



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:
Mohamed Abbou, OSLA

Counsel for Respondent:
Cornelius Fischer, UNOG

Introduction

1. By application filed on 8 August 2018, the Applicant—a Burundian national serving under a temporary appointment as Field Interpreter (P-3), Commission of Inquiry on Burundi (“COIB”), Office of the High Commissioner for Human Rights (“OHCHR”)—requested suspension of action, pending management evaluation, of:

a. “[T]he decision to separate [her] from the Organization by way of termination or non-renewal on the ground that she does not hold a valid national passport”;

b. “[T]he decision to repatriate [her] to a different duty station by 12 August 2018 and prior to the expiry of her temporary appointment on 30 September 2018”;

c. “[T]he Administration’s failure to ensure a safe and secure working environment”; and

d. “[T]he Administration’s failure to assert [its] privileges and immunities and the related failure to refer the matter to the Secretary-General for a decision on the application of the privileges and immunities”.

2. The application was served on to the Respondent for a reply, which he submitted on 10 August 2018.

Facts

3. On 17 March 2017, the Applicant, a Burundian national, joined the Organization under a temporary appointment as Field Interpreter (P-3), Commission of Inquiry on Burundi (“COI Burundi”), Office of the High Commissioner for Human Rights (“OHCHR”) in Geneva. Her temporary appointment is currently due to expire on 30 September 2018.

4. In her application, the Applicant alleges that early in 2018, she received information indicating that she was “blacklisted in Burundi” and that “her entry in the country would be subject to strict surveillance as a result of her involvement with the [COI Burundi]”. She also submits that between January and June 2018, she “voiced her concerns both orally and in writing with several OHCHR officials”, and that she held several meetings with her First and Second Reporting Officers as well as with other officials to address her concerns.

5. By email of 2 July 2018, the Applicant wrote to the High Commissioner, OHCHR, to bring her situation to his attention and to request his good offices to obtain “an immigration status in the host country as [her] national passport [was to expire] on 12th August 2018 and, given the current situation, renewal of her passport with the Burundian authorities [was] not feasible”.

6. By email of 23 July 2018, the Chief of Office, Executive Direction and Management (“EDM”), OHCHR, replied to the Applicant that “the Organization [was] not in a position to support [her] in filing an immigration petition or political asylum request with the host country Switzerland as this is not compatible with [her] status as a UN employee at [that] time”. The Chief of Office therefore offered the following two options to the Applicant while noting *inter alia* that the proposal was premised “on the understanding that it [was] not possible for [her] to remain in Switzerland as a UN employee without a valid national passport” and asking her to revert as soon as possible on which option she wanted to exercise:

- a. repatriation to Nairobi (the Applicant’s place of recruitment) or Bujumbura (the Applicant’s place of nationality) by 12 August 2018 combined with arrangements for the Applicant to telecommute until the end of her temporary appointment; or
- b. termination of her temporary appointment by 12 August 2018, with the respective repatriation and travel entitlements to the Applicant’s country of nationality or anywhere else in the world up to the cost of repatriation and travel to her country of nationality.

7. On 8 August 2018, the Applicant requested management evaluation of the decisions set forth in para. 1 above.

Parties' contentions

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

Prima facie unlawfulness

- a. The Organization wrongly asserts that the Applicant is ineligible to "stay in the host country" without a valid passport; however, she has a valid carte de legitimisation until the end date of her appointment on 30 September 2018;
- b. Moreover, the Organization could arrange for the Applicant to have an official travel document, namely a United Nations Laissez-Passer ("UNLP"), when travelling for official business and to allow the Applicant to discharge her official functions;
- c. The Organization has breached its duty of care towards the Applicant by failing to issue a UNLP and has further compromised the Organization's privileges and immunities by making the Applicant's continued employment dependent upon a decision by the authorities of Burundi to renew her passport;

Urgency

- d. The Applicant is being required to either repatriate to a different country or to separate from service by 12 August 2018;
- e. The Applicant was waiting for the outcome of a security assessment to be conducted by the Respondent to evaluate the risks associated to her return to Burundi but such assessment seems to not have been carried out;

Irreparable damage

f. The Applicant is being required to either repatriate to a different country or to separate from service by 12 August 2018 and both options present unsurmountable difficulties for her. Furthermore, loss of employment would deprive the Applicant of her means of subsistence and constitutes alone irreparable damage.

9. The Respondent's primary contentions may be summarized as follows:

Receivability

a. The application is not receivable, as it is not directed against an administrative decision as required under art. 2.2 of the Tribunal's Statute. The Organization is in the process of advising the Applicant on her personal situation with regard to the issue of her expiring national passport and her residence in Switzerland under a Legitimation Card ("LC"), i.e., the official document issued by Swiss authorities to the Organization's staff members for legal residency in Switzerland;

b. The Organization has not taken any decision or attempted to separate or repatriate the Applicant. Furthermore, it does not object to the Applicant serving from her current duty station (Geneva) until the expiration of her temporary appointment on 30 September 2018. This was shared with her during a meeting held on 7 August 2018. Furthermore, LC renewal requires that a staff member hold a valid national passport; and

c. The email of 23 July 2018 from the Chief of Office, EDM, OHCHR, presented options to the Applicant to address the expiration of her national passport while she still had a valid travel document. Once the Applicant's national passport expires, she will only be able to travel to her country of nationality (Burundi);

Prima facie unlawfulness

d. The Organization has properly considered the Applicant's concerns with respect to her personal security. A security assessment concluded that the risk for the Applicant's return to Burundi to renew her passport is low and there is no evidence substantiating the Applicant's security claims. This notwithstanding, the Organization is willing to provide resources to ensure the Applicant's safety while in Burundi for the renewal of her passport such as a security detail;

e. There is no evidence of adverse actions by Burundi authorities towards the Applicant and the Respondent "fails to understand the relevance of the Applicant's claim with regard to the Organization's privileges and immunities";

Urgency

f. The matter is not urgent because no administrative decision has been taken and no decision will be implemented by 12 August 2018; and

g. The date of expiry of the Applicant's passport is of no consequence to her current employment with the Organization.

10. The Respondent submitted no arguments with respect to irreparable damage.

Consideration

Receivability

11. Art. 2.2 of the Tribunal's Statute provides that it shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage.

12. Examination of the above-mentioned three cumulative conditions requires the existence of an administrative decision that “produces direct legal consequences affecting [an] [a]pplicant’s terms of appointment” (see *Melpignano* UNDT/2015/075. See also *Ngokeng* 2014-UNAT-460, paras. 26-27, and *Wasserstrom* 2014-UNAT- 457, paras. 34-35).

13. After consideration of the parties’ submissions and of the supporting documentation, the Tribunal is of the view that there is no administrative decision open to challenge. The 23 July 2018 email, on which the current application is grounded, presented the Applicant with options to address the forthcoming expiration of her national passport. There is no evidence that she reverted to the Organization with a preferred option thus triggering an action from the Organization, much less that the Organization has decided to follow a specific course of action.

14. Furthermore, the Respondent unequivocally stated in his reply that no action will be taken on 12 August 2018 and that the Applicant can serve until the end of her temporary appointment from her current duty station (Geneva).

15. In the absence of an administrative decision, the Tribunal can only conclude that the application is not receivable *ratione materiae*, and it does not need to examine if the three statutory requirements specified in art. 2.2 of its Statute are met in the case at hand.

Request for anonymity

16. In her application, the Applicant notes that it had been filed on an *ex parte* basis as it contains personal information about her and her family and that “[r]elease of such information to the public may not only place [her] and her family at risk, but may also affect ongoing investigations conducted by the [COI Burundi]”. She therefore asked that her name be anonymized.

17. First, the Tribunal notes that while orders related to applications for suspension of action pending management evaluation are published on its website, the case record and filings made before the Tribunal are not available to the public. The parties and their counsel are expected to maintain the confidentiality of all written pleadings and documentation relating to the case by ensuring that they are not disclosed to third parties.

18. Second, while transparency, by e.g., not anonymizing decisions, is a key element of the Organization's system of administration of justice, it is an element that must be balanced on a case by case basis against the need *inter alia* not to put the security of applicants at risk.

19. Having due regard to the circumstances of the present case, the Tribunal finds it warranted to deviate from its default practice and, therefore, to anonymize this decision.

Conclusion

20. In view of the foregoing:

- a. The application for suspension of action is rejected; and
- b. The present Order is to be anonymized for publication purposes.

(Signed)

Judge Teresa Bravo

Dated this 10th day of August 2018

Entered in the Register on this 10th day of August 2018

(Signed)

René M. Vargas M., Registrar, Geneva