

# UNDT/2021/041, Smith

## UNAT Held or UNDT Pronouncements

Whether the application is receivable in its entirety In determining the date when the three-year statutory period under art. 8.4 of its Statute should run from, the Tribunal recalls that “a written decision is necessary if the time limits are to be correctly, and strictly, calculated. Where the Administration chooses not to provide a written decision, it cannot lightly argue receivability, *ratione temporis*” (see Manco 2013-UNAT-342, para. 20). Without receiving a notification of a decision in writing, it would not be possible to determine when the period of three years for contesting the decision under art. 8.4 of its Statute would start. The three-year statutory period under art. 8.4 of its Statute started to run from 18 February 2019 in this case. The Applicant filed his application on 13 September 2019, i.e., around seven months later after his receipt of the contested decision, thereby respecting the three-year statutory time limit under art. 8.4 of its Statute. Accordingly, the application is receivable. The Tribunal considers that the Applicant has the status of Secretariat staff. Whether the Applicant is eligible to be granted a continuing appointment ICTY, like its successor, IRMCT, is a subsidiary organ of the Security Council and thus a non-Secretariat entity. Therefore, the Applicant was not working at the United Nations Secretariat as required by staff rule 4.16(b)(ii) when he participated in the 2010 ICTY G to P competitive examination, nor was he recruited to the Professional category at the United Nations Secretariat pursuant to staff rule 4.16 after the 2010 examination. In any event, General Assembly resolution 65/247 explicitly excludes international or locally recruited staff recruited for service in ICTR or in ICTY from being eligible for a continuing appointment, unless they are “successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service”. Therefore, the Applicant was not eligible for consideration for a continuing appointment at least until 31 December 2017 when he left ICTY for IRMCT. Thus, the Applicant has failed to establish that the requirement excluding ICTY staff members from eligibility for continuing appointment does not apply to him. Accordingly, the Tribunal finds no merit in the Applicant’s claim that he is entitled to a continuing appointment pursuant to staff rule 4.14. The Applicant has not met the burden of proving that the contested decision is unlawful. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

## Decision Contested or Judgment/Order Appealed

The Applicant filed an application contesting the decision not to grant him a continuing appointment.

## Legal Principle(s)

It is trite law that the applicant must “identify an administrative decision capable of being reviewed”. The Tribunal has “the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”, and “may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed”. An application shall not be receivable if it is filed more than three years after the applicant’s receipt of the contested administrative decision. A “later negative decision to an administrative request already denied by an implied administrative decision effectively re-set the clock” for a staff member to submit his or her application. Staff members of non-Secretariat entities may nevertheless have the status of Secretariat staff. In this respect, art. 101(2) of the United Nations Charter clarifies that United Nations staff may be assigned “as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat”. Staff members recruited upon successful completion of a competitive examination pursuant to staff rule 4.16 are eligible for a continuing appointment after two years under a fixed-term appointment, subject to satisfactory service. Moreover, General Assembly resolution 65/247 explicitly excludes the international or locally recruited staff

recruited for service in the International Criminal Tribunal for Rwanda (“ICTR”) or in ICTY, unless they are “successful candidates from national competitive recruitment examinations [or] staff from language services after two years of probationary service”.

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Smith

Entity

IRMCT

Case Number(s)

UNDT/GVA/2019/054

Tribunal

UNDT

Registry

Geneva

Date of Judgement

23 Apr 2021

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Administrative decision

Appointment (type)

Continuing appointment

Burden of proof

Applicable Law

Administrative Instructions

- ST/AI/2012/3
- ST/AI/2016/1

GA Resolutions

- A/RES/65/247

Secretary-General's bulletins

- ST/SGB/2009/10
- ST/SGB/2011/9
- ST/SGB/2015/3

Staff Regulations

- Regulation 4.5(d)

## Staff Rules

- Rule 4.14
- Rule 4.16

## UN Charter

- Article 101.2
- Chapter VII
- Chapter XV

## UNDT Statute

- Article 8.4

## Related Judgments and Orders

2020-UNAT-980

2020-UNAT-1064

2018-UNAT-849

2018-UNAT-875

2019-UNAT-917

2018-UNAT-821

2017-UNAT-765

2013-UNAT-342

2012-UNAT-201

2013-UNAT-357

2016-UNAT-684