Introduction

1. By an application filed on 30 September 2010, the Applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), contests the decisions notified to him on 17 December 2009 and 15 July 2010 regarding the renewal of his fixed-term appointment and other issues.

Facts

2. The Applicant joined ICTY in May 1998. At the time of issuance of this Judgment, he was employed as a Security Sergeant at the G-5 level on a fixed-term appointment. He has been on sick leave since December 2009 and his current contract is due to expire on 30 June 2011.

3. By memorandum dated 17 December 2009, the Chief of Security at ICTY

his rights under the comparative review downsizing procedure adopted by ICTY. He requested to be reinstated in his supervisory functions and that his contract be renewed "at the same time the generality of staff in the security section will get their contracts renewed, and on the basis of the number of points [he] received in the comparative review…".

7. On 1 April 2010, the Human Resources Section informed the Applicant

regarding his contentions. He clarified in an email of 26 October 2010 to ICTY that: "To avoid duplication of effort, I feel … that we need to await the decision of the UNDT regarding my request, and if this is not granted, then I would continue with my rebuttal."

12. By email dated 15 July 2010, the Chief of Security informed the Applicant of the following:

> I am not recommending you for any additional contract extensions based on your epas rating of Does not meet [performance expectations]. This is in accordance with ST/AI/2002/3 para 10.5 which states that a "does not meet" may result in the non-renewal of a fixed-term contract. Please be aware that I do not have the authority to renew or not renew a contract which lies with Human Resources. However, based on my role as the Chief of Section, I have recommended to HR that your contract not be renewed.

13. On 9 August 2010, the Applicant requested a further extension of time until 11 October 2010. The Tribunal granted an extension until 30 September 2010.

14. On 30 September 2010, the Applicant filed an application with the Tribunal contesting the decisions notified to him on 17 December 2009 and 15 July 2010 respectively, which according to him were about: "a. Non-renewal of [his] employment contract, b. Allegations of poor performance, c. Removal of supervisory duties, d. Exclusion from the ICTY comparative review, e. Breach of e-PAS procedures".

15. On 4 October 2010, the application was transmitted to the Respondent who filed his reply on 3 November.

16. By letter dated 12 May 2011, the parties were informed that the Judge assigned to the case considered that an oral hearing was not necessary. They were given a week to file objections if any, in a written form and with reasons, to the case being considered on the material before the Tribunal.

17. By email dated 20 May 2011, the Applicant objected to the case being determined on the papers before the Tribunal on the grounds among other things that the Tribunal "does not yet have adequate information to enable [his]

July 2010 decision, the Applicant did not submit it for management evaluation. Furthermore, at this time there is no final administrative decision but rather only a pending decision as to the extension of the Applicant's contract until the outcome of the rebuttal process;

b. The Applicant's claims with respect to the "allegations of poor performance" are not receivable *ratione materiae*. The Applicant failed to identify a specific decision. Furthermore, there is no evidence on record of the Applicant requesting management evaluation of the "allegations of poor performance";

c. The Applicant's claims with respect to the breach of e-PAS procedures are not receivable *ratione temporis* as far as his ePAS for the period 2008-2009 is concerned. They are not receivable *ratione materiae* regarding his ePAS for the period 2009-2010 as the Applicant has not yet completed the rebuttal process he initiated;

d. The Applicant's claims with respect to removal of supervisory duties are not receivable *ratione materiae* and are without merit. The decision to limit the Applicant's supervisory functions in light of performance shortcomings identified during the 2009-2010 reporting cycle is an interim measure that is subject to change as a result of the rebuttal process. As such, it is not an appealable administrative decision within the meaning of article 2.1(a) of the Tribunal's Statute. In addition, it is within the discretionary authority of the Respondent to reassign the Applicant to duties commensurate with his demonstrated performance, pursuant to staff regulation 1.2(c). This decision was reasonable and not tainted by extraneous or improper considerations;

e. The Applicant's claims of exclusion from the comparative review process are not receivable *ratione materiae* and are without merit. The Applicant has not been excluded from the comparative review process and no final decision on the Applicant's contract has been made yet.

Consideration

21. The Applicant contests two decisions notified to him on 17 December 2009 and 15 July 2010 respectively, regarding the renewal of his fixed-term appointment and other issues, which will be detailed below.

22.

> and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

27. In the present case, the Tribunal considers that the Respondent provided sufficiently detailed explanations and supporting documentation to justify the contested decision, whereas the Applicant failed to substantiate his allegation that the decision was improperly motivated. It bears highlighting that there were safety and security issues involved and that the precautionary principle alone would justify a measure of the kind taken against the Applicant.

Allegations of poor performance and ePAS process

28. The Tribunal notes that the Applicant's claims regarding his ePASes for 2008-2009 and 2009-2010 are not properly before the Tribunal. Notwithstanding other grounds of inadmissibility, any claims regarding the ePAS for 2008-2009 are time-barred. As regards the ePAS for 2009-2010, the Applicant failed to exhaust internal remedies since he opted to keep his rebuttal pending.

29. The Applicant's claims regarding his ePASes are therefore not receivable.

Exclusion from the ICTY comparative review

30. Assuming that the Applicant also contests his alleged "exclusion from the ICTY comparative review", he does not provide the Tribunal with sufficient detail to enable it to rule on this issue. Therefore, any claim in this respect must be rejected.

Decision of 15 July 2010

31. On 15 July 2010, the Chief of Security informed the Applicant that she would recommend that his contract not be renewed.

32. Even assuming that the Applicant intended to contest the decision not to renew his contract beyond 15 July 2010, rather than the Chief of Security's recommendation, he did not request the management evaluation of such decision and his application in this respect is therefore not receivable pursuant to article 8.1 of the Tribunal's Statute.

33. In view of the foregoing, the Tribunal finds that the application filed by the Applicant on 30 September 2010 must be rejected. This conclusion is without prejudice to the Applicant's right to file another application against his ePAS for the period 2009-2010 upon completion of the rebuttal process and/or regarding the non-renewal of his contract once a new, final decision is communicated to him.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 1st day of June 2011

Entered in the Register on this 1st day of June 2011

(*Signed*)

Víctor Rodríguez, Registrar, Geneva