



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

SCHOOK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former high-ranking official of the United Nations Interim Administration Mission in Kosovo (“UNMIK”), challenges the decision not to extend his fixed-term appointment beyond 31 December 2007.

Facts

2. The Applicant joined UNMIK in April 2006 as Principal Deputy to the Special Representative of the Secretary-General, at the Assistant Secretary-General level, under an appointment of limited duration, which was subsequently extended until 31 December 2007.

3. In the course of 2007, the Office of Internal Oversight Services (“OIOS”) conducted two investigations into allegations of misconduct and retaliation made against the Applicant. Additionally, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) initiated on 24 August 2007 an investigation into allegations of contempt of court by the Applicant and, on 22 October 2007, a waiver of his immunity was granted by the Secretary-General in relation to that investigation.

4. On 26 September 2007, the Applicant held a press conference at the UNMIK headquarters in Pristina, stating among other things that he was aware that OIOS had begun an investigation into allegations of misconduct and protesting his innocence. On the following day, the Applicant was asked to return to the United Nations Headquarters in New York and on 2 October 2007, he met with the Under-Secretary-General for Peacekeeping Operations. He returned to UNMIK thereafter.

5. Some time in December 2007, the Applicant was interviewed in connection with the OIOS investigation into allegations of misconduct.

6. On 15 December 2007, the Applicant was informed orally that his contract would not be renewed beyond its expiry. He left Kosovo on 17 December and he was separated from service on 31 December 2007.

7. On 3 January 2008, the Applicant met with the Chef de Cabinet of the Secretary-General. The parties differ as to the exact content of the meeting but it is common ground that the Applicant had requested that meeting in order to clarify why his appointment had not been renewed. In a note to the file appended to the Respondent's reply, it is stated that, during the meeting, the Chef de Cabinet "referred to the concerns over the negative publicity associated with the OIOS investigations and other issues, which, it was felt, may have unconstructive implications at this politically very sensitive moment in Kosovo", and he clarified that the Applicant's departure was due to the expiration of his appointment. The Applicant, who relies on his own handwritten notes of the meeting, contends that the Chef de Cabinet told him that his appointment had not been extended "because the Secretary-General did not want to answer questions about ... sexual exploitation, corruption, ethics violations and the ICTY indictment".

8. The Applicant was informed in March 2008 that OIOS had found no evidence of misconduct on his part in relation to the allegations of retaliation and, by letter dated 28 April 2008, that ICTY had concluded that the allegations of contempt of court made against him were unsubstantiated. OIOS also found that there was insufficient evidence to support the allegations of misconduct and the Applicant was so informed by email of 10 June 2008.

9. On 14 July 2008, he wrote to the Secretary-General, seeking compensation for the damage he claimed to have suffered as a result of the decision not to renew his contract and the manner in which the investigations had been conducted.

10. By letter dated 30 December 2008, the Acting Chief, Administrative Law Unit responded on behalf of the Secretary-General, rejecting the Applicant's claims.

11. On 5 February 2009, the Applicant filed an appeal with the New York Joint Appeals Board. The Respondent submitted his reply on 2 April and, on 21 June 2009 the Applicant submitted his observations thereon.

12. On 1 July 2009, the Applicant's appeal was transferred to the Tribunal. On 8 October 2009, the Respondent submitted his comments on the Applicant's observations, after which further exchanges ensued between the parties.

13. By Judgment UNDT/2009/065 of 4 November 2009, the Dispute Tribunal dismissed the application as irreceivable. It noted that the decision not to renew the Applicant's contract had been communicated orally to him on 15 December 2007, and it considered that his application was time-barred as he had failed to submit his request for review within the two-month time limit provided for in former staff rule 111.2(a).

14. The Applicant lodged an appeal with the United Nations Appeals Tribunal ("UNAT") which, in Judgment 2010-UNAT-013 delivered on 30 March 2010, found that the time limit provided for in staff rule 111.2(a) did not apply in the instant case since the Applicant had not been notified in writing of the contested decision. It accordingly set aside Judgment UNDT/2009/065 and remanded the case for consideration of the merits.

15. Following a directions hearing held on 24 November 2010, the Tribunal issued on 2 December 2010 Order No. 88 (GVA/2010), whereby it decided to suspend the proceedings and refer the case to mediation. The parties having failed to reach a mediation agreement, on 29 March 2011 the Tribunal instructed by Order No. 29 (GVA/2011) that the proceedings be resumed and it requested both parties to provide specific information concerning the facts of the case.

16. On 5 and 12 April 2011, the Respondent filed his response to the Tribunal's request for information. On 15 April 2011, he filed additional submissions, appending summaries in English of local press releases as well as television broadcasts, all of which reported on the Applicant's press conference of 26 September 2007. The Applicant filed his response to the Tribunal's request for information on 19 April 2011 and the Respondent filed his further response to Order No. 29 (GVA/2011) on 20 April 2011.

17. On 21 April 2011, a hearing on the merits was held, during which the Applicant confirmed that the scope of the case is confined to the decision not to extend his appointment beyond 31 December 2007.

Parties' submissions

18. The Applicant's principal contentions are:

a. The decision not to renew his contract was tainted by lack of due process and prejudice, and it was in fact taken as a result of the ongoing OIOS investigations. His contract should have been extended until completion of the investigations;

b. The Applicant's appointment had previously been extended twice, his performance seemed to be satisfactory and he had no reason to believe that his contract would not be renewed beyond 31 December 2007;

c. The note to the file does not accurately reflect the content of the meeting of 3 January 2008. The Chef de Cabinet neither made mention of "negative publicity" nor alluded to the press conference of 26 September 2007. Rather, he referred to the "OIOS investigations, ICTY issues, sexual exploitation, corruption, and ethics violations". However, those allegations were subsequently proven untrue. Further, the note was disclosed to the Applicant only when the Respondent filed his reply;

d. Besides, the short separation notice, i.e. 13 days, he received prevented him from finding a suitable alternative employment;

e. The decision not to renew his contract caused irreparable damage to the Applicant's professional and personal reputation.

19. The Applicant claims compensation for the loss of income "from 31 December 2007 until January 2009"—the period when he remained unemployed—and for the damage he alleges to have suffered.

20. The Respondent's principal contentions are:
- a. The decision not to renew the Applicant's contract constituted a valid exercise of discretion. Former staff rule 304.4(a) states that appointments of limited duration do not carry any expectancy of renewal and it is established case law that the Administration is not required to provide justification for non-renewal. In the instant case, there were no circumstances giving rise to a legal expectancy of renewal and the record does not show that the decision was tainted by impropriety, procedural flaw or extraneous factors;
 - b. Since the actions of Under-Secretary-Generals and Assistant Secretary-Generals have a significant and direct impact on the delivery of the Organization's mandate, the Secretary-General must be vested with a broad discretion to determine who represents him at the highest levels;
 - c. The Applicant was informed during the meeting of 2 October 2007 with the Under-Secretary-General for Peacekeeping Operations of the Secretary-General's concerns over "negative publicity".

Consideration

21. According to former staff rule 304.4(a), appointments of limited duration carried no expectancy of renewal or conversion to any other type of appointment (see also *Beaudry* 2010-UNAT-085). Notwithstanding this general statement, the Appeals Tribunal did not exclude in *Syed* 2010-UNAT-061 that some circumstances could justify departing from the above rule. In several judgments, the Dispute Tribunal considered that countervailing circumstances may exist which create an expectancy of renewal (see, for instance, *Balestrieri* UNDT/2009/019 as confirmed by *Balestrieri* 2010-UNAT-041, *Ahmed* UNDT/2010/161 and *Jennings* UNDT/2010/213). These rulings are in line with the case law of the former UN Administrative Tribunal, as reflected particularly in its Judgment No. 885, *Handelsman* (1998), according to which countervailing circumstances include an express promise by the Administration that the staff member's appointment will be extended or abuse of discretion.

22. In addition, the Appeals Tribunal held in *Asaad* 2010-UNAT-021 that all administrative decisions ought not to be arbitrary or motivated by factors inconsistent with proper administration, nor should they be based on erroneous, fallacious or improper motivation. It further emphasised that these limits on the Organization's discretion also applied to the highest-ranking staff members (see *Bertucci* 2011-UNAT-121, which deals with the position of Assistant Secretary-General).

23. Lastly, the Appeals Tribunal emphasised in *Islam* 2011-UNAT-115 that, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts.

24. In the instant case, the Applicant's successive appointments were subject to the provisions of the 300 series of the Staff Rules applicable at the material time. His letter of appointment covering the period from 17 April 2006 to 16 April 2007 reflected the content of former staff rule 304.4(a) as follows:

This appointment of limited duration does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations.

25. As to the extension of the Applicant's appointment until 31 December 2007, it stipulated:

This extension ... is subject to the terms and conditions specified in your Letter of Appointment effective 17 April 2006, and is also subject to the provisions of the Staff Regulations and the 300 series of the Staff Rules, together with any amendments thereof.

26. It is thus clear from the above that the Applicant's successive appointments carried no expectancy of renewal. Further, the Tribunal considers that there were no countervailing circumstances within the meaning of the established case law.

27. First, although in his application the Applicant puts forward that "there was no reason to believe [that he] would not be extended", he does not allege that he was given a promise that his appointment would be renewed, and indeed there is no express or implied promise to that effect in the case file. At the request of the

Tribunal, he confirmed during the hearing of 21 April 2011 that he had never received any promise that his appointment would be extended.

28. Second, the Applicant submits that the contested decision is based on erroneous, fallacious or improper motivation. Relying on his own notes of the meeting of 3 January 2008, he contends that the Chef de Cabinet told him that his appointment had not been extended “because the Secretary-General did not want to answer questions about [his] sexual exploitation, corruption, ethics violations and the ICTY indictment”.

29. The Respondent asserts, based on a note to the file of 3 January 2008, that the Chef de Cabinet referred to “concerns over the negative publicity associated with the OIOS investigations and other issues which, it was felt, may have unconstructive implications at this politically very sensitive moment in Kosovo”.

30. Without it being necessary to adjudicate on the accuracy of this conflicting evidence, the Tribunal considers that the note to the file and the Applicant’s handwritten notes coincide in showing that the reason for the non-renewal decision, as disclosed during the meeting of 3 January 2008, was the negative impact that allegations then made against the Applicant could have on the Organization.

31. The Tribunal observes that, on 26 September 2007, the Applicant held a press conference in his personal capacity. In his latest written submissions, he explains that he held the press conference as he could no longer deny that investigations were ongoing. The English summaries of local press releases and television broadcasts which the Respondent attached to his written submissions of 15 April 2011 confirm that, during the press conference, reference was made to both OIOS and ICTY. This is borne out by the UNMIK Press Briefing Notes of 26 September 2007, which is also attached to the Respondent’s written submissions of 15 April 2011. Taken together, this evidence clearly shows that, at the material time, there were allegations made against the Applicant in relation to the OIOS investigation and in connection with ICTY, which were then widely reported in the media in Kosovo, sometimes in overwhelmingly negative terms. For instance, in a newspaper article published on 26 September 2007, a link was

established between the Applicant and a high official from Kosovo who had been indicted by ICTY, while noting that “critics ha[d] accused the UN mission in Kosovo of giving [that high official] special treatment, believing his considerable influence ha[d] helped stop hardliners from turning to violence in the diplomatic deadlock over Kosovo’s push for independence”. This connection also appeared in another article released on the same day. The headline of an article published on 27 September 2007 read: “Schook accused of evil deeds, does not resign”. Additionally, an article published on 28 October 2007 on a news website stated: “The UN’s administration of Kosovo has been fraught with controversy” while, at the same time, reporting on the Applicant’s press conference.

32. The Tribunal notes that the negative impact of the allegations against the Applicant is supported by the facts insofar as these allegations were indeed reported disparagingly by some media in Kosovo. Of course, not each and every negative media report on UN staff members may adversely affect the Organization. On the other hand, the picture may change in cases where the highest-ranking representatives of the Organization are involved. In *Bertucci* 2011-UNAT-121, the Appeals Tribunal expressly stated that, as a matter of principle, it did not deny the Secretary-General the possibility to take into consideration the effect of press articles in cases of selection of an Assistant Secretary-General. Accordingly, it is within the Secretary-General’s discretion to take action to address the negative impact of allegations which could jeopardize the reputation and proper functioning of the Organization where those allegations concern the most senior officials of a United Nations body, like UNMIK, which is so exposed not only to local public opinion but also to international attention.

33. In his application, the Applicant emphasizes that, at the relevant time, he was the second most senior United Nations official in UNMIK. At the directions hearing on 24 November 2010, he also explained that his functions as Principal Deputy to the Special Representative of the Secretary-General included senior representation in the absence of the Special Representative. Therefore, they may be no doubt that the Applicant was to be considered as one of the most important representatives of the United Nations in Kosovo.

34. Concerning the Applicant's contention that the allegations made against him were subsequently proven untrue, it must be emphasised that the decision not to renew the Applicant's appointment was not based on the accuracy of these allegations but on their being publicly echoed and, more specifically, on their suspected impact on the future of, in the Applicant's own words, "an extremely complex and politically sensitive mission".

35. Consequently, in view of the Applicant's particular responsibilities as the second-highest official of UNMIK, the decision not to renew his contract constituted a proper exercise of the Secretary-General's discretion. It should be recalled at this juncture that, where the Secretary-General is entitled to use his discretionary power, the Tribunal's role is restricted to examining whether this discretion has been abused within the meaning of the principles recalled above. In the view of the Tribunal, no such abuse took place in the present case.

36. Lastly, with respect to the Applicant's contention that the short separation notice prevented him from finding a suitable alternative employment, it is sufficient to note that former staff rule 309.5(a) provided: "Appointments under [the 300 series of the Staff Rules] shall expire automatically and without prior notice on the expiration date of the period specified in the letter of appointment." The Applicant's initial letter of appointment expressly stated "[t]he appointment expires without notice on the 16th day of April 2007" and, by referring to the "terms and conditions specified in [his] Letter of Appointment effective 17 April 2006", the subsequent appointment extension was also conditional upon the above provision. The Applicant's contention is accordingly rejected.

Conclusion

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

The application is rejected in full.

(Signed)

Judge Thomas Laker

Dated this 11th day of May 2011

Entered in the Register on this 11th day of May 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva