



**Before:** Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

TSONEVA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Robbie Leighton, OSLA

**Counsel for Respondent:**  
Elizabeth Brown, UNHCR  
John Stompor, UNHCR

## **Introduction**

1. By application submitted by email on 29 December 2014 and through the Tribunal's eFiling portal on 23 January 2015, the Applicant, a staff member of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision by the High Commissioner not to promote her from the P-4 to the P-5 level during the 2013 Promotions Session.

2. It is noted that the facts and grounds of appeal in this matter are very similar to those in Case No. UNDT/GVA/2015/165 (*Rodriguez-Viquez*), which was heard jointly with the present case. Parts of Judgment *Rodriguez-Viquez* UNDT/2016/030, delivered on 14 April 2016, are repeated in this Judgment.

## **Facts**

3. The Applicant joined UNHCR in September 2000 as Protection Officer at the P-3 level in Tbilisi, Georgia, and was granted an indefinite appointment under the 100 series of the former UN Staff Rules. In February 2003, she was assigned as Second Officer (P-3), still in Tbilisi. In April 2003, following a period of special leave with full pay of one month and three weeks, she was assigned as Second Officer (P-3) in Geneva, Switzerland, and, in January 2004, she was assigned as Supply Officer (P-3) in the Contracts Unit, Supply Management Service.

4. In December 2007, the Applicant was appointed as Senior Contracts Officer (P-4), in Geneva. On 1 November 2009, she was promoted to the P-4 level, effective the same day. In August 2012, she was temporarily assigned as Senior Contracts Officer to the Regional Bureau for Asia and the Pacific, in Geneva, and, in March 2014, she was temporarily assigned as Senior Legal Officer to the UNHCR Staff Council, still in Geneva.

5. Between 1 January 2015 and 31 July 2015, she was temporarily assigned as Policy Officer (Human Resources) with the Division of Human Resources Management (“DHRM”). In August 2015, she resumed her temporary assignment as Senior Legal Officer with the UNHCR Staff Council.

6. On 5 February 2014, the High Commissioner promulgated the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) (“Promotions Policy”). In essence, the Promotions Policy provides for the High Commissioner to make available a number of promotion slots to the P-4, P-5 and D-1 levels, and to award these to the most meritorious staff members based on recommendations made by a panel composed of senior UNHCR staff members, known as the Senior Promotions Panel (“SPP”) insofar as promotions to the P-5 and D-1 levels are concerned, which follows three rounds of evaluation of eligible staff members.

7. On 4 April 2014, the DHRM informed the Applicant that she was eligible to be considered for promotion to the P-5 level during the 2013 Promotions Session. She was, therefore, advised to ensure completion of her personal appraisal document, also known as an “e-PAD”, and accuracy of all data contained in her fact sheet by 14 April 2014. This deadline was subsequently extended to 24 April 2014.

8. On 2 May 2014, the DHRM informed the Applicant that she had met the requirements to advance from the First Round to the Second Round of the Promotions Procedure.

9. From 30 June 2014 to 4 July 2014, the SPP members gathered in Geneva to conduct their individual comparative assessment of the candidates who had advanced to the Second Round. The individual rankings given by each SPP member were then aggregated by the DHRM, and consolidated lists of assessment rankings were compiled, separately, for female and male candidates.

10. The six SPP members gave the Applicant the following “rankings” among the female candidates for promotion to the P-5 level: 66, 69, 85, 137, 151 and 154. The DHRM calculated that the arithmetic mean of the six individual rankings was 110.33 and established that the Applicant received a consolidated ranking of 129 out of 161 female candidates for promotion to the P-5 level. As her consolidated comparative ranking did not place her among the top 56 female candidates, the Applicant’s candidacy did not advance to the Third Round.

11. On 4 July 2014, namely towards the end of the Second Round comparative assessment, the High Commissioner announced that 240 slots would be available for promotions to the P-4, P-5 and D-1 levels during the 2013 Promotions Session and, in particular, that 56 slots would be available for promotion from the P-4 to the P-5 level, which, he decided, would be equally shared between female and male staff members.

12. By memorandum dated 17 October 2014 and distributed to all the UNHCR staff members via email on 20 October 2014, the High Commissioner published the list of promoted staff members. The Applicant was not among them.

13. By email of 31 October 2014, the Applicant requested the DHRM to provide her with the minutes of the SPP meetings reflecting the evaluation of her candidacy for promotion.

14. On 31 October 2014, the DHRM provided the Applicant with a copy of her fact sheet as reviewed by the SPP. The DHRM also reiterated the steps of the promotions process, as described in the Promotions Policy, and stated that “the Second Round individual evaluations by the six [SPP] Members ... resulted in an overall ranking that placed [her] outside the group of candidates who proceeded to the Third Round ... [which] corresponded to 200% of the number of slots allocated for promotions to the P-5 level”.

15. By email of the same day, the Applicant reiterated her request to obtain “the minutes reflecting the recommendations of the [SPP]”.

16. On 7 November 2014, the DHRM responded that there were no minutes of the Second Round evaluation as the candidates' comparative assessment was done individually by the SPP members, and recalled the process envisaged by the Promotions Policy as set out in its response of 31 October 2014.

17. On 17 November 2014, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the decision not to promote her to the P-5 level.

18. On 19 December 2014, the Applicant received an interim response informing her that her request for management evaluation was still under consideration. She did not receive any further response.

19. The Applicant submitted her application with the Registry of this Tribunal via email on 29 December 2014 and, on 23 January 2015, she submitted it through the Tribunal's eFiling portal.

20. The Respondent submitted his reply on 25 March 2015, after having been granted two extensions of time to do so.

21. The Applicant filed additional observations on 13 April 2015 and, on 14 January 2016, she filed additional evidence.

22. From 21 to 26 January 2016, the Tribunal held a hearing on the merits of the instant case, jointly with six other cases challenging contemporaneous decisions and raising similar issues, namely Cases Nos. UNDT/GVA/2015/132 (Natta), UNDT/GVA/2015/157 (De la Varga Fito), UNDT/GVA/2015/158 (Landgraf), UNDT/GVA/2015/163 (Spannuth Verma), UNDT/GVA/2015/165 (Rodriguez Viquez) and UNDT/GVA/2015/166 (Muftic). Four witnesses from the DHRM were heard: the Head of the Human Resources Policy and Planning Service, a Human Resources Officer in the Assignments and Promotions Section who served as the SPP Secretary for the 2013 Promotions Session, the Head of the Assignments and Career Management Service, and a Performance Management Associate in the Performance Management Unit.

23. During the hearing on the merits, the Applicant adopted the submissions made on behalf of the six other applicants in the above-mentioned cases by the Counsel of the Office of Staff Legal Assistance, insofar as they were relevant to her case.

24. On 29 January and 4 February 2016, the Respondent and the Applicant, respectively, filed additional submissions, with leave from the Tribunal.

25. During the course of the proceedings, the Respondent filed a number of documents *ex parte*, which contain confidential information. The Tribunal made all these available to the Applicant, with redactions as necessary and on an under seal basis.

#### **Parties' submissions**

26. The Applicant's principal contentions are:

- a. The Promotions Policy was applied retroactively, in contravention with the standards of fairness and predictability enshrined in administrative law;
- b. The 2013 Promotions Session covered a period of two years (2012 and 2013) rather than one, in contravention with sec. 4.1.1 of the Promotions Policy;
- c. The High Commissioner made his decision on the number of available slots for promotion and their distribution between male and female candidates without taking into account the recommendations of the Joint Advisory Committee ("JAC");
- d. The SPP was not legally constituted as some of its members served for more than three consecutive terms, and evaluated the eligible staff members in both the Second and Third Round of evaluation;

e. Some SPP members were in a situation of conflict of interest as they participated in the Promotions Session where their supervisees were promoted. The Deputy High Commissioner was also in a situation of conflict of interest as he could be consulted by the High Commissioner on the recommendations made by the SPP, and was at the same time in charge of deciding on requests for management evaluation submitted by candidates who had not been promoted;

f. By failing to sufficiently define the three evaluation criteria for the Second Round, namely “performance”, “managerial achievements” and “exemplary leadership qualities”, set objective standards and align itself with the performance appraisal policy, the Promotions Policy did not allow for a fair and transparent comparative assessment of the candidates. Furthermore, the modalities of the implementation of the Promotions Policy have not been set forth in an administrative issuance;

g. The DHRM’s decision not to provide the SPP members with the candidates’ e-PADs or their e-PADs’ ratings prevented them from taking into account relevant information, and constitutes a procedural error in the implementation of the Promotions Policy;

h. The Applicant was disadvantaged by the absence of information in her fact sheet regarding her performance in 2011;

i. The Promotions Exercise was not conducted in a fair and transparent manner as no minutes of the evaluation of candidates were prepared and communicated to the staff members, in contravention with sec. 5.11 of the Promotions Policy. Furthermore, the UNHCR failed to provide reasons for its decision not to promote the Applicant, thus preventing her from identifying ways to strengthen her candidature, and having elements in support of her claim to have the Tribunal review the Organization’s exercise of discretion.

- j. Accordingly, the Applicant requests:
  - i. Rescission of the contested decision and grant of promotion to the P-5 level;
  - ii. “Financial compensation for material damages”; and
  - iii. Compensation for moral damages.

27. The Respondent’s principal contentions are:

- a. The Secretary-General has broad discretion in matters of promotion; accordingly, review of administrative decisions regarding promotions involves an examination of “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration”;
- b. The Respondent has “minimally shown” that the Applicant’s candidacy for promotion was given full and fair consideration as the six SPP members separately reviewed her fact sheet, which included the narrative of her performance appraisals during the five years preceding 31 December 2013, and none of them ranked the Applicant’s candidacy among the 56 top female candidates who advanced to the Third Round. The presumption of regularity stands satisfied and it is incumbent upon the Applicant to show, through clear and convincing evidence, that she was denied a fair chance of promotion;
- c. In turn, the Applicant failed to establish that the contested decision was unlawful, for the reasons set forth below;
- d. Firstly, the Promotions Policy did not have a retroactive effect as it entered into force on 5 February 2014 and was subsequently applied in the 2013 Promotions Session, which began in the first quarter of 2014;



e. Secondly, the Applicant failed to demonstrate any procedural error in the implementation of the Promotions Policy that would warrant rescission of the contested decision; in particular:

i. The Promotions Policy does not require that promotions sessions be held every year;

ii. The High Commissioner is not bound by the recommendations of the JAC in its determination of the number of available slots for promotion. Furthermore, the High Commissioner considered the advice of the JAC on the award of more promotion slots to women but decided to address the issue of gender imbalance through other means;

iii. The SPP members served only one term, and their tenure was in compliance with the Promotions Policy;

iv. The Applicant did not substantiate her allegations of conflict of interest resulting from the fact that supervisors sat on the board reviewing candidacies of their supervisees, or from possible consultations between the High Commissioner and his Deputy on the award of promotions;

v. The SPP members' conduct of the comparative assessment and ranking based on the narrative part of the e-PADS as reproduced on the candidates' fact sheet, to the exclusion of the ratings contained in the e-PADS, was consistent with sec. 5.9.1 of the Promotions Policy. It was also justified by the need to ensure fairness to all candidates given the important variations in the use of ratings by individual managers;

f. Thirdly, it was appropriate that no information regarding the Applicant's performance from 1 January 2011 to 31 December 2011 was included in her fact sheet that was considered during the Second Round evaluation, as the Applicant had initiated a rebuttal process of her performance appraisal, which had not been completed at the time;

g. The Applicant was provided with sufficient reasons for the contested decision as she was informed that her overall ranking placed her outside the 200% margin of the number of slots allocated for promotion to the P-5 level, and provided with a copy of her fact sheet used by the SPP members for their review of her candidacy. In addition, the Promotions Policy did not require the SPP to prepare minutes of its Second Round review;

h. In respect of the remedies sought, the Respondent submits that even if the Tribunal were to find that the promotions process was tainted by any shortcomings, these should not lead to the rescission of the contested decision as the Applicant had no “significant” or “foreseeable” chance for promotion;

i. The Applicant’s claim for moral damages is also without merit given that she has adduced no evidence of such damages;

j. Consequently, the Respondent requests the Tribunal to reject the application in its entirety.

### **Consideration**

28. Before examining the alleged errors in the contested decision, the Tribunal considers it appropriate to give a brief overview of the Promotions Policy, which is unique to the UNHCR and stems from its “rank in person” system. This Policy has been applied for the first time in the 2013 Promotions Session and fundamentally departs from the previous policy as staff members are no longer given a point-based scoring but rather subjected to a comparative assessment among each other by a panel composed of senior staff members of the UNHCR. Whilst some of this Tribunal’s previous holdings in respect of the UNHCR previous promotions sessions remain of relevance, most of these cannot be applied *mutatis mutandis* to the present case.

*Overview of the Promotions Policy*

29. Unless they serve on an expert post, the UNHCR staff members in the International Professional category who are serving on indefinite and fixed-term appointments are conferred personal grade levels. They apply for assignments at their personal grade level or one level above. These staff members may be promoted to the P-4, P-5 or D-1 levels in accordance with the procedures set forth in the Promotions Policy.

30. The Promotions Policy, adopted on 5 February 2014, introduced a “new methodology and procedures for the promotion of International Professional staff” (sec. 1). Pursuant to this Policy, the High Commissioner determines each year the number of available promotion slots at the P-4, P-5 and D-1 levels, upon recommendation from the JAC (sec. 4.1.2). He then receives recommendations for promotion by the SPP, insofar as promotions to the P-5 level are concerned, following its review of the eligible candidates as outlined in the Policy (sec. 4.1.1).

31. The Promotions Policy establishes the eligibility criteria, namely that the candidate “must meet minimum seniority-in grade requirements” (sec. 5.1), and the procedures for three potential rounds of evaluation.

32. To advance from the First Round to the Second Round, a candidate must satisfy at least three out of five “Evaluation Criteria, or Green Lights”, namely: language proficiency, number of rotations, service in D, E and/or U duty stations, functional diversity, and performance records (i.e., absence of any gap in e-PADs) (sec. 5.7). Alternatively, candidates with twice the minimum seniority-in-grade at their current level advance automatically to the Second Round, regardless of whether they have sufficient “green lights” (sec. 5.8.4).

33. The Second Round, which is the main consideration of this case, entails a comparative assessment of the candidates by the SPP members based on the following three criteria: performance, managerial accountability and exemplary leadership qualities.

34. More specifically, sec. 5.9.1 of the Promotions Policy provides the following in respect of the Second Round:

5.9.1 A comparative assessment of the staff members who advanced from the First Round will be undertaken in the Second Round evaluation of the promotions procedure. Panel Members will individually conduct a comparative assessment and ranking of the staff members who have passed the First Round based on their evaluation of the following criteria:

- (i) **Performance:** A staff member's performance during the past five years must be at the minimum "Achieved", or its equivalent, for overall work objectives and must be at the minimum "Proficient", or its equivalent, for overall competencies indicating the staff member's ability and readiness to perform at a higher level as reflected in the narrative of the performance appraisal in the PAR/e-PAD and the Fact Sheet. The highest regard will be given to consistently demonstrated exceptional performance and documented exemplary service, including in emergency operations during the past five years. In addition, service at the higher grade level for one year or longer, during the past five years, recognized through the receipt of a SPA or RALP [Remuneration At the Level of Post] shall be considered.
- (ii) **Managerial Accountability:** For promotion to any level, and particularly to the P-5 level and above, a staff member must have demonstrated a high level of competence and professionalism in the management of human, financial, material resources, programmes or operations. Managerial achievements shall be demonstrated by their reflection in the PAR/e-PAD performance evaluations and Fact Sheet narrative.

5.9.2 For promotion to the P-5 or D-1 levels, the Panel Members will identify staff members who have demonstrated exemplary leadership qualities such as motivating a team, providing a vision and promoting a climate of respect and appreciation in the work place.

5.9.3 The number of staff to be advanced from the Second Round to the Third Round will correspond to the minimum of 150% of the number of slots available for promotions to P-4 and to a minimum of 200% of the number of available slots available for promotion to P-5 and D-1. Based on the Panel Members' assessments, the Panel Secretariat will compile the Second Round assessment rankings and develop a consolidated list of substantially equally meritorious

candidates for consideration by the Panel Members in the Third Round.

35. The Third Round entails a collective review of the “substantially equally meritorious candidates” by the SPP, and the making of final recommendations corresponding to the number of available slots (secs. 5.10.1 and 5.10.2). The evaluation is based on the Second Round criteria, and provides for the need to ensure geographical distribution as well as any disciplinary measure, documented reprimand, financial mismanagement or gross negligence during the past five years (sec. 5.10.2). For promotions to the P-5 level, the SPP may request a written assessment of any particular candidate from the respective Director, for staff in Headquarters, or from the respective Representative, for staff in the field (secs. 5.10.3 and 5.10.4).

36. The High Commissioner awards promotions, which are conditional on the staff member obtaining a specific position at the higher level. This condition does not apply to staff members who already serve on a position at the higher level or on an expert post, or are within two years of retirement age (sec. 5.12).

37. Pursuant to sec. 5.10.2, “[a]t grade levels where gender parity had not yet been achieved, at least 50% of the promotion slots will be awarded to substantially equally meritorious female staff”.

38. Finally, staff members may, without prejudice to their right to formally contest the non-promotion decision in the internal justice system, seek recourse “on the basis that some documentation relating to the period under review that may have had an impact on the final recommendation was not available at the time of the review” (sec. 5.13).

#### *Standard of review*

39. It is well established that the Secretary-General has broad discretion in matters of appointment and promotions. When reviewing such decisions, the Dispute Tribunal shall examine “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was

given fair and adequate consideration” (*Abbassi* 2011-UNAT-110, para. 23; see also *Majbri* 2012-UNAT-200, para. 35; *Ljungdell*, 2012-UNAT-265, para. 30).

40. More specifically, the Appeals Tribunal held in *Rolland* 2011-UNAT-122 that (para. 21):

All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

41. In *Rolland*, the Appeals Tribunal also distilled the burden of proof for challenges against promotion decisions, holding that (para. 26):

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

42. In its judgment *Rodriguez-Viquez* UNDT/2016/030 of 14 April 2016 in Case No. UNDT/GVA/2015/165, which was heard jointly with the present case, the Tribunal stressed that “[i]n the context of a promotion exercise conducted under a specific policy, such as in the present case, the Tribunal’s review is essentially focused on the implementation of the policy (see *Bofill* 2013-UNAT-283)”. Insofar as challenges to the design of the Promotions Policy are concerned, the Tribunal held that:

It is not the Tribunal’s role to examine whether a policy adopted by the Administration is well-founded or appropriate. This does not mean, however, that the Tribunal may not entertain challenges to the legality of the policy in respect of non-compliance with a higher norm, insofar as the irregularity may result in a staff member not being given fair and full consideration for promotion. For example, a promotion policy setting out a discriminatory criterion would lead to an unlawful decision even if it were

correctly applied. Whereas there is no doubt that the Tribunal has no authority “to amend any regulation or rule of the Organization” (*Mebtouche* 2010-UNAT-045, para. 11), a decision may be rescinded if it is taken pursuant to a policy which does not comply with a higher norm. In this context, the Tribunal may also “point out what it considers to be a deficiency” in a policy and “recommend a reform or revision” (*Mebtouche* 2010-UNAT-045, para. 11; see also *Nguyen-Kropp and Postica* UNDT/2015/110).

43. In addition, the Tribunal notes that the Appeals Tribunal has recalled in a number of cases “the well-known principle of law against retrospective application of laws” (*Hunt Matthes* 2014-UNAT-444; *Nogueira* 2014-UNAT-409). Thus, the Applicant’s argument in respect of the retroactive application of the Promotions Policy also requires consideration.

44. In view of the foregoing, the Tribunal will examine whether:

- a. The Promotions Policy was applied retroactively
- b. The procedure as laid down in the Promotions Policy was followed;
- c. The Applicant was given fair and adequate consideration for promotion to the P-5 level; and
- d. The Applicant was provided sufficient reasons for the contested decision.

45. The Appellant’s arguments related to the design of the Promotions Policy will be addressed under the third prong of the Tribunal’s review.

*Whether the Promotions Policy was applied retroactively*

46. The Applicant submits that by setting evaluation criteria *ex post facto*, the Promotions Policy has a retroactive effect and lacks the requisite level of consistency and predictability. The Respondent submits that the Promotions Policy did not apply retroactively as it was implemented in the promotions session that followed its adoption. Furthermore, he submits that the Applicant has no entitlement to the continuing application of the previous promotions policies.

47. The Tribunal finds that it is within the purview of the Administration's discretion to, firstly, decide whether to hold promotions sessions and, secondly, establish the evaluation criteria. As such, the Administration can validly change its promotions policy and apply a new one for promotions sessions to be conducted after its adoption. In the instant case, the 2013 Promotions Session was held from April 2014, as per the Promotions Policy (see sec. 4.1.5). At that time, the Promotions Policy had already come into force and, as such, it was not applied retroactively.

48. The Tribunal agrees with the Applicant that in the context of UNHCR's rank in person system and promotion mechanism, it would be a good managerial practice that evaluation criteria for promotions be known in advance, for the sake of predictability and transparency. However, there is no legal entitlement to promotion based on set criteria stemming from the applicable rules or the staff members' contract of employment.

49. The Tribunal notes that a more delicate issue arises from the fact that the Promotions Policy places the staff members' performance records for the precedent five years at the core of the Second and Third Round evaluations and, as such, entails a retrospective review. Whilst this is not unlawful and it is, to some extent, similar to any appointment or promotion exercise, the Tribunal stresses the importance of taking into account the particularities of the appraisal system in force during the five years under review in the implementation of the Promotions Policy, to conform with the principle of non-retroactivity of the law and ensure procedural fairness to the candidates. This particular issue will be discussed in more details below.

*Whether the procedure as laid down in the Promotion Policy was followed*

50. The Tribunal will examine, in turn, each of the alleged errors in the implementation of the Promotions Policy specifically raised by the Applicant. It will then proceed to identify other errors that were found in the implementation of the Promotions Policy following arguments raised by other candidates for



promotion during the 2013 Promotions Session, which the Applicant adopted, and that equally impacted on the consideration of her candidacy for promotion.

Absence of a promotions session in 2012

51. The Applicant takes issue with the fact that no promotions session was held in 2012, so the 2013 Promotions Session covered two years, in contravention with sec. 4.1.1 of the Promotions Policy. The Respondent submits that it is not required to hold a promotions session every year, and that no session was held in 2012 due to the fact that the High Commissioner did not make any slots available for promotion.

52. At the outset, the Tribunal stresses that the contested decision concerns the High Commissioner's decision not to promote the Applicant during the 2013 Promotions Session. Any prior decision not to hold a promotions session in 2012 falls outside the scope of the Tribunal's review.

53. Insofar as the Applicant challenges the fact that the 2013 Promotions Session covered two years, the Tribunal finds that this argument is without merit. The fact that no promotions session was held in 2012 does not impact on the exercise conducted for the 2013 Promotions Session, which entails a review of the staff members' eligibility based on their personnel record as of 31 December 2013, and of their performance from 1 January 2009 until 31 December 2013, if eligible.

54. Furthermore, the Tribunal notes that the Promotions Policy only came into force on 5 February 2014, so it is not applicable to any promotions session prior to the one of 2013. In any event, the Promotions Policy does not require that a promotions session be held every year, as sec. 4.1.1 of the Promotions Policy provides that the holding of a promotions session is "[s]ubject to availability of promotion slots".

Determination of the number of available slots for promotion and gender considerations

55. The Applicant challenges the determination by the High Commissioner of the overall number of available slots for promotion, as well as the distribution of these slots between female and male candidates, based on the fact that he did not follow the recommendations made by the JAC. The Respondent submits that the High Commissioner is not bound by these recommendations.

56. The High Commissioner's power to set the number of available promotion slots is defined in sec. 4.1.2 of the Promotions Policy, which provides:

[The] Division of Human Resources Management (DHRM) will submit to the Joint Advisory Committee (JAC), at least 10 working days prior to the relevant promotions session, its recommendations on the number of available promotion slots using relevant statistics on positions and staffing, including but not limited to, distributions by grade level, expected separation and recruitment and trends in inter-agency exchanges. The number of promotion opportunities, reflected quantitatively as promotion slots, will be decided by the High Commissioner, taking into account the advice of the JAC.

57. It follows from this provision that the High Commissioner has discretion in the determination of the available slots for promotion. Although the High Commissioner shall take into account the advice of the JAC, such advice does not bind him in any way.

58. In the instant case, the exact recommendation of the JAC is unclear insofar as the overall number of promotion slots to P-5 is concerned, as it has not been introduced in evidence. However, a memorandum from the High Commissioner to the Co-Chairpersons of the JAC, dated 4 July 2014, shows that he reviewed and considered the advice provided by the JAC on this matter. This is sufficient to meet the requirement of sec. 4.1.2 of the Promotions Policy.

59. As to the distribution of the available promotion slots between male and female candidates, it appears from the High Commissioner's memorandum of 4 July 2014 that the JAC recommended to him that "55% of the available slots for promotion, or even a higher percentage, be allocated to female staff members and

the balance of the available slots be allocated to male staff members”. The memorandum shows that the High Commissioner took into account this recommendation but decided otherwise. Instead, he elected to address the problem of gender inequity in UNHCR staffing through other means, namely by instructing the DHRM to review the UNHCR gender policy and its means to achieve gender targets. He then decided that pending review of this policy, “the available slots for promotion this year shall continue to be equally shared between female and male staff members, which is in line with paragraph 5.10.2 of the [Promotions Policy]”.

60. The Tribunal finds that the High Commissioner’s decision not to follow the advice provided by the JAC on the gender distribution of promotion slots does not constitute an error in the implementation of the Promotions Policy. The problem in respect of that decision, however, lies elsewhere.

61. As previously found in *Rodriguez-Viquez*, absent any reference in sec. 4.1.2 to gender considerations, the High Commissioner’s discretion is limited, at this stage, to determining the number of available slots for promotion at each level, based on the UNHCR’s staffing table and staff movements prognostics. Although the High Commissioner may have sought to achieve gender parity in setting in advance the number of slots available for each gender group, which is most certainly a commendable and lawful objective in light of the UN Charter and the “Policy on Achieving Gender Equity in UNHCR staffing” (IOM 018/2007—FOM 019/2007) of 8 March 2007 (“Gender Policy”) (see *Mebtouche* UNDT/2009/039, para. 17), he ended up making a predetermination of issues that had to be addressed at a later stage, that is, at the time of awarding the promotions, after the evaluation of the candidates had actually taken place (see sec. 5.10.2 of the Promotions Policy). He also unlawfully limited the number of promotions slots that may have otherwise been awarded to women.

62. In this respect, the Tribunal stresses that the Promotions Policy does not provide for promotion quotas based on gender, as seemed to be considered by the High Commissioner. Rather, it provides for a *minimum* of 50% of the available slots to be awarded to “substantially equally meritorious female staff”. Hence, the

number of promotion slots that are to be awarded to women is clearly not limited to 50%, and ultimately depends on the merits of the candidates, in line with art. 101.3 of the UN Charter, which provides that “[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity”. The intended consequence of sec. 5.10.2 of the Promotions Policy is so apparent from the face of it that there can be no question as to its meaning. As the Appeals Tribunal stated in *Scott* 2012-UNAT-225:

28. The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

63. The Tribunal stresses that it was open to the High Commissioner to establish a promotion mechanism that entailed a separate consideration of female and male candidates in order to achieve gender parity, insofar as it otherwise complied with the UN Charter requirement that promotions be based on merit. However, this had to be done through the adoption of clear rules to this effect, as previously underlined by this Tribunal in *Mebtouche* UNDT/2009/039. Indeed, in that ruling related to the UNHCR 2007 Promotions Session, the Tribunal emphasized that any effort towards achieving gender parity must comply with the requirement of the UN Charter that promotions be based on merit and materialise through the adoption of clear rules for promotions that reconcile these two principles before the annual promotion session, rather than through a request to the DHRM to apply quotas.

64. The High Commissioner’s decision to award an equal share of the promotion slots to male and female candidates appears to be at the origin of, or at least interrelated with, a significant error in the implementation of the Promotions

Policy identified in *Rodriguez-Viquez*, which directly impacted on the consideration of the candidacy of all candidates for promotion during the Second Round, including that of the Applicant.

65. It has been established that male and female candidates for promotion were considered in two separate groups in the Second and Third Rounds, leading the SPP to recommend, and ultimately the High Commissioner to select, an equal number of female and male staff members. More specifically, it appears that after having identified the candidates who had passed the First Round, the DHRM established separate lists of candidates for female and male candidates, which it submitted to the SPP members for their comparative assessment during the Second Round. The SPP members were instructed to rank the female and male candidates separately as, in the DHRM's view, "one group does not compete with another, [and] these are separate exercises".

66. At the hearing, the Head of the Human Resources Policy and Planning Service, UNHCR, explained that candidates for promotion were separated by gender from the Second Round onwards as the High Commissioner had decided that the available slots would be equally shared between female and male staff members. In this respect, the evidence shows that the High Commissioner indeed made this decision, as recalled above, but only after the DHRM had already instructed the SPP members to consider candidates separately by gender, namely in his memorandum of 4 July 2014.

67. The Tribunal notes that the Promotions Policy, which establishes the methodology for a three-round evaluation of candidates and sets out the evaluation criteria for each round, does not provide for the separate consideration of male and female candidates at any stage, nor does it refer to gender as being a factor for consideration in the evaluation of candidates. There is no reference to gender consideration in the Promotions Policy until the very end of the process, where sec. 5.10.2 provides that "[a]t grade levels where gender parity has not yet been achieved, at least 50% of the promotion slots will be awarded to substantially equally meritorious female staff".

68. Significantly, the Promotions Policy consistently refers to the comparative assessment and ranking of a single pool of candidates. In this respect, secs. 5.9.1 and 5.9.3 provide that in the Second Round, the SPP shall conduct “[a] comparative assessment of the staff members who advanced from the First Round”, following which “the Panel Secretariat will compile the Second Round assessment rankings and develop *a consolidated list of substantially equally meritorious candidates* for consideration by the Panel Members in the Third Round” (emphasis added). Then, secs. 5.10.1 and 5.10.2 provide that in the Third Round, “[p]anel members will collectively review *the list of substantially equally meritorious candidates* as retained after the second round review and make final recommendations”, which “are not to exceed the number of slots available at each grade level” (emphasis added).

69. The fact that the DHRM had already instructed the SPP members to consider female and male candidates separately before the High Commissioner had announced his decision to divide equally the promotion slots between the two groups raises serious doubts about the whole decision-making process in respect of gender consideration for the application of the Promotions Policy, and is indicative of a lack of transparency of process.

70. In any event, the Tribunal finds that although the Administration may have sought to achieve the High Commissioner’s objective to award an equal number of promotions to female and male candidates, its separation of candidates by gender for consideration during the Second Round review was in violation of the Promotions Policy. Not only did it introduce a new criterion for consideration during the Second Round, but it was also entirely inconsistent with the terms of the Policy itself, which clearly envisaged a single pool of candidates for their comparative assessment and ranking by the SPP at this stage. All candidates who had passed the First Round were required to be assessed on their merits as one group in the Second Round to produce a list of “substantially equally meritorious” candidates for consideration by the SPP in the Third Round.

### Composition of the SPP

71. The Applicant submits that the SPP was not legally constituted, as some of its members served for more than three consecutive years when taking into account their prior service in the Joint Review Board, which was previously in charge of promotions, and SPP members served for both the Second and Third Rounds of evaluation. The Respondent submits that the SPP members' tenure was in compliance with sec. 4.3 of the Policy.

72. Sec. 4.3 of the Promotions Policy provides that:

The tenure of office of the Panels shall be for one Promotions and one Recourse Session addressing the same year. Members of either Panel shall not serve more than three consecutive terms.

73. It follows from this provision that SPP members were not only allowed but obliged to serve for a whole promotions session, namely for the Second and Third Round as well as the recourse session.

74. In turn, there is no evidence on record that SPP members have served in the two previous exercises conducted under old promotions policies. In any event, their tenure under the new Policy commenced in 2014, so any prior appointment under previous promotions policies would have no impact on its limit pursuant to such policy.

### Conflict of interest

75. The Applicant argues that some SPP members were in a position of conflict of interest as they participated in the assessment of their supervisees' candidacy for promotion. She further asserts that the Deputy High Commissioner's dual functions as adviser to the High Commission in the award of promotions and as responsible officer for management evaluations placed him also in a position of conflict of interest. The Respondent argues that the Applicant has adduced no evidence in support of her first argument, and that her second argument is hypothetical.

76. Sec. 4.6 of the Promotions Policy, which addresses situations of conflict of interest, provides that:

Where a case under review by either Panel raises a conflict of interest for a Panel Member, Secretary, LAS Representative or Ex-Officio, that person shall excuse himself or herself during consideration of the case. Possible scenarios for a conflict of interest include, but are not limited to, a Panel Member's own promotion or that of his or her spouse, partner or current supervisee.

77. The Head of the Human Resources Policy and Planning Service, DHRM, UNHCR, testified that the expression "current supervisee" was meant to refer to "direct supervisees", otherwise the review would become impossible as the SPP members were all senior managers who had several staff members under their overall supervision. The SPP Secretary confirmed this and testified that it was anticipated that the SPP members would know some candidates. He further said that the SPP agreed on "an internal disclosure system", for example when an SPP member had in the past assessed the performance of a candidate, but he did not provide more details about the exact system put in place, nor did he specifically discuss the issue of supervisors reviewing the candidacy of their current, direct supervisees.

78. The Tribunal notes that the Applicant raised the issue of conflict of interest in her written submission but did not bring the matter any further. She has adduced no evidence that SPP members indeed assessed their current direct supervisees during the Second Round evaluation. That being said, given that the SPP members were current D-1 and D-2 UNHCR staff members, it is highly possible that some of the candidates for promotion to the P-5 level were their direct supervisees. The Respondent did not argue the contrary. What is certain, though, is that there is no indication that any of the SPP members recused himself or herself from the assessment of a candidate. The consolidated table of rankings for candidates for promotion to the P-5 level shows that each candidate was evaluated by all SPP members.



79. In view of the foregoing, the Tribunal finds that there is no evidence that the SPP members assessed the candidacy of their current direct supervisees. However, this remains a real possibility, and the Tribunal is concerned that there appears to be no system currently in place to ensure that the requirement of sec. 4.6 is met. The Tribunal recommends to the Administration to consider the matter and adopt an appropriate procedure, which should be made available to the UNHCR staff members.

80. As to the Deputy High Commissioner's alleged conflict of interest, it is undisputed that the Deputy High Commissioner is in charge of deciding on requests for management evaluation and may, at the same time, be consulted by the High Commissioner on promotion awards. More specifically, sec. 5.11.3 of the Promotions Policy provides that:

When taking the promotions decisions, the High Commissioner will take into account the recommendations of the Panels, which are not binding and shall in no way restrict his or her discretion whether to promote staff. The High Commissioner may consult with the Deputy High Commissioner and the Assistant High Commissioners on the recommendations made by the Panels and solicit their views on the merits of eligible candidates who were not recommended or considered by either of the Panels.

81. The Tribunal notes that the two functions, which are expressly attributed to the Deputy High Commissioner by the applicable rules, may be incompatible with the requirement that management evaluations be conducted with impartiality and objectivity (General Assembly resolution 62/228 (Administration of justice at the United Nations), adopted on 22 December 2007; see also *Munir* UNDT/2014/020). In the context of the comparative review envisaged by the Promotions Policy, where the selection of candidates for promotions necessarily implies the denial of promotions to others, the Deputy High Commissioner's participation in the selection process, as an adviser or otherwise, may compromise his ability to review, with the requisite standards of impartiality and objectivity, requests for management evaluation submitted by staff members who had not been promoted.

82. However, in the instant case, the Tribunal finds no evidence of a conflict of interest that could have tainted the contested decision. As discussed above, any potential conflict of interest would arise when the Deputy High Commissioner is seized of a request for management evaluation of a decision denying promotion, and would not affect the High Commissioner's decision on promotions as such, which is the decision under review in the present proceedings. In turn, it cannot be concluded that the consideration of the Applicant's request for management evaluation, or lack thereof, was impaired by a conflict of interest. Firstly, the Deputy High Commissioner did not make any determination on the merits of such request. Secondly, as there is no evidence on record that the Deputy High Commissioner was involved in any way in the High Commissioner's decision to award promotions in the 2013 Promotions Session, his lack of response to the Applicant's request for management evaluation cannot be attributed to a conflict of interest arising from a prior involvement in the decision-making process.

Failure to provide the SPP members with the candidates' e-PADs

83. The Applicant also challenges the fact that the SPP members were provided only with the candidates' fact sheet, to the exclusion of their e-PADs. The Respondent recognises this but argues it was in line with the Promotions Policy as the staff members' fact sheet reflected their e-PADs.

84. The evidence before the Tribunal was that the fact sheet displays the staff members' working history and part of their performance appraisal, namely the narrative section of their e-PADs. It does not include, however, the numerical ratings for the appraisal of each objective and competency contained in the e-PADs, and the overall ratings for such.

85. In this connection, it is recalled that the Policy for the UNHCR Performance Management & Appraisal System (IOM 087/2008—FOM 089/2008) ("PAMS"), introduced in 2008, governed the appraisal system in use during the performance assessment period relevant for the 2013 Promotions Session, namely 1 January 2009 to 31 December 2013.

86. In brief, the PAMS provided for an assessment of whether staff members had achieved their agreed work objectives, and demonstrated the competencies required for their post by the UNHCR based on a ten-point rating scale. More specifically, each work objective had to be rated pursuant to the scale below, and the scores for each objective were then combined by the system to generate an overall work performance rating on work objectives:

- |                            |         |
|----------------------------|---------|
| i. Not Achieved            | 1, 2    |
| ii. Partially Achieved     | 3, 4, 5 |
| iii. Achieved              | 6, 7, 8 |
| iv. Exceptionally Achieved | 9, 10   |

87. The same principle applied for the rating of competencies, which were assessed pursuant to the following scale:

- |                              |         |
|------------------------------|---------|
| i. Not proficient            | 1, 2    |
| ii. Partially Proficient     | 3, 4, 5 |
| iii. Proficient              | 6, 7, 8 |
| iv. Exceptionally Proficient | 9, 10   |

88. The ratings were to be accompanied by comments from the staff member's supervisor and, where applicable, from multi-raters (see secs. 25, 40, 50(b) of the PAMS).

89. At the hearing, the Head of the Human Resources Policy and Planning Service, UNHCR, testified that the experience had shown that some supervisors were more prone to give high rankings than others, causing what he referred to as a "rating inflation". He expressed the view that the ratings were "unreliable" and meaningless if not supported by comments. The Administration therefore considered that only the narrative part of the e-PADs should be disclosed to the SPP members for their assessment of candidates during the Second and Third Rounds, as they would give a better picture of the performance and abilities of any staff member under consideration.

90. The Head of the Human Resources Policy and Planning Service further explained that the UNHCR was not satisfied with the appraisal system established by the PAMS and reviewed it in 2014, notably to modify the rating scale, and to require that exceptional ratings be the subject of review, in order to remove the arbitrariness contained in the previous appraisal system. He also stated that the Promotions Policy was drafted in the light of the forthcoming new performance appraisal policy, and intended, from its inception, to exclude the e-PADs from the SPP members' review. The Chief of the Assignments and Promotions Section, DHRM, UNHCR, further testified that the SPP members were specifically advised in a briefing session that "e-PADs ratings [were] not to be disclosed" to them.

91. The Respondent also submitted documentary evidence showing that from 2009, following the first appraisal exercise pursuant to the PAMS, disparities in ratings among various managers and offices were noted with concern. In a broadcast e-mail message of 4 June 2010, the then Director of DHRM, UNHCR, informed all staff members that "across offices around the world and in headquarters, there is a lot of variation in the ratings; and at the individual level, ratings and narratives sometimes do not correspond". He impressed upon the fact that measures would be taken to remedy the problem in the next appraisal cycle and that DHRM would, upon its review of the individual e-PADs, "revert to staff members and managers with comments, and also draw lessons learned to improve practice in general". The DHRM also undertook to "a) update the guidance on the rating scale; b) introduce standards for the quality assurance of e-PADs; and c) provide guidelines to managers and Reviewing Officers on how to calibrate ratings". In the meantime, he announced that "all completed e-PADs will be accepted in the system but for purposes of reporting, the fact sheets of all staff members will include only the narratives for 2009". However, he specified that the e-PADs, including the ratings, could be "referred to by DHRM as needed, for example in cases of contract extensions or non-extensions, personal promotions, conversions or non-conversions".

92. A similar broadcast was sent on 18 May 2011 by the then Director, DHRM, although some improvements were noted. In particular, it was reported that “[a]s for the overall ratings, the vast majority of the e-PADs are in the range of 5.1 to 8.0 (‘proficient’/‘achieved’). So far, 19% of the completed e-PADs have at least one overall ‘exceptional’ rating, compared to 29% in 2009. This trend is reflected in all regions and at Headquarters, which points to a positive tendency to improved validation and calibration of ratings”. The DHRM reiterated its commitment to ensure quality of the 2010 performance appraisals and stressed that “Guidelines on preparing a good performance evaluation” were available on the intranet.

93. At the outset, the Tribunal notes that the ratings, although they appear to have been considered as presenting some problems of consistency from the early years of the application of the PAMS, continued to be at the core of the appraisal system for the five years under review during the 2013 Promotions Session. The PAMS was not modified during that period, rather it was decided to work with the managers to ensure consistency. Managers continued to be asked and expected to evaluate their supervisees by providing them a rating, together with comments. Irrespective of the DHRM’s assessment of the ratings’ value, they were an integral part of the staff members’ e-PADs from 2009 to 2013 and formally part of the UNHCR’s legal framework. Any reference to an e-PAD during that period included both the narrative and the ratings contained in the performance appraisal document, irrespective of the fact that only the comments were reproduced in the staff members’ fact sheet. For the current Promotions Session, the Promotions Policy must be read in the light of the PAMS, which was the applicable administrative issuance regarding performance appraisal at the relevant period.

94. The Promotions Policy, at sec. 5.9.1(i) and (ii), explicitly refers to both the candidates’ fact sheet and e-PADs for consideration by the SPP in the Second Round. The reference to two separate documents clearly indicates that both were to be provided, otherwise the mention of PAR/e-PAD would be meaningless.

95. In particular, sec. 5.9.1(i) provides that the SPP shall assess a staff member's "ability and readiness to perform at a higher level as reflected in the narrative of the performance appraisal in the PAR/e-PAD and the Fact Sheet". This provision also contains a footnote referring directly to the ratings contained in the e-PADs, stating that "[p]erformance appraisal ratings may change during the validity of this Policy" and that "[g]uidance will be provided in assessing equivalencies".

96. In turn, sec. 5.9.1(ii) states that "[m]anagerial achievements shall be demonstrated by their reflection in the PAR/e-PAD performance evaluations and Fact Sheet narrative". The performance evaluation is without any doubt the one found in the e-PAD, which consists not only of the narrative, but also of the ratings of work objectives and competencies. The Tribunal notes that the structure of the obligation under sec. 5.9.1(ii) to consider material is different from that in section 5.9.1(i). Rather than referring to the consideration of the narrative in both the e-PAD and the fact sheet, sec. 5.9.1(ii) contains a clear distinction between that which is reflected in the PAR/e-PAD performance evaluations and that reflected in fact sheet narrative. The words "performance evaluation" attach to the PAR and the e-PAD, while the word "narrative" attaches to the fact sheet. Clearly, in light of the unambiguous wording of this provision, it is from both the e-PAD performance evaluations and the fact sheet narrative that the assessment had to be made in respect of the "managerial achievements".

97. The Respondent's argument that sec. 5.9.1 should be interpreted in such a way that the e-PAD and the fact sheet refer to the same document, namely the fact sheet alone, must be rejected as it has been clearly established that the fact sheet does not entirely reflect the e-PADs because it does not reproduce the ratings contained in the latter. If it had been intended to refer only to the narrative, then the Promotions Policy had to be drafted to so specify this. It is also clear from the Promotions Policy that the information contained in the e-PADs, including the ratings, was directly relevant to the SPP members' assessment during the Second Round.

98. Firstly, sec. 5.9.1(i) required the SPP members to assess whether the staff member's performance met the minimum threshold of "Achieved" or its equivalent for overall work objectives, and "Proficient" or its equivalent for overall competencies. These performance thresholds directly refer to the ratings reflected in the e-PADs, as per the PAMS. Without being provided such ratings, the SPP members were not in a position to verify if the minimum requirements set forth in sec. 5.9.1(i) were met.

99. The Respondent sought to provide explanations during the hearing as to how satisfaction of these performance requirements was verified. After vague and ambiguous testimonies from two witnesses, who suggested that the DHRM undertook a review of the eligible candidates to identify if any of these did not meet the minimum performance standard prior to the panel's review, it was ultimately established that it was following the SPP members' express "queries about performance" that the SPP Secretary took action in this respect.

100. The documentary evidence shows that on 1 July 2014 the SPP Secretary asked the Performance Management Unit, DHRM, UNHCR, to identify among the eligible candidates for promotion to the P-5 and D-1 levels those who "received at least one 'Not/Partially Achieved' and/or 'Not/Partially Proficient' rating on their e-PADs covering the period from 1 January 2009 to 31 December 2013", and to indicate by an asterisk if those ratings had been provided more than once. A Performance Management Associate in the Performance Management Unit then generated a report from the UNHCR's Enterprise Resource Planning System, and identified "those e-PADs in which the rating for overall objectives and/or the rating for overall competencies for at least one e-PAD during the period 2009-2013 was below 5.1, which was the lowest possible 'Achieved'/'Proficient' rating under [the PAMS]". He identified four candidates for promotion to the P-5 level who received a rating of less than "Achieved" or "Proficient", and conveyed this information to the SPP Secretary by email. The Tribunal is not entirely sure how this information was ultimately conveyed to the SPP, but it seems to have been done orally.

101. The Tribunal considers that these explanations as to the methodology adopted by the DHRM to implement the Promotions Policy are worrisome in several aspects. First, it appears that it was not anticipated, prior to the SPP session, that a review of the candidates' e-PADs was necessary to, *inter alia*, verify if the performance standard was met. This, in turn, raises doubts about how the DHRM envisaged undertaking the assessment of the evaluation criterion set forth in sec. 5.9.1(i), which is certainly one of the most determinative criterion of the entire process.

102. Then, it seems that the Performance Management Associate who did the verification exercise used the wrong indicator by identifying those who had an overall score below 5.1 for competencies and objectives. In this respect, the PAMS established a scale where "Achieved" and "Proficient" corresponded to a score of 6 to 9 (see paras. 86 and 87 above), which technically means that a staff member must have a score of at least 6 to minimally meet these standards. In turn, Annex 2 to the PAMS entitled "Background and overview of the PAMS Process" provides in its sec. 16 that "Achieved" and "Proficient" correspond to a rating between 5.1 and 8.0, which also seems to be the position adopted by the DHRM, as per the broadcast sent on 18 May 2011 (see para. 92 above). The Tribunal cannot reconcile these two apparently contradictory provisions of the PAMS and, given that it is not determinative of the present application, will limit itself to recommending the Administration to look into the matter. As a result, it is well possible that staff members who did not even meet the minimum performance threshold advanced to the Third Round.

103. Most importantly, it turned out that it was the DHRM that assessed part of the performance criterion under sec. 5.9.1(i), instead of the SPP, in contravention with the explicit terms of the Promotions Policy, under which the authority to make that assessment clearly falls on the SPP. In this respect, the information provided by the DHRM to the SPP was not sufficient to conclude that the SPP members ultimately made their individual assessment of the evaluation criterion as per the terms of sec. 5.9.1(i). The apparent decision of the DHRM to keep the ratings from the SPP meant that the SPP members were, thus, not personally able



to ascertain the correctness or otherwise of the information in the considerations under sec. 5.9.1(i) of the Policy even though the Policy required that they had to be personally satisfied that the criterion had been met.

104. Additionally, the ratings given to the candidates by their supervisors in respect of the achievement of their work objectives and their level of competencies was certainly a useful, if not necessary, indicator to compare the various candidates' performance, managerial achievements and leadership qualities. It provided a quantitative measure that would possibly allow the SPP members to identify strengths and weaknesses in the various staff members' candidacy, and compare them against one another. For instance, ratings of "Exceptionally Achieved" or "Exceptionally Proficient" were most certainly relevant to the SPP's consideration of, *inter alia*, whether candidates had "consistently demonstrated exceptional performance and documented exemplary service", as per sec. 5.9.1(i) of the Promotions Policy. As the Respondent acknowledged in his reply, the expression "exceptional performance" refers directly to the PAMS, in which the best level of performance was rated as "Exceptionally Achieved" or "Exceptionally Proficient". If the SPP members had been provided with the e-PADs, they could possibly have identified outstanding candidates by their ratings, with the assistance of the comments provided by the supervisor. Although there may be some concerns as to the reliability of the ratings, they nevertheless constituted the essence of the appraisal system at the relevant period, and provided quantitative values possibly useful to distinguish candidates in a pool of 161.

105. Furthermore, the Tribunal is of the view that while the Administration may have found it more appropriate not to disclose the candidates' performance ratings to the SPP due to the so-called "rating inflation", providing the SPP only part of the candidates' performance appraisal presented more important intrinsic dangers. Under the PAMS, staff members were essentially evaluated based on a scoring system, for which the policy provided strict and specific guidance (see, for example, secs. 10, 23, 25, 30-45, 50 of the PAMS). Amongst others, sec. 52 of the PAMS stated that the Reviewing Officer had to provide "substantive comments

for extreme ratings”, thereby putting in place a review mechanism to avoid unjustified high rankings. Whereas comments were also part of the evaluation, they were meant to support/complement the score given. No guidance was provided for the narrative part of the appraisal. As the Head of the Human Resources Policy and Planning Service testified, narratives varied depending on the commitment of each supervisor. Most certainly, the e-PADs were not completed during the relevant period with a view that only the comments, or “narrative”, provided thereto would be taken into account. In other words, the scoring and the comments constituted a whole under the relevant appraisal process. Thus, providing only the narrative part of the e-PAD to the SPP members gave them an incomplete picture of the candidates’ performance evaluation.

106. The Tribunal cannot emphasise enough the importance of the Promotions Policy being in perfect alignment with the performance appraisal policy at the time under review in the context of the UNHCR’s current promotion mechanism, due to the fact that promotion is essentially based on performance appraisals during the five preceding years. Whilst the Head of the Human Resources Policy and Planning Service, DHRM, UNHCR, attempted to explain the decision not to disclose the ratings by reference to flaws in the PAMS and the then proposed adoption of a new appraisal policy, the Tribunal finds no support in the wording of the Promotions Policy itself for such contention.

107. It goes without saying that any change in the appraisal policy, as appears to have happened as of 10 November 2014 with the entry into force of the new “Policy on Performance Management” (UNHCR/HCP/2014/12), does not and cannot impact upon prior performance appraisals and, as such, cannot be taken into account when making a comparative assessment of the performance of candidates for promotion under the current Promotions Policy when years prior to 2015 are under review. If the e-PADs produced in application of the PAMS were found to be not representative of the staff members’ performance, the Promotions Policy should not have been drawn in such a way that they are made the centrepiece of the promotions exercise. Also, if the intent was that the new

Promotions Policy was to be applied in conjunction with a new appraisal policy, then transitional measures should have been foreseen and implemented.

108. Lastly, the Tribunal notes with surprise that the SPP members were presented, for their signature, with a copy of the consolidated list of candidates under review during the Second Round. This was prepared by the DHRM and contains the following certification: “I herewith confirm that I have reviewed the fact sheets and performance appraisals of the staff members contained in the above ranking, which reflects my comparative assessment of them in line with paragraph 5.9.1 of the [Promotions Policy]”. Inexplicably, the SPP members all signed this document despite not having been provided the e-PADs. The Tribunal finds that this apparently incorrect confirmation created an appearance of compliance with the Promotions Policy.

109. In view of the foregoing, the Tribunal finds that the exclusion of the e-PADs from the SPP members’ comparative assessment of the candidates during the Second Round constitutes another fundamental procedural error in the implementation of the Promotions Policy. The exclusion of the candidates’ numeric ratings, which were central to the appraisal system from 2009 to 2013, deprived the SPP of essential information for their consideration of the performance, managerial achievements and leadership qualities criteria under sec. 5.9.1 of the Promotions Policy. It also prevented them from personally assessing whether the minimum performance standard set forth in sec. 5.9.1(i) was met, as they were required to do. Again, it appears that the DHRM sought to apply the Promotions Policy in the way it thought it was intended to be and, as such, it contravened its actual plain wording.

#### Establishment of an additional evaluation criterion

110. Although not specifically raised by the Applicant, the Tribunal has identified another procedural error in the implementation of the Promotions Policy, which consisted in the DHRM advising the SPP members to take into account the suitability of the candidates for appointment in positions at a higher level.

111. It has been established that during a briefing session by video conference with the SPP about the Second and Third Rounds' evaluation process, the Deputy Director of the DHRM advised the SPP members as follows, as recorded in a document entitled "Talking Points" produced by the Respondent:

At every stage, refer back to what you are doing—recommending those who have a proven ability to contribute at a higher level of responsibility, in effect the "Rationale" of the policy (para. 3). The ones you recommend should be easily place-able [sic.] at the higher level. Ask yourselves if you (as a senior manager) would, based on the documentation and from what you know, give him/her a position/function in your area of responsibility. One negative, often criticised, outcome of the previous exercise was that it was too mathematical and yielded results that the Organization was not able to subsequently handle.

112. The Head of the Human Resources Policy and Planning Service, UNHCR, testified that this excerpt of the notes used to brief the SPP reflects so much his idea that he may well have written it. As the designer of the Promotions Policy, he explained that the new Policy sought to depart from the mathematical exercise conducted under the previous one, and shift towards a subjective review by the most senior managers, who are in a position to assess whether candidates could ultimately be placed in positions at a higher level. He impressed upon the subjective character of the Second Round evaluation, and on the fact that the SPP members were expected to consider if the candidates were suitable for placement at a higher post "in light of their life and personal experience".

113. It is not entirely clear to the Tribunal how the SPP members received the advice or instruction as the Respondent did not call any as witnesses to provide explanation. The testimonies of those staff members from the DHRM who participated in the briefing and the Promotions Session suggest that the SPP members did not raise any particular concern or opposition in this respect. What is certain, however, is that the DHRM conveyed a clear and consistent message to the SPP members that they should consider this factor in their comparative assessment of the candidates, including in the Second Round.

114. The Tribunal recalls that the three evaluation criteria for the Second Round are clearly set out in sec. 5.9.1 of the Promotions Policy, and are limited to an assessment of the candidates' performance, managerial qualities and exemplary leadership qualities. These criteria all refer to the merits of the candidates. There is no reference to considerations relating to suitability for placement in a specific post in the Second Round. Rather, the Promotions Policy is built in such a way that this placement factor plays a role at a later stage of the process. In this respect, sec. 5.12.1 provides:

Promotion to the P-4 level and above will be subject to the staff member obtaining a position at these levels. Staff members will be considered for positions at the higher grade level in the compendium following the announcement of the relevant promotions session results, whilst respecting all other eligibility conditions.

115. Secs. 5.12.2 to 5.12.6 then go on to set the effective date of promotion, depending on whether the staff member was already serving at the higher level or not, serving on an expert post or was within two years from retirement.

116. The Tribunal finds that suitability for placement in a specific post at a higher level was not a relevant evaluation criterion during the Second Round pursuant to the Promotions Policy. Although it is acknowledged that the Promotions Policy calls for an element of subjectivity in the comparative assessment of candidates in the Second Round, there is a significant difference between comparing the candidates' individual ability to perform at a higher level, and the Organization's capacity to place them in such a higher level, in this case at the P-5 level. Whilst the former purely depends on the candidates' working history and performance record, the latter essentially depends on the Organization's operational needs at a specific point in time.

117. The advice provided by the DHRM went further by asking the SPP members to consider to whom they would give a position in their "area of responsibility", hence making the assessment subject to the particular needs of the section in which the SPP members were working, at that point in time. Depending on whether a candidate fitted with the specific needs of an SPP member's section,

he would have, or not, a better chance of receiving a high ranking. In this respect, it is further noted that three SPP members were selected by the Administration and three by the staff members. Although these were senior staff members and were most probably generally aware of the operational requirements of the Organization, there is no indication that, among the six, they covered all the various areas of work of the UNHCR, nor that they had a specific knowledge of the Organization's need at the P-5 level at that particular time and within the Organization as a whole.

118. The Tribunal does not question the appropriateness of taking into account organizational requirements in the grant of promotions. However, it stresses that the Promotions Policy sets in place a process whereby, in the context of the UNHCR's rank in person system, staff members are awarded conditional promotions purely based on merits, and then effectively promoted when their profile corresponds to a particular need of the Organization. This is evidenced from the fact that the High Commissioner is bound to set a quantitative number of promotion slots, without any reference to specific areas of expertise, and from the evaluation criteria for each of the three rounds of evaluation, which solely relate to the candidates' personnel records. As abstract as the comparison of candidates may be without reference to any specific post, it is clear that the Promotions Policy does not envisage a matching exercise until the very end of the process, which is the effective grant of promotion upon the promoted staff's actual appointment to a specific post at the higher level (secs. 5.12.1, 5.12.2 and 5.12.3).

119. In view of the foregoing, the Tribunal finds that in advising the SPP members to take into account the suitability of the candidates for appointment in positions at a higher level, the DHRM introduced an extraneous criterion for consideration during the Second Round which had the potential to subvert the whole promotion exercise, shifting from a merit-based consideration to an operational one. Given the DHRM's role in providing "technical advice and guidance on rules, regulations, policy and methodology" to the SPP (see sec. 4.2.5 of the Promotions Policy), the mere provision of its advice to the SPP constitutes an error in the implementation of the Promotions Policy, irrespective of whether

or not the SPP members did actually consider this criterion in their comparative assessment of the candidates. The presumption of regularity attached to the acts of the Administration has been rebutted, and it was for the Respondent to adduce evidence that the SPP members did not take into account this irrelevant evaluation criterion. Not only the Respondent did not adduce evidence in this respect, but he rather insisted that this was a proper factor for consideration.

#### Use of personal knowledge

120. The Tribunal has identified a second procedural irregularity in the implementation of the Promotions Policy, which was not specifically raised by the Applicant but applies to her case. It consisted in the DHRM advising the SPP members to take into consideration their personal knowledge of the candidates rather than strictly relying upon the documentation before them.

121. The evidence shows that the SPP members were invited by the then Deputy Director of DHRM, UNHCR, to inform their ranking with their personal knowledge of the candidates. The Talking Points used for the teleconference with the SPP members invited them to “[l]ook for proof where available (fact sheets, assignment records and performance records) and ask for proof where you may know of facts that are not borne out in the documentation. You may need this for Round 3.” The Chief of Assignments and Promotions, DHRM, UNHCR, who participated in the drafting of these Talking Points, explained in her testimony that if SPP members knew information about staff members as a result of having worked with them or supervised them, they were encouraged to inquire with the DHRM if said information was reported “somewhere”, for example in a current performance report. The SPP Secretary further confirmed that it was expected that the SPP members’ rankings would be informed by their personal knowledge of various candidates, in both a positive and a negative way. He added that the DHRM was at the SPP’s disposal to provide additional information. However he was not aware of any information having been so requested.

122. Again, the Tribunal is not in a position to ascertain how the advice given by the DHRM influenced the SPP members' assessment of the candidates. The assertion that no information was requested must be considered with circumspection, as the testimony of the SPP Secretary in respect of the DHRM's interaction with the SPP members was on some aspects directly at odds with documentary evidence later presented, as discussed above (see paras. 99 and 100 above). Also, it could not be certain that the SPP members did not ask information from someone else within the DHRM.

123. The Promotions Policy explicitly states, at sec. 5.9(i) and (ii), that the SPP members must base their comparative assessment of the candidates on the latter's fact sheets and e-PADs. In turn, sec. 4.7 states that "[t]he Panels shall ensure that conclusions are not influenced by any unsubstantiated information provided orally or in writing by any person or authority external or internal to the UNHCR, including by, or on behalf of, staff members whose cases are under review", thereby specifically preventing the taking into consideration of information not reflected in the documents provided to the whole panel. Likewise, the Promotions Policy does not envisage any role for the DHRM to provide additional information to SPP members but solely to provide technical advice and guidance on the applicable rules (see sec. 4.2.5).

124. The Tribunal finds that there is no room in the Promotions Policy for the SPP members to inform their rankings with additional information they may know about but that is not reflected in the documents subject to their review. Otherwise, candidates may be advantaged or disadvantaged based on the fact that they are known to some of the SPP members, opening the door to nepotism and bias.

125. The Tribunal acknowledges that SPP members may have known some of the candidates, for having previously worked with them or supervised them and, to some extent, may be influenced by their personal knowledge of the candidates' performance. This is unavoidable and, indeed, implicitly allowed by the Promotions Policy which did not preclude SPP members to assess candidates they may know, unless if they were their current supervisor. That said, there is a difference between being influenced by some personal knowledge of the



candidates, and engaging in an inquiry to bring in information that was not contained in the documents under review. As part of a fair and transparent process, and in compliance with the Promotions Policy, any information that is not included in the documents before the SPP must be considered as irrelevant for the purpose of the candidates' comparative assessment.

126. In view of the foregoing, the Tribunal concludes that, irrespective of whether or not the SPP members actually used information that was not reflected in the candidates' fact sheet, the DHRM's advice to take into account information not reflected in the documents submitted to the collegial review of the SPP was improper and constitutes a procedural irregularity in the implementation of the Promotions Policy.

#### Ranking methodology

127. The Tribunal has identified a third procedural error in the implementation of the Promotions Policy that vitiates the contested decision, which relates to the application of a ranking methodology suggested by the DHRM and the identification of significant errors in the rankings provided by some SPP members.

128. It has been established that the DHRM advised the SPP members that “[a]t times, two or more fact sheets may be indistinguishable”, in which case they could “rank them the same”. The DHRM explained the methodology for ranking in this scenario by way of examples. For instance, if the first three candidates of a list had indistinguishable fact sheets, they were all three to be ranked number one, and the candidate after them was to be ranked number four.

129. The consolidated table of rankings for female candidates for promotion to the P-5 level shows that four of the six SPP members gave the same ranking to one or more candidates at some point. Errors in following the suggested methodology were identified in the ranking provided by these four SPP members, some being of very serious concern.

130. For example, a first SPP member gave identical rankings to a number of candidates on several occasions, but without taking it into account when attributing the next rank. He ranked 18 candidates number 1 and the next ones were ranked numbers 10, 11, 12, 14 and 15, instead of 19, 20, 21, 22 and 23 according to DHRM's suggested methodology. On several other occasions, he ranked two candidates the same and gave the immediate following ranking to the next one, rather than leaving one rank blank. He also mysteriously left a number of ranks vacant without any obvious reason. For instance, he did not rank any candidates numbers 74 to 77, whilst only one candidate was ranked number 73. He repeated this mistake several times.

131. A second SPP member also systematically failed to take into consideration the facts that some rankings were awarded to two or three candidates when attributing the next ranking. For instance, he ranked 3 candidates number 4 and ranked the next candidate number 5. He also left several ranks unassigned, without any obvious reason. For example, he did not assign the rank numbers 52 to 59 to anybody, whilst only one candidate was ranked number 51. His random attribution of ranking raises serious questions about the methodology he was applying or the diligence with which he conducted the comparative ranking exercise.

132. None of these errors were detected prior to the present proceedings. The evidence shows that the DHRM collected the individual rankings from each SPP member, an Administrative Assistant reproduced these in a consolidated list, and calculated the average ranking of each candidate; then, the SPP members were asked to sign the consolidated ranking table, which they apparently did without any further questioning.

133. As previously held in *Rodriguez-Viquez*, the Promotions Policy provides for a 'comparative assessment and ranking' of the candidates, which means that candidates must be compared to one another and given a consecutive ranking, from the first to the last. There is no provision for the giving of the same ranking to more than one candidate. Furthermore, the impact on the consolidated ranking of an SPP member attributing the same ranking to more than one candidate, for

instance by giving the privilege of the best ranking to 18 candidates, is different from that of an SPP member ranking candidates individually and consecutively. Surprisingly, it appears that the DHRM did not consider how its suggested methodology could distort the candidates' consolidated ranking, neither at the time of proposing their methodology nor when it "crunched the data". No statistician was consulted, although it appears necessary to get a professional advice given the potential impact of the proposed methodology on the candidates' overall ranking.

134. Even more worrisome is the fact that the DHRM developed the consolidated list of candidates who advanced to the Third Round based on the numbers provided by the SPP members which displayed, on their face, blatant errors. Amongst others, random attribution of rankings by one SPP member who left several ranks non attributed should have reasonably caused concern as to the procedures adopted and lead to further enquiries. As the Respondent has provided no explanation, it is not possible to speculate about the exercise in which the SPP members thought they were involved. However, these should reasonably have caused some concern to the DHRM and lead to further enquiries. In this respect, the Tribunal notes that sec. 6 of the Promotions Policy provides that "compliance with this policy will be monitored by the Director of DHRM, as appropriate". Most surprisingly, it appears on the evidence before the Tribunal that no one from the DHRM made any review of the consolidated table. If such a review was in fact made, it certainly did not result in any action being taken.

135. The Respondent submitted that the Tribunal should not be concerned by the errors in rankings as they had no impact on the Applicant's chances to advance to the Third Round. The DHRM prepared a corrected consolidated ranking table, where, it asserts, it correctly applied its suggested methodology for the ranking of "undistinguishable" candidates. These corrected tables were prepared for the purpose of the present proceedings and are not signed by the SPP members. They show slight variations in the consolidated ranking of a number of candidates, which would not affect their passing or not to the Third Round, except for one candidate, who was previously ranked 58<sup>th</sup>, and ended up being ranked 52<sup>th</sup> upon

correction. This staff member, who did not advance to the Third Round, should have, pursuant to the DHRM's suggested approach.

136. The individual who actually undertook this correction process was not produced as a witness. The precise manner in which the recalculation was undertaken is thus unclear. Most surprisingly, the Respondent called as a witness to explain the correction grid the current Head of Assignments and Career Management Service (D-1), UNHCR, although she was not involved in the 2013 Promotions Session and did not prepare the correction grid herself. In her written statement, she stated:

I have reviewed the aggregate table of the female candidates for promotion to the P-5 level that was prepared by the Panel Secretariat during the Second Round of the 2013 Promotions Session. I found that there were a number of divergences from the instructions on ranking in cases in which an SPP member awarded identical individual rankings to more than one candidate. For example, one SPP member awarded 18 candidates the ranking of 1, and then awarded the next five strongest candidates the ranking of 10, 11, 12, 14 and 15. Pursuant to the instructions, the next five candidates should have been ranked 19, 20, 21, 22 and 23, rather than 10, 11, 12, 14 and 15.

137. She was unable to provide any further explanation during her testimony before the Tribunal.

138. The problem with this correction exercise is that it assumes that the methodology for ranking "undistinguishable" candidates suggested by the DHRM was binding or, at best, that the SPP members intended to follow it. Firstly, as these "instructions" were not the subject of an administrative issuance, they cannot be considered as binding upon the SPP members. One witness, indeed, referred to the methodological suggestion as in fact being no more than that, a suggestion, as it could not be more. Secondly, absent any evidence from the SPP members, who were not involved in the correction exercise, it cannot be presumed that they intended to follow the DHRM's suggested approach. Indeed, most of them did not. In these circumstances, the Respondent's *post factum* reconstruction is purely speculative and of no assistance. The Tribunal is therefore not in a

position to assess the impact of the numerous errors and dubious methodology adopted by some SPP members on the Applicant's chances for promotion.

139. In view of the foregoing, the Tribunal concludes that the award of the same ranking to more than one candidate, upon suggestion from the DHRM, had no basis in the Promotions Policy and constitutes a procedural error in its implementation. Such methodology could not be reasonably introduced without an administrative issuance, and after due consideration of its potential impact on the consolidated ranking of candidates. Furthermore, the numerous and significant errors in the rankings provided by SPP members raises serious concerns as to their reliability and questions as to the methodology that some SPP members adopted, which remained unquestioned and unexplained by the DHRM.

*Whether the Applicant was given fair and adequate consideration for promotion*

Arbitrary process

140. The Applicant argues that the whole process was arbitrary due to the lack of objective evaluation criteria and the absence of an administrative issuance distilling the modalities of the implementation of the Promotions Policy. Other unsuccessful candidates have also alluded to the scale of the task the SPP members were asked to accomplish within a short amount of time. They have highlighted important disparities between rankings provided by different SPP members to the same candidate and asserted that these are indicative of an arbitrary decision-making process and, in some instances, bias. The Respondent submits that the Tribunal may recommend changes to the Promotions Policy if it is contrary to the Staff Rules and Regulations, but cannot order them. He submits that he has "minimally demonstrated" that the Applicant was given full and fair consideration for promotion as her fact sheet has been reviewed by the SPP members and evaluated against others pursuant to the criteria set forth in the Promotions Policy. He argues that these evaluation criteria were sufficiently defined and in line with the PAMS to allow for a comparative assessment of the candidates. The Respondent asserts that disparities in rankings were expected and intrinsic to the nature of the process, which involved a subjective review by the

various SPP members. For the sake of completeness, the grounds of appeal raised by the Applicant on this particular point will be addressed together with those raised by other unsuccessful candidates whose cases were heard jointly with the present one.

141. At the outset, the Tribunal notes that the consolidated table of ranking for female candidates for promotion to the P-5 level displays significant divergences in the rankings provided by different SPP members to the same candidate. One candidate was ranked sixth out of 161 by one SPP member and last by another. Another one was ranked first and 158<sup>th</sup>. Similar extreme variances between SPP member rankings for the same candidate are demonstrated throughout the table. The table also displays total disagreement in respect of some candidates amongst the six SPP members. For instance, one candidate was ranked numbers 1, 20, 22, 49, 66 and 155. Another one was ranked 9, 23, 46, 75, 85 and 133. A third one was ranked 1, 27, 55, 60, 122 and 143. A similar pattern is noted for a large number of candidates.

142. At other times, the table points towards some consensus but with significant outliers. For instance, one candidate was ranked first by five SPP members but 84<sup>th</sup> by the sixth one. Another candidate was ranked in the top 20 by five SPP members but 99<sup>th</sup> by the sixth one. A third candidate was ranked among the top 56 who would advance to the Third Round by five members but last by another one. In turn, one candidate was ranked numbers 102, 122, 125, 146 and 150 by five members but first by the sixth SPP member. Ultimately, the SPP members agreed only upon 5 out of 56 candidates who advanced to the Third Round.

143. The Tribunal considers that the discrepancies in the ranking table deserved some explanations. It is beyond understanding that applying the same criteria, which all refer to the candidates' own personnel record, and supposedly reviewing the same information, two SPP members would disagree to such an extent as to rank one candidate at almost the two extremities of the spectrum among a wide pool of 161 candidates. While there is no doubt that the exercise involves an element of subjectivity, it is reasonable to assume that there would be at least some consensus within the group as to whether a candidate is outstanding or

whether he or she would rank among the less meritorious. The Tribunal finds that the variations are such as to raise serious concerns as to the whole process. Most surprisingly, no query was made by those administering the process. It seems particularly incongruous that the DHRM, which was so concerned about an unevenness in respect of appraisal scoring in the e-PADs, found that such variations of assessment in the rankings by the SPP members was entirely acceptable and could proceed without comment.

144. Instead of questioning the methodology and being concerned with the actual validity of the comparative assessment made by the SPP, the Respondent sought to argue before the Tribunal that the divergence of rankings, even if extreme, was expected and, indeed, part of the review exercise. In this respect, the Head of Human Resources Policy and Planning Service, UNHCR, stated in his witness statement:

11. In order to fulfil the aim [of identifying staff members who have a proven ability to contribute to the work of UNHCR at a higher level of responsibility], a comparative assessment of the candidates by senior staff members in whose divisions the candidates could work in the future was made the centrepiece of the Second and Third Round of evaluation. The six senior staff members on the SPP during the 2013 Promotions Session were at the D-1 and D-2 levels. Half were nominated by DHRM and half were nominated by the Staff Council.

12. In addition, the Promotions Policy allows for each of the SPP members to have a different perception of a candidate's ability to contribute to the work of UNHCR at a higher level of responsibility. This can be based on the different professional experiences of each of the SPP members. For example, it is possible that one SPP member might accord greater weight to the performance of a candidate during an emergency than would another SPP member.

13. The differences between the SPP members become apparent during the Second Round in which they individually conduct their comparative assessments and rankings of the candidates for promotion. A purpose of having the SPP members individually conduct their comparative assessment and rankings during the Second Round was to allow each SPP member to retain independence and to bring forth these differences.

145. This line of explanation appears to reflect the Head of Human Resources Policy and Planning Service's misconception that the SPP members could take into account candidates' suitability for placement at the higher level with reference to actual placement opportunities. If this explanation for the lack of consensus is indeed accurate, it would appear that not only the DHRM but also the SPP members misconstrued the review exercise as being one involving the SPP members picking those among the groups that they considered would be most needed at the P-5 level, or perhaps even in their own area of work, rather than comparing the candidates on their own merits, as required by the Promotions Policy. This may be a possibility, which would then lead to the conclusion that the procedural error identified above concretely distorted the candidates' rankings.

146. The Applicant and other unsuccessful candidates for promotion also alluded to other possibilities, more specifically to the SPP members' taking into consideration their personal knowledge of candidates, to a failure to sufficiently define the evaluation criteria and to the scale of the task. The Tribunal has already addressed the first factor, which indeed could possibly explain some outlier rankings and demonstrate that this advice by the DHRM generated tangible problems. The Tribunal will now examine the two additional suggested factors in turn.

147. As recalled above, it is not the Tribunal's role to engage in a review of the Promotions Policy unless it is alleged that it does not comply with a higher norm. This is not the case in the instant application. The three evaluation criteria for the Second Round, that is, performance, managerial achievements and exemplary leadership qualities, are in line with staff regulation 1.1(d), which provides that "[t]he Secretary-General shall seek to ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity". The Promotions Policy provides further particulars for each criterion, which are also in line with staff regulation 1.1(d).



148. Regarding performance, it provides for a minimum standard “indicating the staff member’s ability and readiness to perform at a higher level” and for consideration of “consistently demonstrated exceptional performance and documented exemplary service, including in emergency operation” and of “service at the higher grade level for one year or longer ... recognized through the receipt of a[n] SPA or RALP” (see sec. 5.9.1(i)).

149. Regarding managerial accountability, it provides that “a staff member must have demonstrated a high level of competence and professionalism in the management of human, financial, material resources, programmes or operations” (see sec. 5.9.1(ii)).

150. Regarding exemplary leadership qualities, sec. 5.9.1(iii) refers to qualities such as “motivating a team, providing a vision and promoting a climate of respect and appreciation of the work place”.

151. Given the discretion vested in the Administration for the establishment of its policies and procedures, it is not for the Tribunal to go any further and examine whether the evaluation criteria were fit for purpose or otherwise sufficiently defined. In any event, the difficulties encountered in the promotions exercise under review appear to stem not from the evaluation criteria themselves, but from the methodology to assess them in a comparative fashion.

152. Turning to the task the SPP members were asked to undertake, the Tribunal notes that there is little guidance, if any, in the Promotions Policy about the procedure or methodology to be used to fulfil the highly complex exercise that the Second Round evaluation involves. No administrative issuance was provided either. Instead, the DHRM attempted to devise the methodology to be followed.

153. It has been established that on 17 June 2014, the DHRM convened the SPP to the Promotions Session to be held in Geneva from 30 June 2014 to 11 July 2014, for consideration of all eligible candidates for promotion to the P-5 and D-1 levels, male and female. There were 161 female and 170 male eligible candidates for promotion to the P-5 level, in addition to those to the D-1 level in respect of which the Tribunal is unaware of the number. The SPP members were,

at that time, given access to all the candidates' fact sheets. From 30 June to 4 July 2014, the SPP members gathered in Geneva to conduct their individual assessment of all the candidates, in a controlled environment, away from any distraction. Upon arrival, the SPP members were provided with a computer, a hard copy of all the fact sheets, divided by gender and grade level, and the four lists of candidates to use as a template for their ranking. The DHRM provided the SPP members another briefing, where the following suggestion was made as to the methodology for the comparative assessment of the candidates:

We may suggest that you start off with a first review of the individual piles [referring to the four piles of candidates for promotion to the P-5 and D-1 level, separated by gender] and further sub-divide each into three: a) your most definite (a number not exceeding the number of slots); b) the not-at-all (not yet) list; and c) don't know (maybe) list.

Ranking is not scoring. Ranking is a comparative exercise. If A is better than B, then A gets a higher rank. You will have to play with the order in each pile until you come to a definitive place for each.

154. SPP members were also encouraged to “annotate any observations that highlight the merits of the staff member on the template provided to facilitate the ranking” as “[t]hese observations may prove useful for future reference, either when determining the final individual ranking of staff members or during the 3<sup>rd</sup> round review”. According to the SPP Secretary, there was no further discussion among the SPP members as to the methodology for their comparative assessment of the candidates. The SPP members, who were initially allocated three days for their overall review plus an additional one if needed, appear to have completed their review within four days. The fifth day was reserved for the DHRM to consolidate the data, so the Third Round could proceed the following week.

155. There is no doubt that the SPP members' task was enormous and highly complex, considering the large number of candidates that had to be assessed in a comparative fashion and the documents at their disposal. Comparing and ranking 161 candidates based on their performance, managerial skills and leadership qualities was, by nature, a highly complex exercise. The Applicant's fact sheet, for instance, contains 18 pages of densely condensed information about her

languages skills, academic background, employment records, performance evaluations, and development and learning events.

156. The Tribunal recalls that the fact sheet contains no quantitative value such as performance ratings by a supervisor. For the relevant period, the fact sheet merely contains, in the “Performance Evaluations” section, the staff member’s work objectives and the comments of his or her supervisor divided as follows:

- a. “Manager Comments on Values, Core Competencies, and Managerial Competencies;
- b. “Manager Comments on Cross-Functional and Functional Competencies”; and
- c. “Manager Overall Competencies Comments”.

157. These rubrics are very general and there are no specific comments, for instance, on managerial achievements and leadership qualities. The comments, which were not meant to serve as a specific appraisal of the candidates’ capacity to perform at the P-5 level, are either very general or, at times, focus on particular projects that are not directly relevant for the present exercise. The SPP members were required to compare 161 fact sheets within a day or two, to do the same for the 170 male candidates to the P-5 level, and then for the candidates to the D-1 level. The whole review was completed within four days.

158. Having reviewed the Applicant’s fact sheet and some others in similar applications before it, the Tribunal cannot but wonder how the SPP members could possibly, reasonably and properly compare the 161 female candidates’ performance, managerial achievements and leadership qualities in the face of the information displayed in their fact sheet alone, and undertake the same task for the 170 male candidates and then the D-1 candidates in such a short period and without any further guidance. The difficulty is particularly acute given that the candidates are not competing for a specific post where particular experience or competencies may be of significant import, but compared on the basis of their ability to perform at a higher level in their respective area of expertise.

159. In the Tribunal's view, the ratings contained in e-PADs were not only explicitly required by the Policy, but also crucial to give the SPP members some comparative measures. The comments provided by the supervisors do not provide enough information to constitute the basis of the envisaged comparative exercise and, in any event, were not designed or intended to provide it.

160. In view of the foregoing, the Tribunal finds that the Respondent failed to demonstrate, even minimally, that the Applicant was fully and fairly considered for promotion. The consolidated table of rankings displays significant divergences in the rankings given to the same candidate by different SPP members, which cannot be simply explained by reference to the fact that this review exercise entailed an element of subjectivity. Not only did the Respondent fail to provide any satisfactory explanation for these divergences, but he also failed to demonstrate that the Applicant's candidacy for promotion was, indeed, properly compared with that of the 160 other female candidates by the six SPP members based on the established evaluation criteria.

161. Given the failure to provide the SPP members with the e-PADs' ratings, which were necessary to compare the candidates in light of the evaluation criteria, the invitation to take into account operational requirements as well as personal knowledge of candidates, and the way the review was conducted, the Tribunal finds that the presumption of regularity has been rebutted, and that there are strong indicators that the Second Round review was carried out in an arbitrary manner.

#### Safeguards embedded in the process

162. When issues with rankings were addressed with the witnesses called by the Respondent, they repeatedly answered that any imperfections in the process were cured by the fact that the number of candidates who proceeded to the Third Round was equivalent to 200% of the number of available slots for promotion, so the Third Round offered the SPP members an opportunity to collectively probe their individual assessment. Furthermore, they asserted that averaging the individual SPP members' rankings smoothed out individual errors or inconsistencies and

diluted outliers rankings. Counsel for the other applicants argued that the presence of a Third Round review can only cure errors in respect of candidates who advance to this stage. He, and the Applicant, further submitted that the averaging of the SPP members' rankings is similarly insufficient to smooth out the issues identified.

163. Firstly, the Respondent's argument that the Third Round constitutes a safeguard mechanism does not withstand judicial scrutiny, and this misconception seems to have caused the Administration to unjustifiably take a lax approach during the Second Round. It goes without saying that errors in rankings or any other procedural errors in the implementation of the Promotions Policy committed during the Second Round evaluation cannot be cured during the Third Round in respect of those staff members, such as the Applicant, who did not advance to that stage. The constitution, in the Second Round, of a larger pool of candidates than the actual available promotion slots is meant to allow the panel to collectively select the top 56 among the "substantially equally meritorious candidates", not to cure procedural defects committed earlier. If some candidates were included in the pool by mistake and others excluded, the SPP members were no longer comparing "substantially equally meritorious candidates".

164. Secondly, the Tribunal notes that there is no provision in the Promotions Policy in respect of the methodology for consolidating the individual rankings provided by each of the six SPP members. The evidence shows that the DHRM elected to take an arithmetic mean of the individual rankings provided by each SPP member. By taking an arithmetic mean, the candidates' rankings were *de facto* converted into numerical values, which were then ranked from the lowest to the highest. None of the witnesses presented by the Respondent could provide any cogent explanation as to why this methodology was chosen. The evidence disclosed that no statistical advice was sought or obtained in respect of the appropriate methodology to be used.

165. The Tribunal recalls that the new version of the Promotions Policy, applied for the 2013 Promotions Session, is substantially different from the previous policy as it entails a ranking process rather than a scoring one. The consolidation

process became even more complex with the allocation of the same ranking to various candidates, as explained above, and in the presence of extreme rankings. Whilst the methodology adopted may ultimately be an acceptable way to proceed, the Tribunal is concerned that no consideration appears to have been given to the impact of taking an arithmetic mean rather than, or in conjunction with, a median or a mode for instance. The possibility of excluding extreme rankings from the average also appears not to have been considered. Given the small number of SPP members, the impact of an outlier was potentially determinative of the final rank given to a candidate. For instance, one candidate who was ranked between 61 and 103 by five SPP members, nevertheless advanced to the Third Round as she was ranked number 30 by a sixth one. If this outlier ranking had been discarded, this candidate would not have been among the 56 candidates who advanced to the Third Round, which also means that someone else would have.

166. In these circumstances, the Tribunal is not convinced by the Respondent's argument that taking an arithmetic mean of the six individual rankings cured all the significant problems in the rankings highlighted above. Rather, it appears that the complexity of the statistical exercise involved has been underestimated.

#### Prejudice resulting from the use of the e-PAD rebuttal mechanism

167. The Applicant alleges that she was prejudiced in her candidacy for promotion due to the fact that her fact sheet did not reflect her performance for the year 2011, as the rebuttal process she had initiated under the PAMS was not completed at the time. The Respondent argues that in the circumstances, it was appropriate that no information regarding the Applicant's performance from 1 January to 31 December 2011 be included in her fact sheet and that "a reference to the ongoing disagreement regarding the performance appraisal could have disadvantaged the Applicant".

168. Pursuant to sec. 58 of the PAMS, the finalisation of an e-PAD is contingent upon agreement of the staff member or, in case of persistent disagreement, the issuance of a report by the rebuttal panel. Sec. 3.2 of Annex 5 to the PAMS entitled "Disagreement and rebuttal process" provides that "[u]ntil the rebuttal

process is concluded, the staff member's PAD will be held by PMU [Performance Management Unit] and be considered as pending. Its contents will not be uploaded to the fact sheet and it will not be placed on the staff member's Official Status File". Annex 5 also provides a detailed rebuttal procedure, with tight deadlines. It follows from these provisions that when a rebuttal process is initiated by a staff member, the concerned e-PAD will not be reflected in his or her fact sheet or otherwise taken into account until such process is completed.

169. It is unclear to the Tribunal why the Applicant's e-PAD for the year 2011 was still not finalised at the cut-off date of 31 December 2013 for the 2013 Promotions Session, and even at the hearing, in January 2016, given the time limits for this process set forth in the PAMS and its import on consideration for promotions under the Promotions Policy. However, the Tribunal finds that given that such e-PAD was not finalised as of 31 December 2013, the absence of any performance appraisal for the year 2011 in the Applicant's fact sheet does not constitute an error in the implementation of the Promotions Policy nor a failure to take into account relevant information in the assessment of the Applicant's candidacy. Likewise, the absence of any indication in the fact sheet that the Applicant's e-PAD for 2011 was under review does not contravene the applicable rules and, most importantly, is unlikely to have played a determinative role in the SPP's assessment of her candidacy. Irrespective of the justification, the fact remained that there was no completed performance appraisal for the year 2011 for the SPP consideration at the time.

*Failure to provide reasons for the decision*

170. The Applicant argues that the SPP was required to take minutes of its Second Round evaluation and to share these with the staff members. She further argues that the lack of reasons provided to her for the contested decision also causes it to be illegal as she was prevented from meaningfully challenging it. The Respondent submits that the SPP was not required to take minutes of the Second Round evaluation as it entailed an individual assessment of the candidates and, consequently, no formal meeting was held. He also submits that the Applicant was provided with sufficient reasons for the contested decision as she was informed

that she was not ranked within the top 56 candidates who advanced to the Third Round.

171. Sec. 5.11.1 of the Promotions Policy provides that “[m]inutes will be kept of all meetings, recording deliberations and incorporating comments formally submitted. The minutes will summarize conclusions reached”. Sec. 5.11.2 further provides that “[m]inutes shall be shared in draft with all members of the relevant Panel who attended the session for consideration. The Minutes shall be cleared, finalized and signed by the Co-Chairpersons and the Secretary and sent to the High Commissioner”. In turn, sec. 4.2.5 provides:

The Director of DHRM will designate an Ex-Officio to provide technical advice and guidance on rules, regulations, policies, and methodology to each Panel. A representative of the Legal Affairs Service (LAS) may be invited to any promotions session in order to provide legal advice to the relevant Panel. The advice of the Ex-Officio and LAS representative shall be recorded in the Minutes.

172. The Tribunal agrees with the Respondent that the Promotions Policy does not specifically envisage that the SPP members will hold a meeting for their Second Round review, which entails an individual assessment by the SPP members of the candidates. However, the evidence shows that the DHRM convened the SPP members to gather in Geneva to make such assessment, and most importantly, seized this opportunity to give them instructions or suggestions as to the modalities of their review. No minutes were taken of said meeting. Likewise, the DHRM provided advice to the SPP prior to its gathering in Geneva, through videoconference and emails, as detailed above. These were not formally recorded in minutes either, but they are, to some extent, reflected in the emails themselves and a document entitled “Talking Points”.

173. The Tribunal finds that in these particular circumstances, the meeting of the SPP for the Second Round, and more specifically the technical advice and guidance provided by the DHRM, had to be recorded in minutes, pursuant to secs. 4.2.5 and 5.11.1 of the Promotions Policy. This was particularly important to ensure predictability and transparency of the process in the context where the



DHRM was devising the methodology for the implementation of the Promotions Policy, which had not been the subject of any administrative issuance.

174. Whether these minutes had to be shared with the staff members is another disputable issue, as sec. 5.11.2 solely envisages the disclosure of the minutes to the High Commissioner. Absent any such minutes, the issue is hypothetical so the Tribunal will refrain from making any assessment.

175. Turning to the alleged failure to provide reasons for the decision, the Tribunal recalls that as part of a comparative assessment, the decision not to promote a staff member automatically entails that he or she was not ranked among the top ones, without the need to provide any further reasons. It would be practically impossible for the Administration to explain to each and every unsuccessful candidate why he or she was not ranked among the top candidates; the only justification that may possibly be provided is the individual and consolidated rankings obtained by a staff member. As the Promotions Policy does not provide for these to be disclosed to the candidates, doing so is therefore left to the discretion of the Administration.

176. The Tribunal notes that the Respondent appears to have taken an inconsistent approach in respect of its disclosure of rankings to candidates for the 2013 Promotions Session. In one of the cases that was heard jointly with the present one, the Respondent disclosed her rankings to a candidate, upon her request. In other cases, the Deputy High Commissioner disclosed rankings to candidates through his response to requests for management evaluations. In the instant case, the Applicant has not been provided with her rankings until she received the Respondent's reply in the present proceedings, on 25 March 2015, although she expressly requested reasons for the decision not to promote her and to be provided with the minutes of the SPP's meetings reflecting the evaluation of her candidacy for promotion and explicitly challenged the Administration's failure to provide her such reasons in her request for management evaluation.

177. The Tribunal notes with concern that contrary to other candidates who were informed of their rankings through the Deputy High Commissioner's response to their requests for management evaluation, at the latest, the Applicant's request for management evaluation remained unanswered and her rankings were not divulged to her, despite her express and repeated requests. This difference in treatment, which remains unexplained, is in breach of the Administration's duty to act fairly, justly and transparently in dealing with its staff members (*Ahmed* 2011-UNAT-153, para. 45).

178. The Tribunal also finds that in view of the specific circumstances set out above, the Administration's failure to disclose the rankings to the Applicant at an earlier stage is in breach of its duty to provide reasons, albeit limited in nature, for its decision not to promote her, as set out in *Obdeijn* 2012-UNAT-201. In this judgment, the Appeals Tribunal stressed the obligation for the Administration to provide reasons for its decision when a request is made "as part of a formal review process", as "a failure by the Administration to respond would seriously hamper or preclude the staff member, the Management Evaluation Unit, and the Tribunals from reviewing administrative decisions affecting the contractual rights of staff members". The Tribunal notes however that whilst the delay in providing the Applicant her rankings may have initially hampered her ability to challenge the contested decision, she was ultimately not prevented from meaningfully challenging the contested decision and, as a consequence, suffered no prejudice.

179. The Tribunal observes that the Administration's lack of consistency in disclosing the rankings, coupled with the opacity in the procedures followed by the DHRM and the SPP, may have caused the Applicant not to fully understand the decision reached and the overall process. To alleviate this problem, the Tribunal strongly encourages the Administration to adopt clear and transparent procedures for the implementation of the Promotions Policy.

*Conclusion in respect of the legality of the decision*

180. The Tribunal has identified above several significant procedural errors in the implementation of the Promotions Policy during the 2013 Promotions Session, which may be summarised as follows:

- a. The High Commissioner deciding in advance of the Promotions Session that an equal number of available slots for promotions would be allocated to female and male candidates, and limiting the slots awarded to women to 50%;
- b. The DHRM separating the candidates by gender for the Second Round evaluation;
- c. The DHRM failing to provide the SPP members with the e-PADs ratings;
- d. The SPP members not assessing compliance with the minimum performance threshold under sec. 5.9.1(i) of the Promotions Policy;
- e. The DHRM advising the SPP members to take into account, during their Second Round review, the candidates' suitability for placement in actual positions at the P-5 level;
- f. The DHRM advising the SPP members to take into account their personal knowledge of the candidates;
- g. The DHRM introducing a ranking methodology which permitted the allocation of the same rank to more than one candidate, without any administrative issuance and any consideration of the impact on the candidates' consolidated ranking;
- h. The significant errors in the rankings provided by the SPP members, coupled with a lack of diligence by DHRM in the consolidation of data, puts into question the reliability of the rankings;

i. The extreme divergences in the rankings provided by the various SPP members to the same candidates, for which no satisfactory answer has been provided, and which may suggest that the errors identified above concretely impacted on the results, or that the comparative and ranking exercise was simply impossible to accomplish given the large number of candidates, the information provided to the SPP members, which consisted only of the candidates' fact sheet, and the short time for conducting their review; and

j. The failure to take minutes of SPP meetings prior to, or during, the Second Round evaluation and to record advices provided by the DHRM.

181. In light of all the foregoing, the Tribunal finds that the contested decision is unlawful.

182. The Tribunal notes that the Applicant was eligible for consideration for promotion in the 2014 Promotions Session, which it understands is in its final stage, and will continue to be eligible in future sessions until promoted. By conducting an extensive review of the 2013 Promotions Exercise, addressing each and every procedural irregularity raised by the Applicant, and in line with the Appeals Tribunal's judgment in *Mebtouche* (see para. 42 above), the Tribunal hopes to have provided some guidance as to how the Promotions Policy ought to have been implemented in its current formulation, should the UNHCR decide to continue to use it in future promotions exercises.

183. In addition to insisting on the necessity of implementing the Policy as adopted, the Tribunal recommends to the Administration to "reform" such by supplementing the Policy with an administrative issuance detailing the modalities of its implementation. As noted above, the comparative assessment in the Second Round is highly complex given, amongst others, the number of candidates involved. The methodology for such exercise needs to be thought through carefully, and delineated in fair and transparent procedures, which are to be accessible and binding so that they can be relied upon and be subject to judicial scrutiny.

*Remedies*

184. The Tribunal shall consider the remedies sought by the Applicant, listed in para. 26.j above, in light of art. 10.5 of its Statute, which delineates its powers regarding the award of remedies.

Rescission of the contested decision

185. It is settled jurisprudence that in respect of the UNHCR's promotions sessions, the Tribunal can only rescind the decision not to grant a promotion if the procedural irregularities uncovered had deprived the applicant of a significant chance for promotion (see *Vangelova* 2011-UNAT-172; *Bofill* 2011-UNAT-174; *Dualeh* 2011-UNAT-175). The Tribunal shall therefore consider whether the Applicant would have had a significant chance of being promoted if the errors indicated above had not been committed.

186. The Applicant was eligible for consideration for promotion, and met the requirement allowing her to advance from the First to the Second Round of evaluations. As the Second and Third Round involved a comparative assessment of the candidates, rather than eliminatory criteria, the Applicant had a chance to be ultimately promoted. The actual probability of being promoted depended entirely on how she would compare with the other candidates in the course of the Second and Third evaluation rounds.

187. In this respect, the creation of two separate pools of candidates, male and female, creates a first difficulty in assessing the Applicant's ultimate chances for promotion. Because female candidates (totalling 161) and male candidates (totalling 170) were never compared against each other, it is difficult to assess how the Applicant would have performed in a wider pool of 331 candidates, where only 112 were to advance to the Third Round, and 56 were ultimately to be selected.

188. The Respondent's suggestion that the Applicant would not have been selected given that she was ranked 129<sup>th</sup> out of 161 is purely speculative, as the candidates are not given a score but a rank. Moreover, because of the wide

divergence of opinion among the SPP members in their assessment of candidates, the rankings that the Applicant received in a pool of 161 female candidates does not predicate the one she would have received in a larger pool of 331 candidates, nor the one she would have received if her candidacy had been collectively reviewed by the SPP members within a pool of 112 candidates in the Third Round.

189. On this point, the Tribunal highlights that it has similarly identified major issues in the ranking of P-5 male candidates, which contributes to the overall uncertainty surrounding the eventual results of a comparative exercise of the whole pool of candidates for promotion to the P-5 level. In particular, in its Judgment *Rodriguez-Viquez* UNDT/2016/030, the Tribunal found that:

104. The consolidated table of rankings for male candidates for promotion to the P-5 level shows that all six SPP members gave the same ranking to one or more candidates at some point. Indeed, whereas three panel members gave the same ranking to more than one candidate only in a few occasions, three others did it systematically, *de facto* engaging in a grouping exercise. Errors in following the suggested methodology were identified in the course of the present proceedings by the DHRM, the Applicant and the Tribunal in the rankings provided by each of the six SPP members, some being of very serious concern.

190. Most importantly, the Tribunal is of the view that the Applicant's consolidated ranking as established by the DHRM, as well as the individual rankings provided by the SPP members, are so unreliable that they cannot serve as a basis for consideration of the Applicant's chance for promotion. How would the Applicant have been compared against the other candidates if the SPP members had been provided with her e-PADs, and if they had not been told to take into consideration information they may know about certain candidates and their suitability for placement in P-5 positions? What would her overall ranking have been if the SPP members had not given the same rank to several candidates and had not committed mistakes in their rankings? How would the Applicant have compared with the top 112 candidates if she had advanced to the Third Round? It is impossible to tell nor should the Tribunal speculate.

191. The errors in the implementation of the Promotions Policy are so significant that their impact on the Applicant's chance for promotion cannot be measured. Most certainly, the Applicant had a real chance for promotion.

192. Therefore, the Tribunal rescinds the decision.

#### Specific performance

193. The Applicant requests to be granted promotion to the P-5 level. She also requests the Tribunal to review the Promotions Policy and establish an administrative instruction.

194. The Tribunal reiterates that the contested decision is discretionary in nature, and that it is not its role to exercise the discretionary authority vested on the SPP and the High Commissioner by substituting its own assessment for that of the competent official (see *Sanwidi* 2010-UNAT-084; *Abbassi* 2011-UNAT-110). It is part of the concept of discretion that its exercise may lawfully result in decisions that are different from those the Tribunal might have preferred. Therefore, where the judicial review concerns the exercise of discretion, the Tribunal can order specific performance, such as it has been requested in the present case, solely in the rare hypothesis where the result of the exercise of discretion can be narrowed down in such a way as to only have one legally correct outcome (see *Ademagic et al.* UNDT/2015/115). This is not the case in the application at hand.

195. The Tribunal has concluded that the SPP had not fairly and adequately considered the Applicant's candidacy for promotion to the P-5 level when comparing her with the other candidates. The High Commissioner, who is the competent decision-maker, has not received a proper and meaningful recommendation for making his decision as to whether or not to award one of the 56 available slots for promotion to the P-5 level to the Applicant. Until this exercise has been properly performed, its outcome remains open for the Applicant. If the Tribunal were to grant the Applicant a promotion, it would be tantamount to prejudging the outcome of the comparative assessment of all eligible candidates envisaged in the Promotions Policy, and substituting its

assessment for that of the SPP and the High Commissioner, something that the Tribunal is neither allowed nor in a position to do.

196. As to the Applicant's requests to review the Promotions Policy and establish an administrative instruction, the Tribunal reiterates that it does not have the authority to amend the Promotions Policy or supplement it, and it is not its role to redesign it so as to depart from the system currently in place. The Tribunal would not even be in a position to recommend any operational amendment to the Policy. Indeed, its implementation during the 2013 Promotions Session under review was so flawed that it is impossible to ascertain whether it would lead to fair and adequate consideration of staff members' candidacy for promotion if properly implemented. The Tribunal has already recommended the adoption of an administrative issuance to detail the modalities of the implementation of the Promotions Policy and it cannot go any further.

197. Therefore, the Applicant's request for specific performance must be rejected.

#### Alternative compensation

198. Art. 10.5(a) of the Tribunal's Statute provides that "where the contested administrative decision concerns ... promotion ..., the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered".

199. In calculating the *quantum*, the Appeals Tribunal has stressed that the determination of the "compensation in lieu" must be done on a case-by-case basis and carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265). In respect of decisions denying promotions, it further held that "there is no set way for a trial court to set damages for loss of chance of promotion and that each case must turn on its facts" (*Sprauten* 2012-UNAT-219, para. 22; see also *Niedermayr* 2015-UNAT-603).



200. In similar cases involving rescission of decisions denying promotions under UNHCR previous promotions policies, the Tribunal set the amount of alternative payment to rescission to CHF8,000 (see *Tsoneva* UNDT/2010/178; *Mututa* UNDT/2009/044), CHF9,000 (see *Andrysek* 2010-UNAT-070) and CHF10,000 (see *Andersson* UNDT/2012/091), taking into account that the applicants would be eligible again to be considered for promotion the following year.

201. Along the same lines, the Appeals Tribunal recently awarded USD10,000 for loss of chance of promotion as compensation in lieu of rescission, in a case where it found that the particular circumstances rendered the assessment more complicated than usual. The Tribunal concluded that it “had to assess the matter in the round and arrive at a figure that [was] deemed by [it] to be fair and equitable, having regard to the number of imponderables” (*Niedermayr* 2015-UNAT-603).

202. Considering the extreme difficulties in ascertaining the Applicant’s chances for promotion, the fact that she was eligible again for promotion in the 2014 session, and the previous determinations of the Appeals Tribunal and this Tribunal on the matter, the Tribunal considers, on balance, that it is fair and appropriate to set the amount of compensation in lieu of rescission to CHF6,000.

#### Material damages

203. The Applicant asked for “[f]inancial compensation for material damages taking into consideration [her] eligibility as of 2012 and lack of recognition of [her] merits for the wellbeing and prosperity of the UN and UNHCR for the last 25 years in different positions and functions, as well as complete disregard of the gender parity and proper geographical distribution of the promotion slots”.

204. The Tribunal emphasises that it can only entertain the Applicant’s claim for material damages insofar as it relates to a prejudice stemming from the contested decision, namely the decision of 20 October 2014 not to promote her to the P-5 level. In this context, the only damages that may be considered would relate to a loss of the additional salary she would have received had it not been for the contested decision.

205. In previous cases concerning the UNHCR promotions sessions, the Tribunal rejected requests for material damages on the basis that its order to rescind the decision and to award compensation in lieu of rescission covered all material damages that an applicant may have incurred. The Tribunal reasoned that if the Respondent chose to *rescind* the contested decision and to take a new decision on an applicant's promotion, the applicant would be able to claim promotion retroactively if promoted, or to challenge the new decision on promotion if not promoted. Consequently, there would not have been a material damage. In turn, if the Respondent chose to pay compensation, the sum awarded must be considered as compensation for loss of salary due to the denial of promotion (see *Tsoneva* UNDT/2010/178; *Mututa* UNDT/2009/044; *Andersson* UNDT/2012/091).

206. Whereas the Tribunal's holding that payment of the amount awarded for compensation in lieu of rescission applies to the present case, its finding that rescission may entail retroactive grant of promotion and compensate any loss of salary cannot be applied *mutatis mutandis*.

207. Under the current Promotions Policy, the Applicant's promotion, even if it could theoretically be awarded retroactively, would not be effective from the time of the High Commissioner's initial decision on promotions, that is 20 October 2014, but only as of when the Applicant is appointed to a post at the higher level (secs. 5.12.1 and 5.12.3). In this respect, the Tribunal notes that although the Applicant alleges that her promotion would be effective immediately in her case, because she was within two years of retirement, this was not the case at the relevant time, namely on 20 October 2014.

208. Indeed, on 20 October 2014, the Applicant was 58 years old, namely four years away from retirement as her normal retirement age is 62 due to the fact that she entered the service of the United Nations, and thus she started contributing to the United Nations Pension Fund, after 1 January 1990.

209. It follows that, even if promoted, the Applicant would not automatically receive retroactive payment of salary at the higher level from 20 October 2014; as a result, rescission of the contested decision would not fully compensate a loss of

salary. The Tribunal must therefore examine if this possible loss of salary, in case the Respondent does not elect to pay compensation in lieu of rescission, justifies that it awards the Applicant material damages.

210. As recalled above, even if the Applicant had been granted promotion on 20 October 2014, this promotion would not have been effective until she was appointed to a P-5 level position. In the meantime, she would have continued to receive her salary at the P-4 level. Therefore, any loss of salary would depend not only on whether the Applicant was indeed promoted, but also on when she would have been appointed to a P-5 position had she been promoted. The evidence shows that the Applicant had not been appointed to a P-5 position as of the date of the hearing. Whether, and if so when, she would have been appointed at that level had she been promoted on 20 October 2014 and considered in the next vacancies' compendium is speculative.

211. Considering that it is uncertain that the Applicant would have been granted promotion, that it is also uncertain that she would have been appointed to a post at the P-5 level in the next vacancies' compendiums, and that the appointment process would have, in any event, taken some time, the Tribunal finds that any possible loss of salary for the year following 20 October 2014 is too speculative to justify or permit the award of material damages.

#### Moral damages

212. Lastly, the Applicant asked for compensation for moral injury. In her application, she claimed "[c]ompensation (although difficult to assess) for moral damages (frustration and denigration) to see staff members with less experience, merits, and responsibility, some not eligible but promoted". During the hearing, the Applicant generally adopted the arguments raised by Counsel for the other applicants, and more specifically insofar as moral damages are concerned. As a consequence, the Tribunal understands that the Applicant also claims compensation for moral injury as a result of an asserted fundamental breach of her due process rights, which, she argues, does not need to be supported by evidence based on *Asariotis* 2013-UNAT-309.

213. In *Asariotis*, which was issued on 28 March 2013, the Appeals Tribunal delineated the Dispute Tribunal's jurisdiction to award moral damages in the following terms:

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

214. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows:

As part of its judgement, the Dispute Tribunal may *only* order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation *for harm, supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision. (emphasis added)

215. The present application was filed on 29 December 2014. Hence, it predates the above amendment to the Statute. The question arises as to whether the application is governed by this amended version of the Tribunal's Statute.

216. Resolution 69/203, which introduced the amendment to art. 10.5 of the Tribunal's Statute, does not contain any provision as to the modalities of its entry into force or transitional measures. Likewise, neither the Tribunal's Statute nor its Rules of Procedure contain any provision governing the entry into force and applicability of changes to procedural rules before the Tribunal.

217. To determine the modalities of application of the amended version of art. 10.5 of the Tribunal's Statute to ongoing proceedings, the Tribunal has examined, in *Rodriguez-Viquez*, the nature and effect of the amendment. It found that whereas under *Asariotis* "a moral injury could be inferred from the fact that a staff member has sustained a fundamental breach of his or her substantive or due process entitlements", this is no longer possible under the amended version of art. 10.5 of the Tribunal's Statute. The Tribunal concluded that in effect, "the amendment modifies the rules of evidence in respect of a claim for moral injury".

218. As recalled above, the Appeals Tribunal has consistently upheld the well-known principle that changes in law may not be retroactively applied (see para. 43 above). Applying the amendment to Tribunal's Statute to applications filed before its publication, which now requires that harm be supported by evidence, would introduce new procedural rules to legal proceedings that are ongoing, to the detriment of the Applicant. As such, it would violate the principle of non-retroactive application of the law. As the Tribunal previously held in *Rodriguez-Viquez*, "[g]iven that the amendment merely introduces a change to a procedural rule, it is applicable to proceedings initiated after its entry into force, namely 21 January 2015".

219. For the reasons outlined above, it follows that the recent amendment to art. 10.5 of the Tribunal's Statute is not applicable to the instant case. Accordingly, the *Asariotis* jurisprudence may be relied upon in setting the appropriate compensation in the present cases.

220. The Tribunal finds that it can be inferred from the numerous, significant procedural breaches in the implementation of the Promotions Policy, which impaired the Applicant's right to be fairly and adequately considered for promotion, coupled with a lack of transparency of the process and the unequal treatment of her request for information concerning the reasons for the contested decision, that the Applicant has suffered "frustration", "denigration" and "emotional distress", as she claims.

221. Therefore, the Tribunal finds that the Applicant's claim for moral injury is sufficiently substantiated and deems it fair and appropriate to award her compensation in the amount of CHF3,000.

### **Conclusion**

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

- a. The contested decision denying the Applicant a promotion to the P-5 level is hereby rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant CHF6,000;
- c. The Applicant shall also be paid moral damages in the amount of CHF3,000;
- d. The aforementioned compensations shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and

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e. All other claims are rejected.

*(Signed)*

Judge Rowan Downing

Dated this 3<sup>rd</sup> day of May 2016

Entered in the Register on this 3<sup>rd</sup> day of May 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva