



File number: SA-13-J

Before: Judge for Staff Appeals
Judge Thomas Laker

Date: 7 November 2019

Language: English

Classification: Public

**PUBLIC REDACTED VERSION OF THE
22 OCTOBER 2019 DECISION ON APPEAL**

Appellant:
[REDACTED]

Legal Assistants to the Appellant:

Neil Macaulay, Barrister at Bretton Woods Law
Graham Butler, Associate Professor of Law at Aarhus University

Respondent:
The Registrar

I. INTRODUCTION

1. This case concerns the renewal of the employment contract of [REDACTED] (“Appellant”), a citizen of the United Kingdom (“UK”), with the Kosovo Specialist Chambers (“KSC”) from 15 June 2019 only until 31 October 2019, as opposed to 14 June 2020. This decision was taken by the Registrar in context with the decision by the government of the UK to invoke Article 50 of the Treaty of the European Union for withdrawal from the European Union (“EU”).

2. The Appellant has been employed at the KSC [REDACTED] and has an employment contract until 31 October 2019.¹ The Call for Contributions reflected that the post to which the Appellant applied was open to nationals of Third Contributing States.²

3. The Appellant requested review of the following administrative decisions: (i) the Registrar’s intent, expressed during a meeting on 15 April 2019, to issue contracts to UK staff until 31 October 2019;³ and (ii) the actual employment contract of the Appellant, renewing her contract until 31 October 2019.⁴

4. On 12 July 2019, the Registrar denied the Request for Review on the basis, *inter alia*, that the decision to offer the Appellant a contract until 31 October 2019 “cannot be regarded as an administrative decision that is likely to infringe on any rights deriving from [the Appellant’s] previous contract”.⁵ The Registrar further determined

¹ See F009, Filing Pursuant to the Order on Case Management of 2 September 2019, 9 September 2019 (confidential), para. 4.

² See F009/A02, Annex II (Call for Contributions 4-2016) (confidential) (“Call for Contributions”), p. 52 (Registry pagination).

³ F001/A01, Minutes of 15 April 2019 meeting (confidential).

⁴ F001/A01, Employment contract [REDACTED], 31 May 2019 (confidential).

⁵ F001/A03, Registrar’s Review Decision, 12 July 2019 (confidential) (“Review Decision”), p. 4.

that the withdrawal of the UK from the EU meant that UK staff members cannot be employed beyond 31 October 2019, based on the eligibility of costs.⁶

II. PROCEEDINGS

5. On 28 July 2019, the Appellant filed an appeal against the decision of the Registrar of 12 July 2019, denying her request for review of a decision renewing her employment contract until 31 October 2019.⁷

6. On that same day, the Appellant filed an application requesting the recusal and/or disqualification of the undersigned Judge from considering the Appeal.⁸

7. On 30 July 2019, the President of the KSC assigned the Appeal to the undersigned Judge and invited him to decide upon the Application, insofar as it related to the request for the recusal.⁹

8. On 9 August 2019, the Registrar responded to the Appeal.¹⁰

9. On 15 August 2019, the undersigned Judge declined to recuse himself from considering the Appeal.¹¹

10. On 18 August 2019, the Appellant filed a reply.¹²

⁶ Review Decision, p. 5.

⁷ F001, Appeal before a Judge for Staff Appeals under Staff Rules 83 and 84, 28 July 2019 (confidential) ("Appeal").

⁸ F002, Application for Recusal/Disqualification of a Judge, 28 July 2019 (confidential) ("Application").

⁹ F003, Decision Assigning a Judge for Staff Appeals, 30 July 2019 (confidential), p. 3.

¹⁰ F004, Response to Appeal against the Decision of the Registrar, 9 August 2019 (confidential) ("Response").

¹¹ F005, Decision on a Request for Recusal Pursuant to Rule 7 of the Staff Appeals Procedure and Rule 20 of the Rules of Procedure and Evidence, 15 August 2019 (confidential).

¹² F006, Reply to the Response of the Registrar, 18 August 2019 (confidential) ("Reply").

11. On 20 August 2019, the President of the KSC dismissed the Appellant's alternative request for disqualification of the undersigned Judge.¹³

12. A case management discussion was held on 23 September 2019, in accordance with Rule 18(1) of the Rules of Procedure for Staff Appeals ("Staff Appeals Procedure").¹⁴

III. APPLICABLE LAW

13. Rule 33 of the Specialist Chambers and Specialist Prosecutor's Office Staff Rules ("Staff Rules") provides that "[t]he selected candidate shall provide the [Kosovo Relocated Specialist Judicial Institution ("KRSJI")] with all relevant documents attesting that all requirements for the post are met regarding:

[...]

(2) The requirements listed in the vacancy notice; moral requirements, i.e., character references as to their suitability for the performance of their duties;

[...]

(5) any other requirements listed in the vacancy notice.

14. Rule 37 of the Staff Rules sets out, in part:

(a) Employment contracts for contracted staff shall only be concluded for a fixed term. They shall normally be granted for a one year period but may be issued for a different period for operational needs.

(b) The renewal of a contract shall not give rise to any right or expectation of further renewal or conversion into a contract of indefinite duration, even if the same type of work is required by the KRSJI thereafter.

¹³ F007, Decision on a Request for Disqualification, 20 August 2019 (confidential).

¹⁴ See F008, Order on Case Management Pursuant to Rules 17 and 18 of the Staff Appeals Procedure, 2 September 2019 (confidential).

15. Rule 83 of the Staff Rules sets out, in part, that “[e]very staff member shall have the right to appeal against a final administrative decision of the Registrar relevant to the rights and obligations of staff.”

16. Rule 84 of the Staff Rules sets out, in relevant part:

(a) A staff member who wishes to appeal an administrative decision of the Registrar other than a decision taken as a result of a disciplinary action shall, as a first step, address a letter to the Registrar requesting that the administrative decision be reviewed; such letter must be sent with signature to the working email address of the Registrar within one month from the date the staff member was notified of the administrative decision in writing.

(b) If the staff member wishes to appeal, the staff member shall submit the appeal by signed letter to the working email address of the Registrar within fourteen days from the date of receipt of the Registrar's answer to the request under sub-rule (a).

[...]

(d) The appeals procedure shall be set out by the President. The appeals procedure must ensure equal representation of the views of the staff member concerned as well as those of the Registrar.

[...]

(g) The judge for staff appeals shall endeavour to bring about a speedy solution of the matter in conformity with the requirements of due process. The judge for staff appeals shall decide on the appeal in accordance with the highest standards of administrative practices in comparable fields and shall provide reasons for his or her decision that shall, to the extent possible, be made public. The judge for staff appeals shall issue his or her decision within thirty days after hearing from the parties, unless there are compelling reasons to request a delay.

17. Rule 5 of the Staff Appeals Procedure sets out, in part:

(1) Time limits are prescribed by the Rule or may be set by the Judge. Unless otherwise specified, they are calculated by calendar days.

(2) Time limits run from the first working day after the notification of the relevant filing [...]

18. Rule 10(1) of the Staff Appeals Procedure provides that

[t]he Judge for Staff Appeals is competent to receive and decide on an appeal against a decision of the Registrar whereby the Appellant alleges that the Registrar has:

- (i) exceeded his or her responsibilities or competence;
- (ii) failed to exercise his or her responsibilities;
- (iii) erred on a question of law;
- (iv) committed an error in procedure, such as to affect the decision of the case; or
- (v) erred on a question of fact, resulting in a manifestly unreasonable decision.

19. Rule 29(3) of the Staff Appeals Procedure provides that final decisions shall, to the extent possible, be public and may only be redacted where this is deemed necessary by the Judge, *proprio motu* or upon request by the Appellant for the purpose of protecting the Appellant's identity.

IV. SUBMISSIONS BY THE PARTIES

20. The Appellant submits that the Registrar failed to provide a reasoned opinion, as required by the Staff Rules and the Staff Rules and the Standard Operating Procedure on Review of Administrative Decisions.¹⁵ Specifically, the Appellant contends that the Registrar, “[b]y failing to confirm whether an administrative decision has even been identified [...] has left the staff member bereft of any discernible indication that [her] complaint has even been properly identified and considered”.¹⁶

21. Further, the Appellant contends that the Registrar “made specific errors of law” throughout the Review Decision.¹⁷ Specifically, the Appellant asserts that the Registrar, as far back as February 2019, erroneously relied on the wording that “there

¹⁵ Appeal, paras. 14-15. *See also* Appeal, paras. 7-9, 12-13.

¹⁶ Appeal, para. 15.

¹⁷ Appeal, p. 4.

is no legal basis for continuation of secondments from the UK and for employment of UK nationals as international contracted staff”, without any legal foundation or support.¹⁸ The Appellant submits that by failing to address this core issue of the Appeal, the Registrar has caused unnecessary moral harm and has obstructed the “speedy solution of the matter” as required by the Staff Rules.¹⁹

22. According to the Appellant, there is further no requirement within the KSC’s legal framework that staff employed there belong to a specific nationality.²⁰ The Appellant contends that by maintaining a nationality requirement for staff, the Registrar has erred in law, failed to observe Rules 1 and 28 of the Staff Rules, and acted in an unlawful and discriminatory manner.²¹ The Appellant also asserts that the nationality requirement imposed by the Registrar is “a violation of customary international law, a fundamental princip[le] of international administrative law, the European Convention on Human Rights and the Constitution of the Republic of Kosovo” and “[m]ost crucially it violates the Staff Rules”.²²

23. The Appellant further submits that the decision announced at the 15 April 2019 meeting to offer UK staff members’ contracts until 31 October 2019 was not taken by the Registrar, as required by internal law, but was taken at the behest of someone else.²³ The Appellant contends that by relying on outside instructions, the Registrar has “created the situation where the right to a legal remedy in this instance may also lie against others making decisions elsewhere”.²⁴

24. According to the Appellant, there was in fact an expectation of renewal of contracts for the duration of a year, as evidenced by the fact that staff contracts are

¹⁸ Appeal, para. 16.

¹⁹ Appeal, para. 16.

²⁰ Appeal, para. 16. *See also* Reply, paras. 6-7.

²¹ Appeal, paras. 17-18.

²² Appeal, para. 18. *See also* Appeal, para. 19.

²³ Appeal, paras. 20-22.

²⁴ Appeal, para. 21.

ordinarily renewed on an annual basis.²⁵ The Appellant contends that the Registrar did not need to offer a shorter term contract to UK staff members, as she had previously also granted a one year contract, notwithstanding the impending withdrawal of the UK from the EU.²⁶

25. The Appellant asserts that the Registrar's reliance on "operational needs" to justify the shortened duration of the employment contracts "is misplaced and wrong in law and fact".²⁷ According to the Appellant, the duties associated with her post will continue after her departure.²⁸ The Appellant submits that the Registrar wrongfully relied on the grant agreement as a basis for providing shortened contracts and she contends that the intent expressed by the Registrar is in fact contrary to the grant agreement, which does not provide for a nationality requirement.²⁹

26. Finally, the Appellant asserts that she "suffered substantial anxiety, stress and moral harm as a result of the decision to issue [her] with a shortened contract".³⁰ According to the Appellant, the decisions by the Registrar have led to uncertainty when it comes to her finances, her status and her personal life, and her health and wellbeing have suffered as a result.³¹

27. The Appellant requests that the Registrar provide "all written records of 'instructions' given to the Registrar [...] so that [she] can determine the basis for making the instruction claim and the legality of the 'instructions'".³² The Appellant further requests that the person who instructed the Registrar be made known and the

²⁵ Appeal, para. 25. *See also* Appeal, para. 27; Reply, para. 11.

²⁶ Appeal, para. 27.

²⁷ Appeal, para. 25. *See also* Reply, para. 12.

²⁸ Appeal, para. 25.

²⁹ Appeal, para. 26.

³⁰ Appeal, para. 28.

³¹ Appeal, para. 28.

³² Appeal, para. 29. *See also* Appeal, para. 30.

“production of all their records and determination behind the decision to confirm whether such instructions were given and if so the legality of them”.³³

28. The Appellant seeks the following relief: (a) the speedy resolution of the matter in conformity with the requirements of due process and the modification of the decision to award her with a shortened contract to a one-year contract; (b) the immediate offer and replacement of the current contract with a contract that runs until 14 June 2020 and the continuation of her employment as is reasonably expected or a declaration of entitlement thereto; (c) a judicial declaration of the illegality of the Registrar’s conduct to determine the Appellant’s employment rights solely on grounds of nationality; (d) the annulment of the Call for Contributions advertising her position and an undertaking not to advertise her position until the claimed legal basis for ending her employment has been found finally proven; (e) provision of a reasoned explanation of the manner in which the Registrar reached her decision; (f) immediate provision in writing of all scenarios foreseen if the application of the contract offered results in her employment ending on 14 June 2020; (g) if her employment ends, but the administrative decision is subsequently reversed/found to be wrong, her reinstatement under the terms of her June 2018/June 2019 contract, and compensation for loss of earnings; (h) if her employment ends, but the administrative decision is subsequently reversed/found to be wrong and reinstatement is not possible, damages to be awarded in full consideration of all prejudice and material harm; (i) damages for moral harm of €20,000; (j) legal costs to be assessed; (k) an order for privacy regarding the Appellant’s name and details.³⁴

29. The Registrar submits that requiring staff members to demonstrate that there existed an administrative decision that produced direct legal consequences to the staff member requesting review and caused that staff member prejudice has an appropriate

³³ Appeal, para. 29.

³⁴ Appeal, para. 31.

legal basis and is a reflection of established jurisprudence of international civil service tribunals.³⁵ The Registrar asserts that the threshold established by this requirement “is necessary to avoid litigation of matters that are not ripe for review, hypothetical matters or matters in the abstract”.³⁶ The Registrar contends in this regard that she is not required to address hypothetical future injuries based on potential future administrative procedures.³⁷

30. The Registrar further submits that the internal legal framework does not provide for a right to renewal of an employment contract at the KSC-Specialist Prosecutor’s Office (“SPO”) and the offer to renew the Appellant’s appointment until 31 October 2019 therefore cannot be considered an administrative decision that is likely to infringe upon the Appellant’s rights deriving from her previous contract.³⁸ According to the Registrar, the Appellant has failed to point to any express promise of renewal for a specific duration, in writing or otherwise.³⁹

31. The Registrar asserts that the Appellant has not provided any supporting material or otherwise explained in detail her claims for material or moral damages that were allegedly caused as a result of the renewal of her employment.⁴⁰

32. The Registrar contends that, in accordance with Rule 37(a) of the Staff Rules, the Appellant was rightfully issued a shortened contract on the basis of operational needs.⁴¹ According to the Registrar, the grant agreement, read together with the budget of the KSC-SPO and the budgetary impact statement, reflect that only

³⁵ Response, paras. 17-19, 21. *See also* Response, paras. 22-27.

³⁶ Response, para. 19.

³⁷ Response, para. 19.

³⁸ Response, paras. 29-30. *See also* Response, paras. 31-33.

³⁹ Response, para. 34. *See also* Response, para. 43.

⁴⁰ Response, para. 36.

⁴¹ Response, paras. 43-44. *See also* Response, paras. 64, 72.

personnel that have the nationality of an EU member State or a Third Contributing State can be considered as an eligible cost.⁴²

33. The Registrar further asserts that the Registry is under the European Commission's "legal and financial control of the budgetary implementation" and that the Registrar is responsible for the administration of the KSC-SPO in accordance with Article 43(3) of the Law and is the signatory to the grant agreement.⁴³ Accordingly, the Registrar submits that it is her obligation to ensure full compliance by the KSC-SPO with the terms of the grant agreement.⁴⁴ The Registrar contends that the relevant EU bodies have stipulated on several occasions that the employment of UK nationals by the KSC-SPO cannot continue without a withdrawal agreement or any other arrangement in place and notes that EU Council Decision (EU XT 20015/19) extended the date for the UK's withdrawal until 31 October 2019.⁴⁵

34. The Registrar submits that the only difference for UK staff members compared to other staff members is the difference in length of the employment contract and that the renewal of the contract itself does not prejudice UK staff members.⁴⁶ The Registrar contends that the duration of the Appellant's contract is justified based on objective, operational needs, taking into account primarily financial considerations and only indirectly considerations based on nationality.⁴⁷ In any event, the Registrar asserts that as reflected in the jurisprudence of the United Nations Dispute Tribunal, "[t]he principle of equality means that those in like cases should be treated alike, and that those who are not in like case[s] should not be treated alike".⁴⁸ The Registrar submits that the objective reality of the UK's withdrawal from the EU, and therefore the scope

⁴² Response, paras. 47-49. *See also* Response, paras. 46, 55.

⁴³ Response, para. 50. *See also* Response, para. 51.

⁴⁴ Response, para. 51.

⁴⁵ Response, para. 52-53. *See also* Response, paras. 56-57.

⁴⁶ Response, para. 58.

⁴⁷ Response, para. 59.

⁴⁸ Response, para. 60. *See also* Response, para. 61.

of the application of the relevant EU treaties prohibiting discrimination on the basis of nationality, affects staff members differently.⁴⁹

35. The Registrar contends that the Call for Contributions, of which the Appellant has requested the removal, is not the subject of the Appeal and this request should thus be rejected.⁵⁰

36. The Registrar requests that the undersigned Judge reject the Appellant's request for the production of documents on the basis that these documents are irrelevant to the determination of the Appeal.⁵¹

37. Finally, the Registrar submits that to the extent that the Appellant's request for an order for privacy is limited to redacting the Appellant's name and identifying information in the final decision, the Registrar has no objection.⁵² The Registrar requests the opportunity to be heard before the undersigned Judge decides to issue a public redacted version of this decision pursuant to Rule 29 of the Staff Appeals Procedure.⁵³

38. In her reply, the Appellant contends that the relevant provisions relied upon by the Registrar as a basis for issuing a shortened contract are either redacted in their entirety or have not been provided to the Appellant.⁵⁴ The Appellant asserts that the failure by the Registrar to provide the Appellant with the relevant documents upon which the Registrar has relied, not only raises questions of a "procedural, due process

⁴⁹ Response, para. 60.

⁵⁰ Response, para. 62. *See also* Response, para. 73.

⁵¹ Response, para. 65. *See also* Response, para. 66. The Registrar contends that for this same reason, there is no need for an oral hearing in this case. *See* Response, para. 65. The Registrar requests that should the undersigned Judge consider that there is a reviewable decision, she be granted the opportunity to make further submissions, including at an oral hearing, if any. *See* Response, paras. 67, 74. *See also* Reply, para. 2. It is noted that this request was rejected during the case management hearing and thus no longer needs to be addressed herein.

⁵² Response, para. 69.

⁵³ Response, para. 70.

⁵⁴ Reply, para. 3.

and inequality of arms disadvantage” but also “leaves the particular matter unevicenced in the pleadings”.⁵⁵ The Appellant further contends that the Registrar has dismissed as irrelevant the very documents underpinning the basis upon which she has in substantial part justified her decision.⁵⁶

39. The Appellant contends that the budget impact statement upon which the Registrar relies does not form part of the Appellant’s contract, was not referenced in the Review Decision and did not prevent the Registrar from issuing a one-year contract for the previous year.⁵⁷ Similarly, the Appellant asserts that the grant agreement was signed in full knowledge that the UK intended to withdraw from the EU and a one-year contract was still issued last year.⁵⁸ The Appellant submits that, in any event, she is to date still a citizen of an EU Member State and should thus not have been treated differently from other staff members.⁵⁹ The Appellant further replies that the budget impact statement contains the word “can” as opposed to “shall” when it comes to the hiring of EU staff members and Third Contributing States.⁶⁰

40. The Appellant further asserts that there is a reviewable administrative decision and that the word “prejudice” appears nowhere in the cases cited by the Registrar or “generally under the [United Nations] employment law regime”.⁶¹ The Appellant contends that even if she were required to show prejudice as a result of the administrative decision, there is clear evidence thereof as a result of the shortened duration of the employment contract.⁶² The Appellant submits that the nature and circumstances of her complaint “satisf[ies] the tests of admissibility of all the mature

⁵⁵ Reply, para. 3.

⁵⁶ Reply, para. 9.

⁵⁷ Reply, para. 5. *See also* Reply, para. 4.

⁵⁸ Reply, para. 8.

⁵⁹ Reply, para. 8.

⁶⁰ Reply, para. 5.

⁶¹ Reply, para. 11.

⁶² Reply, para. 11.

internal legal systems of international organisations including the KSC Staff Appeals system”.⁶³

V. CONSIDERATIONS

A. ADMISSIBILITY OF THE APPEAL

a. Timely filing of the Appeal

41. Rule 84(b) of the Staff Rules provides that an appeal shall be submitted within 14 days from the date of receipt of the Registrar’s decision on the request for review.

42. In the present case, the Review Decision was communicated to the Appellant on Friday, 12 July 2019, and the Appeal was filed within the 14-day time limit, namely on 28 July 2019.⁶⁴ The Appellant attached the documentation required to the Appeal pursuant to Rule 15(2) of the Staff Appeals Procedure. The requirements for an appeal as set out in Rule 84(b) of the Staff Rules and Rule 15 of the Staff Appeals Procedure have therefore been met and the Appeal is admissible in this respect.

b. *Ratione personae*

43. Rule 84(a) of the Staff Rules provides that “[e]very staff member shall have the right to appeal against a final administrative decision of the Registrar”.

44. The Appellant was a staff member on 28 July 2019, when the Appeal was filed. Accordingly, the Appeal is admissible in this respect as well.

⁶³ Reply, para. 12.

⁶⁴ See Rule 5(2) of the Staff Appeals Procedure.

c. *Ratione materiae*

45. Rule 83(a) of the Staff Rules, read together with Rule 84(a) of the Staff Rules, grants the staff member the right to file an appeal against a (final) “administrative decision” only.

46. It has been previously determined, in accordance with established jurisprudence of international civil service tribunals, that an administrative decision is “[a] unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order”.⁶⁵ In the present case, the offer by the Registrar of a renewed contract to an individual staff member satisfies all the requirements necessary to constitute a reviewable administrative decision. Indeed, by establishing the conditions of service, the (i) Registrar, as appointing authority,⁶⁶ (or administration) (ii) has taken a unilateral decision (iii) in a precise individual case, (iv) which produces a direct legal consequence, given that the renewed contract with the staff member can only be concluded under the conditions established by the Registrar.

47. It is well known that Rule 37(b) of the Staff Rules excludes any right or expectation of further renewal of a contract. However, after deciding to offer an individualized employment contract, the administration is bound by the Staff Rules and any other obligation set forth in the employment contract with that staff member.

⁶⁵ See SA-11-J/F008, Public Redacted Version of the 13 September 2019 Decision on Appeal, 18 September 2019, para 45, citing UNAT, *Faye v. Secretary-General of the United Nations*, 2016-UNAT-654, Judgment, 30 June 2016, paras. 39-41; UNAT, *Harb v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, 2016-UNAT-643, Judgment, 24 March 2016, paras. 25-27; UNAT, *Gehr v. Secretary-General of the United Nations*, 2014-UNAT-475, Judgment, 17 October 2014, para. 16; UNAT, *Lee v. Secretary-General of the United Nations*, 2014-UNAT-481, Judgment, 17 October 2014, paras. 48-49; UNAT, *Wasserstrom v. Secretary-General of the United Nations*, 2014-UNAT-457, Judgment, 27 June 2014, para. 34. See also ILOAT, *L. v. EMBL*, Judgment, No. 4145, 128th Session, 3 July 2019, para. 5; ILOAT, *K. v. ILO*, Judgment No. 4039 26 June 2018, para. 3; ILOAT, *H. v. EPO*, Judgment No. 4048, 26 June 2018, para. 7; The above decisions often refer to the former United Nations Administrative Tribunal, *Andronov v. United Nations Secretary-General*, Judgment No. 1157, (2003), para. V.

⁶⁶ See Rule 27 of the Staff Rules.

In other words, Rule 37(b) of the Staff Rules only applies to the period before the offer of an employment contract. Once the unilateral decision to unconditionally offer a comprehensive and individualized employment contract has been taken by the administration and presented to the individual staff member for signature, a direct legal consequence to the legal order is established as the administration has committed itself to be bound by the Staff Rules vis-à-vis the individual staff member.

48. Accordingly, when assessing whether the Appeal is admissible, it is sufficient to determine whether the contested decision is “relevant to the rights and obligations of staff”.⁶⁷ At this stage, only the mere possibility that a violation of such rights occurred has to be demonstrated. In the present case, the offer of a contract for less than one year constitutes a decision that may be relevant to the rights of that staff member as provided for in Rule 37(a) of the Staff Rules.⁶⁸ Similarly, the difference in treatment of the Appellant vis-à-vis non-UK staff members may also give rise to a violation of the Appellant’s rights as a staff member.

49. Whether or not the Registrar in fact violated any such rights is a matter that is to be discussed and decided based on the merits of the Appeal, which will be addressed in turn.

B. MERITS OF THE APPEAL

50. Regarding the applicable standard of judicial review as set forth in Rule 10 of the Staff Appeals Procedure, the questions presented by the Appeal centre on whether the Registrar erred on a question of law when offering the Appellant a contract for a duration of less than one year, contrary to what was offered to other non-UK staff members.⁶⁹

⁶⁷ See Rule 83(a) of the Staff Rules.

⁶⁸ See Rule 83(a) of the Staff Rules.

⁶⁹ See Rule 10(1)(iii) of the Staff Appeals Procedure.

a. Interpretation of Rule 37(a) of the Staff Rules

51. Rule 37(a) of the Staff Rules provides that “[e]mployment contracts [...] shall normally be granted for a one year period but may be issued for a different period for operational needs”. The manner in which Rule 37(a) of the Staff Rules is drafted calls for a determination of the relation between the legal concepts of “shall” and “normally”.

52. According to general principles of interpretation of provisions of international administrative law, the use of the word “shall” denotes the absence of any margin of discretion and indicates that there exists a strict obligation to act or proceed as set forth in that provision. However, the inclusion of the word “normally” after “shall” in Rule 37(a) of the Staff Rules reflects the lawmakers’ intention to grant some flexibility regarding the otherwise mandatory action or process. It follows that the strict obligation to act or proceed as set forth in Rule 37(a) of the Staff Rules, derived from the word “shall”, only applies to normal cases.

53. The combination of the words “shall” and “normally” in Rule 37(a) of the Staff Rules provides for a deviation from the mandatory action or process where the circumstances are not considered ‘normal’. In legal terms, such cases are characterized as ‘exceptional’ and, as exceptions, they have to be interpreted narrowly. The classification of a case as ‘exceptional’ is open to a full and unlimited judicial review.

54. Lastly, the reference to “operational needs” in Rule 37(a) of the Staff Rules can only be read as an explicit example of such an exceptional case. Indeed, the reference to “operational needs” does not preclude the existence of other exceptional circumstances, which may warrant deviating from the obligation on the part of the Registrar to issue a one year contract to staff members.

55. From the above, it is concluded that Rule 37(a) of the Staff Rules allows for the issuance of employment contracts for a period other than one year in exceptional cases.

b. The withdrawal by the UK from the EU and its effect on Staff Rule 37(a) of the Staff Rules

56. The undersigned Judge considers that the proceedings initiated by the UK in accordance with Article 50 of the Treaty of the European Union for withdrawal from the EU amount to an exceptional circumstance with respect to the application of Rule 37(a) of the Staff Rules. There is no doubt that the withdrawal of a member State is an unprecedented event in the history of the EU. Accordingly, the Registrar was entitled to issue a contract for a duration of less than one year, provided there existed a sound basis to conclude that a nexus existed between the UK's impending withdrawal from the EU and the Appellant's contractual situation.

57. It is noted that in the present circumstances, the Appellant was offered a contract for less than one year based on the fact that she would no longer fulfil the nationality requirement for employment at the KSC. Further, it is noted that the existence of nationality requirements in employment contracts between international organizations and their staff is neither uncommon nor prohibited under international civil service law.⁷⁰

58. The Staff Rules, however, do not contain an explicit reference to such a nationality requirement. Moreover, it is doubtful whether provisions from other legal sources can be read into or alongside the Staff Rules to provide for such a nationality requirement, in view of Rule 1(b) of the Staff Rules, which reflects that the Staff Rules

⁷⁰ See, e.g., ECHR, *Case of Bigaeva v. Greece*, Application No. 26713/05, Judgment, 28 May 2009, para. 40; ECHR, *Case of C. v. Belgium*, Application No. 21794/93, Judgment, 7 August 1996, para. 38.

themselves “contain the fundamental conditions of service and basic rights, duties and obligations of staff members”.

59. Notwithstanding the absence of an explicit reference to a nationality requirement in the Staff Rules, the post in the vacancy announcement to which the Appellant applied reflects that there existed a nationality requirement for her position.⁷¹ Indeed, the specific reference to her post being open to candidates from Third Contributing Countries suggests that in the absence thereof, this post would only have been open to candidates from the EU.⁷² The Appellant should therefore have been aware of the existence of a nationality requirement as an essential precondition to concluding an employment contract with the KSC when she applied to her post. Accordingly, while the Staff Rules may not include an explicit reference to a nationality requirement, it was an essential precondition for a selected candidate to be hired for this post in view of the express inclusion thereof in the vacancy announcement.

60. Rule 33(5) of the Staff Rules obliges selected candidates to provide the KSC with all relevant documents attesting to the fact that all requirements for the post are met, including “any other requirements listed in the vacancy notice”. It follows that the Registrar, in considering whether to renew the Appellant’s offer of employment, must also take into account and verify whether the staff member continues to possess the nationality required by the original vacancy announcement, upon which the renewed offer is premised. At the time that she was presented with the renewed offer of employment, the Appellant was not in a position to guarantee that she will have one of the nationalities required by the vacancy announcement beyond 31 October 2019.

61. As found above, an exceptional circumstance as envisioned by Rule 37(a) of the Staff Rules existed in view of the UK’s intended withdrawal from the EU and the

⁷¹ See Call for Contributions, p. 52 (Registry pagination).

⁷² See Call for Contributions, p. 52 (Registry pagination).

crucial question that remains unanswered as part of the process: the status of UK nationals within the EU (and thus, within the KSC) following the UK's withdrawal. It has further been found that the Appellant will no longer fulfil all the requirements set forth in the vacancy announcement upon which the Appellant's post is premised once the UK withdraws from the EU. Accordingly, given the exceptional circumstances presented in this case, Rule 37(a) of the Staff Rules allows for the issuance of a renewed offer of employment until such date as the Appellant fulfilled the nationality requirement, namely 31 October 2019.

62. In sum, the Registrar did not err on a question of law in this regard.

c. The principle of equal treatment

63. As set forth above, UK staff members, unlike staff members of other nationalities, were not in a position to attest to the requirement that they would fulfil the nationality requirement reflected in the underlying vacancy announcements beyond 31 October 2019 when they were offered a renewal of their employment contract. As such, the UK staff members cannot be considered "equal" to non-UK staff members in the legal sense of the word and there is thus no violation of the principle of equal treatment.

d. The right to renewal of an employment contract

64. It is first noted that the wording of Rule 37(b) of the Staff Rules expressly states that the renewal of a contract shall not give rise to any right or expectation of renewal.⁷³ Moreover, the Appellant does not point to any promise to her in this regard by the Registrar, whether in writing, as required by the established jurisprudence of other international administrative tribunals, or otherwise.⁷⁴ Accordingly, there is no

⁷³ See also Rule 43(a) of the Staff Rules.

⁷⁴ See, e.g., UNAT, *He v. Secretary-General of the United Nations*, No. 2018-UNAT-825, Judgment, 22 March 2018, para. 41.

merit to the Appellant's contention that she has a right to renewal of her contract by virtue of the KSC's past practice in this respect.

65. Since the Registrar had a sound legal basis for the issuance of an offer of employment until 31 October 2019 only, there was no obligation to instead provide the Appellant with a contract for the duration of one year, with the understanding that the Registrar could terminate the contract after 31 October 2019. The Appellant's argument in this respect is thus equally dismissed.

66. In view of these findings, the Appellant's arguments related to possible external decision-makers, as well as her demand for the production of documents from the Registrar attesting to the decision-making process need not further be addressed.

e. Relief requested

67. In view of the above, the relief requested by the Appellant as it relates to the modification of her current contract to a contract until 14 June 2020, as well as the continuation of her employment beyond that date, and a judicial declaration of the illegality of the Registrar's conduct cannot be granted.⁷⁵ The Appellant's requests for relief set forth in paragraphs 31(d) through (i) of the Appeal do not have any basis in procedural and/or substantive law. The Appellant's request for legal costs "to be assessed"⁷⁶ is dismissed in view of Rule 84(f) of the Staff Rules, which provides that a staff member may decide to seek legal assistance "at his or her own expense".

68. Finally, it is noted that Rule 29(3) of the Staff Appeals Procedure provides that final decisions shall, to the extent possible, be public and may only be redacted where this is deemed necessary by the Judge, *proprio motu* or upon request by the Appellant to protect the Appellant's identity. It is further noted that the Appellant has requested

⁷⁵ See Appeal, paras. 31(a)-(c).

⁷⁶ See Appeal, para. 31(j).

that information identifying the Appellant be redacted when a public version of a final decision is issued, to which the Registrar has not objected.⁷⁷

69. While the Registrar has asked to be heard on the issuance of a public redacted version of this decision, there is no legal basis for such a request. [REDACTED].

VI. CONCLUSION

70. In view of the foregoing, the undersigned Judge finds that the Registrar did not act in a manner set forth in Rule 10(1) of the Staff Appeals Procedure. The Appeal, including the relief sought therein, is therefore **dismissed**.



**Judge Thomas Laker,
Judge for Staff Appeals**

Dated this 7 November 2019
At The Hague, the Netherlands.

⁷⁷ See Appeal, para. 31(k).