduct of a second interview by the ASG/OHRM; the CRB’s ignorance of procedural irregularities; and the alleged violation of the Organization’s policies on gender parity and geographical diversity. The UNDT dismissed the application finding that “any procedural error identified by the Applicant did not, of itself or collectively, account for the decision to appoint the successful candidate rather than the Applicant or the other recommended candidate”.³

³ Impugned Judgment, para. 65.

Submissions

Ms. Tiwathia's Appeal

4. Ms. Tiwathia alleges several inaccuracies and omissions in the facts and procedure section of the Judgment. First, contrary to the facts recounted in paragraphs 28 (d) and 38 of the Judgment, Dr. Pasquier-Castro did not participate in the shortlisting of candidates. Instead, from 8 to 20 March 2012, while Dr. Paquier-Castro was on leave, Dr. Narula evaluated the applications for both the D-1 and D-2 posts and prepared shortlists for each. Second, the UNDT omitted to find that on 10 July 2012, Dr. Paquier-Castro explained to Ms. Tiwathia that since a woman had been selected as the Director, a male candidate had been selected as Deputy Director. Finally, in response to Ms. Tiwathia's requests for management evaluation, the Chef de Cabinet, in maintaining the contested decision, affirmed that ST/AI/1999/9 on "Special Measures for the Achievement of Gender Equality" (Gender Policy) was applicable to Ms. Tiwathia's case.

5. The UNDT's analysis of the assessment process is fundamentally flawed. The appearance of bias was manifest throughout the process. The UNDT erred in law and fact by concluding that the involvement of a retiree in the selection process, the extraneous considerations voiced by the subject-matter expert on the panel, an improper panel with only one subject-matter expert and the unauthorized and undocumented second interview process all led to a reasonable suspicion and belief that there was a lack of full and fair consideration but that there was no evidence of a compensable breach and that the procedural errors did not account for Ms. Tiwathia's non-selection. The existence of a pattern of irregularities and unauthorized undocumented processes irreparably tainted the final decision.

6. The UNDT erred in the application of the selection criteria. Under ST/AI/2010/3 (Staff selection system) and the Hiring Manual, criteria that are relevant for a position must be clearly listed in the job opening. The UNDT erred in not giving sufficient weight to the evidence adduced by the ASG/OHRM as the Hiring Manager as well as the final recommendation of 5 July 2012 to the USG/DM. When cross-examined, the ASG/OHRM stated that the job opening was broad to ensure that a larger pool of candidates was possible. However, the Hiring Manager does not have the authority to change the selection criteria half-way through the selection process. By doing so, candidates are misled as to the true

basis for selection, the goal of transparency is lost and the CRB's ability to provide proper oversight is undermined.

7. The UNDT erred in law and fact in concluding that the record did not establish the selection decision was based on seniority. The memorandum dated 5 July 2012 to the USG/DM and the ASG/OHRM's testimony clearly show that as a hiring manager, she relied upon seniority as a factor in her decision-making. However, seniority does not find mention in any selection-related Secretary-General's bulletin or administrative instruction and has in effect been removed as a criterion. It only appears in ST/AI/1999/9. Furthermore, based on the definition of seniority in ST/AI/1999/9, the Hiring Manager erred in fact in determining the relative seniority between Ms. Tiwathia and the selected candidate. Ms. Tiwathia was in fact senior. Had seniority been properly applied under ST/AI/1999/9 as a criterion for recommending a candidate, then it would have favoured Ms. Tiwathia.

8. The UNDT erred in law in accepting the ASG/OHRM's contention that the Gender Policy was out of date and therefore inapplicable. The UNDT erroneously found that Section 1.8 of ST/AI/1999/9 was inconsistent with Section 9.3 of ST/AI/2010/3 and that the provisions of ST/AI/2010/3 superseded ST/AI/1999/9. The Appeals Tribunal has reaffirmed the use and mandatory character of ST/AI/1999/9 in other selection cases and the UNDT failed to acknowledge the established jurisprudence. Moreover, the Secretary-General contradicted himself by initially claiming that the ST/AI was applicable, but that the fact that Ms. Tiwathia was not substantially equal to the selected candidate did not allow its application to her specific case, while later claiming that it was no longer applicable at all. The Secretary-General further contradicted himself by initially stating that Ms. Tiwathia was not substantially equal to the selected candidate and subsequently finding that the candidates were "equally appointable".

9. The UNDT erred in law by finding that Section 1.8(d) of ST/AI/1999/9 was not applicable because there was no reference in Section 9.3 of ST/AI/2010/3 to a similar requirement set out in Section 1.8(d). Section 9.3 adds a reporting requirement for selection of an external candidate, but does not anywhere remove or make optional the requirement to justify, in writing, a selection decision in favour of a male. Had the UNDT ruled correctly, it would have been clear that the Secretary-General failed to adhere to his statutory obligations.

10. Ms. Tiwathia presented uncontested evidence of geographical imbalance within senior management of MSD. The failure to respect the principle of diversity that is derived from the Charter of the United Nations underscores the lack of full consideration.

11. The UNDT erred in finding that the procedural errors identified did not account for the final decision. Had the Organization's policies on gender and geographical representation been respected, the outcome would have been different. While discriminatory motives are rarely manifested in a transparent way, the accumulation of irregularities and lack of respect for the core values of the Organization point to an arbitrary exercise and abuse of discretionary authority.

12. Ms. Tiwathia asks that the Appeals Tribunal grant her appeal and vacate the UNDT Judgment. She requests the difference in salary and benefits from 1 August 2012 until she is promoted to the D-1 level or reaches the mandatory retirement age. Since the contested post has been filled, her own post should be considered for reclassification or she should be given priority consideration for any available D-1 vacancies for which she is suited. She requests compensation in the amount of three years' net base pay for the effect of the contested decision on her pension and her professional reputation, the loss of opportunity, as well as the emotional stress occasioned by the violation of her rights.

The Secretary-General's Answer

13. The UNDT correctly determined that the Administration had followed the required procedures under ST/AI/2010/3 and Ms. Tiwathia presented no credible evidence that the selection process had been tainted by extraneous factors. Ms. Tiwathia was accorded full and fair consideration and suffered no prejudice as she was placed on the roster of successful candidates at the end of the selection process.

14. The UNDT did not err in fact in finding that the involvement of a retiree in the selection procedure did not vitiate the panel's findings. The record indicates that during the interview process, two individuals were present in addition to the panel members: the retiree, as technical expert, and an individual from OHRM, as a note-taker. Ms. Tiwathia's reliance on Section 9.3 of the Manual for Hiring Managers which provides that if any members of an assessment/interview panel are retirees, the interviews will be void, is therefore misplaced. In the present case, the retiree was not a member of the

interview panel and there are no restrictions concerning the status of an expert, providing technical assistance to the interview panel. Furthermore, Section 9.3-5 allows for a technical expert to be invited to evaluate the assessment process.

15. Ms. Tiwathia has further failed to demonstrate that the UNDT erred in its finding regarding allegedly biased comments by Dr. Pasquier-Castro about the selection of the best qualified doctors from the most medically-advanced countries. Ms. Tiwathia suffered no prejudice as a result of these comments. Dr. Pasquier-Castro was a member of the interview panel that actually recommended Ms. Tiwathia as one of four candidates in the selection process. Moreover, as she had conceded herself, other staff members involved in the interview panel were all from non-Western European and other countries.

16. Contrary to Ms. Tiwathia's claim that the interview panel was composed of only one subject-matter expert, the record indicates that all members of the interview panel were subject-matter experts. The substantive nature of the post in the areas of both occupational medicine and management required subject-matter experts in both areas. In the present case, Dr. Pasquier-Castro was an expert in medicine and management of occupational medicine, and Ms. Lopez and Mr. Mitrokhin were both experts in managing diverse divisions and units. Ms. Tiwathia therefore failed to demonstrate that the UNDT erred in finding that the interview panel consisted of three subject-matter experts.

17. Ms. Tiwathia has failed to prove that the UNDT erred in finding that the second interview was improperly conducted. Under Section 2.3 of ST/AI/2010/3, selection decisions for posts up to and including the D-1 level are made by the head of department under delegated authority. Where a list of candidates has been endorsed by the CRB, the head of department may select any one of those candidates. In the present case, the four candidates had all been endorsed by the CRB and the interview panel made no recommendation as to which candidate should be selected. In order to determine the most suitable candidate, the ASG/OHRM conducted a 20-minute interview with each of the four candidates. The UNDT did not err in finding that the ASG/OHRM's decision to conduct a second interview was a proper exercise of discretion as a hiring manager.

18. Ms. Tiwathia's claim that the UNDT erred in its application of the selection criteria has no merit. The selection was based on the results of the interviews, a review of the personal history profiles of the candidates, as well as the fact that the selected candidate had previous management experience and was the most senior P-5 among the recommended candidates. It was the selected candidate's previous management experience obtained as Chief Medical Officer with UNAMI, and not the fact that such experience had been obtained in the field, which was relevant to the selection. Furthermore, Ms. Tiwathia's contention that mission experience is not required for headquarters or for the function of director is without merit as the function of DD/MSD involves support in the delivery of medical services for the Organization as a whole, including peace-keeping missions. In sum, the selected candidate fulfilled the requirements for the job opening and the selection decision was taken in accordance with the legal framework.

19. Similarly, Ms. Tiwathia's claim that the UNDT erred in its application of the gender and geographical diversity policies is without merit. Under the Staff Regulations, Rules and pertinent administrative issuances governing the appointment and promotion of staff, she had no right to a promotion or selection. Moreover, under definition (x) of ST/AI/2010/3, the head of office/department should take into account departmental targets concerning gender and geographic representation in making the selection decision. There is no requirement that either gender or geography be the dispositive factors in the selection process.

20. The UNDT correctly held that ST/AI/2010/3 prevailed over Section 1.8 of the Gender Policy and concluded that there was no breach of the Organization's Gender Policy. Priority consideration cannot be interpreted as a promise or guarantee of a candidate's selection. In none of the 15 cases quoted by Ms. Tiwathia did the Tribunals find that a selection decision may be rescinded solely because of a failure to apply a provision of the Gender Policy. Moreover, in the present case, OHRM provided a written analysis of the four candidates as well as a written recommendation for the selected candidate which highlighted the reasons for choosing him over the other candidates on the basis that he was best suited for the position. Both were squarely in line with the regulatory framework.

21. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

The Secretary-General's Motion to supplement Answer

22. The Secretary-General is seeking to admit his additional pleading on the basis of new jurisprudence which he contends is highly relevant to the appeal and which was not available at the time of the answer. Given that the case of *Zhuang, Zhao and Xie* forms a central argument for Ms. Tiwathia regarding how the Organization's Gender Policy interacts with the Organization's staff selection process, it is important that the Appeals Tribunal be presented with the Secretary-General's views on the outcome of the judicial proceedings in that case.

Ms. Tiwathia's Comments on the Secretary-General's Motion to supplement Answer

23. The Secretary-General has failed to demonstrate any exceptional circumstances justifying a departure from the Appeals Tribunal's practices and allowing for the admission of additional pleadings. The jurisprudence followed in the case of *Zhuang, Zhao and Xie* has not been altered since the time the appeal and answer were first filed. The Secretary-General incorrectly holds that that case forms a central argument of her appeal, whereas it was only one of several precedents cited in the appeal in support of her contention that the Gender Policy continues to apply until validly amended. The Appeals Tribunal's issuance of a judgment upholding that argument does not constitute an exceptional circumstance. Ms. Tiwathia requests that the Appeals Tribunal reject the motion.

Considerations

24. As a preliminary matter, we find that pursuant to Article 30 of our Rules of Procedure, and in light of the medical condition of Ms. Tiwathia's counsel, it is in the interests of justice to grant Ms. Tiwathia's motion for an extension of time to file her comments on the Secretary-General's motion to supplement his answer. We therefore accept Ms. Tiwathia's comments on the Secretary-General's motion as timely filed. We deny the Secretary-General's motion for leave to supplement his answer since his additional pleadings would not advance or assist with the disposal of the case.

25. The Appeals Tribunal cannot find fault with the UNDT's reasoning, which comports with our jurisprudence on the exercise of discretion in administrative matters.⁴ As the Appeals Tribunal held in *Staedtler*, the mere disagreement by an appellant with the UNDT's statement of its reasons or the facts and law supporting its Judgment is not a basis for overturning the Judgment.⁵

26. Section 2.3. of Administrative instruction ST/AI/2010/3 provides:

Selection decisions for positions up to and including the D-1 level are made by the head of department/office/mission, under delegated authority, when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been endorsed by the central review body, the head of department/office/mission may select any one of those candidates for the advertised job opening, subject to the provisions contained in sections 9.2 and 9.5 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future job openings at the same level within an occupational group and/or with similar functions.

27. In the instant case, Ms. Tiwathia was endorsed and placed on a roster of pre-approved candidates. Whereas in her appeal she reargues her case, she does not acknowledge the very thorough consideration given to her claims by the UNDT and while she alleges bias, she was effectively listed as qualified.

28. Administrative Instruction ST/AI/1999/9 provides at Section 1.8(a)(ii) that vacancies in the professional category and above shall be filled by women candidates if “[h]er qualifications are substantially equal or superior to those of the competing male candidates”.

29. This rule does not apply in this case since the selected candidate received the same ratings as Ms. Tiwathia except in the competency of professionalism for which he was rated “outstanding”. His qualifications were therefore superior to hers.

30. The Appeals Tribunal has consistently 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

⁴ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-577, para. 35.

⁵ *Ibid.*, para. 45.

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.⁶

31. The UNDT did not err in finding that the ASG/OHRM's decision to conduct a second interview was a proper exercise of discretion as a hiring manger. In doing so, the ASG/OHRM did not depart from, but endorsed, the panel's recommendations.

32. Irrelevant are seniority and experience of the candidate if the selected candidate is rated higher.

Judgment

33. The appeal is dismissed.

⁶ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, citing *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216 and cites therein.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar