



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

ABU AL ASAL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY AND LIABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Nicole Wynn, AAS/ALD/OHR
Nusrat Chagtai, AAS/ALD/OHR

Introduction

1. By an application dated 16 January 2018, the Applicant is challenging, “the decision to withdraw the offer [she] received from [the United Nations-African Union Mission in Darfur (“UNAMID”)] for the post of Security Officer at the FS-4 level”.

2. The case was initially assigned to Judge Nkemdilim Izuako with the Nairobi Registry and assigned Case No. UNDT/NBI/2018/008.

3. On 19 February 2018, the Respondent filed his reply in which he asserted that the application is not receivable because, in essence, the Applicant lacked legal standing before the Dispute Tribunal as she was not a United Nations staff member when the offer of employment was withdrawn, arguing that a valid visa had not been issued by the Government of Sudan before then. Even if receivable, the Respondent submits that the contested decision was lawful as UNAMID withdrew the offer of appointment due to reduction in staff pursuant to Security Council resolution 2363 (2017).

4. By email of 19 July 2019, the Nairobi Registry informed the parties that the case was transferred to the New York Registry due to the end of Judge Izuako’s term with the Dispute Tribunal and to balance the Tribunal's case load and ensure judicial efficiency.

5. Upon the transfer to the New York Registry, the case was assigned a new case number: Case No. UNDT/NY/2019/062.

6. On 25 November 2019, the New York Registry informed the parties that the case had been assigned to the undersigned Judge.

7. After various written orders and case management, the Respondent filed his closing statement on 6 July 2020 and the Applicant filed her closing statement on 11 July 2020.

8. For the reasons stated below, the Tribunal finds that the application is receivable and grants it on the merits.

Facts

9. To provide background for the issues to be determined, it follows from the documents of the case that:

- a. On 1 December 2016, the offer of employment dated 30 November 2016 was sent to the Applicant;
- b. On 2 December 2016, she applied for a Laissez-Passer, indicating that she accepted the offer;
- c. On 5 December 2016, she fully accepted the offer;
- d. On 27 July 2017, the Administration withdrew the offer of employment.

Consideration

The issues of the case

10. By Order No. 102 (NY/2020) dated 16 June 2020, in response to the Applicant's submissions, the Tribunal held that the question of whether a UNAMID staff member inappropriately disposed of her visa inherently forms part of the factual circumstances related to the decision to withdraw the offer to the Applicant of 27 July 2017. It is therefore not an independent and separate administrative decision.

11. The issues of the case were therefore defined as set out below, which the Tribunal now reaffirms:

- a. Is the application receivable?

b. If so, was it proper for the Administration to withdraw the Applicant's visa on 27 July 2017 based on the reason(s) provided?

c. If not, to what remedies is the Applicant entitled?

Receivability

The basic issue

12. The Respondent essentially submits that the application is not receivable because the Applicant is not a staff member as she never received a letter of appointment, and “[a]n individual does not become a staff member in the United Nations until the Organization issues a letter of appointment”.

13. The Respondent further contends that the Applicant did not have standing before the Dispute Tribunal on the basis of “a quasi-contract” between the Applicant and the Organization pursuant to *Al Hallaj* 2018-UNAT-810, because not all conditions of the Applicant's offer of an appointment were met. This appointment was “conditional upon the issuance of a visa and her receiving the Government of Sudan's approval to perform her duties in Sudan”, but the Sudanese Ministry of Foreign Affairs “never issued a visa to the Applicant”, or informed “UNAMID that it had processed a visa to the Applicant on 19 December 2016, which it had decided to withhold”. Rather, “when UNAMID withdrew the offer of appointment on 27 July 2017, the conditions of the offer remained unfulfilled”.

14. In response, the Applicant essentially submits that her visa to Sudan was issued on 19 December 2016, and therefore also before the withdrawal of the offer on 27 July 2017, and that the visa was forwarded to UNAMID on the same date (meaning on 19 December 2016) but not further processed for onboarding the Applicant.

15. The Tribunal notes that in the offer of employment dated 30 November 2016 from UNAMID to the Applicant was stated that her “appointment [was] subject to

satisfactory completion of pre-recruitment formalities through the United Nations Secretariat procedures, including ... issuance of visa”. Accordingly, even after the Applicant accepted the offer of employment, her job contract with UNAMID was therefore still contingent upon her receiving a visa, and until that condition had been fulfilled, the Administration could therefore withdraw the offer in the given circumstances. The Respondent does not contest that the Applicant complied with all other requirements for recruitment, such as medical clearance, and that the only outstanding condition for the formation of an unconditional employment agreement was therefore the issuance of a visa.

16. In line herewith, the Appeals Tribunal has consistently held that all conditions outlined by the Administration in the offer of employment must be satisfied for an unconditional agreement to be formed, and in the lack thereof, a non-staff member’s application to the Dispute Tribunal is not receivable under art. 3 of the Statute of the Dispute Tribunal (see, for instance, *Sprauten* 2011-UNAT-111, *Gabaldon* 2011-UNAT-120, *Al Hallaj* 2018-UNAT-810, and *Latimer* 2019-UNAT-901).

17. The key question regarding receivability is therefore whether, as a matter of fact, the Government of Sudan has issued the relevant visa to the Applicant and shared it with UNAMID before the Administration withdrew its offer of employment.

Was a visa issued to the Applicant and shared with UNAMID before the withdrawal of the offer?

18. As evidence for the Applicant’s submission that upon the request of UNAMID, the Ministry of Foreign Affairs actually did issue her a visa on 19 December 2016, she attaches a note verbale dated 28 November 2016 by which UNAMID requested the Ministry of Foreign Affairs that the Applicant be issued an “entry visa” for her to assume her position as Security Officer with the Mission, referring to “the Status of Forces Agreement (“SOFA”), pursuant to which the Government shall, on request by UNAMID, issue without delay ... entry visas to members of UNAMID”.

19. The Applicant further appends an “entry visa” dated 19 December 2016 from the Ministry of Foreign Affairs to “the Director of the Passport Office At Khartoum Airport”. With reference to UNAMID’s note verbale dated 28 November 2016 and explicitly stating the Applicant’s name, nationality and passport number, it is indicated in this visa that “In accordance with the details included in the note ... For your information and action ... We inform you that the Ministry has approved the requested visa as a courtesy”. It is further noted that “[t]his approval is valid for (3) months”. The visa is officially translated from Arabic to English.

20. The Respondent does not challenge the veracity of the visa, which the Applicant submits in evidence, but rather argues that by the time of withdrawing the offer of appointment on 27 July 2017, the Ministry of Foreign Affairs had “placed the Applicant’s visa on hold given the Government of Sudan’s concerns about issuing visas to foreign nationals for Security Officer positions in light of reductions in security positions for Sudanese nationals”. The Respondent contends that this is supported by the following facts:

- a. On 6 June 2017, the Applicant’s name “still appeared on the list of individuals with pending visas, and [the Ministry of Foreign Affairs] still had concerns about the issuance of those visas given the streamlining of national Security Officers”;
- b. On 25 July 2017, when “UNAMID requested [the Ministry of Foreign Affairs] to cancel the processing of the Applicant’s visa, along with 14 other individuals with pending visas, [the Ministry of Foreign Affairs] had still not issued a visa”;
- c. The Ministry of Foreign Affairs “confirmed to UNAMID on 29 January 2018, and by the note verbale on 15 February 2018, that it had placed the Applicant’s visa on hold”.

21. As evidence, the Respondent submits the following documentation:

a. A copy of an email of 15 May 2017 from an Administrative Officer in UNAMID in which the Applicant's name is indicated on a list of names "pending visa report", and a copy of an email of 21 July 2017 from a Human Resources Assistant in which her name is indicated among a list of "recently recruited surety personnel with pending visa";

b. A document titled, "Joint Agreed Minutes of the 7th Technical-Level Meeting, Khartoum – 6 June 2017" signed by an ambassador from the Ministry of Foreign Affairs and the Director of Mission Support of UNAMID. The first of various topics that were discussed were "Issuance/Processing of Visas". Reference was made to the "issue of pending visas, which is impacting the mandated activities of UNAMID" and to the Ministry of Foreign Affairs agreeing "that they will review the pending list while at the same time questioning the logic behind the recruitment of Security [O]fficers [the position, which the Applicant had been offered] at a time when the mission streamlined national Security Officers". A list of "pending visas" was attached, and the Applicant's name was stated on this list;

c. An email of 29 January 2018 in which a staff member of the Human Resources section of UNAMID states that the Ministry of Foreign Affairs had informed him the same date (29 January 2018) that "the note verbal for the [A]pplicant was approved but placed on hold because of concerns raised by government entities". It appears from the email exchange that the Human Resources assistant requested this information from the Ministry of Foreign Affairs to respond to the Applicant's present application, which was dated 16 January 2018;

d. A note verbale from the Ministry of Foreign Affairs to UNAMID dated 15 February 2018, in response to a note verbale dated 11 February 2018 from UNAMID, in which UNAMID sought "the assistance of the esteemed Ministry in confirming the issuance of ... the Sudanese visa in favour of [the Applicant]" with reference to UNAMID's note verbale of 28 November 2016.

In the Ministry's note verbale, reference was then made to the technical monthly meetings and the "remarks related to the Security Officers posts in the framework of the dismissal of the National Security Officers during the streamlining in December 2016", which it was stated also "applie[d]" to the Applicant (unofficial translation);

e. Some reports of the Secretary-General on UNAMID to the Security Council in which the status of visa applications and issuances was also addressed. While the Applicant's visa application was pending, the Secretary-General, for instance, informed the Security Council that "[a]s of 15 March 2017, 292 visa requests submitted since January 2016 remained pending, 47 of which were for international civilian staff". As demonstrated by similar reports from the previous and subsequent years, the issue was also raised in these reports.

22. The Applicant presents a vastly different account of events. She submits that the Sudanese Government had indeed issued the visa to the Applicant and shared it with UNAMID on 19 December 2016. The Applicant further contends that "[t]he mission explained that on-boarding process was canceled to all security posts; [but the Regional Service Center in Entebbe] can confirm that [an] officer from Nigeria (as international security officer) joined the mission after she received the visa at the same time my visa was issued".

23. As evidence, the Applicant appends:

a. An undated handwritten statement from a former Office Assistant in the Travel and Visa Unit in UNAMID ("the Office Assistant") in which he states that on 19 December 2016, he received a Sudanese entry visa for the Applicant from a Protocol Assistant, which he was to send to Human Resources to initiate the processing, assumedly, of the Applicant's onboarding. The Office Assistant further explains his supervisor ("the Supervisor"), however, instructed him to delete the visa and instead send it to

him. The Office Assistant therefore got suspicious and decided to send it to himself to his United Nations email account. The Office Assistant subsequently sent the visa to the Applicant;

b. A copy of an email of 19 December 2016 from the Office Assistant's United Nations email account to himself to which is appended an attachment titled, "NV#01447". On 26 May (the year is not stipulated), the Office Assistant further forwarded to his personal "Hotmail" email address. The Tribunal notes that UNAMID's reference number on note verbal dated 28 November 2019 was "DMS/HRM/21.01/he/16/01447" (emphasis added) and that this exact number was reiterated in the Applicant's 19 December 2016 entry visa issued by the Ministry of Foreign Affairs;

c. An email of 4 January (or 1 April) 2018 from the Office Assistant to the "DMS" (assumedly the Director for Mission Support) with the subject line, "Fw: Evaluation Letter - MER [assumedly, management evaluation request] of Mr. Diaeldin Yassin (MEU [assumedly, Management Evaluation Unit])/1 846-17 / R) (RA [unknown abbreviation])". In this email, the Office Assistant essentially recounts what he also states in the undated handwritten statement mentioned above.

24. The Respondent challenges the Office Assistant's account of events and submits in evidence an email from the Supervisor of 18 May 2020 in which he states that, "The only statement I can provide here is that [the Office Assistant's] statement is blatantly false. It's worth [noting] that [the Office Assistant] was streamlined and departed UNAMID extremely bitter". The Respondent further contends that the "unsigned and undated handwritten statement" of [the Office Assistant] and "his email to the Director of Mission Support (DMS), written after the offer was withdrawn, does not rebut consistent evidence on the record showing that when UNAMID withdrew the offer of appointment, the Applicant never had a valid visa".

25. The Applicant responds that the Office Assistant “due to the COVID 19 curfew in Sudan did not have access to a printer; he shared with me a [handwritten] statement which was supported with other official correspondences to UNAMID officials”.

26. The Tribunal notes that subsequent to the filing of the written statements of the Office Assistant and the Supervisor, none of the parties have requested any of them to appear before the Tribunal as witnesses to provide oral evidence in accordance with art. 17.1 of the Dispute Tribunal’s Rules of Procedure. Based thereon, and considering that the case file otherwise is complete, neither the Tribunal sees any reason to do so.

27. As a point of departure, the Tribunal notes that factual disputes, such as the one of the present case, are to be determined by the preponderance of evidence (see, for instance, *Elobaid* 2018-UNAT-822, para. 35). By preponderance of evidence is generally understood that this is “the standard of proof in most civil cases in which the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not” (see Merriam-Webster’s online legal dictionary).

28. In the present case, the Tribunal accepts the Office Assistant’s undated and handwritten statement as a genuine reflection of his opinion regarding the relevant events as it is fully corroborated by the written statement, which he provided to the DMS on 4 January (or 1 April) 2018.

29. Also, the Tribunal is convinced by the Office Assistant’s account of the events. The evidence shows that by email of 19 December 2017, the Office Assistant indeed sent himself a copy of what appear to be the visa, which he subsequently forwarded to his personal “Hotmail” email address on 26 May (on an unknown year). If the Office Assistant did not have possession of the visa, it is impossible for the Tribunal to understand from whom, or where, the Applicant should otherwise have

received a copy of this visa. The Tribunal also finds that it is telling that the Respondent has not as much as intended to disprove, or even commented on, the Office Assistant's email of 19 December 2017 to himself, even though the Tribunal made direct reference to this email in Order No. 102 (NY/2020).

30. The Tribunal, furthermore, takes note that the Respondent has not as much as intended to deny that Applicant's assertion that at around the same time as the Applicant, a Security Officer from Nigeria had her/his visa processed by the Sudanese Government and was actually recruited to UNAMID.

31. The Supervisor's statement that the Office Assistant misrepresented the facts as he was "extremely bitter" with his separation from the Organization is unconvincing as this is a matter entirely unrelated to the Applicant's situation and occurred more than two years ago.

32. Accordingly, the Tribunal finds that based on the documents before it, the Applicant has therefore appropriately established the Office Assistant's account of events on the preponderance of evidence. As a matter of fact, the Applicant has therefore proven that the Ministry of Foreign Affairs issued a visa to her on 19 December 2016, that this visa was shared with UNAMID on the same date, and that, at this time, the Applicant adequately complied with all the requirements stipulated in the offer of employment dated 30 November 2016.

33. The Tribunal further finds that whatever the reason was for UNAMID to decide not to further process the Applicant's onboarding, or whether this was done deliberately or by mistake, is in this context irrelevant. Also, the Tribunal notes that it only makes sense that the visa was referred to as pending in various subsequent communications to which the Respondent refers, because according to the visa's own terms, it expired only three months after its issuance on 19 December 2016 (meaning on 19 March 2017) and the earliest communication to which the Respondent makes reference was dated 15 May 2017.

34. With reference to the Appeals Tribunal's jurisprudence cited above (*Sprauten* 2011-UNAT-111, *Gabaldon* 2011-UNAT-120, *Al Hallaj* 2018-UNAT-810, and *Latimer* 2019-UNAT-901), the application is receivable *ratione personae* as the Applicant has legal standing to bring the present case before the Dispute Tribunal.

Was it proper for the Administration to withdraw the Applicant's visa on 27 July 2017 based on the reason(s) provided?

35. On 27 July 2017, a Manager from the Onboarding and Separation Service Line in the Regional Service Centre Entebbe informed the Applicant that “[f]ollowing consultations with UNAMID and [the Field Personnel Division in the former Department of Field Support in United Nations Headquarters] we have been advised the post to which you had been recruited has been abolished. The offer of appointment issued to you on 30 November 2016 is hereby withdrawn”.

36. The Applicant submits that “[w]hen UNAMID withdrew the offer of appointment on 27 July 2017, the conditions of the offer remained unfulfilled due to a mistake committed by a staff member who ordered to hide [her] approved valid visa that was issued on 19 December 2016”. UNAMID did not observe “its duty of care after the mission officials (DMS) received the information of the breach through one of its staff member”, and the decision to withdraw the offer did not “conform to the rules” and was tainted by an “error” and/or “ulterior motive[s]”.

37. The Respondent's submissions may be summarized as follows:

- a. “UNAMID withdrew the offer of appointment in anticipation of the abolition of the post, which was to be used to finance the Applicant's appointment”;
- b. “The Appeals Tribunal has consistently held that the Organization has broad discretion to reorganize its operations and departments to adapt to economic realities, including the abolition of posts”;

c. “UNAMID withdrew the offer of appointment on 27 July 2017 following the Security Council’s 29 June 2017 approval of the civilian staffing review (CSR) to reduce civilian staffing levels. At that time, neither the Applicant, nor UNAMID, were able to fulfil any of the terms of the offer of appointment because the Applicant was never in a position whereby she could travel to Sudan and assume her duties as a Security Officer”;

d. It is irrelevant that the Ministry of Foreign Affairs “apparently processed a visa in December 2016 because that visa was never issued to the Applicant. It was instead placed on hold and its processing in December 2019 was never communicated to UNAMID. Indeed, the evidence shows that the Government of Sudan never intended to issue a visa to the Applicant given its concerns about the reduction of national security officer positions”;

e. “The Applicant has produced no evidence of ill-motive. The post which would have been used to finance her appointment was among 32 Department of Safety and Security posts which were abolished effective 31 December 2017 [reference to annex omitted]. The unsworn and undated handwritten statement of [the Office Assistant] and his email to the DMS does not establish that the contested decision was tainted by ill-motive. It is not credible evidence. It is inconsistent with evidence on the record showing that as of 6 June 2017, the Applicant was among the list of individuals with pending visas” [reference to annex omitted]. It is also inconsistent with [the Ministry of Foreign Affairs’] own statement in its note verbale of 15 February 2018 that it had placed the Applicant’s visa on hold”;

f. “Given that neither party could perform the contract and the post that would have financed the Applicant’s appointment was to be abolished, it was lawful and reasonable for UNAMID to withdraw the offer of appointment”.

38. The Tribunal notes that the Respondent’s submissions are based on the factually incorrect premise that the Ministry of Foreign Affairs had not issued a visa

to the Applicant. As held in the above, the Tribunal finds that the Applicant has demonstrated that on 19 December 2016, an entry visa was indeed issued to her, which the Ministry of Foreign Affairs had forwarded to UNAMID, which, for unknown reasons, however, decided not to proceed with the onboarding process. As these reasons have not been revealed to the Tribunal, it is left with no other option than to conclude that the withdrawal of the offer of employment on 27 July 2017 with reference to the impending abolition of the post, was improper, because at least until the expiry of the visa on 19 March 2017, the Applicant complied with all recruitment requirements under the offer of employment. The Applicant therefore had a contractual right to be recruited before 19 March 2017 as the Respondent has provided no reason whatsoever for not doing so.

39. Accordingly, the Tribunal finds that it was improper for the UNAMID to withdraw the offer on employment on 27 July 2017 in the given circumstances.

Remedies

40. The Tribunal notes that the parties' submissions on remedies are inadequate for it to make a determination thereon in accordance with art. 10.5 of the Dispute Tribunal's Statute, and that the Applicant is self-represented.

41. Accordingly, the Tribunal will need further information and written documentation from the Applicant regarding:

- a. The income she actually obtained in 2017 and until the post against which she was to be recruited was abolished;
- b. The measures that she undertook to mitigate any possible loss of income, for instance, by applying to other jobs;
- c. Her non-pecuniary harm in terms of stress and/or other mental anguish.

Conclusion

42. In light of the above, the Tribunal DECIDES that the application is receivable and grants it on the merits.

43. Regarding remedies, the parties are ordered as follows:

a. By **4:00 p.m. on Monday, 10 August 2020**, the Applicant is to file an updated submission on remedies, appending all relevant documentation, which is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing;

b. By **4:00 p.m. on Monday, 17 August 2020**, the Respondent is to file an updated submission on remedies, appending all relevant documentation which is to be a maximum of five pages, using Times New Roman, font 12 and 1.5 line spacing;

c. By **4:00 p.m. on Friday, 21 August 2020**, the Applicant is to file her observations, if any, to the Respondent's updated submission on remedies, which is to be two pages maximum, using Times New Roman, font 12 and 1.5 line spacing;

d. Unless otherwise ordered, the Tribunal will thereafter proceed to determine the issue of remedies.

(Signed)

Judge Joelle Adda

Dated this 20th day of July 2020

Entered in the Register on this 20th day of July 2020

(Signed)

for Nerea Suero Fontecha, Registrar, New York