Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2011/050
Judgment No.:	UNDT/2012/012
Date:	30 January 2012
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

MAULFAIR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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members who met the eligibility requirements for consideration for conversion to an indefinite appointment had been informed through individual mail. Staff members who had not received such notification but considered that they met the requirements were invited to contact the Recruitment and Appointments Service, which the Applicant did on 1 March 2011.

8. By email dated 7 March 2011, the Applicant was advised that, owing to non-compliance with the requirement of at least two years of service in a D or E duty station, she was not eligible for consideration for conversion of her fixed-term appointment to an indefinite appointment.

9. On 6 April 2011, the Applicant submitted a request for management evaluation of the decision communicated on 7 March 2011.

10. By letter dated 21 June 2011, she was notified by the Deputy High Commissioner for Refugees that the decision not to consider her eligible for consideration for conversion of her fixed-term appointment to an indefinite appointment would stand.

11. The Applicant submitted her application to the Tribunal on 9 September 2011 and the Respondent filed his reply on 10 October of that year.

12. By Order No. 177 (GVA/2011) of 19 October 2011, the Tribunal raised, on its own motion, the issue of the lawfulness of the conversion procedure provided for in the internal memorandum of 21 January 2011 in view of the fact that the Staff Rules with effect from 30 June 2009 precluded the granting of indefinite appointments.

13. Counsel for the Respondent and Counsel for the Applicant submitted their observations on 2 and 14 November 2011, respectively.

14. On 24 January 2012, the Tribunal held a hearing in which Counsel for the Respondent and Counsel for the Applicant participated in person.

d. Application of the contested criterion excludes staff members who have demonstrated an objective interest in serving in D or E duty stations but were never selected for those positions and staff members who have served in such duty stations but were unable to complete two years of service as a result of events outside their control. Thus, application of the contested criterion precludes "reasonable consideration" of requests for conversion of appointments. Such consideration should be based on criteria that are within the staff member's control or that have some reasonable nexus to the concept of career service and are applicable to all staff members without distinction;

e. The Deputy High Commissioner for Refugees has already authorized exceptions to the contested criterion and the circumstances of the three staff members who benefited from those exceptions are not sufficiently different from the Applicant's to warrant a less rigid application of the contested criterion;

f. Concerning the issue raised by the Tribunal on its own motion, she concurs with the Respondent's observations.

16. The Respondent's contentions are:

a. The Applicant does not claim to have been eligible under the internal memorandum of 21 January 2011; rather, she questions its lawfulness. The Tribunal does not have the authority to amend the applicable regulations or to set aside the memorandum, but only to interpret its provisions in light of higher-ranking laws. In this case, the memorandum does not violate such laws;

b. The High Commissioner did not act *ultra vires* when introducing the requirement of two years of service in a D or E duty station. In its resolution 37/126, the General Assembly decided that "staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment". Former staff rule 104.12(b)(iii) and current staff rule

13.4(b) state that the status of staff members who meet the eligibility criteria for a permanent appointment will be considered "taking into account all the interests of the Organization". Furthermore, resolution 51/226 states that considerations other than five years of continuing service should be taken into account in awarding a permanent contract and, in light of the operational considerations of UNHCR, the requirement of two years of service in a D or E duty station, which provides an incentive for staff to assume functions in the deep field, is a reasonable consideration with a view to career service;

c. The requirement of two years of service in a D or E duty station has a reasonable nexus to the concept of career service. A strict rotation policy for UNHCR staff both satisfies the Office's operational requirements and the need for burden-sharing among its Professional staff and gives staff working at headquarters an understanding of field realities;

d. The requirement of two years of service in a D or E duty station has been a crucial part of the legal framework governing the granting of indefinite appointments for an extended period of time. It was introduced under the former Staff Rules and was expressly stipulated in the Procedural Guidelines for Appointments, Postings and Promotions promulgated on 3 November 2003. Consequently, it does not constitute a new limitation to the applicable provisions and the Applicant had long been aware of it;

e. The contested criterion allows for reasonable consideration of requests for conversion of appointments. It was applied without distinction to all staff who were subject to rotation;

f. The General Assembly did not intend to confer on staff the right to conversion of their appointments to indefinite appointments and the Administration has discretionary authority in that area;

g. The Applicant has not applied for a single position in a D or E duty station since her reassignment to Turkey in February 2005;

h. The circumstances of the staff who were granted indefinite appointments despite not having served in the deep field were substantially different from those of the Applicant;

i. Concerning the issue raised by the Tribunal on its own motion, the one-time review exercise for the granting of indefinite appointments in accordance with internal memorandum IOM/04-FOM/05/2011 addresses the acquired rights of UNHCR staff and does not violate any higher-ranking law.

Consideration

17. The Tribunal, through its Order No. 177 (GVA/2011) of 19 October 2011, raised on its own motion the issue of the lawfulness of conversion of fixed-term appointments to indefinite appointments by UNHCR as provided in the internal memorandum of 21 January 2011. However, in light of the written observations submitted by the parties and their oral observations during the hearing, the Tribunal considers that there is no further need to consider the issue that it raised.

18. Therefore, it must now consider the arguments submitted by the Applicant in contesting the lawfulness of the High Commissioner's decision not to convert her fixed-term appointment to an indefinite appointment.

19. The Applicant first maintains that the High Commissioner acted *ultra vires* in requiring at least two years of service in a D or E duty station for conversion of a staff member's fixed-term appointment to an indefinite appointment, as he did in his internal memorandum IOM/04-FOM/05/2011 of 21 January 2011, since this criterion was not envisaged by the General Assembly.

20. Internal memorandum IOM/04-FOM/05/2011 of 21 January 2011, entitled "One-Time Review for the Granting of Indefinite Appointments", refers to the Procedural Guidelines for Appointments, Postings and Promotions, promulgated by internal memorandum IOM/FOM/75/2003, which establish the eligibility criteria for a staff member's consideration for conversion of a fixed-term

appointment to an indefinite appointment, including the requirement of a minimum of two years of service in a D or E duty station.

21. The Applicant maintains that the General Assembly, in its resolution 51/226 (Human resources management) of 25 April 1997, did not expressly establish that criterion of length of service in a particular duty station and that the High Commissioner therefore acted *ultra vires*.

22. However, the aforementioned resolution states:

> [The General Assembly,] *Taking note* of the report of the Secretary-General on the ratio between career and fixed-term appointments,
> 1. *Underlines* the importance of the concept of career service for staff members performing continuing core functions;
> ...
> 3. *Decides* that five years of continuing service as stipulated in its resolution 37/126 of 17 December 1982 do not confer the automatic right to a permanent appointment, and also decides that other considerations, such as outstanding performance, the operational realities of the organizations and the core functions of the post, should be duly taken into account[.]

23. Thus, the intent of the United Nations General Assembly, as expressed in the aforementioned resolution, was not to establish an automatic right to a permanent appointment but to allow the Secretary-General, and therefore the High Commissioner for Refugees, to take other considerations into account, including the operational realities of the organizations that they head.

24. It is beyond dispute that, owing to the operational realities of UNHCR as assessed by the High Commissioner, he may wish to grant indefinite appointments only to staff members on fixed-term appointments who have two years of service in D or E duty stations, which are considered more difficult than other duty stations, and the Tribunal does not find this unreasonable within the meaning of General Assembly resolution 37/126, adopted on 17 December 1982.

25. While the Applicant goes on to maintain that it was the UNHCR Administration that prevented her from m

discontinued and that her subsequent applications for similar positions were rejected, these circumstances have no bearing on the lawfulness of the contested decision since it is clear that UNHCR deliberately chose to give a career advantage to staff who met the established criteria.

26. Lastly, while the Applicant maintains that staff members who did not meet the criterion of service in D or E duty stations were nevertheless awarded indefinite appointments, she provides no evidence in support of her allegations. Although the High Commissioner, in his defense, admits that exceptions were made for medical reasons, it appears that internal memorandum IOM/04-FOM/05/2011 of 21 January 2011 refers to the Procedural Guidelines for Appointments, Postings and Promotions, promulgated by internal memorandum IOM/FOM/75/2003, which provide for medical exceptions to the rotation requirement for staff members.

27. Thus, the Applicant, who was not in the same situation as the staff members for whom medical exceptions were warranted, cannot claim that the Administration did not meet its obligation to treat staff members in similar situations alike.

28. It is clear from the foregoing that none of the Applicant's contentions establish the unlawfulness of the contested decision.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 30th day of January 2012

Entered in the Register on this 30th day of January 2012

(*Signed*)

Anne Coutin, Officer-in-Charge, Geneva Registry