



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

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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 oduct their

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.
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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

Considerations

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

