



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/071

Judgment No.: UNDT/2022/129

Date: 6 December 2022

Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

## Introduction

1. The Applicant, a staff member of the United Nations Support office in Somalia (“UNSOS”), filed an application on 20 August 2022 contesting the decision to deny their request to “have [their] gender in United Nations administrative systems reflect [their] gender identity”. Additionally, the Applicant requests that the Tribunal redact any personal/sensitive information from the judgment, including their name, that would allow the public to identify them.<sup>1</sup>

2. The Respondent filed a reply to the application on 20 September 2022.

3. The Applicant filed a motion for interim measures<sup>2</sup> on 1 October 2022 seeking “an injunction against the Organization registering me as “male” and addressing or referring to me by “Mr.” or with male pronouns pending the judgment on the merits”. The Tribunal rejected the motion, without entering the merits, on the grounds that the matter did not pose a case of particular urgency.<sup>3</sup>

4. The Tribunal held a case management discussion with the parties on 26 October 2022. It was agreed by the parties that the case did not require a hearing.<sup>4</sup> Via Order No. 156 (NBI/2022), the Tribunal instructed the Respondent to file further submissions on the Applicant’s annexes 3 and 4, the Respondent’s annex R/1, the Danish word “køn”, the choice of the term “gender” for Umoja purposes, and the criterion used for applicability of ST/AI/2020/5 (Temporary special measures for the achievement of gender parity).

5. In compliance with Order No. 156, the Respondent filed further submissions on 17 November 2022 and 30 November 2022. He also filed a supplemental response

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<sup>1</sup> Application, p. 11, para. 25.

<sup>2</sup> Pursuant to articles 10.2 of the Statute and 14 of the Rules of Procedure of the United Nations Dispute Tribunal.

<sup>3</sup> Order No. 147 (NBI/2022).

<sup>4</sup> See also Order No. 168 (NBI/2022).

on 1 December 2022 that consisted of correspondence from the Permanent Mission of Denmark to the Office of Legal Affairs (“OLA”).

## **Facts**

6. The Applicant, a national of Denmark, was assigned male gender at birth. According to the Applicant, in November 2020, they appeared before the competent authority in Denmark and gave a solemn declaration to the fact that they now identify as female and requested to have a new passport issued to acknowledge that fact.<sup>5</sup> A new passport was issued on 17 May 2021 with “Sex” marked as “X”.<sup>6</sup> The Applicant 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.

7. On 25 September 2021, the Applicant wrote to the UNSOS Chief Human Resources Officer (“UNSOS/CHRO”) 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/BEK nr 1337 af 28/11/2013).<sup>7</sup>

8. On 29 September 2021, UNSOS requested advice from OLA on the Applicant’s request for change of gender identity.<sup>8</sup>

9. On 23 November 2021, OLA wrote to the Permanent Mission of Denmark to the United Nations in New York, asking them to verify whether the passport establishes that the staff member has changed their gender to female under the laws of Denmark.<sup>9</sup> 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

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<sup>5</sup> Application, page 2, para. 2.

<sup>6</sup> Application, annex 01.

<sup>7</sup> Application, annex 02.

<sup>8</sup> Application, annex 05, para. 1.

<sup>9</sup> *Ibid.*, para. 3.

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.<sup>10</sup>

10. 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 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 paragraph 4, section 5 of Proclamation No. 1337, reproduced below:<sup>11</sup>

The local council may permit that the sex is indicated as X if a passport applicant, of age 18 or above, submits a written declaration which states that the wish to have the sex indicated as X is founded in the experience of belonging to the opposite sex, or the applicant produces evidence to previously having been granted a new social security number in accordance with Paragraph 3 Section 6 in law on Central Register of Persons.

11. The Applicant pointed out that the Permanent Mission had conflated the concepts of “sex” and “gender” in their reply to OLA because under Danish legislation the process for changing one’s “sex” is through the issuance of a new social security number and a name change. The Applicant indicated that, at the appropriate time, they would change their name but that this was not a requirement for acceptance as a trans woman.<sup>12</sup>

12. According to OLA, on 21 February 2022, the Permanent Mission of Denmark informed it that the legislation relevant for the case had been updated in December 2021 and provided a link to “BEK nr. 2693 af 28/12/2021” or “Danish Passport Law”<sup>13</sup>;

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<sup>10</sup> *Ibid.*, para. 4.

<sup>11</sup> Application, annex 03.

<sup>12</sup> *Ibid.*

<sup>13</sup> Application, annex 05, para. 5.

and on 3 March 2022, the Permanent Mission of Denmark provided the following unofficial English translation of paragraph 4, section 5 of the Danish Passport Law:<sup>14</sup>

The Local Council may give permission to use the gender designation “X” if a passport applicant submits a written declaration to the effect that the wish to use the gender designation “X” is based on the experience of belonging to the other gender, the person in question being intersexed, not identifying as male or female or if the person in question provides documentary evidence for having previously been given a new civil registration number (CPR No.) pursuant to § 3 (7) of the Danish Act on the Civil Registration System.

13. On 4 March 2022, the Ministry of Foreign Affairs (“MoFA”) of Denmark responded to the Applicant confirming the circumstances surrounding the issuance of their new passport, that the applicable legislation in place on 17 May 2021 was Proclamation No. 1337 and BEK nr 953, and providing the following unofficial English translation of Proclamation No. 1337 used by MoFA:

(5) The Local Council may give permission to use the gender designation “X” if a passport applicant who has reached the age of 18 submits a written declaration to the effect that the wish to use the gender designation “X” is based on the experience of belonging to the other gender, or if the person in question provides documentary evidence for having previously been given a new civil registration number (CPR No.) pursuant to § 3 (6) of the Danish Act on the Civil Registration System.<sup>15</sup>

14. The MoFA also informed the Applicant that a mistake had been made when informing the United Nations of the applicable law and that the information provided was based on the wording of paragraph 4, section 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.<sup>16</sup>

15. On 7 March 2022, OLA sought various clarifications/confirmations from the Permanent Mission of Denmark based on paragraph 4, section 5 of BEK Nr. 2693 af

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<sup>14</sup> *Ibid.*, para. 6.

<sup>15</sup> Application, annex 04.

<sup>16</sup> *Ibid.*

28/12/2021. 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.<sup>17</sup>

16. 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 Applicant 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.<sup>18</sup>

17. The UNSOS Head of Mission (“HoM”) informed the Applicant, via memorandum dated 29 March 2022, that:

- a. 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.
- b. The Organization is bound by the data contained in the national passport and the information provided by the Permanent Mission of Denmark.
- c. It is accepted that the current gender designation as “male” in the Organization’s record is not correct and needs to be updated in line with the Applicant’s recognition as “transgender” by their country of nationality.

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<sup>17</sup> Reply, annex R/1.

<sup>18</sup> Application, annex 05.

d. A working group is currently looking into how the Organization can equip its systems to accommodate a staff member with a gender marker other than male or female, since there is currently no mechanism for this to be captured in Umoja or other systems/records of the Organization.<sup>19</sup>

18. On 26 April 2022, the Applicant submitted a management evaluation request (“MER”) of the 29 March 2022 decision. The remedies the Applicant was seeking through management evaluation were: “Recognition of [their] preferred gender status in accordance with [their] gender identity, through amendment of [their] gender in Umoja and other United Nations administrative systems to ‘female’”; and compensation for the violation of their basic human rights and for loss of opportunity.<sup>20</sup>

19. In a management evaluation response dated 24 June 2022, the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) upheld the contested decision.<sup>21</sup>

### **Applicant’s submissions**

20. The Applicant’s request to have their gender reflected as female in Umoja and other United Nations administrative systems must be granted due to section 1 of ST/SGB/2004/13/Rev.1. The Applicant does not claim that their “sex” is anything but male. This is evidenced by their social security number, which is an odd number.<sup>22</sup> It is undisputed that the “X” in their passport does not acknowledge that their “sex” is female, but it means that the local council has accepted that they have “the experience of belonging to the other sex”. This means that the Applicant is a trans woman with a female gender.

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<sup>19</sup> Application, annex 06.

<sup>20</sup> Application, annex 08.

<sup>21</sup> Application, annex 09.

<sup>22</sup> See p. 7, para. 10 of the Application, quoting the Danish Law on the Civil Registration System (BEK no. 1466297 of 21 April 2022, para. 1). Social security numbers assigned to women are even and to men are odd.

21. BEK nr. 2693 is inapplicable to this case because it was promulgated on 28 December 2021 with an effective date of 1 January 2022 whereas the Applicant's passport was issued on 17 May 2021. Since there is no retroactivity clause in BEK nr. 2693, it has no effect in this case. Additionally, this legislation cannot retroactively rescind the gender status that was vested in the Applicant by the issuance of their new passport. As confirmed by the Permanent Mission of Denmark, the applicable legislation is Proclamation No. 1337. The use of the term "gender" in the unofficial translation provided by the Ministry of Foreign Affairs is incorrect and should be changed to "sex" because Danish passports refer to "sex" not to "gender" and there are only two sexes but multiple genders. Thus, it is factually impossible to belong to "the other gender".

22. Pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), the Applicant has the right to: "be treated with dignity and respect"; "a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority" and to "timely appropriate corrective action" if/when prohibited conduct occurs. While the Organization figures out the mechanism to accommodate staff members with gender markers other than male or female, the Applicant should be registered as female as an interim measure for the following reasons:

- a. They have declared severally to the Organization and their national authorities that they identify as female.
- b. Being referred to as male, Mr. or with male pronouns in official registers and correspondence is harassment under ST/SGB/2019/8 as this is unwelcome, offensive and humiliating to the Applicant, and interferes with their work.
- c. Under the Temporary Special Measures on Gender Equality ("TSM")<sup>23</sup>, the Applicant's registration as "male" is an unfair and arbitrary distinction that holds them to the wrong standard when being considered for promotion or

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<sup>23</sup> ST/AI/2020/5.



reassignment. When registered as a male, the Applicant would have to be better qualified than a female candidate to be selected and even then, only after referral to the Executive Office of the Secretary-General (“EOSG”). As “transgender”, a term not identified in the TSM, the TSM would not apply to the Applicant.

d. The Organization has a duty of care towards staff members. Relying on para. 32 of A/73/152 (Protection against violence and discrimination based on sexual orientation and gender identity), the Applicant submits that a prolonged wait for recognition of gender identity often contributes to several social problems, including drug and alcohol abuse. The Organization would be responsible for any such problems that may arise by prolonging the waiting period for the Applicant.

23. The Organization has erroneously conflated “gender” with “sex”. Pursuant to paragraphs 13 and 79 of A/HRC/47/27 (The law of inclusion: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), “gender and sex do not substitute each other [...]” “They are autonomous concepts used to describe two different aspects of the human experience.”<sup>24</sup>

24. All people, including lesbian, gay, bisexual and transgender (“LGBT”) persons, are entitled to enjoy the protections provided for by international human rights law.<sup>25</sup> ST/SGB/2019/8 incorporates elements of the Universal Declaration of Human Rights entitling staff members to being “treated with dignity and respect” and “free of any form of discrimination”. The Bulletin even lists “gender identity” as a protected category in Section 1.2.

25. The Applicant seeks the following remedies:

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<sup>24</sup> Application, annex 07 (p. 2, para. 1).

<sup>25</sup> A/HRC/19/41, section II.A, para. 5.

- a. Rescission of the contested decision and recognition of their preferred gender status in accordance with their gender identity, through amendment of their gender in Umoja and other United Nations administrative systems to 'female'.
- b. Compensation for: (i) the violation of their basic human rights and the psychological consequences they have suffered as a result of the contested decision; and (ii) the loss of opportunity for all applications made after 25 September 2021 because they were assessed as a male candidate in contravention of the TSM.

### **Respondent's submissions**

26. The Respondent's case is that the application should be dismissed because the contested decision is lawful. Pursuant to section 2 of ST/SGB/2004/13/Rev.1., gender is determined by reference to the law of the competent authority under which the staff member's personal status has been established. The Permanent Mission has not recognized the Applicant's status as a female. Under Danish law, 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. Neither the Applicant's views nor interpretation of Danish law can supplant the requirements of ST/SGB/2004/13/Rev.1.

27. The Applicant referenced in their communication to the Permanent Mission of Denmark that Danish Law requires additional steps for legal recognition as female but has apparently chosen not to take those steps because the Applicant finds them "abusive". Similarly, the Applicant's claim that the contested decision violates the Universal Declaration of Human Rights is irrelevant. The Dispute Tribunal lacks jurisdiction to decide that specific regulations are inconsistent with the Universal Declaration of Human Rights or to resort to law other than the relevant Staff Regulations and Rules and administrative issuances of the Organization.

28. The Respondent could not stipulate or disprove whether the Danish word “køn” used in the Applicant’s passport denotes “sex” or “gender. In the “unofficial translation” of BEK nr. 2693 af 28/12/2021 provided by the Permanent Mission of Denmark to the Organization, “køn” appears to be translated as gender and not “sex”.<sup>26</sup> The Respondent submits that: the response that the Ministry of Foreign Affairs provided to the Applicant on 4 March 2022 is not the official response that the Permanent Mission of Denmark provided the Organization; in line with ST/SGB/2004/13/Rev.1, “gender” as recorded in Umoja is based on the information in staff members’ national passports or national identity cards and is used interchangeably with “sex”; and the applicability of ST/AI/2020/5 is based on legal sex or legal gender as determined by the relevant authority and indicated in a national passport or identity card.<sup>27</sup>

29. Relying on *Larriera*<sup>28</sup> and *Ernst*<sup>29</sup>, the Respondent submits that it cannot interpret the legislation of a Member State and that the role of the Administration in requests for change of personal status by staff members is to verify the personal status of the staff member with the Permanent Mission of the competent Member State and act in accordance with that verification as officially communicated to the United Nations.<sup>30</sup> In this respect, the Respondent points out that the Permanent Mission of Denmark informed the Organization that the “correct/currently applicable” Danish legislation is article 4.5 of BEK nr. 2693 af 28/12/2021 and that the Applicant is not female under this law.<sup>31</sup>

30. Under art. 10.5(b) of the UNDT Statute, the Tribunal may not award compensation: (i) absent proof of harm suffered<sup>32</sup>; (ii) when no illegality has been

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<sup>26</sup> Respondent’s response to Order no. 156 (NBI/2022), dated 17 November 2022.

<sup>27</sup> *Ibid.*

<sup>28</sup> 2022-UNAT-1271.

<sup>29</sup> UNDT/2011/047, para. 30, *aff’d*, 2012-UNAT-227.

<sup>30</sup> Respondent’s supplemental response to Order no. 156 (NBI/2022), dated 30 November 2022.

<sup>31</sup> Annex R/2 to Respondent’s response to Order no. 156 (NBI/2022), dated 17 November 2022.

<sup>32</sup> *Nchimbi* 2018-UNAT-815, para. 29; *Zachariah* 2017-UNAT-764, para. 37; *Kallon* 2017-UNAT-742, paras. 58- 62, 67; *Tadonki* 2014-UNAT-400, para. 59; *Asariotis* 2013-UNAT-309; *Obdeijn* 2012-UNAT-201, para. 42.

established<sup>33</sup>; and (iii) based on a general allegation of future or hypothetical harm<sup>34</sup>. In this case, the Applicant is not entitled to any remedy because they have not produced any evidence of harm due to the contested decision and their claim of loss of opportunity is speculative. Should the Applicant believe that they have not received full and fair consideration in a selection process for a specific position, the Applicant retains the right to contest that hypothetical selection decision once it is made.

### **Considerations**

31. Noting that the argument employs inchoate terminology, especially different acceptations of the word “gender”, the Tribunal, at the onset, will clarify the terms used herein.

32. The Applicant, admittedly, is a biological male. The Tribunal will refer to this characteristic as sex. The Applicant claims to have female gender acknowledged by the Danish Passport Law and requests that the same be reflected in the United Nations systems related to staff’s personal status. The Tribunal will refer to this claimed characteristic as legal gender. The Applicant’s claim is based on their declared identification with female gender, to which category the Tribunal will refer as gender identity. This said, the Tribunal considers that the question of gender identity is not necessarily coterminous with legal gender, the first being a personal conception of oneself and/or a societal concept, and the latter being a legal category belonging to personal status.

33. Two issues are relevant for the case at bar. First is the Applicant’s legal gender in their country of nationality. Second, is the meaning attributed to “gender” in the United Nations human resources management portal, Umoja. On this occasion, it is necessary to recall that the impugned decision that had triggered the present process had been a refusal to change the designation of the Applicant’s gender from “male” to “female” in Umoja.<sup>35</sup> The Applicant’s subsequent request, in their MER and in the

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<sup>33</sup> *Wishah* 2015-UNAT-537, para. 40.

<sup>34</sup> *Benfield-Laporte* 2015-UNAT-505, para. 41; *Wu* 2010-UNAT-042, paras. 29 and 33.

<sup>35</sup> Application, annexes 02 and 06.

application, to have the correction made in sweepingly referenced “United Nations administrative systems”, will not result in broadening of the Tribunal’s cognisance over any other administrative system than Umoja.

34. Regarding the first issue, the parties base their dispute on the unofficial translation of the Danish Passport Law, which has been supplied by the Permanent Mission of Denmark and by the Applicant. As results from the argument and documents presented, the Danish Passport Law recognizes that a person may be gender non-compliant with the biological sex and thus, upon request, have X inserted in the rubric “sex”. Much time in this dispute has been spent on establishing what were the precise legal conditions for such designation, relevant for the time of the Applicant’s obtaining the “X” marker in their national passport. In part, it was possibly attributable to the fact that the relevant correspondence persistently referred to “current applicable legislation“, instead of asking, as precisely ordered by the Tribunal in Order No. 156 (NBI/2022), about the state of legislation at the time when the Applicant obtained the designation X in their passport.<sup>36</sup> Eventually, the response obtained from the Permanent Mission of Denmark is not unambiguous, although it would appear that in the earlier correspondence the Permanent Mission of Denmark may have provided information congruent with that of the Danish MoFA.<sup>37</sup> The Tribunal, in any event, finds that the response obtained by the Applicant from the MoFA of Denmark, the authenticity of which was not questioned, has not been rebutted.

35. At this junction, the Tribunal is compelled to take issue with the Respondent’s Counsel’s statement included in the supplementary submission in response to Order No. 156 (NBI/2022), where it is averred that “It is not for the Respondent to prove or disprove whether the Applicant’s or the Danish Permanent Mission’s translation of any document is ‘adequate’. Nor can the Respondent or the Dispute Tribunal interpret the legislation of a Member State”.<sup>38</sup> The Tribunal recalls that the Respondent is bound to act in the public interest, which includes respecting rights of staff members of the

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<sup>36</sup> Respondent’s response to Order No. 156 (NBI/2022) and the following supplementary submission.

<sup>37</sup> Respondent’s final supplementary submission to Order No. 156 (NBI/2022) dated 1 December 2022, annex R/3, p. 5.

<sup>38</sup> Respondent’s supplemental response to Order no. 156 (NBI/2022), dated 30 November 2022.

Organization. As long as the Respondent derives consequences for the staff member's terms of appointment from the content of the national law, it is his obligation to have the content of the national law established correctly. The staff member is under the burden of proving their personal status, and any changes to, it through official documents and the Respondent, where necessary, is competent to seek information at the Member's State representation. This, however, does not relieve the Respondent from conducting a further inquiry in the face of apparent incompleteness, error or, as in this case, contradicting information originating from the same Member State agency. When necessary for the determination of the material facts, the Respondent, just as the Dispute Tribunal, must also interpret the national laws, ultimately – with the assistance of an expert. The Tribunal further notes that sources cited by the Respondent are inapposite: the whole dispute that gave rise to *Larriera* 2022-UNAT-1271 was about interpreting legislation of the Member States, moreover, para. 32 certainly does not say that the Tribunals cannot do it. *Ernst* UNDT/2011/047 para. 30, on the other hand, only “recalls that no national laws or regulations are directly applicable to staff members of the Organization”, in the context of an applicant's demand that the Organization mirror the employment regulation of one of the Member States, as such has nothing to do with the present issue.

36. The same level of diligence is expected regarding issues arising from unofficial translations. The Tribunal regrets that the Respondent, having available to him not only hundreds of Danish-speaking staff, but also translation services of the Organization, did not find it appropriate to undertake a basic inquiry enabling him to stipulate or disprove that the word *køn* in the Danish Passport Law means, as maintained by the Applicant, both sex and gender.

37. Procedurally, given that the Applicant has made a *prima facie* case, the Respondent could have stipulated on both issues, sought evidence to the contrary, or considered it not relevant and accept that determination will be in accordance with the Applicant's averment, of which possibility the Respondent was informed in the Tribunal's Order. However, given the obligations toward public interest, the

Respondent is not in a position to deny responsibility, either for clarifying the substance of relevant legal relations or for taking a position on issues disputed in the process.

38. The Tribunal is, however, satisfied that the word *køn* in the Danish Passport Law translates into sex<sup>39</sup>, notwithstanding that in other contexts it may be translated as gender. For the issue at hand, the Tribunal relies on the official translation in the Applicant's passport (Eng. sex, Fr. sexe), which it finds more persuasive than an unofficial translation of the excerpt of the legislation concerned.

39. On the substance of the law, the Applicant attaches importance to the fact that at the time of their declaration the relevant provision formulated these conditions in a narrow way, that is:

[t]he wish to use the sex designation "X" is based on the **experience of belonging to the other sex (alternatively- gender)**, or if the person in question provides documentary evidence for having previously been given a new civil registration number (CPR No.) pursuant to § 3 (6) of the Danish Act on the Civil Registration System [emphasis added].

40. Whereas the subsequent and currently applicable amendment introduced more options:

[t]he wish to use the sex designation "X" is based on **the experience of belonging to the other sex (alternatively – gender), the person in question being intersexed, not identifying as male or female** or if the person in question provides documentary evidence for having previously been given a new civil registration number (CPR No.) pursuant to § 3 (7) of the Danish Act on the Civil Registration System [emphasis added].

41. The Tribunal considers that it is clear from the function of a passport, which is to reflect personal status for the purpose of affirmation of identity and citizenship in international relations, as well as results from the biodata page in the Applicant's document<sup>40</sup>, that, as is the case with all European Union passports, it concerns itself with the holder's sex, as an identification marker, and not with pronouncing on gender,

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<sup>39</sup> Basic internet search demonstrates that "køn" is translated as sex or similar in major European languages.

<sup>40</sup> Application, annex 1, point 5 "Køn/Sex/Sexe".

which is understood as a conception of oneself or a societal concept. Therefore, the Tribunal concedes, in accordance with the Applicant's averment, that, for the temporal frame relevant here, the marker X did not include a third category of "intersex". The Tribunal disagrees, however, that this marker would be binding as to the designation of legal gender. To attach such weight to the X would be incorrect, considering the highly subjective and possibly varied in time conception of gender identity and the on-demand procedure for obtaining the X designation in the passport. Rather, the Tribunal considers that X only means that sex is not being marked as F or M because of a variety of possible gender identity and gender expression issues, which should not stand in the way of the holder's use of the passport. This understanding is confirmed by the still expanding basis for the X designation, the latter broadened after the issuance of the Applicant's passport, and is consistent with the Council of Europe current trend, or a postulate, to review, *inter alia*, the necessity of including sex/gender markers in official identity and other documents.<sup>41</sup> Conversely, as clearly confirmed by the Permanent Mission of Denmark, the Applicant is not recognized as female under the Danish Passport Law, which would have been indicated as "F" in the passport.<sup>42</sup>

42. The Applicant does not demonstrate, nor, for that matter, did the Respondent inquire in his two-year correspondence with the Permanent Mission of Denmark, whether gender non-compliance would change the Applicant's personal status under the Danish law in any other way than non-disclosure of sex in the passport. As stated, however, by the Applicant in their MER, and admitted in the CMD, they are still recognized as male under the Danish Civil Registration System ("CPR"). According to the Applicant – and corroborated by information volunteered by the Permanent Mission of Denmark<sup>43</sup>, the latter uses a binary designation scheme and generates even numbers for females and odd numbers for males for the purpose of social security. Effecting a change of køn designation in that system is also possible upon a declaration, it only requires a wait time/reflection period of six months. Whereas the Applicant maintains

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<sup>41</sup> CoE Report <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>, at para 74.

<sup>42</sup> Reply, annex R/1.

<sup>43</sup> Respondent's final supplementary response to Order No. 156 dated 1 December 2022.



that making the latter declaration would not alter their legal status other than obtaining access to health care specific for women while losing access to health care specific for men, they decided not to take such a step as yet.

43. In conclusion, the Tribunal finds that the Applicant is not recognized as female under their national law.

44. Regarding the Applicant's status in Umoja, the Respondent relies on ST/SGB/2004/13/Rev.1, which establishes the framework for the Organization's determinations regarding personal status for purposes of entitlements under the Staff Regulations and Rules. Section 1 of ST/SGB/2004/13/Rev.1 provides that "[t]he personal status of staff members for the purpose of entitlements under the Staff Rules and Staff Regulations of the United Nations will be determined by reference to the law of the competent authority under which the personal status has been established." Section 2 of ST/SGB/2004/13/Rev.1 provides that the Secretariat can submit for verification requests relating to the determination of the personal status of staff members with the Permanent Mission to the United Nations of the country that has the competent authority, and the Secretariat will take action in accordance with that verification.

45. With respect to this argument, the Tribunal notes that personal data entered in Umoja goes beyond entitlements and serves to record all the relevant employee's information. Umoja registers personal data for the purpose of identification, employment status, employment-related events, as well as entitlements. It also uses data for broadly understood statistics, which is not relevant for the Applicant's present claim. Importantly, however, as stressed by the Applicant, a staff member's "gender" recorded in Umoja is fed to other collaborating platforms, in particular Inspira, which enables applications for job openings. This latter functionality has no connection with entitlements. Conversely, in accordance with ST/AI/2020/5 it gives priority to female candidates. Therefore, ST/SGB/2004/13/Rev.1 is not dispositive of the issue. The application of the rule expressed by ST/SGB/2004/13/Rev.1 section 1 to Umoja records would only be possible by way of analogy, providing that such analogy does not

contradict the letter or the purpose of the law. At present, the Tribunal does not find such a contradiction.

46. The Respondent confirms that “gender” as recorded in Umoja, and by extension informing the application of ST/AI/2020/5, is based on the information in staff members’ national passports or national identity cards. “Gender” in this context is used interchangeably with “sex”, as recorded on the relevant document.<sup>44</sup> The Tribunal notes that there is a certain inconsistency in relying on “sex” as recorded in – at least most of - passports (or identity cards) and yet calling it “gender”, without any apparent reason and without defining what gender means in this context. There is a further inconsistency in deferring to passports on the one hand, and recording the Applicant as male, which their passport does not affirm. The Tribunal understands that the Respondent is revisiting this area with the help of a working group. This said, on the content of the Danish law as put before the Tribunal, there is no basis to record the Applicant as female, which is what they are requesting and what the impugned decision was about.

47. Finally, the Tribunal is, obviously, bound by norms expressing international standards and competent to refuse to apply a provision that would contradict them.<sup>45</sup> In the present case, however, it sees no violation of international standards. As a person non-compliant with their biological sex, the Applicant has the right to an outward expression of gender identity, respect for their identification and should be protected against improper discrimination on this basis. This does not translate to automatic access to entitlements or policies attaching to female sex or legal gender. The Respondent devised a certain policy and determined its scope. The Applicant, in a particular case, might challenge the policy itself as improperly discriminatory. They, however, fail to show that they are encompassed by it.

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<sup>44</sup> Respondent’s response to Order 156 (NBI/2022) dated 17 November 2022.

<sup>45</sup> See A/RES/61/261, para. 4; *Trevino* 2022-UNAT-1231, paras. 58-68; *Mashour* 2014-UNAT-483, paras. 36-40; *Applicant* UNDT/2012/114, paras. 80-82.

**Judgment**

48. The application fails and is therefore dismissed.

*(Signed)*  
Judge Agnieszka Klonowiecka-Milart

Dated this 6<sup>th</sup> day of December 2022

Entered in the Register on this 6<sup>th</sup> day of December 2022

*(Signed)*  
Abena Kwakye-Berko, Registrar, Nairobi