Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

JAIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. The Applicant contests the decision by which the Office of the United Nations High Commissioner for Refugees ("UNHCR") considered that he was not eligible for consideration for conversion of his fixed-term appointment to an indefinite appointment.

2. He requests rescission of the contested decision.

Facts

3. The Applicant was recruited by UNHCR in Dar es Salaam, Tanzania, a C duty station, in October 1999 on a fixed-term contract at the Professional level. After having been reassigned to Geneva in November 2002, he was reassigned to Dhaka, Bangladesh, a C duty station, in November 2008. Since 1 September 2011, he has been working in Cotabato, Philippines, a D duty station.

4. In an internal memorandum of 21 January 2011 entitled "One-Time Review for the Granting of Indefinite Appointments" (IOM/04-FOM/05/2011), the High Commissioner for Refugees informed UNHCR staff that in view of the entry into force of the new Staff Regulations and Rules on 1 July 2009, a one-time review would be initiated in order to consider candidates who met the eligibility requirements as of 30 June 2009 for consideration for conversion from a fixed-term appointment to an indefinite appointment. Paragraph 12(b) of the memorandum also stated that in order to be eligible, Professional staff must have served a minimum of two years in a D or E duty station.

5. Pursuant to this memorandum, by email dated 23 February 2011, the Director of the Division of Human Resources Management indicated that the staff 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.

6. By email dated 15 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, he was not eligible for consideration for conversion of his fixed-term appointment to an indefinite appointment.

7. On 12 May 2011, the Applicant submitted a request for management evaluation of the decision communicated on 15 March 2011.

8. By letter dated 7 July 2011, he was notified by the Deputy High Commissioner for Refugees that the decision not to consider him eligible for consideration for conversion of her fixed-term appointment to an indefinite appointment would stand.

9. The Applicant submitted his application to the Tribunal Registry in New York on 22 September 2011.

10. On 18 October 2011, the Respondent requested a change of venue from New York to Geneva because, *inter alia*, three similar cases were before the Tribunal in Geneva. He then submitted his reply on 24 October of that year.

11. By Order No. 283 (NY/2011) of 1 December 2011, the Tribunal decided to transfer the case to Geneva.

12. By Order No. 7 (GVA/2012) of 6 January 2012, 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 12 and 13 January 2012, 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.

Parties' submissions

15. The Applicant's contentions are:

a. The High Commissioner acted *ultra vires* by introducing the additional condition of two years of service in a D or E duty station, contrary to United Nations General Assembly resolutions 37/126 and 51/226. This additional requirement by the High Commissioner is without a nexus to the concept of career service, as it disregards the fact that assignment to a designated duty station is contingent upon the outcome of a selection process that does not take staff members' wishes into account;

b. Application of the contested criterion excludes, *inter alia*, staff members who have demonstrated through their applications an objective interest in serving in D or E duty stations but were never selected for those positions. Even though he had submitted numerous applications for positions in such duty stations and had been recommended on several occasions by the managers responsible for the vacant positions, the Appointments, Postings and Promotions Board never recommended the Applicant for such positions.

c. 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;

d. Concerning the issue raised by the Tribunal on its own motion, he 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, he 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;

e. The contested criterion allows for reasonable consideration of requests for conversion of appointments. It was applied without distinction

Translated from French