



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

SMOLJAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Miles Hastie, OSLA

Parisa Elahi, OSLA

**Counsel for Respondent:**

Karen M. Farkas, UNHCR

## **Introduction**

1. By application dated 9 August 2013, the Applicant contests the decision not to appoint him to the position of Senior Business Analyst (Budget Systems), Global Analysis and Reporting Unit, Programme Budget Service (“PBS”), Division of Financial and Administrative Management (“DFAM”), at the United Nations High Commissioner for Refugees (“UNHCR”) Headquarters in Geneva, Switzerland, at the P-4 level, Job Opening 7219, Position No. 10001739, advertised in the March 2012 UNHCR Compendium (“the Position”).

## **Facts**

2. The Applicant entered service at UNHCR in December 1993. After multiple assignments in the field, he works, since January 2009, as a Registration Officer (Progress), at UNHCR Headquarters, at the P-3 level.

3. The Position, classified as a Standard-Specific post, was advertised internally and externally in the March 2012 UNHCR Compendium. The Applicant applied for it.

4. As part of a comprehensive matching exercise, the Department of Human Resources Management (“DHRM”), UNHCR, shortlisted five internal candidates, including the Applicant. This shortlist was sent to the Head, PBS, who was to be the direct supervisor of the person selected for the Position (“the Manager”).

5. By memorandum dated 10 July 2012, the Manager requested the release of the expanded list of applications, having concluded that “none of the shortlisted internal candidates [met] the minimum requirements of the post.” Regarding the Applicant in particular, the memorandum stated that he did “not have the educational background nor the professional experience as per the essential requirements for [the] post”.

6. In its Final Recommendation Meeting (“FRM”), held between 9 and 13 July 2012, DHRM concluded that it was unable to assess whether the internal applicants fulfilled all requirements for the Position and agreed to release the list of external candidates with the proviso that four internal candidates, including the Applicant, be reviewed together with the external candidates, “under the same conditions in a competency based interview”.

7. A written test was conducted on 18 and 19 October 2012, sat by a total of ten candidates, out of which three were internal (including the Applicant) and seven were external. The tests were administered anonymously and rated by the secretary of PBS.

8. The three top scoring candidates were interviewed by a four-member panel. The Applicant was not among the candidates interviewed for the Position.

9. By memorandum dated 21 January 2013, the Manager submitted her “Views on the Suitability of Applicants” to the Director, DHRM, through the Controller and Director, DFAM. She thereby advised that, following the testing and the interviews, one of the external candidates had been found to be the most suitable applicant for the Position and requested DHRM to favourably consider his candidacy.

10. On 28 January 2013, the FRM recommended the candidate proposed by the Manager.

11. In its meeting held from 25 to 28 February 2013, the Joint Review Board (“JRB”) endorsed the recommended (external) candidate.

12. On 22 March 2013, the “Summary of Decisions of the High Commissioner on Assignments Ref. No. 03/2013” was circulated to all UNHCR staff via email. It reflected that the Position had been filled by an external candidate.

13. On 27 March 2013, UNHCR sent an offer letter to the selected external candidate, describing the major aspects of the appointment, including grade, step and other entitlements. The selected candidate accepted the offer on 2 April 2013, without any conditions.

14. On 11 April 2013, the Applicant requested management evaluation of the decision to select an external candidate against the Position.

15. The Deputy High Commissioner, UNHCR, replied to the Applicant's request for management evaluation by memorandum dated 1 July 2013, upholding the contested decision.

16. The Applicant filed the present application before the Tribunal on 9 August 2013.

17. The Respondent filed his reply on 11 September 2013, with eight of the annexes thereto submitted *ex parte*.

18. By Order No. 60 (GVA/2014) dated 29 April 2014, the Tribunal requested the Applicant to submit observations on the Respondent's contention that he did not meet the requirements for the Position, notably those regarding educational background and work experience. He was also requested to provide a translation into English of his university degree(s) title(s).

19. The Applicant filed the requested observations and provided his own translation of his university degree title on 13 May 2013.

20. By Order No. 69 (GVA/2014) of 16 May 2014, the parties were instructed to file objections, if any, to a judgment being rendered without an oral hearing. The Respondent expressed no objection. The Applicant stated, by submission dated 30 May 2014, that he did not oppose to a judgment being rendered without an oral hearing; however, he objected to any disposition of the case that took into consideration the content of any of the confidential documents filed by the Respondent, in the absence of their disclosure to him and the opportunity for him to address them.

**Parties' submissions**

21. The Applicant's principal contentions are:

a. DHRM failed to conduct a comprehensive matching exercise, as required by paras. 7(b) and 78 of the Policy and Procedures on Assignments (Inter-Office Memorandum No. 033/2010/Field Office Memorandum No. 033/2010) ("PPAP"). Instead of determining whether the Applicant was or was not a suitable candidate for the Position, DHRM gave an ambivalent answer, to wit, that "in view of the fact that this is a rather technical post ... DHRM is not able to assess whether the internal applicants fulfill all requirements necessary for this position." Although the Manager concluded, after initial review of the internal candidates, that the Applicant did not meet the education and experience required, the FRM made positive statements on his competence for the Position. Further, according to para. 81(g) of the PPAP, while DHRM is to take into account the manager's view, the final selection decision lies with DHRM;

b. External candidates may only be assessed if no suitable internal candidates are identified, pursuant to the matching procedures and priority policies set out in the PPAP. Sec. 15 of the PPAP provides that a post may be re-advertised externally and internally only when a suitable internal candidate has not been identified during the matching process. The same provision sets the order of priority for the review of applicants to externally advertised positions as follows: UNHCR staff members with internal applicant status, other applicants having internal applicant status, International Professional Roster candidates, UN staff members and external candidates, and prescribes that "[o]nly if no suitable candidate is found in one category, candidates in the next category will be considered." More recently, sec. 2(d) of the Policy and Procedures on Assignments – simplification measures (Inter-Office Memorandum No. 025/2011/Field Office Memorandum No. 026/2011) ("Simplification measures") reiterated these principles stating that "[e]xternal applicants shall only be considered when suitable and eligible internal applicants are not identified in the

matching process”. The Applicant qualifies as an internal candidate for this purpose;

c. The Applicant was a suitable candidate. Under para. 15 of the PPAP, a post may be re-advertised internally and externally, following the matching process when no suitable internal applicants are identified “using the following criteria: competency, performance and language requirements (where applicable), and after having solicited applications from available suitable internal staff.” While language requirements are not applicable in this case, the Applicant’s competency is established through his assessment by DHRM as well as by his past experience. As to his performance, his previous performance assessments demonstrate that he possesses relevant skills in the field of business analysis and information technology (“IT”) which are required for the Position. In addition, by shortlisting the Applicant, DHRM indicated that he was suitable for the Position;

d. Undertaking an assessment of external candidates constituted a violation of the PPAP. On the one hand, DHRM deliberately bypassed the matching stage and released the list of external applicants. Because the Applicant was a suitable candidate, and in keeping with para. 15 of the PPAP, the internal matching process should have led to the Position being filled and the recruitment process should not have moved to the next stage, namely the releasing of said list. On the other hand, further errors were committed inasmuch as the Applicant was not accorded priority as an internal candidate. Specifically, the Manager failed to respect the rule that external candidates should only be considered if no suitable internal candidate is identified (para. 15 and 83 of the PPAP) on two counts. First, she reviewed both internal and external applicants concurrently, against what was ruled in *Kasyanov* UNDT/2009/022 and *Wu* UNDT/2009/084. Second, the Manager was required to assess first and foremost whether any suitable internal candidates are available, and not to identify the very best candidate, which she failed to do;

e. UNHCR often appoints candidates who do not meet the literal descriptions of educational and/or professional experience requirements specified in the job descriptions, provided that the candidate has relevant experience allowing him or her to perform the functions. During the matching exercise, DHRM shortlisted the Applicant and he was not excluded in later stages of the process. The FRM meeting minutes, far from reflecting an outright rejection of the Applicant, indicate that a favourable view was taken of him;

f. The Respondent should be estopped from arguing that the Applicant was barred due to ineligibility requirements. This is a post-hoc rationalization for denying the Applicant the Position. In addition, the Respondent's position concerning ineligibility is unsupported by any evidence;

g. The Applicant meets the requirements for suitability based upon his substantial experience both inside and outside UNHCR. He has been responsible for providing business analysis design lead and project management in a number of IT projects at various stages in his career with UNHCR; particularly, he has ongoing experience with ProGres V4 software development project, performing a Business Analyst role for the last two years; in parallel, since 2011, he took part in another software development project dubbed ProGres Lite; in late 1997, he was tasked with analyzing the UNHCR return strategy in Bosnia and turning it into the return process management system; he has been involved in several software development projects for the former Field Software Development Unit; outside UNHCR, he lead the establishment of an IT company offering web design, hosting and administration, be-spoke software development and other IT services on a local market. With respect to his educational background, the Applicant has, both formally and informally, studied software programming as part of his engineering studies, and he continued to develop his IT background through a number of informal and on the job self-study opportunities;

h. The crux of this matter is not an “ineligibility” determination that was never made, but rather the procedure followed concerning “suitability” determinations;

i. Concerning the damage resulting for the Applicant from the contested non-selection decision, since he was not selected for the Position, he must continue applying for positions and will likely be forced to accept a position in a non-family duty station. Separation from his family would cause harm to himself as well as to his family, especially since his wife has recently developed a medical condition requiring quality medical care. Moreover, the Applicant’s career has been harmed as a result of him not being appointed to a P-4 position, as this will have an impact on his seniority in grade for future potential promotion opportunities. Finally, the Applicant has incurred financial loss as he will not receive a Special Post Allowance;

j. As remedies, he requests the rescission of the contested decision and an equivalent position at the P-4 level at UNHCR in Geneva.

22. The Respondent’s principal contentions are:

a. In line with the Appeals Tribunal’s case law (*Abassi* 2011-UNAT-110; *Rolland* 2011-UNAT-122), the Tribunal will rescind a selection or promotion decision only in rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination or bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection/promotion shall be upheld. None of the above circumstances applies to the present case;

b. The jurisprudence relied upon by the Applicant concerns lateral moves under former administrative instruction ST/AI/2006/3 (Staff selection system), whereas the case at hand does not relate to a lateral move and, in any case, is governed by PPAP. Nonetheless, it is not disputed that internal candidates are given priority under the applicable legal framework. The selection of an external candidate would have amounted to a procedural

flaw had the Applicant or another internal candidate been identified as suitable by DHRM;

c. The Applicant's inclusion on the shortlist does not amount to a determination by DHRM that he was fully suitable for the Position. Neither the Applicant, nor any other internal candidate, was at any point in the process identified as suitable according to the relevant PPAP provisions. Para. 81 of the PPAP provides that the "matching process is not a one-off activity but iterative ...". It consists of various steps, starting with the proactive screening of potential candidates by the Career Management Officers ("CMO") and includes the shortlisting of candidates, the soliciting of the Manager's views on the shortlist, a functional clearance where applicable and final recommendation by DHRM. Furthermore, based on para. 2(d) of the Simplification measures, candidates are initially shortlisted by their respective CMO, that is, a person supposed to advocate for candidates in the matching process. As a result, the shortlist is not a consolidated list of suitable candidates established by DHRM, but a list of internal applicants that are not considered evidently unqualified by their respective CMO. At any rate, DHRM could not possibly make a full-fledged suitability assessment without having reviewed the Manager's views, pursuant to sec. 81 of the PPAP. The foregoing is further supported by the fact that DHRM stated in the minutes of the FRM meeting of 9-13 July 2012 that it was unable to assess whether the applicants fulfilled all requirements necessary for the Position. DHRM was explicit in not making a finding on the suitability of the candidates at that stage;

d. By releasing the list of external candidates with the proviso that internal candidates be reviewed together with, and under the same conditions as, the external candidates, before making a final decision, DHRM acted in the best interest of the internal candidates;

e. The test results do not only establish that the Applicant was less suitable than the candidates subsequently interviewed. He received 35% of the possible points and scored lower than the average points granted to all candidates in five out of six tasks; this clearly supports that he was not suitable at all for the Position. The FRM reviewed the procedure and found no fault with it. The recommendation by DHRM of the external candidate amounts to an implicit finding that the internal candidates were not suitable. In any event, contrary to the Applicant's claim, DHRM has never concluded that he and the other internal candidates were suitable for the Position;

f. Regarding the fact that none of the internal applicants was invited for the interview, such interview was not a statutory requirement, but had been requested by DHRM in light of its initial inability to assess such candidates' suitability. Para. 83 of the PPAP allows for written tests and it cannot be considered a procedural flaw to invite only those candidates who performed to a certain standard;

g. As to the Applicant's submissions on his competences and performance, it is not the Tribunal's role to re-assess the suitability of a candidate. Nonetheless, the various essential minimum qualifications in the relevant job description include an advanced university degree in finance, commerce or business administration with course work in change management, as well as ten years relevant experience at the professional level as a business analyst. Based on his fact sheet, the Applicant can hardly claim that he met these minimum requirements. This was explicitly pointed out by the Manager in her first views. Hence, the fact that DHRM allowed the Applicant the chance to disprove this assessment, which he did not, should not be held against the Organization;

h. In light of the above, the Applicant's allegations of damages sustained are moot. The submission that he may be forced to accept a position in a non-family duty station is speculative and irrelevant considering the compensation associated to such an assignment and UNHCR rotation scheme. The Applicant may bring his wife's condition to the Special

Constraints Panel, to be taken into account in the selection procedure under the PPAP. Finally, should the Tribunal find the contested decision to be flawed, it is not in a position to order the Applicant's assignment to an equivalent P-4 in Geneva, as requested.

### **Consideration**

23. In selection cases, the Appeals Tribunal holds in a well-established jurisprudence:

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 (see *Ljungdell* 2012-UNAT-265).

24. Concerning procedural irregularities in selection and/or promotion cases the Appeals Tribunal has constantly held that

The direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation (see *Bofill* 2011-UNAT-174).

25. In applying these standards, the Tribunal finds the Applicant's request to rescind the contested decision unfounded.

26. The Job Description of the post of Senior Business Analyst (Budget Systems), advertised in the March 2012 UNHCR Compendium, sets forth under "Part 2B—Position Requirements" the different qualifications, competences and other conditions deemed necessary to discharge the duties of the post. In particular, its sec. 2.4 spells out, under the self-explanatory title of "Essential

minimum qualifications and professional experience required”, a series of seven requirements which include:

- a. “Advanced University Degree in Finance, Commerce or Business Administration with course work in change management”; and
- b. “Minimum of 10 years relevant experience at professional level as business analyst in the corporate sector of which at least 5 years should be in an international capacity directly relevant to the functions of this position.”

27. According to his fact-sheet, and relying on the translation of his university degree title provided by the Applicant himself, he holds a degree of Mechanical Engineer. It is not sure from the information available whether the latter amounts to an “advanced” university degree, as required. However, it is plain that the Applicant’s studies were not in any of the disciplines specified in the Job Description, but in fact in a subject-matter significantly different from “Finance, Commerce or Business Administration”. This failure to meet the educational requirement alone suffices to render the Applicant ineligible.

28. In addition, as to the Applicant’s professional experience, his fact-sheet reflects that since his joining the Organization in December 1993 until he undertook his current functions in UNHCR Headquarters in 2009, he essentially served as Interpreter, Protection Officer, Field Officer and Resettlement Officer. These posts, by their nature, do not generally entail duties “directly relevant” to the functions of the Position. Assuming that his work in his current position is fully relevant for the Position, this experience accounts for a little more than four years, i.e., since January 2009 until he applied to the Position in or about March 2012. This is far from the ten-year requirement set in the Job Description.

29. The Tribunal takes note of the Applicant’s very vague contention that he has been responsible for providing business analysis, design lead and project management in a number of IT projects at various stages in his career with UNHCR, such as, starting late 1997, analyzing the UNHCR return strategy in Bosnia and turning it into the return process management system and, outside

UNHCR, leading the establishment of a private IT services company operating in a local market. Nevertheless, even if such management and business analysis related components in his previous positions were to be taken into account, it is dubious, to say the least, that the Applicant's cumulated experience in the said fields reached the required ten years, with five of them "in an international capacity".

30. Therefore, the Applicant does not possess the requisite educational qualifications and it is not established that he has the professional experience required by the Job Description. Against this background, the Tribunal cannot but conclude that the Applicant was not eligible for the Position.

31. Indeed, the "Essential minimum qualifications and professional experience required" represent the minimum threshold that any candidate must indispensably meet to be considered eligible. The Organization enjoys large discretion to determine the eligibility requirements. This said, once it has set the pre-requisites for a given post, the Administration is bound to assess all candidates against such criteria in a consistent manner. Hence, the Organization is not only entitled, but actually obliged, to set aside from the recruitment process candidates who are found not to satisfy the minimum requirements. As already the former United Nations Administrative Tribunal held in *Lopes Braga* (Judgment No. 1235 (2003)), proceeding otherwise would harm not only other candidates who were turned down on the grounds that they did not meet such requirements, but also any other potential candidates who refrained from applying, conscious that they did not fulfil same.

32. It is frequent that Job Descriptions/Vacancy Announcements in the United Nations, when setting the education requirements, include a proviso allowing to waive the need for the specified qualifications in case a candidate can demonstrate a particularly strong experience in the relevant discipline. However, the Job Description in the instant case clearly did not envisage such possibility. Accordingly, there was no valid legal basis to depart from the clearly set requirement of an advanced university degree in specified fields as per the Job Description.

33. The Applicant's suggestion that, by not excluding him from the recruitment process at the stage of the FRM meeting, DHRM admitted that he was suitable for the post, is without merit. Not only such a determination was never made, but, on the contrary, DHRM was explicit in stating that it was unable to assess whether the internal candidates, including the Applicant, satisfied the requirements necessary for the Position, as the minutes of the FRM July 2012 meeting clearly show. By allowing the Applicant to move to the next stage in the selection procedure, the Administration was simply giving him a further chance to prove that he fulfilled the specified requirements. Hence, it is hard to see how this could breach the Applicant's rights.

34. As a result of the Applicant's lack of eligibility, as discussed above, he had no chance of promotion. Therefore, in light of the above-quoted judgment *Bofill*, even if a procedural flaw had existed within the selection process, it would not justify the rescission of the selection decision.

35. In any event, inasmuch as the Applicant did not meet the minimum objective requirements for the Position, and was thus ineligible, he could not possibly have been considered suitable. Consequently, sec. 15 of the PPAP and 2(d) of the Simplification measures were not applicable in the instant case. The contested decision was therefore proper.

36. Lastly, with respect to the Applicant's objection against any disposition of the case at hand taking into account the content of the confidential documents filed by the Respondent, unless they were disclosed to him and he was given the chance to address them, the Tribunal wishes to clarify that, in rendering this ruling, it has not relied on the documents contained in the annexes to the Respondent's reply filed *ex parte*.

**Conclusion**

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

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 23<sup>rd</sup> day of July 2014

Entered in the Register on this 23<sup>rd</sup> day of July 2014

*(Signed)*

René M. Vargas M., Registrar, Geneva