UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/046
Judgment No.: UNDT/2018/055
Date: 1 May 2018
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

OZTURK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 13 July 2016, the Applicant contests the decision to deduct 25% of his salary as child support for one of his four children without enrolling the concerned child as his beneficiary, made on 28 February 2013, and implemented as of 1 August 2014.

2. The Respondent filed his reply on 22 August 2016.

Facts

3. The Applicant joined the United Nations Interim Administration Mission in Kosovo ("UNMIK") in 2014, where he serves as a Civil Affairs Officer (P-3).

4. He is the father of five children, born respectively in 1991 ("M."), 2001 ("El."), 2003 ("B."), 2013 ("E.") and 2017 ("D.").

5. On 27 September 2001, the Applicant had a daughter, El., from a common law relationship with a citizen from Kazakhstan. The couple split and the relationship between the Applicant and El.'s mother became very difficult.

6. On 17 August 2005, a domestic court of Almaty, Republic of Kazakhstan ("Kazakhstan"), issued an order for the Applicant to pay 25% of his salary to his former partner in support of their daughter El.. The court order was pronounced *in absentia* because the Applicant was not residing in Kazakhstan at the time and he stressed that no notice was sent to him.

7. On 23 October 2006, the Applicant and El.'s mother signed an agreement, which provided, *inter alia*, that El.'s mother would reimburse to the Applicant, in instalments, a considerable amount of money borrowed from him; that the Applicant on a monthly basis would bear the cost for El.'s nanny (USD200), El.'s cloths and health expenses, and would pay USD200 to cover necessary expenses for El. and her mother while they were living together with the Applicant, as well as cover for their international travel. It also provided for the Applicant to regularly spend time with El..

8. Emails on file show that relations between the Applicant and El.'s mother were very tense and that the Applicant complained to her about her not informing the Kazakh Court correctly, the fact that his visit rights for El. had been disturbed, and that the needs of his other kids had been disregarded and had to be equally respected taking into account the cost of living in their respective country of residency. According to the Applicant, he continued to pay child support in accordance with the agreement of October 2006 until the mother kidnapped El. to Belgium and he had to seek Interpol's intervention, which found El. and brought her back to Kazakhstan.

9. On 29 March 2012, the Legal Support Office, United Nations Development Programme, forwarded to UNMIK a copy of the Kazakh Court order of 2005 (see para. 6 above), together with a request of El.'s mother to have 25% of his salary paid to her as alimony for El..

10. After seeking advice from the Department of Field Support/Field Personnel Division, in Headquarters, the Chief Civilian Personnel Officer ("CCPO"), UNMIK, informed the Applicant, by letter of 7 August 2012, about the child support claim, and requested him to submit proof of compliance within 30 calendar days. The letter specified that should the Applicant wish to contest the order, he was required to provide a new order of a competent court setting aside, vacating or staying pending appeal the original order, or to prove that the matter with the complainant had been otherwise amicably resolved.

11. The Applicant replied to the CCPO on 7 September 2012, requesting UNMIK to hold the salary retentions in abeyance pending adjudication of certain proceedings that he had initiated as of 2010 before national courts of Kazakhstan and Belgium. He further stated that it was only on 12 March 2008 that he became aware of the judicial proceedings and the resulting court order of 17 August 2005 and added that, on 23 October 2006, he and El.'s mother had signed an agreement on child support. Also, the Applicant requested that UNMIK assist him in obtaining information from El.'s mother relevant for the domestic court cases.

12. On 21 November 2012, UNMIK informed the Applicant that the documents he had submitted could not be considered by the Organization to stay the salary deductions, and referred the Applicant to the letter of 7 August 2012, which specified the documents that could be taken into account to this end.

13. On 4 December 2012, UNMIK informed the Applicant that El.'s mother, as a staff member with the United Nations Office for the Coordination of Humanitarian Affairs ("OCHA"), had recorded their daughter (i.e., El.) as her dependant and was in receipt of a dependency allowance for her.

14. On 28 December 2012, the Applicant provided documents tending to support that he had appealed the case to a higher court in Kazakhstan.

15. On 28 February 2013, the CCPO, UNMIK, informed the Applicant that after review of his case, the Office of Human Resources Management ("OHRM") had concluded that the documents he had submitted did not constitute a court order to vacate the initial one, and noted that the appeal dated back to 2010. The CCPO also stated that the Organization would be bound to honour the court order and to proceed to request the Secretary-General to authorise the deductions, unless the Applicant submitted, within 10 days, a stay from the respective national court pending the appeal.

16. On 2 March 2013, the Applicant's lawyer filed a complaint with the Chairman of the Almaty City Court, Kazakhstan, asking, *inter alia*, that the period for an appeal of the court order of 17 August 2005 be resumed.

17. On 13 March 2013, the Applicant replied to the 28 February 2013 communication from the CCPO, UNMIK, objecting to the decision therein.

18. The Applicant married a Kosovo citizen with whom he had a son born on 25 May 2013, namely E.. The Applicant's spouse later initiated divorce proceedings in a domestic court of Mitrovica, Kosovo, and asked that the Court rule upon the parental responsibilities for E..

19. On 12 March 2014, the Auezovskiy district court in Almaty, Kazakhstan, rejected the Applicant's 2 March 2013 request for reinstatement deadline for objections to the alimony court order of 17 August 2005, and noted that its ruling could be appealed with the Almaty City Court.

20. On 19 March 2014, the Applicant's lawyer filed a submission with the Almaty City Court, Kazakhstan, asking that the decisions of 17 August 2005 and of 12 March 2014 be overturned.

21. On 1 August 2014, the United Nations started making monthly deductions of 25% from the Applicant's net salary in connection with alimony in favour of El. as follows:

a. From August to December 2014: USD2,773 per month;

b. From January 2015 to December 2017: USD2,326.97 per month; and

c. Since January 2018: USD1,957.72 per month.

22. The above deductions were paid to El.'s mother. It seems that, initially, the amount of USD2,773 was determined taking into account the Applicant's other children's benefits.

23. On 17 June 2015, a domestic court of Mitrovica, Kosovo, issued a judgment ordering, *inter alia*, that the Applicant pay as "financial contribution to the care and custody of [his child E.]", "the equal amount as for all his children up to 1/3 of his monthly income", until E.'s age 18 (see para. 18 above).

24. Following this ruling, the Applicant again requested suspension of the deduction from his salary arising from the Kazakh court order. In his exchanges with UNMIK, he requested to be provided with a written explanation of his situation to be able to submit it to the Kazakh courts. To his request, he attached the Kosovo court decision of 17 June 2015.

25. By email of 25 November 2015, UNMIK, *inter alia*, informed the Applicant that any change in the deductions being made was subject to his appealing "the Court Order issued by the District Court of Almaty in Kazakhstan with respect to [his] daughter and [providing] a new order from that Court".

26. By submission dated 23 January 2016, completed on 1 February 2016, the Applicant requested management evaluation of the decision of 25 November 2015. In his request for management evaluation, the Applicant requested temporary suspension of the deductions from his salary.

27. At the time of the contested decision, El.'s mother worked as a national staff member of OCHA in Almaty, Kazakhstan, and was in receipt of a child dependency benefit for El.. The mother's monthly gross salary in Almaty, Kazakhstan, was around USD1,345 per month, and the monthly dependency allowance for her daughter El. amounted to approximately USD27.

28. By letter dated 20 April 2016, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the decision not to suspend nor modify the current deductions for child support from his salary and to allow him to include his daughter El. as a dependant.

29. On 27 July 2016, the Auezov Regional Court of Almaty City, Kazakhstan, confirmed that the Court order of 17 August 2005 "still ha[d] legal force".

30. On 13 April 2017, the Applicant filed an application with the Auezov District Court of Almaty City, Kazakhstan, asking for a review of his case, providing, *inter alia*, information on his other children, and asking that the monthly amount of alimony to be paid for El. be reduced to USD500.

31. By decision of 12 September 2017, the Specialized Interdistrict Juvenile Court of the City of Almaty, Kazakhstan, rejected the Applicant's request for reduction of the amount of child support for El.. In its considerations, said court found that the Applicant's "arguments about his grave financial situation due to having four dependent children [were] not sound as they [were] rejected by the case files". It further noted that the Applicant was in receipt of a dependency allowance

from the United Nations for each of his five children, and that his argument that living standards in the European Union were much higher than in Kazakhstan could not "serve as substantiation for reducing the amount of the child support payments to the hard sum of USD500".

Procedure before the Tribunal

32. Pursuant to Order No. 171 (GVA/2017) of 6 September 2017, the parties informed the Tribunal of their view that a hearing was not necessary in this case.

33. The Tribunal, through Order No. 243 (GVA/2017) issued on 7 December 2017, asked the Respondent to provide evidence indicating that the decision of the Kazakh Court had not lapsed by the time it was enforced by the Organization.

34. The Respondent filed two motions for extension of time to comply with Order No. 243 (GVA/2017), which were granted by the Tribunal. The Respondent filed a third motion for extension of time on 18 January 2018, which was granted by Order No. 13 (GVA/2018) of 24 January 2018, by which the parties were also convoked to a case management discussion ("CMD"), which took place on 6 February 2018.

35. Thereafter, the parties made further submissions pursuant to Order No. 34 (GVA/2018) of 7 February 2018.

Parties' Contentions

36. The Applicant's primary contentions may be summarized as follows:

a. El.'s mother obtained a court decision from a Kazakh court without his participation to the proceedings. Moreover, she receives an allowance from the UN for said daughter, whereas the Applicant could not have her registered as his dependent due to the mother's failure to provide him with required information to do so;

b. It is discriminatory, unfair and illegal that one of the Applicant's children receives 25% of his salary, while the other three cannot receive as much;

c. The Kazakh judicial system is ineffective and openly favours its citizens against foreigners. Although he has appealed the litigious order within the national jurisdiction, he has been so far unable to reach a positive settlement of the matter;

d. The issues at hand have been long pending and resulted in considerable stress, time and financial costs for the Applicant and his family; and

e. The requested measures are expected to encourage the mother of the child for whom 25% salary deductions are made to accept a fair settlement of the matter and to protect the interest of her own daughter to regain contact with her father and three brothers.

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

Receivability

a. An application must properly identify in a clear and concise manner each and every administrative decision that it is meant to contest. Challenges are not receivable where the administrative decision is not precisely identified;

b. Pursuant to Secretary-General's bulletin ST/SGB/1999/4 (Family and Child Support obligations for staff members), the Organization is bound to execute the terms of the Kazakh court order of August 2005; since the Secretary-General has no substantive discretion in that regard (sec. 2.2 of ST/SGB/1999/6), the Applicant has not identified a reviewable administrative decision subject to the jurisdiction of the Dispute Tribunal;

Merits

c. Under the above bulletin, the Organization is bound to execute an original family support order unless the staff member submits a new court order of a competent court setting aside or vacating the original orders, which the Applicant has not done; and

d. The Kosovo court order does not vary, vacate, stay or otherwise impact the original Kazakhstan court order. In the absence of a new court order from the Kazakhstan jurisdiction, the Organization is bound to continue to execute the original order.

Considerations

Receivability

38. The Respondent claims that the application is irreceivable on the grounds that the Applicant does not challenge an administrative decision within the meaning of art.2.1(a) of the Tribunal's Statute. In this respect, he argues that challenges where the administrative decision is not precisely defined are irreceivable and, also, that the Applicant failed to identify an administrative decision that is in non-compliance with his terms of appointment.

39. The Tribunal recalls that, as the Appeals Tribunal held in *Massabni* 2012-UNAT-238:

> 2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
>
> 3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

40. It follows that the Tribunal is to examine and interpret an applicant's submission to ascertain the decisions that he or she intended to appeal. Further, in doing so, both the Appeals and the Dispute Tribunal have consistently taken into account whether an applicant was represented by counsel and/or could rely on a legal background (see, e.g *O'Neill* 2011-UNAT- 182, *Longone* UNDT/2015/001).

41. In his application, the Applicant described the decision at issue as follows: "[t]he deductions of 25% my salary (sic) as child support for only one of my child without enrolling the child as my beneficiary".

42. Having carefully reviewed the Applicant's submissions and noting that the Applicant is self-represented and not a trained lawyer, the Tribunal is satisfied that the object of this application is sufficiently clear and two-folded:

a. On the one hand, the Applicant challenges the deduction of 25% of his salary implementing the alimony order of the Kazakh court;

b. On the other hand, he contests the Administration's refusal to recognize his concerned daughter (El.) as his dependent for the purpose of the United Nations' child dependency benefits.

43. The Tribunal is of the view that both of the foregoing decisions are appealable administrative decisions according to the definition adopted by the Appeals Tribunal (*Tabari* 2010-UNAT-030, *Schook* 2010-UNAT- 013, *Al Surkhi et al*. 2013-UNAT-304), endorsing that of the former United Nations Administrative Tribunal in *Andronov* No. 1157 (2003), to wit:

> It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are, therefore, characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

44. In addition, the Respondent's contention that the Applicant has not identified any decision "in non-compliance with his terms of appointment" since the Administration was bound to implement the 2005 order from the Kazakh court is a matter for determination with respect to the merits of the case. The legality of the contested decision is not a question of receivability of an application; it rather constitutes the substantive question to be determined.

45. With respect to the refusal to recognize child El. as the Applicant's dependent for the purpose of the United Nations' dependency benefits, the Tribunal notes that that decision was rescinded and that said child has been recognized as the Applicant's dependent, and he has been receiving dependency allowance for her retroactively, effective 1 August 2014. The Tribunal therefore notes that this part of the application is moot.

46. The Tribunal further has to examine *proprio motu* whether the application is receivable *ratione materiae*, namely, whether the Applicant timely requested management evaluation. It notes that, in his application, the Applicant refers to the decision of 28 February 2013, for which, he states, he requested management evaluation on 1 February 2016.

47. The Tribunal is mindful that the Applicant requested management evaluation twice: first in March 2013 of the decision of 28 February 2013, and then on 23 January 2016, completed on 1 February 2016, of the decision of 25 November 2015.

48. The Tribunal notes that before the email of 25 November 2015 was sent to the Applicant, he had forwarded to the Administration the judgment from the domestic court of Mitrovica, Kosovo, issued on 17 June 2015 ("Kosovo court order"), and had asked for a review of the deductions on that basis. The decision of 25 November 2015 was thus a new decision, taken upon review of the matter in light of new elements and evidence provided by the Applicant.

49. While in his application, the Applicant refers to the decision of February 2013, he also refers to his request for management evaluation of January/February 2016 against the November 2015 decision, and to the fact that he had requested the Organization to consider the new Court order and to make relevant adjustments to the deductions.

50. In applying *Massabni*, the Tribunal is of the view that the Applicant is contesting the decision of 25 November 2015, which was taken after he had sent the Kosovo court order to the Administration. Therefore, the Tribunal is satisfied

that, as far as his application is addressed against the decision of 25 November 2015, the Applicant respected the statutory time limits and the application is receivable, *ratione materiae* and *ratione temporis*.

51. However, any claim against the decision of 28 February 2013 is not receivable *ratione temporis*, due to the Applicant's failure to file an application against that decision within the statutory time limits.

Merits

52. The Applicant requests the Tribunal to find that the decision taken by UNMIK and OHRM/UNMIK to deduct 25% from his salary to pay one of his children the monthly child support allowance—as per the judicial order from the Kazakh Court of 17 August 2005 ("the Kazakh court order")—is illegal, and that other factors should be taken into account, and necessary adjustments be made.

53. The Applicant argues that the child support deductions being taken out of his gross salary amount to 30% of his monthly gains. He also requests that all the deducted amounts be returned to him and that the Tribunal orders the UN to accept the enrolment of his daughter El. as his beneficiary. As noted above, the latter point is moot and will not be addressed by the Tribunal.

54. With respect to the deductions made from the Applicant's salary, the Tribunal notes that pursuant to staff rule 3.18(c)(iii), deductions from salary and other emoluments *may* be made for "indebtedness to third parties when any deduction for this purpose is authorized by the Secretary-General".

55. ST/SGB/1999/4 (Family and child support obligations of staff members) relevantly provides (emphasis added):

> **Section 2**
>
> **Procedures when staff members fail to comply with family support court orders**
>
> 2.1 Under staff rule 103.18 (b) (iii), the Secretary-General *may authorize* deductions from staff members' salaries, wages and other emoluments for indebtedness to third parties. Family support court

> orders create indebtedness to third parties, such as the staff member's spouse, former spouse and/or dependent children.
>
> 2.2 To ensure effective relief when staff members fail to comply with family support court orders, the Organization *will voluntarily* take the following actions when it receives a family support court order against a staff member which is final and which is not being honoured by the staff member:
>
> (a) The staff member will be requested to comply with the order immediately and to submit proof of compliance to the Organization within 30 calendar days from the date of receipt of the request from the Organization;
>
> (b) If the staff member does not submit the proof of compliance within 30 days, the Organization *will* commence deductions from the staff member's United Nations emoluments in respect of the amounts ordered;
>
> (c) The amounts deducted will then be paid to the spouse, former spouse or the dependent child(ren), in accordance with the order.
>
> 2.3 For the purpose of the present bulletin, a family support court order will be deemed final if the only action left in regard of that court order would be to have the order executed. If the staff member concerned contests the order, he or she must submit a new order of a competent court, setting aside, vacating the original order, or staying the original pending appeal, or proof that he or she has otherwise amicably resolved the matter with his or her spouse or former spouse. Until such evidence is submitted, the Organization will honour the original court order.

56. The Tribunal recalls that it is not a family Court and its jurisdictional powers are limited to those granted by its Statute. As a consequence, the Tribunal cannot rescind or vacate the Kazakh court order or the order of any other national court. Its judicial review is limited to adjudicate on the lawfulness of the decision taken by the Organization to honour the Kazakh court order, in light of the Applicant's terms of appointment.

57. In this respect, the Tribunal recalls what the Appeals Tribunal held in *Benamar* (2017-UNAT-797), namely that:

> 44. Third, although a decision of a national court may be subject to criticism by both parties (and also by a third party), it must be obeyed if and to the extent that it is enforceable. Consequently, the parties should generally comply with an executable judicial decision; otherwise they would be taking justice into their own hands, which is not acceptable according to general principles based on the rule of law.

Does the Organization have discretion in determining the amount to be garnished from the Applicant's salary?

58. With the above in mind, the Tribunal recalls that the decision of 25 November 2015 explicitly conveyed to the Applicant that the Organization has no discretion regarding the amount to be garnished from a staff member's salary for child or spousal support, and that the Applicant had to and failed to provide the Administration with a new court order reversing the one of 17 August 2005.

59. Although the Tribunal regrets that the Respondent was not in a position to provide it with a confirmation from the Kazakh Permanent Mission, it is satisfied, on the basis of the available evidence, that the Kazakh Court order of 17 August 2005 is final for the purpose of sec. 2.3 of ST/SGB/1999/4. It is also satisfied that the Applicant did not submit a new order of a competent court, setting aside, vacating the original order, or staying it pending appeal, pursuant to sec. 2.3 of ST/SGB/1999/4.

60. With respect to the agreement signed by the Applicant and El.'s mother on 23 October 2006, the Tribunal is of the view that it does not have enough elements to conclude that the agreement is valid and still in place. Hence, it could not supersede the court order of 17 August 2005 for the purpose of sec. 2.3 of ST/SGB/1999/4.

61. However, the Tribunal is concerned that the Administration did not provide a reasoned response on the issue of the Organization's discretionary authority with respect to deductions made under staff rule 3.18(c)(iii). The Tribunal gave the Respondent an opportunity to respond to that issue, which was raised during the February 2018 CMD and in Order No. 34 (GVA/2018), namely, whether in light, *inter alia*, of the judicial immunity of the United Nations and the wording of staff

rule 3.18(c)(iii) ("may")—as reflected in ST/SGB/1999/4—the Organization disposes of discretion in applying deductions/regarding the amount to be deducted on the basis of national court orders, pursuant to ST/SGB/1999/4. The Tribunal regrets that Counsel for the Respondent, in his submission pursuant to said order, merely stated—in one sentence—that the Organization had no discretion, without providing any rationale for his position.

62. The Tribunal is of the view that the Respondent is confusing two issues: while, on the one hand, staff members are bound and should generally comply with final and executable national court orders (cf. *Benamar*; cf. also staff rule 1.2(b)), the United Nations enjoys judicial immunities. As such, while it cannot ignore national court decisions, these are not binding and enforceable vis-à-vis the Organization. In light of its judicial immunity, the United Nations disposes and has to properly exercise its discretion when it comes to the application of staff rule 3.18(c)(iii). This is reflected by the use of the word "may" in staff rule 3.18(c)(iii), as mirrored in ST/SGB/1999/4. It is also reflected by the fact that such deduction requires the Secretary-General's authorization, which implies that it is not an automatic action but provides the Secretary-General with the final decision making power in this respect.

63. The Tribunal is mindful that sec. 2.3 of ST/SGB/1999/4 states that "[u]ntil such evidence is submitted, the Organization *will* honour the original court order" (emphasis added). In light of the foregoing, that provision cannot entail an absolute obligation, on behalf of the Organization, to honour the original court order. Rather, honouring the court order is a possibility (may), if authorized by the Secretary-General upon the exercise of his discretion. Any other interpretation would be a clear misconception of the Organization's judicial immunity, as reflected in the wording of staff rule 3.18(c)(iii). The Tribunal also recalls that the Staff Rules prevail over administrative instructions and, hence, the latter have to be interpreted and applied in accordance with the Staff Rules.

64. Relevantly, the Appeals Tribunal held in *Onogi Sheryda Elguindi* 2012-UNAT-189, that it was satisfied that the UNJSPF equitably exercised its *discretion* in determining the amount to be deducted from the benefits of the Pension Fund under art. 45 of its Regulations,[1] to satisfy a legal obligation on alimonies evidenced by a national court order. In that case, the UNJSPF had applied its policy by which generally, any deduction under art. 45 of its Regulations shall not exceed 50% of the gross UNJSPF monthly benefit paid to the retiree. That limitation is applied by the UNJSPF even if and when the final and executable national court order(s) command(s) payment of alimonies to one or several spouses or children beyond the 50% of the participant's gross monthly UNJSPF benefit. As held by the Appeals Tribunal, in making such a determination in the exercise of its discretion, the UNJSPF legitimately could and did take into account the needs of the Applicant, his (ex) spouse(s) and minor children (*Onogi Sheryda Elguindi)*.

65. The Tribunal notes that like staff rule 3.18(c)(iii), art. 45 of the Pension Fund's Regulations uses the word "may", as a reflection of the Fund's discretion, which results from its judicial immunity in the review and application of alimony payments under national court orders. The Tribunal also notes that the Respondent admitted that the practical operation of sec. 2.3 of ST/SGB/1999/4 and art. 45 of the Pension Fund Regulations are the same.

Did the Organization legally exercise its discretion when it decided to deduct 25 % of the Applicant's salary for child support for El.?

66. It follows that when applying staff rule 3.18(c)(iii), the Organization had discretion in determining the amount to be deducted on the basis of the Kazakh court order.

[1] Art. 45 of UNJSPF Regulations: [T]he Fund may, to satisfy a legal obligation on the part of a participant or former participant arising from a marital or parental relationship and evidenced by an order of a court or by a settlement agreement incorporated into a divorce or other court order, remit a portion of a benefit payable by the Fund to such participant for life to one or more former spouses and/or a current spouse from whom the participant or former participant is living apart. Such payment shall not convey to any person a benefit entitlement from the Fund or (except as provided herein) provide any rights under the Regulations of the Fund to such person or increase the total benefits otherwise payable by the Fund.

67. The discretionary power of the Secretary-General in implementing these deductions cannot be such as to deprive a staff member e.g. of his/her own subsistence amount or *minimum vital*. As in any exercise of discretion, the Organization has to take into account all relevant considerations, which may include the terms of the final and executable court order and whether the staff member participated in the court proceedings (cf. *Gonzalez-Hernandez* 2014-UNAT-465), or whether a judgment was rendered *in absentia,* its duty of care vis-à-vis the staff member, as well as the needs of the family members for whom the national court order provided alimonies for. Relevant considerations may also include other final court orders on alimonies from other jurisdictions, to the extent they may have an impact on the financial situation of the staff member, or the cost-of-living at the place of residence of the minor child(ren), the *minimum vital* of the staff member and the like.

68. In fact, as the Respondent stated before the Tribunal, the Organization was and is of the view that it does and did not enjoy any discretion and simply and literally applied the terms of the Kazakh Court order, without giving any consideration to any other factor as mentioned above.

69. Without substituting itself to the Secretary-General in his exercise of discretion, the Tribunal notes that the decision from the Kazakh Court of 17 August 2005 did not even mention the Applicant's other minor child, born in 2003 (B.), nor the Applicant's eldest child born in 1991 (M.), although it recognized them as the Applicant's dependents. The fact that a subsequent decision by a Kazakh court (namely, the decision of 12 September 2017) did take all of the Applicant's children into account (including the one born in 2017) is not relevant for the legality of the decision of 25 November 2015. The Tribunal notes that at the time of the decision of 25 November 2015, the Applicant had yet another minor child (E.), born in 2013.

70. Also, the Organization, in its decision of 25 November 2015, did not consider the impact of the judgment from the Kosovo court, which referred to the alimonies to be paid to the Applicant's then three minor children by equal share. No reference

was made, either, to the Organization's duty of care vis-à-vis the Applicant, or the needs of the other (minor) children of the Applicant.

71. Such a course of action is consistent with the Organization's view that it did not have and could not exercise any discretion. The Tribunal notes, however, that where the Organization enjoys discretion, it has to exercise it and, more importantly, it has to do so legally. The Organization's failure to exercise its discretion and to take relevant considerations into account, including its duty of care vis-à-vis the Applicant must, in and of itself, lead to the illegality of the decision of 25 November 2015.

72. However, as mentioned above, the Tribunal cannot substitute its assessment to that of the Organization in the exercise of its discretion, and it will not easily engage in a review of such exercise, unless discretion was not used at all or its use was clearly unreasonable or failed to take relevant considerations into account (cf. for the test to be applied to discretionary decisions *Sanwidi* 2010-UNAT-084).

73. Without substituting itself to the Secretary-General, the Tribunal cannot but express its view that a monthly deduction of 25% corresponding to USD2,326.97 (from November 2015 to December 2017), and USD1,957.72 (starting January 2018) appears unreasonable, in light, *inter alia*, of the amount of child dependency allowance paid to the mother by the UN in Kazakhstan (USD27) and of the fact that the Applicant had, at the time of the contested decision, two—and, since 21 February 2017 three—other minor children.

74. The variation of the deductions made from the Applicant's salary (cf. 21 above) were not the result of an exercise of discretion on behalf of the Administration, but seem to be a matter of calculation depending on the amount to which the 25% was applied by the Administration. The Tribunal will therefore not enter into an analysis of the actual amounts that were deducted, respectively as of November 2015 and thereafter. It limits its findings to the conclusion that a 25% monthly deduction from the Applicant's salary, in execution of the terms of the Kazakh court order without any exercise of discretion, was unlawful.

Remedies

75. The Tribunal is mindful of the remedies requested by the Applicant, who asked that other relevant factors be considered in determining the amount to be deducted under the Kazakh court order, that all deducted sums be returned as El. was not enrolled as his beneficiary yet, that the new Kosovo Court order be considered and that necessary adjustments be made.

76. The Tribunal recalls that the Applicant is not represented, and notes that his request for remedies, implicitly, asks for the rescission of the contested decision, which as a consequence will include reimbursement of the deductions made.

77. Therefore, in light of its finding that the decision of 25 November 2015 to deduct 25% from the Applicant's salary on the basis of the Kazakh court order was illegal, said decision has to be rescinded. As a consequence of the rescission, the Applicant will have to be reimbursed the amounts deducted from him from 25 November 2015 onwards, minus the monthly child benefit allowance he received for El..

78. While the 25 November 2015 decision was illegal and for the reasons outlined above has to be rescinded, the Tribunal does not find it appropriate to grant the Applicant interests on the amounts to be reimbursed, because the Organization not only paid the amounts deducted to El.'s mother but, also, it did so in the mistaken belief that it was bound by the Kazakh court order.

79. Further, the Tribunal notes that in light of the rescission of the 25 November 2015 decision, and since a legal obligation to pay child alimony for El. existed under the Kazakh court order, the Organization, taking all relevant matters into account, has to determine, anew, the amount (or percentage) to be deducted from the Applicant's salary from 25 November 2015 onwards, in favour of El., in a legal exercise of its discretion.

Conclusion

80. In view of the foregoing, the Tribunal DECIDES:

a. The application with respect to the decision not to enrol El. as the Applicant's dependent child is moot;

b. The decision of 25 November 2015 to deduct 25% from the Applicant's salary as alimony in favour of El. from that moment onwards is rescinded;

c. As a consequence, the Applicant has to be reimbursed the amounts deducted from his salary from 25 November 2015 onwards, minus the child allowance paid to the Applicant for El. as of that date; such reimbursement is subject to any deductions to be made from the Applicant's salary after a new determination has been made by the Organization as to the amount to be deducted in light of the Kazakh court order, in a legal exercise of discretion, pursuant to staff rule 3.18(c)(iii);

d. The amount to be reimbursed is to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the reimbursement is not made within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment; and

e. Any other pleas are rejected.

(*Signed*)

Judge Teresa Bravo

Dated this 1st day of May 2018

Entered in the Register on this 1st day of May 2018

(*Signed*)

René M. Vargas M., Registrar, Geneva