



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/071
Order No.: 147 (NBI/2022)
Date: 10 October 2022
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION FOR
INTERIM MEASURES**

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Support office in Somalia (“UNSOS”), filed an application on 20 August 2022 contesting the decision to deny the request to change their gender from male to female in United Nations administrative systems to reflect their gender identity.

2. The Respondent filed a reply to the application on 20 September 2022 in which he asserts that the contested decision is lawful, and that the application should be dismissed.

3. On 1 October 2022, the Applicant filed a motion, pursuant to articles 10.2 of the Statute and 14 of the Rules of Procedure of the United Nations Dispute Tribunal, seeking “an injunction against the Organization registering me as “male” and addressing or referring to me by “Mr.” or with male pronouns pending the judgment on the merits”.

4. The application was transmitted to the Respondent on 3 October 2022, and he filed a response on 4 October 2022. On 5 October 2022, the Applicant filed a motion seeking leave to provide comments on the Respondent’s response. The Tribunal has taken note of the Applicant’s comments.

Facts

5. The Applicant, a national of Denmark, was assigned male gender at birth. According to the Applicant, in November 2020, they appeared before the competent authority in Denmark and gave a solemn declaration to the fact that they now identify as female and requested to have a new passport issued to acknowledge that fact.¹ A new passport was issued on 17 May 2021 with “Sex” marked as “X”.² The Applicant

¹ Application, page 2, para. 2.

² Application, annex 01.

submits that the “X” under Danish law, as it stood at the time, documents that one identifies with the opposite gender than the one assigned at birth.

6. On 25 September 2021, the Applicant wrote to the UNSOS Chief Human Resources Officer requesting recognition of their gender identity by having their gender in Umoja reflect as “female” in accordance with Danish law (Proclamation no. 1337 of 28 November 2013).³

7. On 29 September 2021, UNSOS requested advice from the Office of Legal Affairs (“OLA”) on the Applicant’s request for change of gender identity.⁴

8. On 23 November 2021, OLA wrote to the Permanent Mission of Denmark to the United Nations in New York (“Permanent Mission of Denmark”), asking them to verify whether the passport establishes that the staff member has changed their gender to female under the laws of Denmark.⁵ According to OLA, on 24 November 2021, the Permanent Mission of Denmark responded that “under Danish legislation [...] a person can apply to get an X listed under ‘sex’ in their passport,” and that the “Danish Chief of Police can grant permission to list X under ‘sex’ to a person that has not undergone a gender reassignment, but who has been assessed by the National Hospital’s Sexological Clinic (Rigshospitalet) to be transgender.” In the correspondence to OLA, the Permanent Mission of Denmark also provided a link to Danish Legislation (“BEK nr 1337 af 28/11/2013”) which they indicated was the “relevant legislation” for the case at hand.⁶

9. The Applicant wrote to the Permanent Mission of Denmark on 15 February 2022 requesting disclosure of all correspondence between the Permanent Mission and the United Nations Secretariat regarding their request to have their gender correctly registered in the United Nations personnel systems. The Applicant also sought confirmation: of the circumstances surrounding the issuance of their new passport; that

³ Application, annex 02.

⁴ Application, annex 05, para. 1.

⁵ Ibid., para. 3.

⁶ Ibid., para. 4.

the applicable legislation relating to the issuance of their passport on 17 May 2021 was Proclamation No. 1337 of 28 November 2013; and the adequacy of the English translation of Proclamation No. 1337.⁷

10. On 4 March 2022, the Permanent Mission of Denmark responded to the Applicant confirming the circumstances surrounding the issuance of their new passport, the applicable Proclamation and providing an unofficial English translation. The Permanent Mission of Denmark also informed the Applicant that it had made a mistake when informing the United Nations of the applicable law and that the information provided was based on the wording of section 4(5) of Proclamation No. 1337 without the amendments of Proclamation No. 953 of 28 August 2014. The relevant wording of the amendments of Proclamation No. 953 had been subsequently sent to the United Nations.⁸

11. On 11 March 2022, the Permanent Mission of Denmark confirmed to OLA that: under Danish Passport Law, passport applicants may receive one of the following three markings under the heading “Sex” in their Danish passport: F, M or X; the Applicant’s “Sex” in their Danish passport, in accordance with the Passport Law at the time, has been changed from “M” to “X” based on the Applicant’s declaration of “experience of belonging to the other gender”; and under Danish Passport Law, the Applicant is not recognized as female, which would have been indicated as “F” in the passport.⁹

12. In a memorandum dated 16 March 2022, OLA informed UNSOS that it had received confirmation from the Permanent Mission of Denmark that, under Danish Passport Law, the staff member is not recognized as female. It accordingly recommended that, in accordance with ST/SGB/2004/13/Rev.1 (Personal status for purposes of United Nations entitlements), UNSOS not grant the staff member’s request to change gender in Umoja to female.¹⁰

⁷ Application, annex 03.

⁸ Application, annex 04.

⁹ Reply, annex R1.

¹⁰ Application, annex 05.

13. The UNSOS Head of Mission (“HoM”) informed the Applicant, via memorandum dated 29 March 2022, that based on the confirmation from the Permanent Mission of Denmark under Danish Passport Law they are not recognized as female, thus the Organization is unable to meet their request for a change of gender from male to female in Umoja.¹¹

14. The Applicant requested management evaluation of the 29 March 2022 decision on 26 April 2022.

Applicant’s submissions

15. The Applicant submits that the motion for interim measures is receivable because the contested decision has ongoing effect and does not seek to satisfy the main claim because it only requests that the Organization cease to register the Applicant as “male” whereas the application on the merits seeks their registration as “female”.

16. The contested decision is *prima facie* unlawful because:

a. The decision to designate the Applicant as “male”, after recognizing that they are not, violates the preamble of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority), which guarantees that staff have the right to be “treated with dignity and respect” and to “a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority, and being mindful of the need to prevent such conduct and, if it occurs, to take timely appropriate corrective action”. The Organization has not taken corrective action after being informed and recognizing that the Applicant identifies as female. Referring to the Applicant as “male”, “Mr.”, or with male pronouns in official registers and correspondence is harassment under ST/SGB/2019/8 as it is unwelcome, offensive, and humiliating, and interferes with their work.

¹¹ Application, annex 06.

b. With the introduction of the Temporary Special measures on Gender Equality (“TSM”), their erroneous registration by the Organization as male becomes an unfair and arbitrary distinction based on their gender identity, as it holds them to a wrong standard when being considered for promotion or reassignment. When registered as a male, they would have to be better qualified than a female candidate to be selected and even then, only after referral to the Executive Office of the Secretary-General (“EOSG”). As “Transgender”, a term not identified in the TSM, the TSM would not apply them.

c. The Respondent has failed to determine which other option is available when a staff member is not male. One obvious option would be to designate them as “female” in the interim, while the Organization figures out its policy. This option would immediately terminate the violations of ST/SGB/2019/8, vis-à-vis the Applicant. However, the Applicant concedes that this proposal is beyond the request for an injunction, and that the steps to be taken after the injunction is granted should be left to the Respondent to decide on.

17. Relying on paragraph 32 of A/73/152¹², the Applicant submits that the matter is urgent and causes them irreparable harm because the psychological effects of not being recognized for who they are, has unbearable consequences for them. They have trouble sleeping unless they use alcohol, they have lost appetite, are constantly tired, have problems concentrating and struggle to not affect their work performance.

Respondent’s submissions

18. The motion is not receivable *ratione materiae* because:

a. The Dispute Tribunal may not grant an order as an interim measure, which will result in the final disposition of the application.¹³ Further, as

¹² Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

¹³ *Applicant* Order No. 016, (NBI/2022), para 13; *Minzer* Order No. 75 (NY/2021), paras. 6-9; *Nadeau* Order No. 145 (NY/2018), para. 19; *Faye* Order No. 115. (NY/2015), para. 21; *El-Awar*

previously noted by this Tribunal, “the competence of the Tribunal does not extend over the issuance of any type of interim relief, such as to replace administrative inaction with its own regulatory decision”.¹⁴ The interim measure sought by the Applicant would modify the *status quo* instead of maintaining it because implementation would require changes in the administrative systems of the Organization. Such a process inevitably takes time because it requires the Administration to undertake the necessary due diligence and enquiries, including with the relevant Member State.

b. An administrative decision is a precise act distinguished from other administrative acts and is notified to a staff member on a specific date. The Applicant has not identified a specific administrative decision. The Applicant does not specify any such decision nor communication through which the unwelcome designation was used. The contested decision does not refer to the Applicant as “Mr.” nor use any male pronouns.

c. The Applicant seeks an interim measure not connected to the application on the merits. The Applicant’s request not to be addressed as “Mr.” or other male pronouns pending the final judgment is not based on the application on the merits. This claim is a separate administrative action that has not been separately challenged through management evaluation and, therefore, is not receivable.

19. The contested decision is lawful. The UNSOS HoM properly exercised her discretion in denying the Applicant's request to be registered as a female in Umoja and United Nations systems. Gender is determined by reference to the law of the competent authority under which personal status has been established.¹⁵ The Permanent Mission of Denmark has not recognized the Applicant’s status as a female. Under Danish law,

UNDT/2017/023, para. 22; *Lane* Order No. 31 (NY/2014), para. 12; *Kisambira* Order No. 80 (NY/2014), para. 13.

¹⁴ *Applicant* Order No. 016, (NBI/2022), para 13.

¹⁵ ST/SGB/2004/13/Rev.1.

the 'X' in the Applicant's passport does not denote recognition as female. Only once the Applicant is recognized as female under Danish law may the Organization change the Applicant's personnel record per ST/SGB/2004/13/Rev.1. The Applicant's request for the Tribunal to order a change in their registration status as an interim measure pending the finalization of the work of the "Working Group", lacks merit.

20. Any urgency is self-created and does not satisfy the requirements for suspension of implementation of the contested decision or for interim measures.¹⁶ The Applicant received the Management Evaluation Unit's ("MEU") response on 27 June 2022 but waited almost three months, i.e., until 1 October 2022 to seek an interim measure. There is no explanation for this delay. A delay of 10 days or more without explanation is self-created urgency.¹⁷

21. The Applicant's argument that the matter is urgent because of the alleged psychological consequences of not being recognized as female lacks merit. The Applicant has not produced any evidence of the alleged "psychological consequences". The Applicant continues to perform their functions satisfactorily, as evidenced by their recent promotion to the P-4 level effective 1 September 2022.

22. The Applicant has not provided evidence that they would suffer irreparable harm. They argue that the irreparable harm is similar to the adverse psychological effects for urgency for which no evidence has been submitted. Further, the argument that the Applicant will not enjoy the advantage potentially afforded to female candidates under ST/AI/2020/5 (Temporary special measures for the achievement of gender parity) lacks merit. Their claim of loss of opportunity is purely speculative; their recent selection to the P-4 level is proof of this. The Dispute Tribunal may not award relief based on a general allegation of future or hypothetical harm.

¹⁶ *Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206; *Maloka Mpacko* UNDT/2012/081

¹⁷ *Handy* Order No. 228 (NBI/2019), para. 7.

Considerations

23. The Tribunal sees the need to first clarify the scope of its possible intervention.

24. Pursuant to articles 10.2 of the UNDT Statute and 14 of the Rules of Procedure, the Tribunal may, at any time during the proceedings, order an interim measure to provide temporary relief to either party, where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination. The scope of the Tribunal's powers under articles 10.2 is thus broader than suspension under art. 2 of the Statute, and the Respondent's citation to *Applicant* Order No. 016, (NBI/2022) is not entirely apposite. Still, the Respondent rightly points out, that the temporary relief sought under art. 10.2 of the Statute must inextricably flow from the *prima facie* illegality of the impugned decision, and the risk and urgency that it has created. It cannot be a stand-alone demand reviewed autonomously for necessity.

25. The impugned decision, as it should be recalled, is a refusal to change the designation of the Applicant from "male" to "female" in Umoja. This decision is subject to review for the tripartite test. Where one prong of the test is not met, the motion for temporary relief must be denied.¹⁸

26. The Tribunal finds that the contested decision does not pose a case of particular urgency. Umoja, or strictly speaking, the Organization's human resources management portal, registers personal data of staff members for the purpose of identification, employment status, employment-related events, and entitlements. It also uses data for broadly understood statistics, which is not relevant for the Applicant's present claim. The Applicant was registered as "male" since he joined the Organization, without any recorded opposition. The Danish Passport Law, on which the parties base their

¹⁸ *Chawla* Order No. 179 (NBI/2021); *Al-Bakry* Order No. 114 (NBI/2020); *Mancinelli* Order No. 218 (NBI/2019); *Toure* Order No. 135 (NBI/2018); and *Almou* Order No. 103 (NBI/2017).

argument, was in place since 2014. The Applicant, admittedly, appeared before the municipal body to make the gender non-compliance declaration only in November 2020, i.e., soon after the promulgation of the Temporary Special measures on Gender Equality. The passport bearing the X marker was issued in May 2021; the application on the merits was filed in August 2022 and the motion for interim measures in October 2022. The sequence of procedural steps taken by the Applicant do not convey urgency and the possible use of the functionality of Umoja does not present such urgency either. The Respondent declared voluntary compliance with the Applicant's wish to not be addressed with any masculine pronouns. Altogether, there is no basis to accept that the matter could not wait until the disposal by way of judgment. This conclusion relieves the Tribunal from examining the other prongs of the test.

ORDER

27. The motion for interim measures is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 10th day of October 2022

Entered in the Register on this 10th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi