

Introduction

1. The Applicant is a staff member of the United Nations High Commission for Refugees (UNHCR) in Juba, South Sudan. In his application filed on 5 May 2014, he contests the decision to remove him from the post of Deputy Representative, UNHCR, South Sudan, and the attendant decision to re-advertise his post.

Facts

2. The Applicant joined UNHCR as a staff member in 1984 as General Service staff in Ethiopia. In 1989, he was converted to the National Professional category and in July 1995, he became an G1f7 1 108.38 7T6(n)-9(G1f7 1 108.38 7T1 0 0 1 99.384 759

office who was at the duty station at the time of the outbreak of hostilities. Mr. Balke emailed both the Applicant and Mr. Chanda on 20 December 2013 and asked that either of them should relieve him. After a teleconference with Mr. Balke and the Director of the UNHCR Africa Bureau in Geneva on the same day, the Applicant assured them that he was willing to end his annual leave early in order to return to Juba and assist UNHCR in responding to the crisis.

8. On 22 December 2013, the Africa Bureau Director emailed Mr. Balke, copying the Applicant, Mr. Chanda and Ms. Noriko Yoshida. He stated therein that Mr. Chanda would interrupt his home leave and return to Juba during the weekend of 27-29 December while the Applicant would return to Juba on 23 December 2013. He also stated that Ms. Yoshida of the Africa Bureau office in Geneva would undertake a special mission to Juba pending the return of Mr. Chanda. She was to arrive in Juba on 24 December 2013.

9. The Applicant returned to Juba on 23 December

UNHCR refugee camps in order to enhance protection against any possible attacks at these camps.

13.

18. Mr. Chanda did not return as scheduled nor had he returned by 30 December when the Applicant travelled back to Ethiopia. When he eventually returned to Juba, he sent a memorandum a few days later on 7 January 2014 to the High Commissioner asking for the reversal of the recent assignments of the Applicant as Deputy Representative and that of the head of the Bunj sub-office. His stated reason for the request was that since the announcement of the new assignments, dramatic developments in the country required that the profile of the staff members occupying the two positions be adjusted.

19. In the same correspondence, he stated that the Legal Advise Section (LAS) had advised that the Applicant and the new head of the Bunj sub-office whose assignments he sought to be reversed be consulted before the reversal decision was made. He additionally recommended that the Applicant and the head of the Bunj sub-office be replaced by two other candidates who had competed for their positions but were not originally selected.

20. On 8 January 2014, the Applicant received an email from the OiC of WPJET Division of Human Resources Management (DHRM), Ms. Barbara Kalema-Musoke, stating that as a result of the civil war and violence that had occurred in South Sudan, the High Commissioner for Refugees had decided to review assignment decisions including that of the Applicant for the purpose of re-advertised to reflect the changed operational realities.

21. On 13 January 2014, the Applicant responded to Ms. Kalema-Owuqmg email. He stated in his response that he understood the decision of the High Eqo okuukqpgt WPJET Division of Human Resources Management (DHRM). He stated also that he had volunteered to end his rest and recuperation (R&R) and had that he was willing to be part of the team in South Sudan.

22. In a private conversation on 14 January 2014, Mr. Chanda told the Applicant that the UNHCR leadership was unhappy with him because he had left Juba on 30 December 2013.

23. On the same day, the Applicant sent emails addressed to Ms. Yoshida, Mr. Chanda and others in UNHCR leadership asking to be forgiven for having left South Sudan prior to the arrival of Mr. Chanda. On 15 January 2014, he sent another email to some UNHCR staff members in South Sudan and headquarters also apologizing for his email of 29 December 2013 in which he urged female staff members who were not at the duty station when the crisis broke out not to return to South Sudan during the hostilities due to the high incidence of gender-based violence at the time.

24. Via email dated 16 January 2014, Ms. Karen Farkas, Director/DHRM, sent the Applicant a memorandum dated 13 January 2014. The memorandum stated that after considering his replies and comments on 13 and 14 January 2014, the High Commissioner decided to remove him immediately from his position as Deputy Representative in South Sudan and to assign another staff member with the requisite skills and experience suitable to the emergency situation in the country on a temporary basis. The said memorandum also stated that DHRM would contact him to advise him of the relevant administrative formalities regarding his departure from Juba and assist him with securing another assignment.

25. Qp"45"Lcpwct{"4236."v jg" Cr rnkcpv" tgegkxgf" c"ngvgt"htqo"WPJETøu" Personnel Administration Payroll Section (PAPS) providing him with information related to his departure from the duty station and interim administrative details relating to a future assignment. On 28 January 2014, PAPS informed him that his replacement would arrive in South Sudan on 31 January 2014.

26. On 28 January 2014, the Applicant filed a management evaluation request contesting the PAPS letter of 23 January 2014 that instructed him to leave the duty station until further reassignment. The next day 29 January, PAPS wrote to the Applicant to correct the contents of the memorandum it had sent on 23 January.

dramatically after the announcement of the appointment of the Applicant on 23 December 2013.

33. It is noteworthy that the said acute emergency situation in South Sudan started on 15 December 2013. Eight days later, UNHCR announced the appointment of the Applicant to the position of Deputy Representative following a competitive recruitment process. This means that as at the time that the Applicant changed operational context in South Sudan and therefore the reasons it has given for removing the Applicant from his new position are inconsistent and not supported by the facts.

34. The Applicant's performance in the position of Deputy Representative in the agency operational environment and ability to exercise diplomatic and external relations skills in dealing with a government under threat by an organized armed insurgency.

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37. The said PPAP additionally provides² that apart from exceptional operational imperatives necessitating significant change in the nature and scope of an operation, encumbered positions should not be discontinued or altered requiring their re-advertisement until the incumbent has served at least one year in the said position.

² Paragraph 23.

38. UNHCR has not demonstrated that any exceptional operational imperatives existed at the time necessitating significant change in the nature and

44. The manner of his removal from his new appointment has caused damage to his professional reputation.

45. The Applicant asks for judgment to the effect that he be allowed to

acute emergency situation and the need to address it by temporarily assigning another staff member with the requisite skills and experience. The escalating emergency situation required a different set of skills and competencies from what was previously advertised.

52. With regard to the announcement of the Deputy Representative position, the said announcement was made before any reliable predictions about the development of the crisis could be made. Therefore that announcement made eight days after the crisis started did not take into account the magnitude of the displacements, the impact on the Sudan at the time.

53. Thirdly, the High Commissioner has discretion in making decisions on promotions and appointments and the Tribunal cannot substitute its own views regarding the outcome of a selection process. In *Abbasi*⁴, UNAT held that the Staff Regulations and Rules were followed and whether the staff member was fairly considered.

54. The conflict situations relate to his service as a national officer and mid-level management levels as an international officer at the P-3 and P-4 levels. These do not provide evidence of his suitability for the position of Deputy Representative in the emergency operation in South Sudan following the drastic changes in operational portfolio.

55. Further his comparison of his accomplishments in armed conflict with those of Mr. Fernando who was sent to replace him pending a new recruitment for his position is irrelevant. Mr. Fernando had served at the P-5 level in Pakistan as Assistant Representative (Operations) in a complex operation. The Applicant did not challenge the outcome of the new selection process for his position.

⁴ 2011-UNAT-110.

56. Fourthly, the impugned decision was not improperly motivated by extraneous factors. There is always a presumption that official acts have been regularly performed. In *Assad*, UNAT held that although that presumption is rebuttable, the burden is on the Applicant to successfully rebut it.⁵

57. The Applicant has not discharged the burden of proof with regard to his claim that the real reason for his removal as Deputy Representative was that he left South Sudan on 30 December 2013 prior to the arrival of the Representative. Vjg"Cr rnkecpvøu"uwi iguvkqp"vjcv"jku"tgoqxcn"ycu"cfku iwkugf"fkuekrnkpct{"ogcuwtg" is not true.

58. The reason for removing him was operational and not punitive. It was cnuq"pqv"qpn{"vjg"Cr rnkecpvøu"cuuk ipogpv"vjcv"ycu"tgeqpukfgtgf"cpf"tgxgtugf"kp"vjg" light of the operational realities. The Head of the Bunj sub-office was similarly affected. He was satisfied with the explanations given him by UNHCR Management. Both reversed positions were announced at the same time.

59.

Applicant later tendered a public apology referring to his action as a stupid mistake.

62. The burden of proof that he was removed based on extraneous factors, the Respondent properly exercised his discretion and acted in the best interest of the Organization.

63. Fifthly, the decision to remove the Applicant as Deputy Representative did not violate the provisions of the PPAP. Position status changes which truly are subject to a six-month notice comprise discontinuations, reclassifications and redeployments. Paragraph 19 of the PPAP is not applicable to the re-advertisement of a position with a revised operational context.

64. The provisions of paragraph 19 of the PPAP apply only to changes carried out by managers with delegated authority under the Resource Allocation Framework (RAF). It does not fetter the discretion of the High Commissioner to reassign staff under staff regulation 1.2(c). Even if the provision applies to an assignment by the High Commissioner, it cannot restrict his authority to swiftly react to an emergency.

65. With regard to the restrictions to re-advertisements under paragraph 23 of the PPAP, the outbreak of a major humanitarian crisis that significantly re-advertisement of a recently-filled position in accordance with the said paragraph 23 of the PPAP. In the circumstances, the requirements of paragraph 23 were met.

67.

result of inter-ethnic conflict required the removal of the Applicant and his replacement by another staff member who had the requisite skills and experience. It was decided that the position of Deputy Representative then required different competencies to that previously advertised and which led to the selection of the Applicant which was announced two weeks prior.

73. The Respondent further submitted that by 23 December 2013 when the Crisis in South Sudan had just begun, there were as yet no reliable predictions about the development of the crisis. He continued that it is wrong to conclude that because the new assignment of the Applicant was announced on 23 December 2013, the reason given by UNHCR that further development of the crisis necessitated his removal and the recruitment of a more skilled incumbent is unsubstantiated.

74. In his closing statement, the Respondent submitted that the removal of the Applicant was in the interest of the operation since it was based on a reasoned request by Mr. Chanda to review selection decisions and make adjustments due to the exceptional circumstances that unfolded in South Sudan. It was additionally submitted that the Tribunal should refrain from determining whether the removal of the Applicant was in the interest of the operation. He continued that even if the Tribunal reviewed the reasoning of UNHCR in determining the best interests of the Organization in this case, it must accord due deference to UNHCR in assessing its operational needs.

75. The Applicant challenged the case for the Respondent and submitted that the reasons for the removal of the Applicant from the post of Deputy Representative are not supported by the evidence. He cited the cases of *Pirnea*⁷, *Bowen*⁸ and *Obdeijn*⁹ and pointed out that the said reasons are not in any way supported by the memorandum sent by Mr. Chanda to the High Commissioner on 7 January 2014 requesting that the Applicant be replaced.

⁷ UNDT/2012/068.

⁸ UNDT/2010/197.

⁹ UNDT/2011/032 & UNAT/2012/20.

76. The Applicant submitted that while the memorandum requested the reversal of his assignment as Deputy Representative in light of the recent *dramatic* , it did not state that the Applicant lacked the requisite skills needed due to the said dramatic developments. He also submitted that Mr. Fernando whom Mr. Chanda recommended in the same memorandum of January 7 2014 to replace the Applicant was among the short-listed candidates for the post of Deputy Representative over whom the Applicant had been chosen in December 2013.

77. It is the view of the Tribunal that while there is no contest that staff regulation 1.2(c) confers authority on the Secretary-General to assign staff members to suitable duties and offices, the argument that he can also on the strength of that authority alone simply and arbitrarily remove staff members from their duties is not unimpeachable. It has been well established by judicial pronouncements that any discretionary authority must be exercised judiciously and in the best interests of the Organization.¹⁰

78.

80. After consultations between UNHCR leadership in Geneva and the officers on leave, an email was sent from Geneva on 22 December 2013 to Mr. Balke, the then OiC UNHCR in Juba and copied to the Applicant and others informing them that Mr. Chanda was to cut short his leave and return to Juba during the weekend of 27-29 December while the Applicant would also cut short his leave and return on 23 December. Ms. Yoshida from the Regional Bureau for Africa office in Geneva was to proceed to and arrive in Juba on a special mission on 24 December to act for Mr. Chanda until his return to the duty station.

81. As scheduled, the Applicant returned to Juba on 23 December 2013 and on the same day his appointment as Deputy Representative was announced following a competitive recruitment process. The new appointment was to take effect on 1 January 2014. Also as scheduled, Ms. Yoshida arrived in Juba the next day 24 December 2013. The Applicant worked with Ms. Yoshida to contain the escalating emergency situation until 30 December 2013.

skills were no longer suited to the position.

84. On 4 December 2013 appointments, there were dramatic developments in South Sudan that needed adjustment to the profile of the new position of the Applicant to enable UNHCR to handle the demanding challenges that had emerged. This claim was then followed by a statement that since 15 December 2013, an escalation in violence had engulfed about four states in South Sudan and produced 200,000 IDPs. The memorandum also advised that the Applicant be consulted before the action to remove him was taken.

85. The next day 8 January 2014, the OiC of the UNHCR Human Resources office wrote to the Applicant informing him about a proposed review of assignments that could remove him from his new position as Deputy Representative. Meanwhile in a conversation with the Applicant on 14 January 2014,

to be answered. These questions are: (a) At what point in time were reliable predictions about the scope of the South Sudan crisis made by UNHCR? (b) When were these reliable predictions which Mr. Chanda relied upon to seek the removal of the Applicant, only a few days after he returned from leave, made? (c) Where are these reliable predictions documented?

88. The clear answer is that there were no properly documented analyses of the refugee emergency in South Sudan by UNHCR or Mr. Chanda upon which the decision to relieve the Applicant of the position for which he had properly competed and won could have been based. Such proper and detailed analyses, which would provide needed justification for the reversal of the appointments of a staff member, should have shown what new skill-set was required and how that of the Applicant was not suitable in the circumstances. This documented analysis should have been sent to the High Commissioner together with the memorandum of 7 January 2014 for consideration.

89. In closing arguments, the Respondent submitted that Mr. Chanda made
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finds that a mere statement by a Country Representative, who had been away from South Sudan for most of the crisis, that there had been dramatic developments in the country that required adjustment to the profile of the Deputy Representative and other staff was not a reasoned request and cannot, without more, constitute a

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appointment were evidently never presented to the High Commissioner at the material time to provide him with a basis to take the impugned administrative decision.

92. Where indeed the Organization acts without proper justification, as in this case, to remove a staff member from a position he had properly earned, the claim of an exercise of discretion will fail because discretion must be exercised judiciously. UNAT held that Courts or Tribunals do not normally interfere in the exercise of a discretionary authority except where there is evidence of illegality, irrationality and procedural impropriety.¹¹

93. There is no doubt that the best interests of UNHCR were clearly not served by the removal of the Applicant. It is unfortunate that some members of the UNHCR senior management sought to hide behind the veil of acting in the

regard to the role he played, there is unchallenged evidence that within that period he met with South Sudanese government officials and with the leadership of the Commission for Refugee Affairs. In those meetings, he obtained agreements that ensured the safety and security of civilians and UNHCR staff who were endangered due to the conflict.

96. He also met with UNHCR staff members to discuss stress-management and reinstated a peer support system for them. He additionally arranged for the regional office to send someone to assist staff in the country with stress-related issues. Also, the Applicant arranged for extra security at UNHCR refugee camps. He was able to resolve disputes at the Bunj refugee camp between UNHCR and government officials with regard to access to the camp and the use and distribution of resources.

97. Together with M(g)1 aca3ditio7(to 0 1 e112 Tf1 0 0 1 114e58 589.03 Tm[-])TJ8nTBT/F17

114. Vjg" Tgurqpfgrpøu" ecug" ku" vjcv" vjg" tgoqxcn" qh" vjg" Cr rnkecpv" htq o" jku" new assignment, placing him on SLWFP and then replacing him with a candidate against whom he was previously selected during the recruitment process were based on operational reasons. kp" vjg" ucog" dtgcvj." vjg" Tgurqpfgrpøu" Counsel ctiwgf" vjcv" òjcf" vjg" Cr rnkecpvøu" wpcwvjqt|gf" fgrctvwtg" htq o" Uqwwj" Uwfc" dggp" vcmgp" kpq" eqpukfgtcvkqp í . "vjku" yqwnf" pqv" jcxg" eqpukvwvgf" cp" gzvtcpqgwu" hcevqt0ø"

115. The Tribunal disagrees with the submission vjcv" kh" vjg" Cr rnkecpvøu" departure from South Sudan on 30 December 2013 were considered, it would justify the reversal of his appointment. The argument does not hold water because UNHCRøu" case ku" vjcv" vjg" tgxgtucn" qh" vjg" Cr rnkecpvøu" cr rkpvo gpv" jcf" pqvjkpi" vq" do with the fact that he left South Sudan on 30 December 2013. For UNHCR to successfully base the reversal decision on that fact, it ought to have called for an explanation from the Applicant as to why he left the duty station when he did. It would then remain to be seen if the removal of the Applicant could be justified in the lighv" qh" jku" gznpcvkqpu" cpf" vjg" Wpkvgf" Pcvkqpuø" rqnke{ "qp" uvchh" dncncekpi" their personal and professional lives.

116. Also with regard to his removal as Deputy Representative, the Applicant stated both in his pleadings and witness statement that Mr. Chanda told him on 14 January 2014 during a conversation between them that senior staff of the UNHCR were unhappy with him for leaving South Sudan on 30 December 2013. Even though the Respondentøu" ecug" ku" that vjg" tgxgtucn" qh" vjg" Cr rnkecpvøu" appointment was based pur TJETBT1 0 0 1 99.JTJETn03>161005291t 0 137 Tm[2013.)-109(EoBT9

constituted an extraneous factor reveals that the Applicant's motivation was not based on his motivation.

118. The Applicant's denials, the alleged unauthorized departure of the Applicant from South Sudan on 30 December 2013 and his unilateral advisory to female staff members not to return to the country during the emergency were definitely the reasons for his removal from the position of Deputy Representative. In other words, the decision of the UNHCR leadership to remove the Applicant in this case was not based on any operational reasons but was simply disciplinary action by stealth.

What is the true purport of the memorandum of 7 January 2014 requesting the removal of the Applicant as Deputy Representative in South Sudan? Did the removal of the Applicant from the said position constitute a breach of some of the provisions of UNHCR Policy and Procedures on Assignments and Promotions (PPAP)?

119. The Applicant referred the Tribunal to WP JET/PPAP. It was argued on his behalf that UNHCR violated its own rules, policies and procedures when it removed the Applicant from the position of Deputy Representative in South

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127. Also in the PPAP preamble at paragraph 4(a), it is stated that the
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UNHCR and to assign and promote the most suitable candidates to available
positions in a timely manner in accordance with the established rules while taking
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128.

Case No. UNDT/NBI/2014/031

Judgment No

141. With the exception of the period from December 2014 until September 2015 when he was placed in a temporary assignment with UNHCR in Uganda, the Applicant has been in the SIBA category with full pay since UNHCR was unable to place him.

142. J c x k p i " h q w p f " v j c v " v j g " C r r n k e c p v ø u " t g o q x c n " h t q o " j k u " r q u k v k q p " c u " F g r w v { " Representative was unlawful and that this removal has evidently harmed his career prospects, the Applicant is entitled to compensation for the illegal actions of the UNHCR Administration including its failure to follow its own rules and procedures and accordingly awards the Applicant four o q p v j u ø " p g v " d c u g " u c i c t { " c u " compensation.

(Signed)

Judge Nkemdilim Izuako

Dated this 10th day of March 2017

Entered in the Register on this 10th day of March 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi