



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/018

Judgment No.: UNDT/2013/132

Date : 30 October 2013

English

Original : French

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

LUBBAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Alexandre Tavadian, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM
Sophie Parent, ALS/OHRM

Introduction

1. The Applicant was recruited by the United Nations as a P-3 statistician at the Economic and Social Commission for Western Asia (ESCWA).

2. By application filed with the United Nations Dispute Tribunal on 28 March 2012, the Applicant contests (i) the Administration's implicit refusal to take a decision on an investigation by the United Nations Office of Internal Oversight Services (OIOS) into allegations about his involvement in a network of traffickers of forged passports, (ii) the Administration's refusal to cease defaming the Applicant despite his repeated objections, and (iii) the alleged breach of his right to confidentiality.

3. In addition, the Applicant requests (iv) a formal communication stating that the allegations of his involvement in a network of traffickers of forged passports are unfounded, (v) the removal of his name from all reports pertaining to such a network, (vi) a halt to all forms of defamation against him by OIOS and (vii) damages equivalent to 12 months' salary.

4. In his reply of 3 May 2012, the Respondent contends:

- a. that the application is not receivable *ratione materiae* because:
 - i. OIOS decisions are not within the jurisdiction of the Tribunal;
 - ii. the absence of a response from OIOS does not constitute an administrative decision subject to judicial review because it has no impact on the Applicant's employment rights;
 - iii. the Tribunal has no jurisdiction to rule on defamation claims;
- b. that the absence of a response from OIOS is neither a refusal to take a decision nor a refusal to cease defaming the Applicant.

Facts

5. On 10 November 2010, during questioning by an OIOS investigator, the Applicant learned that he was suspected of possessing or having used a forged passport. The Applicant alleges that confidentiality rules were not respected during the questioning.

6. On 19 April 2011, OIOS sent a note verbale to the Permanent Mission of Lebanon requesting assistance from the Lebanese authorities in collecting certain information about the Applicant.

7. On 8 July 2011, while he was at Rafic Hariri International Airport in Beirut on his way to Egypt for an official mission, the Applicant was arrested by the Lebanese authorities and detained for five hours, during which time he was questioned. His travel documents and laissez-passer were confiscated and were recovered only through the intervention of a former general of the Lebanese army.

8. On 12 July 2011, the Permanent Mission of Lebanon replied to OIOS that no movement to or from Lebanese territory had been reported with respect to fraudulent Dominican Republic passports.

9. On 13 July 2011, ESCWA sent a letter of protest to the Lebanese Government regarding that incident.

10. The Applicant learned from two witnesses that the information that had led to his arrest had come from the investigation being conducted by OIOS.

11. In January 2012, the Applicant received extracts from a confidential interim report¹ containing references to his suspected involvement in a network of traffickers of forged passports.

12. By e-mails dated 20 January 2012 and 14 February 2012 addressed to Sangwoo Kim, OIOS Resident Investigator at ESCWA, Counsel for the Applicant requested OIOS to formally notify the Applicant of the investigation's result. Moreover, Counsel for the Applicant requested that the Applicant's name should be removed from all investigative reports pertaining to a network of forged passport traffickers and that OIOS should cease the dissemination of unfounded allegations against the Applicant. Those requests have gone unanswered.

13. On 27 February 2012, the Applicant filed a management evaluation request alleging a breach of his right to confidentiality, contesting the Administration's implicit refusal to issue a closure letter clearing him of any suspicion in the OIOS investigation, asking that his name should be removed from all documents concerning trafficking in passports and demanding that OIOS should desist from all acts that were detrimental to his reputation and his right to confidentiality. Lastly, he sought monetary compensation equivalent to six months' gross salary.

14. On 8 March 2012, the Management Evaluation Unit (MEU) advised the Applicant that his request was not receivable because the Secretary-General of the United Nations could not be held liable for acts or omissions of OIOS, which was an independent entity. Accordingly, recommendations or determinations made by such an independent entity did not constitute administrative decisions that could be reviewed by MEU. Lastly, the request concerned a disciplinary matter that was outside the jurisdiction of MEU.

15. On 9 March 2012, the Applicant was again stopped at Rafic Hariri International Airport and was asked whether he had a Dominican Republic passport in his possession. In the course of that same month, the Jordanian authorities also asked the Applicant whether he had another passport.

16. On 28 March 2012, the Applicant filed an application with this Tribunal to contest the Administration's refusal to take a decision on the investigation into allegations about his involvement in an alleged network of traffickers of forged

¹ Draft investigative details.

passports, and the Administration's refusal to cease spreading erroneous information about him. He also alleged a breach of his right to confidentiality.

17. On 5 April 2012, the Office of Human Resources Management sent a memorandum to OIOS requesting it to provide information concerning the Applicant.

18. By a memorandum dated 16 April 2012, OIOS replied to the Office of Human Resources Management that, after an investigation of another individual for possible trafficking in forged passports, an investigation into the Applicant's suspected involvement in such trafficking had begun on 24 January 2012 and was still ongoing.

19. On 27 April 2012, the Applicant was stopped at Charles de Gaulle International Airport by French authorities wanting to know whether he had another passport in his possession.

20. On 3 May 2012 the Respondent submitted a reply to the Applicant's application of 28 March 2012, contending that the application was not receivable and that the absence of a response from OIOS was neither a refusal to take a decision nor a refusal to cease defaming the Applicant.

21. On 17 May 2012, the Applicant filed a request to the Tribunal to order the Respondent to produce "all communications containing the Applicant's name that have been addressed to member countries, their representatives or other entities by OIOS on behalf of the Organization".

22. On 19 June 2012, the Applicant filed a request for leave to file a rejoinder.

23. In response to the Applicant's request of 17 May 2012, on 22 June 2012 the Respondent produced information received from OIOS that referred to the Applicant and showed that there had been communication with certain member States.

24. On 29 June 2012, the Tribunal advised Counsel for the Respondent that in order to follow up on the Applicant's request of 17 May 2012, it would need to conduct a prior confidential evaluation of the documents requested by the Applicant in their original, non-redacted form.

25. On 4 July 2012, the Tribunal received and examined the above-mentioned documents.

26. On 10 July 2012, the Tribunal issued an order stating that, having examined those documents, it did not find it necessary to authorize the Applicant to see them. At the same time, the Tribunal informed the Applicant that eight different permanent missions had received communications from OIOS that mentioned the Applicant's name.

27. On 10 July 2012, the Tribunal ordered the parties to produce their witnesses, which they did on 27 and 31 July 2012.

28. On 8 May 2013, OIOS requested the Applicant to answer further questions and, to that end, e-mailed the questions to him on 11 May 2013.

29. On 27 May 2013, the Applicant e-mailed his answers to the questions to OIOS, while stressing that the investigator was biased and should be replaced.

30. On 9 July 2013, the Tribunal ordered the Applicant to produce those questions and answers.

31. On 12 July 2013, the Tribunal received and examined the documents.

Considerations

32. The Tribunal must first consider whether the application in this case is receivable.

33. The Applicant maintains that the absence of a response from OIOS constitutes per se an administrative decision subject to challenge before the Tribunal.

34. In his reply, the Respondent maintains that the application is not receivable *ratione materiae* because OIOS decisions are not within the jurisdiction of the Tribunal. Moreover, the absence of a response from OIOS does not constitute an administrative decision subject to judicial review because it has no impact on the Applicant's employment rights. Lastly, the Tribunal has no jurisdiction to rule on defamation claims.

35. The Tribunal must first consider whether the acts, decisions or omissions imputable to OIOS are within the Tribunal's jurisdiction.

36. This Tribunal has already held that OIOS decisions are subject to challenge before this Tribunal (*Comerford-Verzuu* UNDT/2011/005):

Resolution 48/218 B provides that the purpose of OIOS “is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization” (para. 5(c)), and bulletin ST/SGB/273 states that “[t]he purpose of this Office ... is to assist the Secretary-General in fulfilling his internal oversight responsibilities” (para. 1). What is more, the bulletin reaffirms, as does the resolution (para. 5(a)), that the Office “shall exercise operational independence under the authority of the Secretary-General” (para. 2).

The Tribunal considers that, while it is clear from the foregoing that the General Assembly intended to confer “operational independence” on OIOS—which prevents any staff member, even the Secretary-General, from giving it instructions in its investigative work—the General Assembly must, in stating that the Office acts under the authority of the Secretary-General, have intended to acknowledge that the Secretary-General was administratively responsible for any breaches or illegalities

OIOS might commit. In fact, contrary to what the Respondent contends, in an organization like the United Nations it would be inconceivable for one of its offices to be able to act without potentially engaging the liability of the Organization and thus of the Secretary-General, in his capacity as Chief Administrative Officer.

(...) When faced with apparently contradictory instruments of equal value, the Tribunal must necessarily give precedence to the staff member's right of access to justice. It must find, therefore, that the fact that the Secretary-General may not modify the OIOS decision cannot operate to prevent the staff member from contesting it before the Tribunal.

The Tribunal considers that, while the General Assembly intended when establishing OIOS that it should be operationally independent of the Administration and the Secretary-General, nowhere in the General Assembly resolution, nor in any of the legislative history of the resolution establishing OIOS, is it stated that the decisions of that Office cannot be subject to judicial review. Furthermore, it is unacceptable in a legal system such as that of the United Nations that a staff member should not have access to justice to assert his or her rights.

37. The Appeals Tribunal also established a precedent in *Koda* 2011-UNAT-130:

(...) But

[t]he Office of Internal Oversight Services shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties and, in accordance with Article 97 of the Charter, have the authority to initiate, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to monitoring, internal audit, inspection and evaluation and investigations as set forth in the present resolution...²

Thus OIOS operates under the "authority" of the Secretary-General, but has "operational independence". As to the issues of budget and oversight functions in general, the General Assembly resolution [48/218 B (12 August 1994) para. 5 (a)] calls for the Secretary-General's involvement. Further, the Secretary-General is charged with ensuring that "procedures are also in place" to protect fairness and due-process rights of staff members. It seems that the drafters of this legislation sought to both establish the "operational independence" of OIOS and keep it in an administrative framework. We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-

² General Assembly resolution 48/218 B (12 August 1994), para. 5 (a).

General's administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.

To the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned.

38. In the present case, the Tribunal considers that the fact that OIOS opened an investigation of a matter allegedly involving the Applicant and mentioned his name in various communications sent to a number of countries in relation to that investigation constitutes an administrative decision subject to challenge before this Tribunal.

39. The Tribunal must now consider whether the absence of a response from OIOS constitutes an administrative decision subject to challenge before this Tribunal.

40. It has been consistently held that the failure to take a decision is in itself a decision subject to review by an administrative tribunal, within the meaning of article 2 (1) (a) of the Tribunal's statute (*Nwuke* 2010-UNAT-099; *Rahimi* UNDT/2011/089; "...not taking a decision is also a decision", *Tabari* 2010-UNAT-030).

The Tribunal notes that administrative decisions that are subject to review by the Tribunal are not always presented as affirmative decisions. They are sometimes in the form of a failure to act, which may be characterized as an implied administrative decision (*Zeid* UNDT/2013/005).

41. In the present case, the Tribunal considers that the Office's silence over the course of a multi-year investigation constitutes an administrative decision within the meaning of article 2 of the Tribunal's statute.

42. Lastly, the Tribunal must consider, as required under article 2 (1) (a) of its statute, whether the Applicant's rights are directly affected by the administrative decision of OIOS.

43. This obligation is highlighted in *Nwuke* 2010-UNAT-099, in which the Appeals Tribunal considered that it had jurisdiction to exercise judicial review over such discretionary decisions, provided that the applicant's rights were directly affected.

So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

44. In the present case, the Tribunal must consider whether the fact that OIOS opened an investigation into the Applicant's alleged involvement in the trafficking of forged passports, mentioned his name in various communications sent to a number of countries in relation to that investigation and remained silent for the several years that the investigation has taken constitutes an administrative decision that directly affects the Applicant's contract of employment.

45. The Tribunal is of the view that the mention of the Applicant's name in several documents communicated to a number of countries in relation to an ongoing investigation has had an impact on the Applicant's professional mobility. Indeed, while on official travel the Applicant has been stopped in various airports, sometimes for several hours, and has been asked whether he has another passport in his possession.

46. The Tribunal also takes the view that the absence of a response from OIOS over the course of its multi-year investigation is a deliberate act, if not an instance of negligence in the Administration's duty to act within a relatively reasonable time. This failure to respond has impacted on the Applicant's professional reputation by leaving him open to suspicion in his professional environment.

47. For these reasons, the Tribunal considers that the decision to open an investigation into forged passports, to remain silent for several years and to mention the Applicant's name in a number of documents related to the investigation and communicated to various countries constitutes an administrative decision that has had an impact on the Applicant's terms of appointment.

48. It is in this context that the Applicant claims to be a victim of defamation. In fact, the Applicant is requesting the Tribunal to rule on this matter in order to put an end to what he regards as an attack on his reputation. The Tribunal reiterates its jurisprudence to the effect that it does not have jurisdiction over matters concerning defamation, as it is bound by the provisions of article 2 of its statute.

Conclusion

49. In view of the foregoing, the Tribunal decides that the application is receivable in all respects other than the concept of defamation.

(Signed)

Judge Vinod Boolell

Dated this 30th day of October 2013

Entered in the Register on this 30th day of October 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi