



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MILICEVIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By incomplete application filed on 10 May 2016, completed on 17 May 2016, the Applicant contests two Management Evaluation outcomes, namely MEU/658-15/R and MEU/081-16/R, related to the “decision to abruptly move [him] out of mission area on 30 November 2015 as Chief, [Communication and Information Technology Section (“CITS”)], [United Nations Disengagement Observer Force (“UNDOF”)] before the expiration date of [his] Temporary Assignment”.
2. The Respondent filed his reply on 1 July 2016.

Facts

3. Since 25 November 2008, the Applicant worked as Chief, Telecommunications and Information Technology Unit (P-4), United Nations Mission in Iraq (“UNAMI”).
4. He was promoted to the post of Chief, Telecommunications and Information Technology (P-5), United Nations Global Service Centre (“UNGSC”), Brindisi, Italy, effective 1 February 2011.
5. The Applicant joined UNDOF on a temporary duty assignment (“TDY”), on 1 March 2015, where he served as Chief, CITS. His initial release was approved through 31 May 2015 and was extended until 29 February 2016. The Applicant’s regular post in UNGSC was in turn encumbered by a staff member on assignment from UN Headquarters, through 29 February 2016.
6. On 29 September 2015, the Chief, Mission Support Service (“CMSS”), UNDOF, met with a representative of the Senior Syrian Arab Delegate (“SSAD”), who raised allegations concerning the Applicant’s conduct. The CMSS informed the Head of Mission, UNDOF, as well as Lieutenant General T. and the head of the Regional Conduct and Discipline Unit about the allegations.

7. The CMSS informed the Applicant over the phone that the SSAD had declared him “unwelcome to Syria” based on ungrounded accusations. The CMSS reiterated that statement in an email of 16 October 2015 to the Applicant, stressing further that the SSAD had demanded that the Applicant have no contact with any Syrian colleague. The CMSS also informed the Applicant that the Regional Conduct and Discipline Team had directed him to meet with the SSAD to try to resolve the matter, and asked the Applicant in the meantime not to have any contact with any of the Syrian staff.

8. By email of 28 October 2015, the CMSS informed the Applicant that “the Syrians” were uncooperative as long as the Applicant stayed in his position. Therefore, he suggested that the Applicant leave UNDOF either on administrative leave or going back to UNGSC or on a TDY, “or any other solution [...] acceptable [to the Applicant].” He also stressed that “[i]n any and all cases ... [the Applicant could] remain on the UNDOF post for the remainder of [his] contract, with all the associated entitlements”.

9. By email of 29 October 2015, the CMSS informed the Chief, Human Resources Officer, UNDOF, that the Applicant had been declared “unwelcome to Syria”, and that he would take administrative leave from 5 November 2015, while the Mission would try to resolve the matter. By email of the same day to the CMSS, the Applicant stated that he would take a few days of administrative leave to give the Mission the opportunity to solve the matter amicably with the SSAD. He further reiterated that any allegations against him were completely unfounded and noted that if management insisted on him leaving UNDOF, the only acceptable solution for him would be to be sent on a TDY “to some other Middle East mission, preferably UNIFIL”.

10. Since it became clear by 26 October 2015 that any allegations against the Applicant could not be independently verified or substantiated, UNDOF considered them to be dismissed. The CMSS informed the SSAD of that decision. However, according to the CMSS, the Syrian authorities stood by the allegations and declared the Applicant *persona non grata* (“PNG”) and indicated that the movement of UNDOF HQ from a “very high risk” area to a safe area would not be facilitated

while the Applicant remained in Syria. Following internal consultations, UNDOF decided to request that the Applicant move to another mission.

11. By fax dated 10 November 2015, UNDOF informed the Field Personnel Division, Department of Field Support (“FPD/DFS”), that the Applicant had been declared PNG in Syria, and requested special approval to move him to his parent employing entity, UNGSC, along with his UNDOF post, until the end of his assignment on 28 February 2016.

12. FPD/DFS approved UNDOF’s request by fax of 20 November 2015. It noted that since the Applicant’s post in UNGSC was encumbered by a replacement, the return to UNGSC was only possible if he continued to encumber the UNDOF post. It further stressed that the Applicant’s entitlements should be adjusted to Brindisi from the date of his return to UNGSC to the ending date of his assignment, namely 28 February 2016. In that fax, reference was made to a note filed with UNDOF by the Syrian authorities requesting his removal from the Mission.

13. On 21 November 2015, the CMSS notified the Applicant of the FPD/DFS decision to remove him from UNDOF together with his post.

14. During November 2015, the Applicant asked the CMSS by email to be given a copy of the note from the Syrian authorities mentioned in the fax of 20 November 2015. The CMSS informed the Applicant that “there [was] no actual complaint of any nature against [him]” and that the Mission “never received anything for any of the PNGs”.

15. The Applicant was moved from UNDOF to UNGSC effective 30 November 2015.

16. On 18 December 2015, the Applicant requested management evaluation of the decision “to remove him from mission area without any ground, that was executed with abuse of authority and violation of his procedural rights harming his dignity and professional reputation”.

17. By letter dated 19 February 2016, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to

uphold the decision to remove him from UNDOF and to move him back to his parent duty station.

18. The Applicant subsequently requested management evaluation of the decision of FPD/DFS “to interrupt [his] temporary assignment in [UNDOF] and retroactively place [him] against post in [UNGSC]” on 26 February 2016 and 7 and 9 March 2016. The Management Evaluation Unit informed him by letter of 14 March 2016 that his request was not receivable, since the matter had already been reviewed in the letter of 19 February 2016.

Procedure before the Tribunal

19. The case had been assigned to Judge Meeran during his term in Geneva in 2017. By Order No. 82 (GVA/2017) of 4 April 2017, the Tribunal ordered the parties to make additional filings, by 10 April 2017, and gave each party the opportunity to comment on their respective filing.

20. A first case management discussion (“CMD”) took place on 20 April 2017 to discuss the claims and issues in the case and to give any necessary directions, including the question whether the parties should be given the opportunity to explore formal mediation or alternative dispute resolution.

21. The Respondent advised the Tribunal that there was no room for informal mediation. Since Judge Meeran’s term at the Geneva Registry had expired, and he had ultimately not been redeployed to Geneva, the case was reassigned to the undersigned Judge in April 2018.

22. By Order No. 100 (GVA/2018) of 7 June 2018, the parties were convoked to another CMD, which was held on 20 June 2018, to determine the witnesses to be called and a date for a hearing on the merits. The hearing was held on 18 and 19 September 2018.

Parties’ submissions

23. The Applicant’s principal contentions are:

- a. He contests the outcome of his two requests for management evaluation, and refers to the decision to abruptly move him out of the Mission area, which he notes was arbitrary and taken on the basis of ungrounded and unsupported allegations hence in violation of his due process rights;
- b. There was no investigation and he was not given the opportunity to defend himself;
- c. The Syrian authorities did not provide any official request or a *Note Verbale* requesting to remove him from the Mission; in the past, Syrian authorities had officially informed UNDOF by *Note Verbale* or through their Permanent Mission; therefore, MEU erred in believing the CMSS without any supportive documents from the Syrian Government;
- d. There is neither any proof of *bona fide* efforts made by UNDOF and the CMSS to persuade the Syrian authorities that the Applicant remain in the Mission area; on the contrary, correspondence shows that the CMSS' attitude towards the Applicant became hostile and abusive;
- e. The Tribunal should investigate the situation with and around the UNDOF Office and accommodation arrangement in Damascus during the period from August 2015 to March 2016; in light of mismanagement, the Mission leadership needed "good excuse for Headquarters" and the Applicant was an inconvenient witness, hence, he had to leave the Mission;
- f. Under the Charter, the Organization is not allowed to take (arbitrary) instructions from Member States, and the Secretary-General has a duty to protect staff, pursuant to staff regulation 1.1(c), which he failed to do in the present case; staff regulation 1.1(c) has to be given preference over staff regulation 1.2(c);
- g. For other staff members who had also been declared unwelcome in Syria, arrangements were made by the Mission Leadership to allow them to stay in UNDOF until the end of their assignment or until they accepted other assignments suitable for them; to the best of his knowledge, he is the only staff member who was removed from the Mission in the middle of the

assignment; the decision is arbitrary and discriminatory and based on improper motives;

h. Since his post as Chief, CITS, UNGSC was occupied by another staff member on temporary assignment, he was assigned duties of UMOJA site coordinator and Special projects, without any approving or certifying authority and limited supervisory functions. Hence, he was not reassigned to a position “corresponding to his profile”;

i. He did not request to be assigned on TDY to UNIFIL; rather, he accepted that offer from the CMSS as a solution that was acceptable to him;

j. The email of 29 October 2015 from the CMSS to the Chief, Human Resources Office, is evidence that he was forced and was never asked or agreed to administrative leave;

k. UNDOF did not take steps to alleviate the Applicant’s predicament; rather, even what had been offered by UNDOF at the beginning, and accepted by the Applicant—namely a TDY to UNIFIL or any other Middle East mission—was later withdrawn by the Mission Leadership, without any explanation; this is in direct contradiction to the Tribunal’s ruling in *Hassouna* UNDT/2014/094, para. 51;

l. He requests that the decision related to his removal from UNDOF be vacated and that his temporary assignment in UNDOF be considered as continuous, through the contract duration of his assignment (i.e. until March 2016), and to consider his stay in UNGSC from 1 December through 1 March 2016 as TDY;

m. He claims compensation for:

i. Actual economic loss equivalent to lost earnings and entitlements, to be quantified in net salary as if he were in UNDOF throughout 1 March 2016, plus DSA/MSA for days spent in Brindisi; additional expenses incurred due to the abrupt removal from the Mission area, in particular airplane tickets for planned holidays;

ii. Pecuniary and non-pecuniary damages for loss of professional opportunities, such as the recruitment process for the post of Chief, CITS, UNDOF, his downgrading to the role of UMOJA Site Coordinator at UNGSC;

iii. Procedural violations and for harm to his professional and personal reputation resulting from the decision and the abuse of authority; the removal from the Mission and placement on annual leave is generally associated with serious wrongdoing; he never did anything wrong, as the evidence shows; that and the rumours spread in UNDOF and UNGSC seriously affected his wellbeing and reputation; the instruction not to communicate with staff, his exclusion from daily Mission briefings, directions to other staff not to communicate with the Applicant also impacted on his reputation, and was particularly damaging in light of his very good performance; and

iv. The stress suffered from the sudden removal, abuse of authority, and lack of support by UNDOF leadership, his effective professional downgrade with movement to parent duty station caused a lot of psychological and health issues, which was still showing at the date of the application;

n. Finally, he requests an official, formal written excuse from UNDOF Senior Management to be inserted in his personal file and disseminated as appropriate amongst all UNDOF and UNGSC staff, to reinstate his professional dignity.

24. The Respondent's principal contentions are:

Receivability

a. The Tribunal is not competent to review the Applicant's request for review of the outcome of the management evaluation; the MEU's reviews and the Secretary-General's response to the Applicant's request for management evaluation are not administrative decisions for the purpose of art. 2 of the Tribunal's Statute; the Tribunal can review only the content of the

administrative decision that was previously before the MEU; it cannot be extended to findings included in the MEU's review;

b. The challenge to the outcome of the two management evaluation requests is not receivable *ratione materiae*;

Merits

c. The Secretary-General disposes of great discretion in the organization of work, including assignment of staff members to different functions; the staff member has to prove that the contested decision was motivated by extraneous factors;

d. In the case at hand, the Applicant was declared *persona non grata* by the Syrian Government during his latest TDY at UNDOF; while the Syrian Government did not substantiate its allegations against the Applicant, it requested that he leave the country, despite UNDOF *bona fide* efforts to change the Government's decision; the Applicant could therefore not remain in Syria;

e. When he was declared *persona non grata*, UNDOF sought to alleviate the Applicant's predicament and returned him to UNGSC with his post; this reassignment to a position corresponding to his level, skills, qualifications and experience constitutes a lawful exercise of discretion under staff regulation 1.2(c); and

f. His reassignment to UNGSC had no adverse effect on the Applicant's terms of appointment and he is not entitled to any financial compensation.

Consideration

Receivability

25. The Respondent argues that the Applicant's challenge of the outcome of the MEU decision is not receivable *ratione materiae*. However, while in his application the Applicant stated that he is contesting the outcome to his two requests for

management evaluation, he also referred to the decision to abruptly move him out of the mission area. During the first CMD in April 2017, the Applicant confirmed that he was contesting that initial decision, which had been upheld after his first request for management evaluation.

26. The United Nations Appeals Tribunal has constantly held (*Massabni* 2012-UNAT-238) that:

25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

27. The Tribunal is satisfied that the Applicant did in fact contest the administrative decision to transfer him to Brindisi based on him having been declared PNG by the Syrian authorities and, thus, finds that the application is receivable *ratione materiae*.

Merits

Legal framework

28. The Tribunal recalls that pursuant to staff regulation 1.2(c):

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority, the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

29. While, in case of reassignment, the Secretary-General disposes of great discretion, such is not unfettered. In *Rees* 2012-UNAT-266, the Appeals Tribunal held that:

An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and whether he or she had substantial experience in the field.

30. Relevantly, this Tribunal held the following in *Hassouna* UNDT/2014/094 (para. 12):

However, in the case of a staff member who has been declared *persona non grata* and the host country is not forthcoming with information as to the basis for his/her expulsion or the reasons, if any, do not justify a PNG decision, other considerations may apply. Under these circumstances, a change in the terms and conditions of the staff member's contract or non-renewal is not an option open to the Secretary-General. The Tribunal takes the view that under such circumstances it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country.

31. In diplomacy, the term *persona non grata* comes from the Latin terminology and literally means "person not appreciated or unwelcome person".¹

32. Under international law, it has long been recognized that every sovereign nation has the right to determine whether it will receive a diplomatic envoy from another nation or if he/she will be allowed to stay. The same rationale applies *mutatis mutandis* to the relationship between the UN and a host country.²

33. The logical consequence that follows a *persona non grata* declaration is that the sending state must recall its agent.³ This again applies *mutatis mutandis* to staff

¹ See, Fakhury, A., *Persona Non Grata: The Obligation of Diplomats to respect the Laws and Regulations of the Hosting State*, Journal of Law, Policy and Globalization, VI. 57, 2017, page. 111, published online in www.iiste.org.

² See, ob. cit. page. 111.

³ Ob. cit, page 114.

members working for the United Nations in a given country that declares them PNG. Indeed, as this Tribunal held in *Hassouna*, “in [a] peacekeeping context, the Organization can only operate in a sovereign State with the consent of ... the host country” and “the decision to remove [a] staff member still vests in the Secretary-General though it is triggered by a decision of the host country”.

34. If a staff member is declared PNG by a host country, the Organization has no alternative but to remove that staff member, because such declaration falls within the sovereign prerogative of the host country.

35. The Secretary-General’s discretion to reassign a staff member is therefore somewhat limited by his duty to follow the request of the Host Government to remove a staff member, which may lead to situations where a staff member has to be reassigned, on an urgent basis, and only limited placement options are available.

Issues

36. In light of the above, and having carefully reviewed the file and the evidence produced before it at the hearing, the Tribunal has identified the following legal issues:

- a. Despite the absence of a *Note Verbale*, does the evidence confirm that the Applicant was declared PNG/unwelcome in Syria?
- b. What is the extent of the Administration’s duty to alleviate the predicament in which the staff member finds himself/herself following his/her being declared PNG?; and
- c. Is the Applicant entitled to any compensation?

Was the Applicant declared PNG?

37. The Tribunal notes that the decision to remove the Applicant from UNDOF and transfer him back to UNGSC was based on the Syrian Government having declared him PNG.

38. In the present case, the CMSS was informed in a meeting with the Syrian authorities that the Applicant was declared PNG and no written explanation was provided nor was a *Note Verbale* issued. With respect to the latter, it was clarified during the CMD and the hearing on the merits that the reference to the “note from the Syrian authorities” in the 20 November 2015 fax from FPD/DFS (see para. 12 above) was made in error, and that no such note existed.

39. During the above-referred meeting, the CMSS also asked for the reasons for which the Applicant was declared PNG. In the absence of a formal complaint and any substantiation, the Mission subsequently decided not to further inquire the allegations and considered them to be unfounded.

40. According to the evidence provided by the CMSS, the Mission’s presence in Syria falls under a “Disengagement Agreement”, which is invoked by the Syrian authorities whenever they declare a staff member PNG. He stressed that many staff members had been declared PNG by the Syrian authorities and that during his time as CMSS, in no case had a written explanation or *Note Verbale* been issued.

41. The Tribunal has no reason to question the testimony from the CMSS and finds that the reason provided by the Administration to remove the Applicant from UNDOF—namely that he had been declared PNG—was supported by the evidence.

What is the extent of the Administration’s duty to alleviate the predicament in which the staff member finds himself/herself following his/her being declared PNG by a Host Government?

42. The Tribunal now has to assess the duties of the Organization towards a staff member who has been declared PNG, in light of the above-referenced jurisprudence of the Appeals Tribunal in *Rees* and of the Dispute Tribunal in *Hassouna*.

43. The Applicant contests the decision to remove him from UNDOF and to transfer him back to Brindisi, emphasizing that other UNDOF staff members—who had also been declared PNG—were allegedly allowed to stay in the Mission.

44. At the hearing, the CMSS stressed that at the time the Applicant was declared PNG, the Mission’s Headquarters was in the process of being relocated to a safer

area. He testified that the Syrian authorities clearly communicated to the Mission that they would not authorize the installation of the telecommunication's network required for that relocation as long as the Applicant stayed in the Mission. This was of great concern to UNDOF, since it seriously jeopardized the security of its staff members.

45. The evidence given by the CMSS was highly credible and confirmed not only that the Applicant had been declared PNG, but also that under the particular circumstances, even the temporary stay of the Applicant in the Mission area was not an option and caused serious security threats to the overall operations of UNDOF and its staff, because it prevented the Mission from equipping its new Headquarters and thus jeopardized its relocation. Therefore, the Tribunal finds that the question of how the situation of other PNG staff members had been handled is irrelevant.

46. Moreover, based on the evidence given by the CMSS, the Tribunal is satisfied that he made good faith efforts to persuade the Syrian authorities to change their view, unfortunately without success.

47. The Applicant also stresses that upon his transfer back to UNGSC, he temporarily had to perform functions as UMOJA Coordinator, a post and functions that were two levels below his personal grade. While the Respondent conceded that the level and functions of that post were below the Applicant's personal grade, he stressed that he continued to be paid salary and entitlements at the P-5 level. The Respondent also emphasized that the Administration had looked into other options to find a suitable post at the Applicant's level at a different Mission, but that no such post was available.

48. Mindful of the jurisprudence of the Appeals Tribunal in *Rees*, the Tribunal notes that the situation in this case was peculiar since a quick solution had to be found for the Applicant who, for the reasons outlined above could no longer stay in Syria. Since his parent post at UNGSC was temporarily occupied, the Organization temporarily placed him against another position albeit with functions at a lower level but with salary and entitlements paid at the Applicant's grade (P-5).

49. The Tribunal finds that in a situation where the Organization is bound to take prompt action to reassign a staff member whom a host country has declared as PNG, it is reasonable for the Organization to reassign the staff member, temporarily, to a post with levels of a lower function, while continuing to pay salary and entitlements at the level of the staff member's grade.

50. In the case at hand, the Tribunal is satisfied that under the circumstances, and since the Applicant's parent post was temporarily encumbered, the Administration fulfilled its duty vis-à-vis the Applicant after he had been declared PNG in Syria by transferring him back to UNGSC, and paying his salary and entitlements at the P-5 level despite temporarily discharging functions below his grade.

51. The contested decision is therefore lawful.

Is the Applicant entitled to any compensation?

52. Since the Tribunal found the contested administrative decision to be lawful, the Applicant is not entitled to any compensation.

Conclusion

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

The application is rejected.

(Signed)

Judge Teresa Bravo

Dated this 9th day of October 2018

Entered in the Register on this 9th day of October 2018

(Signed)

René M. Vargas M., Registrar, Geneva