

ORGANISATION  
FOR ECONOMIC  
CO-OPERATION  
AND DEVELOPMENT



ORGANISATION DE  
COOPÉRATION ET  
DE DÉVELOPPEMENT  
ÉCONOMIQUES

**ADMINISTRATIVE TRIBUNAL**

Judgment of the Administrative Tribunal

handed down on 9 January 2024

**JUDGEMENT IN CASE No. 106**

AA

v.

Secretary-General

**Translation** (the French version constitutes the authentic text).

**JUDGMENT IN CASE No. 106 OF THE ADMINISTRATIVE TRIBUNAL**

Hearing on 7 December 2023 at 14h

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal consisted of :

*Louise OTIS, Chair*

*Pierre-François RACINE*

*And Chris DE COOKER*

*with Nicolas FERRE, Registrar, and David DRYSDALE, Deputy Registrar, providing Registry services.*

The Tribunal heard

Jean-Didier SICHAULT and Joao VIEGAS, counsels of the Applicant ;

Auguste NGANGA-MALONGA and Diana BENOIT, on behalf of the Secretary-General ;

Patrice DUBUS, Christel OSTERROTH-CARTIGNY and Annelise GODBER, on behalf of the Staff Association

## INTRODUCTION

1. In his application lodged with the Tribunal's Registry on 17 June 2022, AA (the Applicant) requests, first, the annulment of the decision of the Secretary-General of the Organisation dated 21 March 2022 confirming the decision of the Head of Human Resources Management dated 28 July 2020 not to convert the Applicant's appointment into an open-ended appointment, and second, that the Organisation be ordered to pay him compensation corresponding to nine months' salary for the prejudice he suffered and to award him a sum in costs to be determined at the end of the proceedings.
2. The Secretary-General submitted his comments in response on 21 November 2022, arguing that the application should be dismissed.
3. The Applicant submitted a rejoinder on 19 January 2023.
4. The Staff Association submitted written comments in support of the application on 20 January 2023.
5. The Secretary-General submitted a surrejoinder on 20 March 2023.
6. The Tribunal received the written testimony of BB, executive secretary of the Staff Association, dated 7 November 2023.
7. All the documents cited and produced by the Applicant (annexes) bear the reference letter R, whereas those cited and produced in defence by the Organisation (documents) bear the reference letter O.

## THE FACTS

8. The Applicant joined the Organisation at the International Service for Remuneration and Pensions (ISRP) in July 2013 on a one-month internship, with a view to obtaining a Master 2 in international law from the University of Paris-Assas.
9. Satisfied with his performance, the Organisation recruited the Applicant as a temporary staff member at ISRP for the years 2014 and 2015. The ISRP, which administratively forms part of the Organisation, works on behalf of the Coordinated Organisations (COs), which apply identical rules in certain areas of personnel and pension management.
10. Encouraged by his superiors, the Applicant applied for a position as a lawyer (category A 1) within the ISRP and at the end of the selection process was recruited for the two-year period 2016 and 2017.
11. In view of the quality of his work, the Organisation offered the Applicant the opportunity to renew his appointment for a period of three years ending on 31 December 2020.
12. In 2019, the Applicant successfully applied for the newly created position of legal advisor to the ISRP and thus reached category A2 from April 2019.
13. In 2020, the Applicant was informed by his supervisors that they intended to propose that his contract be converted into an open-ended contract by following the procedure provided for this purpose.
14. An essential element of this procedure is the upstream intervention of a body, the Corporate Review Group (CRG), which is responsible in particular for formulating general recommendations on the conversion of officials in light of the Organisation's long-term

interests. It consists of the Secretary-General's Chief of Staff and four directors designated by the Secretary-General.

15. On 3 February 2020, the CRG met to prepare its recommendations on recruitment and conversion to the Organisation's various directorates.
16. These were communicated to their recipients by an email on 5 March, which emphasised in three instances the need to ensure maximum diversity<sup>1</sup> of nationality and gender. For its part, the ISRP was informed by an email on 5 March 2020<sup>2</sup> (Document 19 of the application) from Human Resources Management (HRM) that according to the CRG's recommendation it needed to make more of an effort to improve its national diversity and to develop the profile of ISRP staff to be more diverse and representative of an international organisation.
17. On 8 April 2020<sup>3</sup>, the ISRP transmitted to HRM its request for the conversion of three officials, including the Applicant. The conversion proposal concerning the Applicant was phrased in particularly glowing terms<sup>4</sup>.
18. It is clear both from an email of 12 June from the ISRP addressed to HRM<sup>5</sup> and from the ISRP's draft work programme and budget for the financial year 2021<sup>6</sup>, which was distributed to the Committee of Representatives of Secretary-Generals of the COs on 12 June 2020 and published on 13 June, that the CRG regarded these requests as incompatible with the recommendations previously made to the ISRP, in particular with respect to the diversity of staff within that service.

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<sup>1</sup> Document R 074

<sup>2</sup> Documents R 074 to 076

<sup>3</sup> Document R 070

<sup>4</sup> Document R 072

<sup>5</sup> Document R 059

<sup>6</sup> Document R 049

19. Informed of this assessment, the ISRP then decided by email of 12 June <sup>7</sup> to withdraw one of the three conversion requests, the one concerning the Applicant being maintained. In this email and to an even greater extent in its draft work programme and budget for the year 2021 <sup>8</sup>, the ISRP, after specifying the officials for whom the conversion request was being maintained, explained at length (§ 19 to 22) the reasons why – despite the CRG’s recommendations – these two requests related exclusively to officials of French nationality, one of whom was the Applicant. These documents do not mention any obstacle to these two requests other than the need to diversify nationalities during conversions.

20. It is clear from an email <sup>9</sup> from CC, head of the ISRP, dated 23 June 2020 that *‘further to the second negative reply from the CRG, but still unofficial if my understanding is correct’*, the ISRP firstly asked the representatives of the Coordinated Organisations – for which the ISRP works – to make their observations on the conversion requests and secondly decided to confine itself to requesting a simple three-year extension for the Applicant on an exceptional basis, explaining that *‘Eventually the three year extension doesn’t prevent the ISRP to present the two files for conversions, would the CO Executive Directors consider that such conversions represent added value for them’*.

21. This new request was accepted, and on 28 July 2020 the Applicant received an offer to renew his fixed-term appointment for a period of three years ending on 31 December 2023. He unreservedly accepted this on 2 August 2020 <sup>10</sup>.

22. On 8 September 2020 <sup>11</sup>, the Applicant asked HRM (Client Services Group, hereinafter CSG) if this renewal amounted to refusal of conversion and if so, what the reasons for this were.

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<sup>7</sup> Document R 059

<sup>8</sup> Document R 049

<sup>9</sup> Document O 019

<sup>10</sup> Document O 016

<sup>11</sup> Document R 042

23. After several reminders from the Applicant <sup>12</sup>, DD, who was responsible for the ISRP within the CSG, sent him, on 3 November 2020, a reply <sup>13</sup> stating *'I would like to confirm that the decision was indeed made that your fixed-term appointment would not be converted into an open-ended appointment'*. He added: *'In the exercise of the Organisation's discretion when reviewing your case and applying the above criteria, due consideration was given to a variety of factors including inter alia factors related to your adaptability, career and growth potential as well as other factors such as the skills and talents available on the labour market and the Organisation's ability to attract, hire, develop, and retain specific expertise as well as the profile of the overall workforce of your Directorate and the projected organisational skills needs.'*

24. An explanatory meeting took place at the Applicant's request on 18 December 2020 between the person responsible for the ISRP within the CSG and the Applicant. BB, who attended this interview as executive secretary of the Staff Association, has reproduced in the written testimony that she provided to the Tribunal the remarks made, according to her, by the person responsible for the ISRP. The latter specified that with regard to the ISRP, 'the CRG has made a specific recommendation on diversity, as it did in 2018, namely that the national diversity of its workforce should be improved so as to be representative of an international organisation. The ISRP had to take this recommendation into account for conversions and exceptional extensions of appointments', and added that 'Consideration of nationality is a recommendation which applies to the entire Organisation and specifically to the ISRP, which has approximately 20 French people out of 41 officials. Improvement is needed in this respect.' This same manager also alluded to other factors, such as adaptability and the labour market situation.

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<sup>12</sup> Documents R 027, R 028 and R 029

<sup>13</sup> Document R 026

25. On 13 January 2021, pursuant to Instruction 122/1.3 of the Staff Regulations, the Applicant asked the Secretary-General to refer the matter to the Joint Advisory Board (JAB) so that it could respond to the following questions <sup>14</sup>: *'-Did the Secretary-General abuse his discretionary authority in deciding to not convert my fixed term appointment? -Was the decision of non-conversion of my fixed-term appointment improperly motivated by discrimination? -Has the OECD respected my rights under Regulation 5 of the Staff Rules as well as the duty of care to which I am owed?'*
26. The Applicant added: *'In its recommendation, I will request the Joint Advisory Board to recommend the annulation of the decision of non-conversion of my fixed-term appointment and to further recommend the conversion of my fixed-term appointment, effective immediately.'*
27. The JAB met for the first time on 22 November 2021 to hear the parties as well as the former head of HRM, and then, after requesting and obtaining new documents, for a second time on the following 2 December in the presence of its members alone; its opinion<sup>15</sup> was sent to the Secretary-General on 14 February 2022. The JAB recommended that the application be rejected as inadmissible, in the absence of any decision by or on behalf of the Secretary-General rejecting the conversion of the Applicant's contract, and as unfounded with regard to damage for which compensation was payable.
28. However, in the last paragraph of its opinion, the JAB expressed itself as follows: *'Finally, the **policies regarding staff diversity need to be made more transparent and to be clearly communicated to all staff.** In particular, there should be clear and transparent **guidelines for the CRG and HRM on the role of nationality and gender in the conversion process, and to which degree these may differ across functions and directorates.**'*

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<sup>14</sup> Document R 023

<sup>15</sup> Document R 022



29. On 21 March 2022, the Secretary-General informed the Applicant <sup>16</sup> that he had decided to follow the recommendations of the JAB in all respects. This is the contested decision.

30. In the meantime, the Applicant had informed the Organisation on 28 May 2021 of his intention to resign <sup>17</sup> and requested that his notice period be shortened to allow him to join his new employer, the European Union Satellite Centre; this request was granted. He therefore left the Organisation on 31 July 2021.

## **THE PARTIES' ARGUMENTS**

31. Firstly, the Applicant maintains that the contested decision involves an error in law, because it is founded on discrimination on the basis of nationality, which is prohibited by Regulation 5 a) of the Staff Regulations. The Applicant received confirmation from his supervisors in June 2020 that his nationality was an obstacle to the conversion of his contract. This is also clear from documents drawn up by the ISRP at the time<sup>18</sup> and finally from an email<sup>19</sup> dated 3 November 2020 and addressed to the Applicant by the HRM official responsible for the ISRP.

32. The Applicant accepts that the Organisation may legally take measures aimed at ensuring a balanced distribution between nationals of member countries, but such measures must form part of clearly defined policies and remain appropriate and proportional, as is the case, for example, with the measures taken by the European Patent Organisation. This was not the case in this instance, however. The Organisation has never adopted a policy of refusing conversion for officials of French nationality due to the over-representation of these officials in the staff as a whole.

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<sup>16</sup> Document R 002

<sup>17</sup> Document R 010

<sup>18</sup> Documents R 059 and R 049

<sup>19</sup> Document R 026

33. Secondly, the Applicant maintains that the decision displays a manifest error of judgment, as the conversion criteria set out in the Secretary-General's guidelines could not reasonably lead in his case to a refusal of conversion. As is clear from the conversion proposal and the glowing assessments he received every year in the annual review<sup>20</sup>, the Applicant met the criteria of these guidelines, which reflect three concerns: knowledge compatible with the development of the Organisation's activities, ability to adapt, and consideration of the characteristics of the staff already employed and the Organisation's capacity to renew that staff. Finally, claiming that his profile was too specialised or criticising him for having only had one employer was frivolous. There is no evidence to suggest that the CRG raised any objections to the Applicant's proposed conversion based on his professional profile.
34. Thirdly, the Applicant maintains that the Organisation failed in its obligation to act in good faith and in its duty of care towards him. The conversion process lacked transparency and his requests for explanations were met with late, erratic and contradictory responses. Furthermore, the proceedings before the JAB were excessively long (more than a year).
35. In his comments in response, the Secretary-General recalls the objectives and the legal and procedural framework of the Organisation's employment policy, and in particular the respective roles of the CRG, which only issues recommendations, and of the Head of the HRM Service, who makes decisions concerning officials of grade A 4 and below. He maintains that the application is pointless and inadmissible, as the JAB considered it to be, since once the conversion request had been withdrawn by the head of the ISRP, the head of HRM was not in a position to take a 'non-conversion' decision.
36. However, in compliance with the principle of good faith, the Secretary-General formulates his observations on the basis that the contested decision should be analysed

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<sup>20</sup> Documents R 011, R 061, R 087, R 101, R 114 and R 129

as a decision of non-conversion. In any case, he considers that he used his discretionary power legitimately.

37. The reason for this is that the jurisprudence of the international tribunals, including the Tribunal of the Organisation, recognises that the international organisations have broad discretionary power in matters of staff recruitment, and the decisions they take may only be challenged within clearly defined limits.

38. Firstly, the contested decision is founded in law. Both Regulation 5 and Regulation 7 b) of the Staff Regulations allow the Secretary-General to take measures to ensure a balanced distribution among nationals of Member States. In addition, the Organisation's employment statistics do not show any discrimination against officials of French nationality in the conversion processes.

39. But other criteria are involved, as was explained in the email of 3 November 2020<sup>21</sup> addressed to the Applicant in response to his requests for an explanation of the decision of 28 July 2020, and by the former head of HRM during the meeting of the JAB of 22 November 2021, in particular the Applicant's lack of professional experience outside the OECD and the highly specialised nature of the roles he had performed in a single department. The Applicant may of course take a different view as to how these criteria should be applied, but such a difference does not constitute proof of a manifest error of judgment in the exercise of a discretionary power.

40. The Secretary-General claims in the second place that the Organisation did not fail in its duty of care and its obligation to act in good faith. Officials recruited for a fixed term are clearly informed that they have no right to either the renewal or the conversion of their contract. The Applicant exceptionally benefited from a three-year renewal and, when he submitted his resignation, obtained a reduction in his notice period so that he could join

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<sup>21</sup> Document R 026

his new employer. The two-month period between his request for an explanation of the decision of 28 July 2020 and the response was not excessive given the circumstances at the time. The same was true of the time taken by the JAB to deliver its opinion.

41. Finally, the sense of disappointment that the Applicant experienced is not enough to indicate negligence on the part of the Organisation justifying compensation for moral damage, especially since the Applicant quickly found a new job with which he was very satisfied.

42. The Staff Association submitted comments in support of AA's request. It argues that a conversion or non-conversion decision must be taken on the basis of fair, clear and known criteria, which was not the case for the Applicant, who was the victim of the vague, subjective and even discriminatory criteria of a decision that was communicated to him in a manner that was confusing and singularly lacking in transparency. It recognises the need to improve staff diversity, but not in a way that ignores the priority nature of skills.

## **THE HEARING**

The Tribunal heard the testimony of EE, who held the position of head of HRM at the time of the events.

## **THE TRIBUNAL'S APPRAISAL**

### **Applicable rules**

43. Regulation 5 of the Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation ('the Staff Regulations') states that: '*a) Officials shall not be subject to any discrimination on the grounds of racial or ethnic origin, nationality, opinions or beliefs, gender, sexual orientation, health or disabilities (1).* According to Note 1, '*The*

*Organisation may nevertheless... take measures designed to ensure gender balance or the equitable distribution of posts among nationals of Members of the Organisation...'*

44. According to Regulation 7, 'a) *In selecting officials, the Secretary-General shall give primary consideration to the necessity to obtain staff of the highest standards of competence and integrity. b) The Secretary-General shall provide, so far as possible, for an equitable allocation of functions among the nationals of Members of the Organisation and balanced gender representation, in particular as regards senior management functions.'*

45. Regulation 9 states that 'For officials at grade A5 or below ... iii) *the fixed-term appointment may be renewed once or more, provided that the total duration of service under such fixed-term appointment does not exceed five years. However, such fixed-term appointment may be renewed after a period of five years of continuous employment in the following cases: - in very limited circumstances and when the Organisation's interests so warrant, for a further period not exceeding three years. iv) the fixed-term appointment may be converted to an open-ended appointment, under the conditions set out in Instructions of the Secretary-General, provided that, at the time of the official's initial appointment or at any time during the official's fixed-term appointment, the official has successfully completed the standard selection procedure referred to in Rule 7/1 and the related Instructions.'*

46. Instruction 109/3 states that 'A *fixed-term appointment shall expire without prior notice on the date specified in the letter of appointment. A fixed-term appointment may be renewed, but an official shall not be entitled to any renewal of such appointment or to its conversion to an open-ended appointment.'*

47. Instruction 109/4 provides that '*Renewal of fixed-term appointments of officials at grade A4 or below shall be decided by the Head of Human Resource Management on the*

*recommendation of the Director concerned. Renewal of appointments of officials at grade A5, A6 or A7 shall be decided by the Secretary-General.'*

48. According to Instruction 109/5, 'a) For officials at grade A5 or below, conversion of fixed-term appointments to open-ended appointments shall be decided, on the recommendation of the Director concerned, after a minimum of five years satisfactory service and if considered to be in the long term interests of the Organisation, bearing in mind organisational requirements. b) The conversion shall be decided by the Head of Human Resource Management for fixed-term appointments held by officials at grade A4 or below and by the Secretary-General for fixed term appointments held by officials at grade A5, after consultation with the Head of Human Resource Management.'

#### **On the admissibility of the application**

49. The Tribunal will first examine the admissibility of the application in its contention that the decision of 28 July 2020 is illegal and that it should therefore be annulled. The Secretary-General decided in his letter of 21 March 2022<sup>22</sup> to follow the opinion of the JAB, which took the view<sup>23</sup> that the initial request made by the Applicant on 13 January 2021 was inadmissible since the latter, who is seeking the annulment of the decision not to convert his appointment, cannot obtain such an outcome by requesting the annulment of the decision of 28 July 2020 of the head of HRM exceptionally granting him a three-year renewal of his appointment, which he accepted.

50. Although the Secretary-General allows in his submissions<sup>24</sup> 'the hypothesis' that the contested decision can be analysed as a decision not to convert an appointment and therefore does not claim that the application is inadmissible because it concerns a

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<sup>22</sup> Document R 002

<sup>23</sup> Document R 004

<sup>24</sup> § 40 of the comments in response

decision renewing the Applicant's appointment for three years, the Tribunal considers it necessary to decide the question of the application's admissibility in this respect.

51. It is beyond dispute that no formal decision not to convert an appointment taken by the person authorised to act on behalf of the Secretary-General in this matter, namely the head of HRM, appears in the Tribunal's documentation, which merely contain minutes of the CRG meetings at which the ISRP's proposals were discussed. It is surprising, as the head of the ISRP also pointed out in his email of 23 June, that the CRG's reactions to its conversion proposals remained '*unofficial*'<sup>25</sup>. Moreover, the conversion process as organised by Instruction 109/5, a) and b) does not provide for a request from an official: provision is only made for a 'recommendation of the Director concerned', and the decision must be taken by the Head of HRM for an official of grade A4 or below.

52. However, the circumstances of the case must be taken into account. The offer made to the Applicant on 28 July 2020 of a three-year renewal of his appointment constituted the final stage of an initial conversion process initiated on the recommendation of the head of the ISRP. As indicated above (§ 16 to 18), this recommendation was inconsistent with the focus of the recruitment and conversion policy defined by the CRG in terms of diversity of nationality, as communicated to the directors by HRM, and in particular to the director of the ISRP by email on 5 March 2020. The repeated and closely argued efforts made by the head of the ISRP and his colleagues to justify, despite the contrary recommendations of the CRG, the conversion of a number of officials of French nationality – initially three, and subsequently two – were in vain, and this led the head of the ISRP, 'further to the second negative reply from the CRG', to request on 23 June 2020 an exceptional renewal of the contracts of two officials without formally renouncing the two conversion requests that had been presented.

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<sup>25</sup> Document O 019

53. Furthermore, the Tribunal notes that in its Conclusion 2, the JAB expresses itself as follows: ‘More generally, the Board recommends that **the Organisation should improve its practices**, in particular as regards timeliness of HRM's response to staff queries and the extent of the explanations provided on the reasons for CRG's recommendation and HRM's final decision of non-conversion despite proposal of conversion by the Director’ (underlining added by the Tribunal).
54. No decisive argument can be drawn from the fact that the head of the ISRP withdrew the request for conversion of the Applicant’s appointment: in his message<sup>26</sup> dated 23 June 2020, the head of the ISRP expressed himself as follows: ‘*Eventually the three year extension doesn’t prevent the IRSP to present the two files for conversions, would the CO (Coordinated Organisations) consider that such conversions represent added value for them.*’
55. In any event, the fact that the CRG’s opposition to the conversion requests presented by the ISRP remained implied does not raise any further difficulty. The jurisprudence of the international tribunals has long accepted the existence of implied decisions subject to appeal<sup>27</sup> (UNDT, judgment 2016/117, *Auda*, 26 August 2016, consideration 38).
56. Finally, in his rejoinder, the Secretary-General expresses himself as follows<sup>28</sup>: ‘*the consideration of these points by the Head of HRM in deciding not to convert the Applicant’s appointment constitutes a legitimate exercise of her discretionary power’ and ‘... The contested decision must be seen in its overall context: it is a decision not to convert the Applicant’s appointment and to offer him an exceptional extension of three years’ (underlining added).*

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<sup>26</sup> Document O 019

<sup>27</sup> UNDT, judgment 2016/117, 26 August 2016, *Auda*

<sup>28</sup> § 36 and 37 of the rejoinder



57. For all of the above reasons, the Tribunal rules that the application is admissible insofar as it challenges a non-conversion decision which is inseparable from the decision to exceptionally extend the Applicant's contract.

### **On the merits of the case**

58. First of all, the Tribunal wishes to point out that, as an international tribunal and in accordance with well-established jurisprudence, it recognises the wide discretion an organisation enjoys in relation to the decision to convert a fixed-term appointment to a permanent one. Given the highly discretionary nature of the decision, it is subject to limited review and will only be set aside 'if it is taken without authority or in breach of a rule of form or of procedure, or if it is based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority'<sup>29</sup> (OECDAT, Judgment 101 and cited case law).

59. The first question is whether the decision of 28 July 2020 is based exclusively on discrimination prohibited by the Staff Regulations.

60. In law, the Staff Regulations firstly prohibit in Regulation 5 any discrimination against officials, in particular on the grounds of nationality, but also require the Secretary-General to ensure, at least as far as possible, an equitable allocation of functions among the nationals of Members of the Organisation, as is clear from Regulation 7 b). Contrary to what the Applicant maintains, it is this provision of the Staff Regulations, which is of the same status as Regulation 5, and not note 1 under the latter article, which establishes the Secretary-General's recognised power to 'take measures designed to ensure gender balance or the equitable distribution of posts among nationals of Members of the Organisation', as stated in note 1 under Regulation 5.

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<sup>29</sup> OECDAT, Judgment 101 and cited case law

61. The Tribunal notes that the principle of equitable geographical distribution of officials appears in numerous texts governing the international organisations, such as the Charter of the United Nations: *'Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible'*,<sup>30</sup> and is recognised in international jurisprudence<sup>31</sup>.
62. In cases where a choice needs to be made between two (or more) candidates, it is accepted in the jurisprudence of the international tribunals that the criterion of nationality can only come into play if the merits of the two candidates are identical, which implies that it can only be taken into account at the final stage of the recruitment process<sup>32</sup> (ILOAT, Judgment 3652 and cited case law).
63. However, the present case differs from the cases referred to above: firstly, it concerns the conversion of a fixed-term contract into an open-ended contract; and secondly, the Organisation did not face a choice between two conversion proposals (in any case, the two applications supported by the ISRP concerned two officials of French nationality occupying different functions); instead, it had to decide whether it should further increase the numerical prevalence of officials of French nationality within the ISRP.
64. Under these conditions, a decision refusing the conversion of an official's contract into an open-ended contract for reasons based exclusively or mainly on his/her nationality, even though the official in question is of the utmost competence and integrity, does not necessarily constitute prohibited discrimination, in particular if it is objectively justified, in conditions where officials of one nationality are over-represented, by the objective of a fair distribution of posts.
65. It is therefore up to the Tribunal to examine, firstly, whether the decision of 28 July 2020, insofar as it amounts to the non-conversion of the Applicant's contract, was exclusively

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<sup>30</sup> Article 101.3

<sup>31</sup> UNDT, judgment 2016-178, 28 September 2018, Sarwar

<sup>32</sup> ILOAT, Judgment 3652 and cited case law

or mainly based on the Applicant's nationality, and, secondly, whether it was justified by the objective of a fair distribution of posts.

66. It is clear from the evidence that before the decision of 28 July 2020, no grounds other than that of the nationality of the ISRP officials whose conversion was being requested were mentioned in the exchanges between the CRG and the ISRP (Documents 15 and 19 of the application). The Secretary-General maintains that the non-conversion decision was based to a far greater extent on the general rules of the Organisation, 'Policy guidelines on Appointment Conversion'<sup>33</sup>, which mention, albeit among other objectives, the need to ensure geographical diversity, than on the recommendations of the CRG concerning the ISRP which are limited to the question of diversity<sup>34</sup>.

67. However, it was only in an email of 3 November 2020 sent by DD, who was responsible for monitoring the ISRP within HRM's Client Service Group, that other reasons were presented to justify the non-conversion of the Applicant's appointment: *'In the exercise of the Organisation's discretion when reviewing your case and applying the above criteria, due consideration was given to a variety of factors including inter alia factors related to your adaptability, career and growth potential as well as other factors such as the skills and talents available on the labour market and the Organisation's ability to attract, hire, develop, and retain specific expertise as well as the profile of the overall workforce of your Directorate and the projected organisational skills needs.'*<sup>35</sup>

68. It is accepted by the jurisprudence of the international tribunals that the reasons for a decision concerning an official may not appear in the communication announcing the non-conversion or non-renewal. These reasons may be specified subsequently, in the context of an appeal by the official and even before a court responsible for hearing the

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<sup>33</sup> Document O 009

<sup>34</sup> Document R 074

<sup>35</sup> Document R 026

appeal, on condition that the official is always in a position to challenge them<sup>36</sup> (see ILOAT, judgment 3837 of 28 June 2017, point 10 and case law cited).

69. Following the email of 3 November 2020 and as part of the proceedings before the JAB<sup>37</sup>, it was explained by Ms Diana Benoit, representing the Secretary-General, that: *'the Claimant's profile, professional experience and expertise did not warrant a conversion to an open-ended appointment, that diversity considerations were only one of several factors taken into account in the Organisation's non-conversion decision and that such considerations were part of the Organisation's recruitment and conversion policies.'*

70. More precisely, according to the observations of the Secretary-General<sup>38</sup>, the Head of HRM at the time indicated in her testimony during the JAB hearing on 22 November 2021 that she had been aware 'i. of the fact that he had never had any professional experience outside the OECD, having joined the Organisation for an internship completed in connection with his studies, which was directly followed by an appointment as a member of the temporary staff, and then as an official; ii. of the fact that he had always carried out his duties at the Organisation within the same small, highly specialised unit, under the supervision of the same management.'

71. Although these reasons only emerged after 28 July 2020, the Tribunal, given the limited nature of the control it exercises over non-conversion decisions, considers that they can be taken into account.

72. With regard to the fair distribution of posts between nationals of the Member States, it is beyond dispute that officials of French nationality represented the largest group within the Organisation. 39

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<sup>36</sup> ILOAT, judgment 3837 of 28 June 2017, point 10 and case law cited.

<sup>37</sup> Document R 004, Section II, § C-1

<sup>38</sup> § 58 of the comments in response

<sup>39</sup> § 26 to 28 of the rejoinder

73. Thus in 2020, French nationals represented nearly 29% of the Organisation's total workforce and 20% of category A officials. Within the ISRP, this proportion was at least 36%, or as high as 46% if account is also taken of officials who had a first nationality different other than French 40 (document 14 of the application). Given the Secretary-General's obligation as described in the Staff Regulations to ensure a fair distribution of posts between Member States and the CRG's recommendations on this point, the Organisation cannot be blamed for not having accepted the conversion of two contracts of officials of French nationality despite the reasoned requests of the ISRP.
74. It follows from points 59 to 72 above that the decision not to convert the contract reflected the objective of a fair distribution of posts between nationals of different Member States and was not justified solely on the basis of the Applicant's nationality. It therefore does not fall within the scope of the discrimination prohibited by the Staff Regulations.
75. The Applicant secondly maintains that the decision not to convert his contract displays a manifest error of judgment. He claims that reasons other than those based on his nationality could not justify the non-conversion of his appointment and that he perfectly fulfilled the conversion criteria set out in the Secretary-General's guidelines: compatibility with the development of the Organisation's activities; adaptability; and closeness of fit with the needs of the Organisation taking the existing staff and the labour market into account. It is true that in the annual staff reviews<sup>41</sup>, his superiors always gave highly detailed, positive, and latterly glowing, assessments of his performance, particularly for the year 2020. These skills and this strong performance are mentioned at length and in detail in the requests for conversion of the Applicant's contract<sup>42</sup> (Documents 14, 15 and 18 of the application).

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<sup>40</sup> Document R 049, points 19 to 21

<sup>41</sup> Documents R 011, R 061, R 087, R 101, R 114 and R 129

<sup>42</sup> Documents R 049, R 059 and R 072

76. However, as noted in paragraph 55, the Tribunal exercises only limited control over decisions such as that at issue in the present case. The criteria set out in the email of 3 November 2020, clarified before the JAB by the head of HRM and repeated by the Secretary-General in his submissions, are not manifestly inappropriate. The Organisation could legitimately take the view, when presented with a request to convert a fixed-term appointment into an open-ended one, that the real and immediate needs of one service were inconsistent with its long-term interests, having regard to the objective of a fair distribution of posts.

77. Furthermore, as was noted previously during the examination of the application's admissibility, the decision not to convert the Applicant's contract is inseparable from the decision to offer him an exceptional three-year renewal of his contract, which he accepted. It seems hard to accept that in such a context, the Organisation committed a manifest error of judgment in failing to retain the Applicant's services for more than three years. On the contrary, by acting in this way, the Organisation very properly took account of the requirements for the proper functioning of the ISRP, which might have been compromised by the Applicant's departure on 31 December 2020.

78. Finally, the Applicant maintains that the Organisation failed in its obligation to act in good faith and in its duty of care.

79. He could not claim that he had a legitimate hope of seeing his appointment converted in the sense in which this expression is used in the jurisprudence of the international tribunals, which requires a firm commitment or an explicit promise made by a person with authority and competence to do so<sup>43</sup>. In this case, no commitment was given and no promise was made to the Applicant, and anyway, those responsible for the ISRP did not have the necessary authority to give such a commitment.

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<sup>43</sup> UNDT, judgments 2014-116, § 24, 19 September 2016, *Kacan* and 2016/178, § 48, 28 September 2016, *Sarwar*

80. It is also true that the Applicant cannot complain about having received an exceptional offer for a three-year renewal of his appointment. Furthermore, when he requested a reduction of his notice period after he had found another job outside the Organisation, he was granted it immediately.
81. However, the Applicant was not immediately informed by the decision-making authority of the reasons why his appointment was not converted: the director of ISRP only informed the Applicant by word of mouth on 23 July 2020. The message of 28 July 2020 from the head of HRM merely offered the Applicant an exceptional three-year renewal of his appointment. He had to wait for more than three months and press the matter on multiple occasions to receive a first written explanation. Furthermore, the email of 3 November 2020 from HRM, the first document to mention reasons for non-conversion other than the Applicant's nationality, does not come from the person responsible for the decision as should have been the case, and is worded in very general terms when it discusses the reasons for the decision other than those based on nationality. It was the same official, and not the person responsible for the decision, who met the Applicant at his request on 18 November 2020.
82. In addition, the delay of more than a year between the request for referral to the JAB made on 13 January 2021 and the communication to the Applicant in March 2022 of the opinion issued by the JAB on 10 February 2022, even though it can be explained in part by the time taken by the Applicant to submit detailed comments and by the very specific circumstances of the period, exceeded what is reasonable: the Applicant had left the Organisation on 30 June 2021.
83. Finally, it is clear from the JAB's opinion that the Organisation's conversion process was flawed and in need of several improvements, in particular with regard to the place and role of nationality and gender criteria and the information given to officials when a conversion is refused. This point is also made in the written comments submitted by the Staff Association.

84. The Organisation's duty of care towards officials implies the obligation to inform them in fair conditions and in complete transparency of the reasons for decisions that affect their interests<sup>44</sup>. All in all, the Tribunal considers that these inadequacies caused the Applicant moral damage which goes beyond the mere disappointment of not having obtained the conversion of his appointment and which will be repaired by compensation equivalent to three months' remuneration.

**THE TRIBUNAL DECIDES:**

Article 1. The Organisation will pay AA a sum equal to three months of his final emoluments.

Article 2. The Organisation will pay AA the sum of 5,000 euros in costs.

Article 3. All other claims in the application are dismissed.

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<sup>44</sup> ILOAT, judgments 2768, § 4, 13 November 2009 and 3940, § 6, 28 January 2018; UNDT, judgment 2028-038, § 39, 14 March 2018, Rehman