



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/59
Judgment No.: UNDT/2010/170
Date: 24 September 2010
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TURNER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
None

Facts

1. By decision of 13 October 2008, the Registrar of the International Criminal Tribunal for Rwanda (ICTR) through its Defence Counsel and Detention Management Section (DCDMS) assigned the Applicant to represent Mr. Léonidas Nshogozza, an ICTR Defense Investigator charged with four counts of contempt¹. The Applicant was advised in a letter of assignment that she would be paid under a Lump Sum System applied at the ICTR, in agreed phases with the last phase being at the close of the trial. A lump sum of USD 50,000 was allocated to the Applicant to cover legal assistance and investigation fees, in addition to reasonable and necessary expenses.

2. Subsequently, the Applicant considered that the allocated sum of USD 50,000 was insufficient to cover outstanding fees incurred prior to the period covered by the lump sum. On 23 February 2009, in the middle of the two-month long trial, she requested the DCDMS to review her lump sum.

3. On 24 February 2009, the Applicant met with the then-Head of the DCDMS in order to increase the lump sum. On 27 February 2009, after the trial ended in the Nshogozza case, she received an email from a DCDMS Officer advising that,

“DCDMS is of the view that the amount allocated for this contempt of court procedure is sufficient. Consequently, your request for a review of the USD 50,000 amount is denied”.

4. On 10 April 2009, the Applicant wrote to the then-Head of DCDMS stating that he had orally agreed, during their meeting of 24 February 2009, to review her lump sum and apply the new lump sum system rules. According to the Applicant, the then-Head of DCDMS never replied to her request.

¹ ICTR Case No. 2007-91-A.

5. By letter dated 4 May 2009, the Applicant reiterated her request to the DCDMS to pay her outstanding fees. According to the Applicant, she did not receive a reply.

6. On 20 July 2009, the Applicant wrote to the Registrar of the ICTR, requesting him to authorize the payment of her outstanding fees and expenses claims as Lead Defense Counsel in the Nshogoza case.

7. In his reply dated 29 July 2009, the Registrar explained that, as agreed from the beginning, the Applicant had been on the Lump Sum System according to the nature of the case she was assigned. For that reason, the Registrar considered that the lump sum of USD 50,000 duly compensated her for the work done and that the Tribunal had covered all her outstanding fees and expenses claims duly justified.

8. By letter dated 26 October 2009 and in accordance with the ICTR Directive on the assignment of Defense Counsel, the Applicant challenged the Registrar's decision before the President of the ICTR, stating that the DCDMS had agreed to increase her lump sum.

9. In a reply dated 24 November 2009, the President of the ICTR denied her request on the ground that he could not find evidence that the Registry had accepted an increase of her lump sum.

10. On 6 February 2010, the Applicant requested management evaluation of the ICTR President's decision of 24 November 2009.

11. By letter dated 10 March 2010, the Management Evaluation Unit (MEU) advised the Applicant that it lacked competence *ratione personae* to review her request as she was not considered staff member of the United Nations, within the meaning of UN staff rule 11.2.

12. On 7 June 2010, the Applicant filed a provisional application with the Dispute Tribunal as well as a motion, requesting an extension of time in order to properly file

an application with the UNDT pending the outcome of her request for arbitration initiated pursuant to an agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the ICTR.

13. On 10 June 2010, the UNDT Registry in Nairobi requested the Applicant to peruse Article 3 of the UNDT Statute and indicate the capacity in which she thought she was eligible to file an application before the Tribunal.

14. In her response to the UNDT Registry dated 14 June 2010, the Applicant argued that she met the requirements to file an application with the UNDT as a former staff member of the United Nations.

15. In the light of her response, the Registry requested the Applicant, on 15 June 2010, to provide her latest offer of appointment including her UN index number.

16. In another message dated 15 June 2010, the Registry requested the Applicant to disclose her index number without further delay. On 16 June 2010, the Applicant provided the number appearing on the identification card issued to her by the UN-ICTR as Defence Counsel.

17. On 16 June 2010, in response to the request, the Applicant transmitted to the Registry a letter indicating that her appointment had ended in March 2010 with the rendering of the Appeals Chamber judgment in the Nshogoza case. She also requested a change of venue to the New York Registry of the UNDT.

18. By email dated 21 June 2010, the Registry advised the Applicant that they were not in a position to enter her application, on the ground that she did not meet the requirements set forth in Article 3 of the UNDT Statute.

19. In her reply dated 22 June 2010, the Applicant challenged the Registry's response and stated that,

“The Management Evaluation Unit’s decision of 10 March 2010 formally places the question of the court’s jurisdiction up for challenge, and I am challenging its decision before the UNDT judges, not [the Registry]”.

Applicant’s submissions

20. The Applicant seeks to challenge the decision by the ICTR not to increase her lump sum to cover alleged outstanding fees incurred in the performance of her duties as Defence Counsel at the ICTR. She submits that, between mid-February until mid-May 2008, while the Registrar delayed her assignment, the Nshogoza Defense incurred defence costs for more than 150 hours of services, which were not covered by the Lump Sum.

21. The Applicant submits that she requested management evaluation in accordance with the rules and regulations. She subsequently filed an application with the UNDT, to contest the decisions by the ICTR not to review the amount of her lump sum. She argues that she is a former staff member of the UN within the meaning of Article 3 of the UNDT Statute and requests this Tribunal to determine its competence *ratione personae*.

22. The Applicant argues that the UNDT has competence to entertain her application as she falls under the scope of Article 3 of the UNDT Statute, paragraph 1, subparagraph 1, as a former staff member of the United Nations. She provided the Registry with her UN-ICTR Identification Card and several letters allegedly supporting her status of former UN staff member and continuous employment.

23. Having filed a request for arbitration pursuant to Article XXIX (“Settlement of Disputes”) of the Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the ICTR, the Applicant seeks an extension of time in the event that this arbitration process does not take place, to enable her to properly file her application on the question of jurisdiction and to address the issues on the merits.

24. The Applicant seeks payment “of all monies duly owned pursuant to ICTR Rules and Regulations in the amount of 201,167.86 USD” and “additional financial compensation that the UNDT may deem appropriate under the circumstances”.

Considerations

25. On the question of the Applicant’s *locus standi*, or in other words her right to appear before this Court, the Tribunal recalls Article 3 of the UNDT Statute which provides that:

1. An application under article 2, paragraph 1, of the present statute may be filed by:
 - (a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
 - (b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
 - (c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

26. From the foregoing, the crux of the matter is whether counsel assigned by the Registrar of the ICTR to represent an accused person (“Defence Counsel”) are considered staff members of the UN within the meaning of Article 3 of the UNDT Statute. A review of the Tribunal’s competence therefore entails the determination of the definition of “staff member”.

Definition of “staff member”

27. The Staff Regulations of the United Nations read as follows²:

“The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the

² Staff Regulations, ST/SGB/2002/1, 1 January 2002

Secretariat. For the purpose of these Regulations, the expressions ‘United Nations Secretariat’, “staff members” or “staff” shall refer to all the staff members of the Secretariat, within the meaning of Article 97³ of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1⁴, of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary”.

28. It is clear that the Charter requires that staff members be “appointed” by the Secretary-General (or those to whom this power has been delegated). The hallmark of a staff relationship is “appointment”, and this is done through a letter of appointment pursuant to staff regulation 4.1. The Staff Regulations apply to all staff members of the Secretariat, within the meaning of Article 97 of the Charter, whose employment relationship and contractual link with the Organization are through a letter of appointment issued pursuant to regulations promulgated by the General Assembly. Such letter is signed either by the Secretary-General or by an official in the name of the Secretary-General.

29. Upon appointment, staff members become international civil servants pursuant to Regulation 1.1. As a consequence, their responsibilities as staff members are not national but exclusively international. Staff members have to subscribe to the following written declaration witnessed by the Secretary-General or his or her authorized representative:

“I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization”.

³ The Secretariat shall comprise a Secretary General and such staff as the Organisation may require.

⁴ The staff shall be appointed by the Secretary-General under Regulations established by the General Assembly.

30. Similarly, staff members also promise to respect the basic rights and obligations set out in the Rules and Regulations (also see UN Staff Regulation 1.2) being the core values of integrity, professionalism and respect for diversity as well as some general rights and obligations. One example of the basic obligations is that a staff member cannot engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General. The latter may authorize outside occupation or employment provided that it does not conflict with the staff member's official functions or the status of international civil servant⁵.

What is the status of a Defence Counsel at the ICTR?

31. Pursuant to Article 20.4 (b) of the ICTR's Statute⁶, an accused person shall be entitled to be assisted by counsel of his or her choice, without payment should this person not have sufficient means to pay for the legal fees. Article 5 of the Directive on the Assignment of Defence Counsel⁷ provides more details on the procedure to follow; a fundamental step is that a suspect or accused who wishes to be assigned Counsel shall make a request to the Registrar.

32. One of the pre-requisites to be eligible as Defence Counsel is that counsel must be admitted to the practise of law in a State or be a University professor of law. Once the Registrar assigns a counsel, Defence counsel shall be, in the performance of their duties, subjected to the relevant provisions of the Statute, the Rules of Detention, the Directive on the assignment of Defence Counsel and any other rules or regulations issued by the Tribunal, such as the Code of Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel⁸.

⁵ Staff Regulation 1.2 (o) and (p)

⁶ Article 20.4(b) of the Statute of the ICTR

⁷ 14 March 2008

⁸ ICTR Rules of Procedure and Evidence Section 2, Rule 44, "Appointment and Qualifications of Counsel" and Article 13 "Status of Assigned Counsel" of the Directive on the Assignment of Defence Counsel

33. In addition, pursuant to the Code of Professional Conduct for Defence Counsel⁹, Counsel owes a “duty of loyalty to his/her client”¹⁰. In case of misconduct resulting in a breach of the Code of Professional Conduct, the Registrar may report any misconduct of Counsel to the professional body regulating the conduct of Counsel in his or her State of admission, or in the case a professor who is not otherwise admitted to the profession, a report may be sent to the governing body of his or her university¹¹. The Host Country Agreement between the United Nations and Tanzania¹² makes the Registry responsible to draft a number of legal documents necessary for the Tribunal’s judicial work, namely the directive on the assignment of Defence Counsel and provides a dispute settlement mechanism between Defence Counsel and the ICTR¹³.

34. From the above, it is abundantly clear that Defence Counsel do not hold the status of international civil servants. Counsel is not “appointed” by the Secretary-General. They are not subjected to the basic rights and obligations set out in the UN Secretariat Rules and Regulations. They are free to engage in any outside occupation or employment, one of the pre-requisites being that Counsel should be practising lawyers or University professors. This view is buttressed by the fact that the Applicant provided the Tribunal with a letter of assignment signed by the DCDMS, on behalf of the Registrar of the ICTR, and that pursuant to Article 10 of the Directive on the Assignment of Defence Counsel, she was informed that she would receive a lump sum to cover legal assistance and investigation fees, in addition to reasonable and necessary expenses. At no time was the Applicant appointed by the Secretary-General pursuant to Regulations made by the General Assembly as required by Article 101 of the Charter of the Organisation, requesting her to comply with the UN Secretariat Rules and Regulations. She could not provide to the Tribunal

⁹ Code of Professional Conduct for Defence Counsel dated 14 March 2008

¹⁰ *Idem*, Article 9

¹¹ *Idem*, Article 21

¹² Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Tribunal for Rwanda dated 24 September 1996.

¹³ *Idem*, Arbitration Panel pursuant to Article XXIX

with an index number. In addition, as a practising lawyer, she was allowed to engage in any other outside activities.

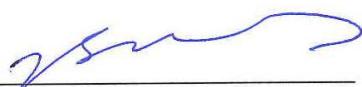
35. The Applicant cannot therefore successfully claim that she is a “staff member” or “staff” of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter as set out in the scope and purpose of the Staff Regulations and being subject to basic rights and obligations as referred above.

36. For the foregoing reasons, the Tribunal finds that Counsel assigned by the Registrar of the ICTR to represent an accused person does not hold the status of UN staff members within the meaning of Article 3 of the UNDT Statute. Therefore, the Tribunal finds that it does not have jurisdiction *ratione personae* over ICTR Defence Counsel.

Conclusion

37. This application is not receivable *ratione personae*.

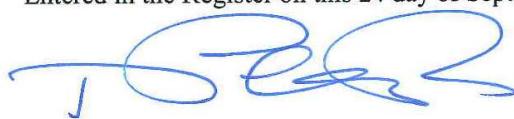
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Judge Vinod Boolell

Dated this 24 day of September 2010

Entered in the Register on this 24 day of September 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi