



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NB/2009/047  
Order No.: UNDT/NBI/O/2010/012  
Date: 04 February 2010  
Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

LIYANARACHCHIGE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON A MOTION TO INTERVENE  
IN THE PROCEEDINGS IN THE CASE OF  
LIYANARACHCHIGE FILED BY MR. X  
ON 27 JANUARY 2010**

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**Counsel for the Applicant in the present motion:**

Mr. Bart Willemsen, OSLA

**Counsel for applicant Liyanarachchige:**

Ms. Rose Dennis, OSLA

**Counsel for respondent:**

Ms. Susan Maddox, ALU

## **Introduction**

1. The present application is related to the case of Liyanarachchige *v. the Secretary-General of the United Nations*. The Applicant Liyanarachchige was summarily dismissed for serious misconduct on 8 May 2009 for having engaged in sexual exploitation and abuse and transporting unauthorized passengers on multiple occasions in the United Nations vehicle assigned to him. He has appealed that decision and a hearing was held on 26 January 2010 by the Tribunal in Nairobi. The case is still pending before the Tribunal.
2. By a motion dated 27 January 2010 and received on the same day by the Registry of the Dispute Tribunal, the Office of Staff Legal Assistance (OSLA) entered an application to intervene, on behalf of the Applicant, in the case of *Liyanarachchige v. the Secretary-General of the United Nations*.
3. The Applicant, a staff member of the United Nations Operation in Côte d'Ivoire (UNOCI), was also investigated and later charged with misconduct for sexual exploitation and abuse in 2007. However, the matter against him remains to date unresolved as the Secretary-General has not taken a decision pursuant to Chapter X of the Staff Rules nor have the charges been withdrawn.
4. Counsel for the Applicant argues that the charges against his client are personal, highly sensitive, and confidential. In this context, Counsel avers that the introduction by the Secretary-General of the allegations against the Applicant and alleged admission of guilt in a public hearing to hear the matter of Applicant Liyanarachchige without informing the Applicant or his counsel of his intention to elicit this confidential (hearsay) evidence about the Applicant directly affects his rights. He therefore seeks intervention to “have

any and all references to him which affect his rights struck from the public record”.

5. Counsel further argues that the Tribunal is competent to grant the request for intervention. Pursuant to Article 2.4 of the Statute read in conjunction with Article 22 of the UNDT Rules of Procedure, the contractual rights of his client would be adversely affected if statements are made in public proceedings to which he is not a party and which refer to confidential charges of serious misconduct against him which remain unresolved.

### **Tribunal’s Review**

6. On the issue of intervention by persons not party to a case, the relevant articles are Article 2.4 of the Statute that provides, *The Dispute Tribunal shall be competent to permit an individual who is entitled to appeal the same administrative decision under paragraph 1(a) of the present article to intervene in a matter brought by another staff member under the same paragraph* and Article 22 of the Rules of Procedure, which reads that, *Any person to whom the Tribunal is open under Article 2.4 of the Statute may apply to intervene on an application form to be prescribed by the Registrar, in a case at any stage thereof, on the ground that he or she has a right which may be affected by the Judgment to be issued by the Tribunal.*
7. The above referred articles should be read in conjunction with Article 2.1 (a) of the Statute according to which, *The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual [...] to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.*
8. It stands to reason in the light of the above articles that the Applicant must first establish to the satisfaction of the Tribunal that he has a legitimate right

arising out of his terms of appointment or contract of employment to vindicate.

9. That a staff member in the situation of the Applicant has concerns about his terms of appointment and contract of employment following or pending an investigation relative to him is legitimate. The results of the investigation may well have serious and far reaching consequences on his employment or terms of appointment.
10. The Article which allows an Applicant to intervene in a matter before the Tribunal refers to a right that may be affected. That right in the view of the Tribunal can only relate to a right linked to or arising out of the right referred to in Article 2.1 (a) of the Statute.
11. The Applicant is requesting to be allowed to intervene in the present matter in order to ensure that all references to him made in the course of the proceedings in the matter relative to Applicant Liyanarachchige be struck from the public record inasmuch as the initial investigation concerning him is “personal, highly sensitive and confidential”.
12. When a staff member is investigated there is initially a report which is confidential. Depending on the facts elicited in the course of the investigation the case may end up with that initial investigation or be pursued further. If the Secretary-General takes an action which adversely affects a staff member’s terms of appointment or contract of employment, the latter can appeal to the UNDT. If there is an appeal and a hearing is held, it is always open to parties to request that any matter that may be prejudicial to them remain confidential pursuant to Article 18.2 of the Rules. This would cover both matters elicited through oral testimony and documentary evidence.

13. There may be situations, as in the present matter, where owing to the circumstances of an investigation more than one staff member may be involved as the facts of the investigation may be common to all of them. In such a case, if one of the staff members is disciplined and appeals to the UNDT, evidence may be provided that refers to the staff member whose case is pending. It is the view of the Tribunal that any relevant evidence that refers to a staff member in the situation of the Applicant should be admitted subject to the caveat that the status of the staff member should not be disclosed.
  
14. However, given the confidentiality of the initial investigation, the Tribunal has a duty to ensure that no matter that may affect the integrity of a staff member whose case is closed or is pending with the Secretary-General, is disclosed pursuant to Article 11.6 of the Statute and Article 26 of the Rules of Procedure. The Tribunal also takes the view that it is the duty of counsel appearing in the case to draw the attention of the Tribunal to any matter requiring confidentiality.
  
15. The Tribunal concludes therefore that there is no right of the Applicant that may be affected as it is understood in Article 2.1 (a) of the UNDT Statute and read with Article 22 of the Rules of Procedure on intervention. The Tribunal will ensure that the identity of the Applicant will in no manner be disclosed either into official record of the proceedings or in any ruling or judgment.

*(Signed)*

Judge Vinod Boolell

Dated this 4<sup>th</sup> day of February 2010

Entered in the Register on this 4<sup>th</sup> day of February 2010

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi