



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: SA-11-J

Before: Judge for Staff Appeals
Judge Thomas Laker

Date: 18 September 2019

Language: English

Classification: Confidential

**PUBLIC REDACTED VERSION OF THE
13 SEPTEMBER 2019 DECISION ON APPEAL**

Appellant:
[REDACTED]

Legal Assistant to the Appellant:
[REDACTED]

Respondent:
The Registrar

I. INTRODUCTION

1. This case concerns the renewal of employment contracts of citizens of the United Kingdom (“UK”), including [REDACTED] (“Appellant”), from 15 June 2019 only until 31 October 2019, as opposed to 14 June 2020. The Registrar updated UK staff members on her intent to renew their contracts until 31 October 2019 during a meeting on 15 April 2019, 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 was employed [REDACTED] with the Specialist Prosecutor’s Office (“SPO”) [REDACTED] and had an employment contract until 14 June 2019.¹ On 13 May 2019, the Appellant submitted his letter of resignation from the SPO, effective 14 June 2019.²

3. On 14 May 2019, the Appellant submitted a request for review of the “decision, as communicated by [the Registrar] in a meeting with British staff on 15 April and subsequently by way of a note of that meeting circulated by email, that UK Staff will be offered new contracts from 15 June 2019 only until 31 October 2019.”³

4. On 12 July 2019, the Registrar denied the Request for Review, arguing that she had expressed her intent, rather than issued a decision, during the 15 April 2019 meeting to extend contracts for UK citizens only until 31 October 2019 and that the intention expressed did not create any direct adverse legal consequences for the

¹ F001, Appeal before a Judge for Staff Appeals under Staff Rules 83 and 84, 28 July 2019 (confidential) (“Appeal”). See also F001/A03, Letter from Dr Fidelma Donlon, Registrar, to [REDACTED], dated 12 July 2019 (confidential) (“Review Decision”), p. 1.

² Review Decision, p. 1.

³ F001/A02, Letter from [REDACTED] to Dr Fidelma Donlon, Registrar, dated 13 May 2019 (confidential) (“Request for Review”), p. 1. It is noted that both the Appellant and the Registrar submit that the Request for Review was filed and/or dated 14 May 2019, notwithstanding the date on the Request for Review reflecting 13 May 2019. See Request for Review. See also Review Decision, p. 1.

Appellant.⁴ The Registrar further noted that the Appellant did not request renewal of his contract, [REDACTED].⁵

II. PROCEEDINGS

5. On 28 July 2019, the Appellant filed the current Appeal against the Review Decision.⁶

6. On 29 July 2019, the Appellant filed an application requesting the recusal and/or disqualification of the undersigned Judge from considering the Appeal on the basis that the Appellant had filed an appeal against a decision rendered by the undersigned Judge in a previous case that was highly critical thereof.⁷

7. On 30 July 2019, the President of the Kosovo Specialist Chambers (“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 of the undersigned Judge.⁸

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

9. On 15 August 2019, the undersigned Judge declined to recuse himself from considering the Appeal.¹⁰

10. On 19 August 2019, the Appellant filed a reply.¹¹

⁴ Review Decision, p. 3.

⁵ Review Decision, p. 3.

⁶ See Appeal.

⁷ F002, Application for Recusal/Disqualification of a Judge, 29 July 2019 (confidential).

⁸ F003, Decision Assigning a Judge for Staff Appeals, 30 July 2019 (confidential), p. 3.

⁹ F004, Response to Appeal Against the Decision of the Registrar, 9 August 2019 (confidential) (“Reply”).

¹⁰ 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).

¹¹ F006, Reply to the Response of the Registrar, 19 August 2019 (confidential) (“Response”).

11. On 20 August 2019, the President of the KSC dismissed the Appellant's alternative request for disqualification of the undersigned Judge.¹²

III. APPLICABLE LAW

12. Rule 37 of the Specialist Chambers and Specialist Prosecutor's Office Staff Rules ("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 [Kosovo Relocated Specialist Judicial Institution ("KRSJI")] thereafter.

(c) The particular temporary nature and the specific needs of KRSJI do not allow providing contracted staff with permanent employment and this is reflected in the level of remuneration.

13. 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."

14. 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).

[...]

¹² F007, Decision on a Request for Disqualification, 20 August 2019 (confidential).

(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.

[...]

(f) A staff member may have the assistance of another staff member or former staff member in the presentation of his or her appeal to the judge for staff appeals, or may decide to seek legal assistance at his or her own expense.

(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.

15. Rule 5 of the Rules of Procedure for Staff Appeals (“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 [...]

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

the 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.

17. 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

18. It is noted that the parties have made extensive submissions in relation to the Appeal, which have all been considered with due care, including the respective annexes. In view of the reasoning and outcome set forth below, it is deemed appropriate to summarize the parties' submissions due to their limited relevance.

19. First, the Appellant submits that the Registrar incorrectly adopted and relied on version 1.3 of the Standard Operating Procedure on Review of Administrative Decisions ("SOPRAD"), dated 21 February 2019.¹³ The Appellant contends that unlike the SOPRAD, neither the Staff Rules nor the Staff Appeals Procedure provide for the requirement that staff members demonstrate that the administrative decision caused prejudice to the staff member, or that the decision produced a direct legal consequence.¹⁴

20. Second, the Appellant submits that the Registrar failed to provide a reasoned opinion, as required by the Staff Rules and the SOPRAD.¹⁵

21. Third, the Appellant contends that the Registrar "made specific errors of law" throughout the Review Decision, the specifics of which the Appellant has set forth in detail in the Appeal.¹⁶

22. In addition, 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

¹³ See Appeal, paras. 13-19.

¹⁴ Appeal, para. 15. See also Appeal, paras. 35-36.

¹⁵ Appeal, para. 21. See also Appeal, para. 22.

¹⁶ Appeal, paras. 24-38.

year contract notwithstanding the impending withdrawal of the UK from the EU.¹⁷ Moreover, according to the Appellant, there was in fact an expectation of renewal of contracts for the duration of a year, as evidenced by the decision to extend contracts for all non-UK staff members for the duration of a year.¹⁸

23. Finally, the Appellant asserts that the Registrar erred in law and fact by failing to take into account the harm and prejudice caused by the Registrar's announcement to issue shortened contracts for UK staff members.¹⁹ The Appellant submits that "this episode has caused [him] considerable stress and anxiety and resulted in moral harm".²⁰ [REDACTED].²¹

24. The Appellant requests that: (i) the Registrar provide certain specified documents²² and (ii) his name and other personal details are redacted from any public final decision, in accordance with Rule 29(3) of the Staff Appeals Procedure.²³

25. The Appellant seeks the following relief: (i) the speedy resolution of the matter in conformity with the requirements of due process; (ii) a judicial declaration of the illegality of the Registrar's conduct to determine the Appellant's employment rights solely on grounds of nationality; (iii) provision of a reasoned explanation of the manner in which the Registrar reached her decision; (iv) damages to be awarded in full consideration of all prejudice and material harm; (v) damages for moral harm of €20,000; and (vi) legal costs to be assessed.²⁴

26. The Registrar submits that requiring staff members to demonstrate that there existed an administrative decision that produced direct legal consequences to the staff

¹⁷ Appeal, para. 39.

¹⁸ Appeal, para. 40. *See also* Reply, para. 18.

¹⁹ Appeal, para. 40.

²⁰ Appeal, para. 40.

²¹ Appeal, para. 40.

²² Appeal, paras. 40-41.

²³ Appeal, para. 42.

²⁴ Appeal, para. 44.

member requesting review and caused that staff member prejudice has an appropriate legal basis and is a reflection of established jurisprudence of international civil service tribunals.²⁵

27. The Registrar further submits that the internal legal framework does not provide for a right to renewal of an employment contract at the KSC-SPO and the offer to renew the Appellant's appointment until 31 October 2019 therefore cannot be considered an administrative decision.

28. The Registrar contends that since the Appellant separated from the SPO on 14 June 2019, he did not suffer any kind of prejudice from a renewal of his contract that never materialized.²⁶

29. 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.²⁷ 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.²⁸

30. The Appellant replies that the Registrar is incorrectly withholding information and avoiding the requirement that she fully and properly plead the facts that are at issue.²⁹ The Appellant submits that arguments in relation to the right to appeal final administrative decisions must be seen not only in the context of the Staff Rules, but must also take into account overarching principles of law, such as the Kosovo constitution and the European Convention on Human Rights.³⁰ Finally, the Appellant

²⁵ Response, paras. 15-26, 35.

²⁶ Response, para. 33.

²⁷ Response, para. 45.

²⁸ Response, para. 46.

²⁹ Reply, para. 3. *See also* Reply, paras. 2, 4, 16.

³⁰ Reply, paras. 10-11.

submits that the nature and circumstances of his complaint “satisfies the tests of admissibility of all the mature internal legal systems of international organisations, including the KSC Staff Appeals system”.³¹

V. CONSIDERATIONS

A. ADMISSIBILITY OF THE APPEAL

1. Timely filing of the Appeal

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

32. In the present case, the Review Decision was communicated to the Appellant on Friday, 12 July 2019 and the Appellant filed the Appeal within the 14-day time limit, namely on 28 July 2019.³² To the Appeal, the Appellant attached the documentation required pursuant to Rule 15(2) of the Staff Appeals Procedure.

33. The undersigned Judge therefore considers that the requirements for an appeal as set out in Rule 15 of the Staff Appeals Procedure have been met and finds the Appeal admissible in this respect.

³¹ Reply, para. 18.

³² See Rule 5(2) of the Staff Appeals Procedure.

2. Eligibility to file an appeal

34. Rule 83(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 relevant to the rights and obligations of staff”.³³ Rule 84 of the Staff Rules further provides the general steps to be undertaken by a staff member when filing an appeal. Pursuant to Rule 84(f) of the Staff Rules, a staff member, in the presentation of his or her appeal, may have the assistance of “another staff member or *former staff member*”.³⁴

35. It is noted that the Staff Rules refer only to the right of staff members to file an appeal and do not grant any such right to former staff members in this regard. It is further noted that the definition of a staff member in Rule 2 of the Staff Rules does not include former staff members as part of this concept.³⁵ However, the explicit reference to former staff members in Rule 84(f) of the Staff Rules reflects that this is a known concept within the Staff Rules.

36. In view of the plain text of the Staff Rules, one cannot assume the existence of a *lacuna* in the written law that could be filled by judicial interpretation. Since both the concepts “staff member” and “former staff member” are used in the Staff Rules it would be inappropriate to determine that the explicit reference of a right to one group can be extended to the other group by way of analogy or otherwise.

37. It is noted that Rule 2 of the Staff Appeals Procedure includes “former staff” as part of its definition of an “Appellant”. The Staff Appeals Procedure, however, was adopted in accordance with Rule 84(d) of the Staff Rules to provide further details in relation to the manner in which the staff appeals procedure is to take place. The Staff

³³ Emphasis added.

³⁴ Emphasis added.

³⁵ See Rule 2 of the Staff Rules.

Appeals Procedure cannot, therefore, expand upon the scope of the Staff Rules and the terms and definitions contained in the Staff Rules must prevail.

38. The undersigned Judge is fully aware of the unfortunate effects of the exclusion of former staff from a right to appeal within the internal justice system of the KSC-SPO. However, as stated by the Higher Judge for Staff Appeals, there must be a distinction between *lex lata* (the law as it exists or is currently in force) and *de lege ferenda* (what the law should be).³⁶ Desirable expansions of the right to appeal, as they exist in many international organizations,³⁷ are to be adopted by the competent legislative bodies. Judges, on the other hand, are duty bound to apply the existing legal framework regulating the operation of the KSC, which, in the present case, is the legal standard reflected in Rule 83(a) of the Staff Rules.

39. Turning to the specific circumstances of this case, it is recalled that the Appeal was filed on 28 July 2019,³⁸ whereas the Appellant resigned from the SPO in June 2019.³⁹ It follows that the Appellant was no longer a staff member when the Appeal was filed. Accordingly, it can only be concluded that the Appellant has no standing to file the Appeal as provided for in the Staff Rules. The Appeal is therefore inadmissible in this regard.

3. Final administrative decision

40. Aside from the Appellant's lack of standing, and independently thereof, it is recalled that Rule 83(a) of the Staff Rules, read together with Rule 84(a) of the Staff

³⁶ See SA-06-HJ/f006, Decision on Admissibility of the Appeal, 5 August 2019 (confidential), para. 24.

³⁷ See, e.g., Article 3 of the Statute of the United Nations Dispute Tribunal; Article II(3) of the Statute of the World Bank Administrative Tribunal; Article II(2)(c) of the Statute of the Administrative Tribunal of the International Monetary Fund.

³⁸ See Appeal.

³⁹ Appeal, para. 8.

Rules, grants the staff member a right to file an appeal against a (final) “administrative decision” only.

41. There are remarkable differences among the internal justice systems of international organizations when it comes to the legal character of a reviewable decision. Certain systems provide for a broad scope, as demonstrated, for example, by Article II(2) of the Statute of the Administrative Tribunal of the International Monetary Fund, pursuant to which an “‘administrative act’ shall mean any individual *or regulatory decision* taken in the administration of the staff of the Fund”.⁴⁰ A “regulatory decision”, on the other hand “shall mean *any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan*, but excluding any resolutions adopted by the Board of Governors of the Fund”.⁴¹ In these systems, abstract general rules can be submitted for review to the respective tribunal. In other organizations, such as the United Nations, however, reference is made only to an “administrative decision” without further definition.⁴² The latter characteristic applies to the internal justice system of the KSC-SPO.

42. In the present case, it is noted that the Appellant appeals the intent expressed by the Registrar during a meeting on 15 April 2019, and subsequently conveyed to staff via email, to issue employment contracts to UK staff members until 31 October 2019.⁴³ The main question is whether this endeavour by the Registrar qualifies as a reviewable administrative decision.

43. Neither the Staff Rules nor the Staff Appeals Procedure define the concept of an “administrative decision”. Although Article 34(3) of the Law on Specialist

⁴⁰ See Article II(2)(a) of the Statute of the Administrative Tribunal of the International Monetary Fund. Emphasis added.

⁴¹ See Article II(2)(b) of the Statute of the Administrative Tribunal of the International Monetary Fund. Emphasis added.

⁴² See Article 2(1)(a) of the Statute of the United Nations Dispute Tribunal.

⁴³ See Appeal, para. 2; F001/0A1, Note to staff regarding meeting of 15 April 2019, undated.

Chambers and Specialist Prosecutor's Offices ("Law") provides that the Registrar shall be responsible for the administration of the Specialist Chambers and may issue any internal rules and instructions for that purpose, the Law does not provide the Registrar with the authority to define and/or limit the scope of rights granted by the Staff Rules to a staff member. Similarly, while Rule 1(c) of the Staff Rules provides the Registrar with the authority to issue standard operating procedures "on the basis" of the Staff Rules and to issue further administrative rules and directives "consistent with" the Staff Rules, this Rule does not confer upon the Registrar the authority to alter the scope of rights granted to a staff member by the Staff Rules. The SOPRAD can thus not serve as an adequate legal basis for a proper definition of the concept of an "administrative decision".

44. Where the Staff Rules are silent on fundamental concepts, their meaning has to be determined by the competent internal judiciary. Pursuant to Rule 84(g) of the Staff Rules, the judge for staff appeals shall decide "in accordance with the highest standards of administrative practices in comparable fields".

45. With this assignment in mind, it is deemed appropriate to rely on well-established jurisprudence in the field of international administrative law. Here, as held in 2003 by the former United Nations Administrative Tribunal, it has long been accepted by all administrative law systems 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".⁴⁴

⁴⁴ See, e.g., 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 ("*Lee Judgment*"), paras. 48-49; UNAT, *Wasserstrom v. Secretary-General of the United Nations*, 2014-UNAT-457, 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,

46. In the present case, neither the 15 April 2019 meeting nor the notes circulated thereafter can be characterized as an administrative decision that had direct legal consequence in a precise individual case. Rather, a plain reading of the minutes circulated in relation to the 15 April 2019 meeting reveals that the Registrar intended to update all UK staff members at the KSC-SPO on her intent to issue contracts until 31 October 2019. Therefore, this message informed about a general policy, rather than addressed a precise individual case. If ever, and at the earliest, the issuance of an individualized contract to a specific staff member could cause the necessary effects “in a precise individual case”, as requested.

47. It is recalled that the Appellant resigned from the SPO before the Registrar had an opportunity to provide him with a renewed contract until 31 October 2019. There was thus no administrative decision that produced direct legal consequences in the Appellant’s individual case. Accordingly, there was no reviewable administrative decision and the Appeal is inadmissible in this respect as well.

B. MERITS OF THE APPEAL

48. For an appeal to be successful, its admissibility is an indispensable precondition. Having found the Appeal inadmissible, there no longer exists a basis or a need for an assessment of the merits of the Appeal.

C. PUBLIC REDACTED VERSION OF THE DECISION

49. 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 for the purpose of protecting the Appellant’s identity. It is further noted that the Appellant has requested that information identifying him be redacted when a public

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.

version of a final decision is issued, to which the Registrar has not objected. However, the Registrar has asked to be heard on the issuance of a public redacted version of this decision. For this request, no legal basis can be found.

VI. CONCLUSION

50. In view of the foregoing, the Appeal, including the relief sought therein, is **REJECTED**.

51. [REDACTED].

A handwritten signature in blue ink, appearing to be 'T. Laker', is centered on the page.

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

Dated this 18 September 2019
At The Hague, the Netherlands.