



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

ADEMAGIC ET AL.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR SUSPENSION OF
ACTION**

Counsel for Applicant:

April L. Carter

Counsel for Respondent:

Christine Graham, ALS/OHRM, UN Secretariat

Introduction

1. By motion filed on 17 December 2014, 13 Applicants (“the Applicants”) request the Tribunal to “issue an order suspending their separation from the International Criminal Tribunal of the former Yugoslavia (“ICTY”) until it has ruled on the *Ademagic et al.* application on the merits”.

Facts

2. In late 2013, by Judgment *Ademagic et al. and McIlwraith* 2013-UNAT-359, the Appeals Tribunal vacated Judgment *Ademagic et al.* UNDT/2012/131 of the Dispute Tribunal, and decided, *inter alia*, that the decision of the Assistant-Secretary-General, Office of Human Resources Management (“ASG/OHRM”), not to convert the Applicants’ fixed-term appointments into permanent ones be rescinded and that “the ICTY conversion exercise [be remanded] to the ASG/OHRM for retroactive consideration of the suitability of the *Ademagic et al.* Respondents/Appellants” for conversion to permanent appointments.

3. Following a new conversion exercise, as ordered by the Appeals Tribunal, the ASG/OHRM took new decisions in June 2014 concerning the conversion of appointments from fixed-term to permanent.

4. On 11 December 2014, a total of 246 Applicants filed a common brief on the merits with the Geneva Registry of the Dispute Tribunal, contesting the ASG/OHRM decisions of June 2014 to deny to all Applicants a conversion of their fixed-term appointments into permanent appointments. The case is registered under Case No. UNDT/GVA/2014/082 and is currently awaiting completion.

Applicants' contentions

5. The Applicants' primary contentions may be summarized as follows:
 - a. It would be inconsistent with the Judgment of the Appeals Tribunal to separate the 13 Applicants on 31 December 2014, without having previously assessed the merits of their individual circumstances, and such separation would cause them irreparable harm;
 - b. Therefore, they seek suspension of their separation until a determination of the merits of the *Ademagic et al.* application is made by the Dispute Tribunal, to ensure that their due process rights are respected and that consistency with the Judgment of the Appeals Tribunal is maintained;
 - c. Article 14 of the Rules of Procedure of the Dispute Tribunal allows it to issue interim orders to prevent irreparable harm, and art. 9(4) of the Statute of the Appeals Tribunal allows the latter to "order an interim measure to provide temporary relief ... to prevent irreparable harm and to maintain consistency with a judgement of the Dispute Tribunal";
 - d. However, since both the Statute of the Appeals Tribunal and the Rules of Procedure of the Dispute Tribunal are silent with respect to the possibility to order interim measures to provide temporary relief to prevent irreparable harm and to maintain consistency with a judgment of the Appeals Tribunal, the Applicants seek relief pursuant to art. 36 of the Rules of Procedure of the Dispute Tribunal.

Consideration

6. While the Applicants, in seeking suspension of the separation decisions pending a determination of the merits of Case No. UNDT/GVA/2014/082, refer to art. 14 of the Rules of Procedure of the Tribunal, they state that they seek "relief pursuant to art. 36" of the Rules of Procedure, which "permits the [Dispute Tribunal] on a particular case to deal with all matters that are not expressly provided for in the Rules".

7. Paragraph 1 of art. 36 (Procedural matters not covered in the rules of procedure) of the Rules of Procedure of the Tribunal reads:

All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

Powers conferred to the Tribunal under art. 36 of its Rules of Procedure

8. Pursuant to the clear and unambiguous wording of art. 36 of the Rules of Procedure, this provision can only be applied in “matters that are not expressly provided for in the rules of procedure”. In other words, as a precondition of applying art. 36, an unforeseen *lacuna* with respect to a specific matter has to be identified. For example, the Rules of Procedure do not contain any provisions regarding the matter of contempt of court and how to deal with it. However, the Tribunal notes that its Rules of Procedure, based on its Statute, do contain provisions with respect to interim relief. Articles 13 and 14 of the Rules of Procedure do expressly allow for interim measures under strict conditions.

9. The Applicants, in seeking application of art. 36 of the Rules of Procedure, note that both the Statute of the Appeals Tribunal and the Rules of Procedure of the Dispute Tribunal are silent with respect to the possibility to order interim measures to maintain consistency with a judgment of the Appeals Tribunal. From there, they seem to deduct that the Statute and Rules of Procedure of the Dispute Tribunal contain a *lacuna* which needs to be filled by way of the Tribunal exercising powers conferred on it by art. 7 of its Statute, as per the terms of art. 36 of its Rules of Procedure.

10. In this respect, the Tribunal recalls staff rule 11.3(a) pursuant to which, as a general rule, the filing of an application with the United Nations Dispute Tribunal shall not have the effect of suspending the implementation of the contested decision. Therefore, by providing for two forms of “interim relief”, respectively in arts. 2.2 and 10.2 of the Tribunal’s Statute, and arts. 13 and 14 of its Rules of Procedure, the Statute and the Rules of Procedure explicitly stipulate exceptions to the above principle.

11. The Tribunal further notes that para. 36 of the draft General Assembly resolution (A/C.5/69/L.7) on the Administration of justice at the United Nations, adopted on 16 December 2014 by the Fifth Committee in the latter's report to the General Assembly (A/69/664), "[r]eaffirms that ... the Dispute Tribunal and the Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes". With this in mind, the Tribunal considers it to be inappropriate, under pretence of the powers conferred to it by art. 36, to circumvent the clear and express wording and limitations of the above referenced articles of its Statute and Rules of Procedure with respect to interim relief.

12. As the Appeals Tribunal held in *Kasmani* 2010-UNAT-011, art. 36 of its Rules of Procedure does not allow the Dispute Tribunal to violate art. 2.2 of its Statute. The Tribunal cannot but find that the same applies to art. 10.2 of the Statute and concludes that there is no room for the application of art. 36 of its Rules and Procedure in the case at hand.

Interim relief under art. 2.2 and art. 10.2 of the Statute

13. In accordance with art. 2.2 of the Tribunal's Statute and art. 13 of its Rules of Procedure, individuals may request it to order the suspension, pending management evaluation, of a contested decision that is the subject of an ongoing management evaluation. However, the Applicants did neither mention a request for management evaluation with respect to the decisions to separate them from service on 31 December 2014, nor did they refer to art. 2.2 of the Statute or art. 13 of the Rules of Procedure. What is more, they expressly requested suspension of the decisions in question pending a determination of Case No. UNDT/GVA/2014/082 on the merits. Therefore, the present motion cannot be entertained under the framework of art. 2.2 of the Tribunal's Statute and art. 13 of its Rules of Procedure.

14. Regarding interim measures during the proceedings, that is, after an application on the merits has been filed with the Tribunal, art. 10.2 of the Tribunal's Statute provides that:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

15. Article 14 of the Rules of Procedure of the Tribunal repeats, almost in identical terms, this provision.

16. In this respect the Tribunal notes that the Applicants recently filed an application on the merits against the decisions to deny them conversion of their fixed-term appointments to permanent appointments, registered under Case No. UNDT/GVA/2014/082. However, their request for interim relief does not refer to the denial of a permanent appointment, but to the decision to separate them from service on 31 December 2014, i.e. to a different administrative decision than the one contested in their application on the merits.

17. Indeed, art. 10.2 does not provide for the suspension of an administrative decision other than the one subject to a pending application on the merits. Rather, under art. 10.2 of the Statute, the suspension can only concern the decision subject to that application, i.e., in the case at hand, the decision not to convert the Applicants' appointments to permanent ones. This is, however, not what the Applicants have requested.

18. Therefore, and without analysing whether the other conditions of art. 10.2 are met, and, also, without determining if the application of that article is possible given that the relevant decisions relate to a case of appointment, promotion or termination, the Tribunal cannot but find that, under art. 10.2 of its Statute, the requested relief cannot be entertained either.

Conclusion

19. In view of the foregoing, the motion for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 19th day of December 2014

Entered in the Register on this 19th day of December 2014

(Signed)

René M. Vargas M., Registrar, Geneva