



Before: Judge Sean Wallace
Registry: Nairobi
Registrar: René M. Vargas M., Officer-in-Charge

AAQ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Lucienne Pierre, AS/ALD/OHR

Introduction

1. The Applicant, a staff member of the United Nations, filed an application on 26 June 2023 to contest the decision to deny a request for change of gender in the Organization's records.
2. The Respondent filed a reply on 27 July 2023 requesting the Tribunal to reject the application.

Procedural background

3. In the application, the Applicant also requests anonymity on the ground that the application addresses matters that are hugely personal and go to the core of the Applicant's identity.
4. By Order No. 138 (NBI/2023), issued on 18 September 2023, the Duty Judge *inter alia* directed that the Applicant's motion for anonymity be ruled on once the case is assigned to a Judge.
5. The case was assigned to the present Judge on 21 September 2023.

Ruling on the motion for anonymity

6. The Tribunal notes that it is in the interest of justice to grant the motion. Since the United Nations Appeals Tribunal ("UNAT" or "the Appeals Tribunal") has already used the pseudonym of AAQ in reference to the Applicant (see *AAQ* 2023-UNAT-1381), for consistency purposes the Tribunal adopts the same and directs that AAQ will be used in all the orders and judgment in this case.

Suspension of proceedings

7. By Order No. 146 (NBI/2023), issued on 26 September 2023, the Tribunal recalled that the present application follows a prior application by the Applicant contesting a refusal to change their gender from male to female, in which this Tribunal

issued a judgment. This judgment had been appealed and it was pending before the UNAT as Case No. 2023-UNAT-1783.¹

8. The Tribunal, finding that the outcome of that appeal would impact the handling of the present application, decided to suspend the proceedings in this case pending the outcome of the appeal in Case No. 2023-UNAT-1783.

9. On 27 October 2023, UNAT issued its judgment *AAQ* 2023-UNAT-1381 and found that the Dispute Tribunal was without jurisdiction to have decided the case on its merits and thus the application was not receivable (see *AAQ*, para. 62).

Facts

10. The Applicant was born as a Danish national and assigned the male gender.

11. On 22 November 2022, the Applicant was issued with a State of New York Driver's License with the "Sex" marked as "F" in accordance with the New York State Gender Recognition Act.

12. On 23 November 2022, the Applicant requested the Chief Human resources Officer of the relevant administering UN entity to have the gender assignment in Umoja reflect that established under New York State law.

13. On 2 February 2023, the Applicant received a memo dated 31 January 2023, denying the request ("contested decision").

14. On 21 February 2023, the Applicant requested management evaluation of the contested decision.

15. On 29 March 2023, the Applicant received a management evaluation response upholding the contested decision.

¹ In the prior application, AAQ sought the same relief but relied on Danish law and a new Danish passport where "sex" was referred to as "X". AAQ, para. 6. This distinction is not relevant as to receivability.

Consideration

16. The question before the Tribunal is whether or not the UNDT has jurisdiction to adjudicate the application.

17. Article 2(1)(a) of the UNDT Statute provides that the Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual:

[t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

18. The settled jurisprudence of this Tribunal also requires that such a decision must have both a direct and adverse effect on the employment of the Applicant. Further, such an effect must be an actual past, as opposed to a potential future, effect (see *AAQ*, para. 54; and *Lee* 2014-UNAT-481, para. 52). The Appeals Tribunal has since emphasized that potential future adverse consequences of an administrative decision are an insufficient basis for UNDT jurisdiction (see *AAQ*).

19. There is no submission on record that the contested decision imposes or imposed adverse consequences on the Applicant. The Applicant rather argues the case based on three grounds, namely that the decision-maker acted unlawfully by:

- a. failing to consider the law of the competent authority under which the Applicant’s gender has been established;
- b. not considering the law of the competent authority under which the Applicant’s female gender has been established; and
- c. taking into account irrelevant factors in making the decision.

20. More specific to the present case, in *AAQ*, UNAT held the following:

60. For AAQ, although not being considered female in Umoja might arguably impact potentially some benefit to them, pursuant to *Avramoski* AAQ would need to wait for a decision denying an actual and specific benefit on this basis in order to challenge it. At the time this proceeding arose, the decision not to record them as female in Umoja was not directly impacting any actual specific benefit or entitlement or other incidence of their employment.

21. In line with the above finding, the Tribunal finds that the Applicant, even in the case at bar, has not established how the contested decision adversely affects the Applicant's employment. The jurisdictional constraints do not allow this Tribunal to hear and decide the application in the absence of a particular facts-based case. Thus, the application needs to be rejected.

Judgment

22. The application is dismissed as not receivable.

(Signed)

Judge Sean Wallace

Dated this 20th day of November 2023

Entered in the Register on this 20th day of November 2023

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi