



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON MOTION
FOR RECONSIDERATION**

Counsel for Applicant:

Marcos Zunino, OSLA
Ana Giulia Stella, OSLA

Counsel for Respondent:

Isavella Maria Vasilogeorgi, AAS/ALD/OHR, UN Secretariat

Introduction

1. By Order No. 176 (GVA/2021) of 7 December 2021, the Tribunal instructed the parties, *inter alia*, to file their respective list of witnesses by 17 December 2021 while ensuring their availability for a hearing to be held from 24 to 27 January 2022.
2. On 16 December 2021, the Respondent informed the Tribunal that he would like to call the complainant (“V01”) as his sole witness for the oral hearing and confirmed her availability.
3. On 5 January 2022, the Respondent requested that the Tribunal allow V01 to testify without the Applicant being present during her testimony.
4. On 6 January 2022, the Tribunal issued Order No. 1 (GVA/2022) notifying the parties of a tentative schedule for a hearing on the merits, which included the appearance of V01.
5. On 7 January 2022, the Tribunal ordered:
 - a. The Respondent to substantiate with medical evidence, by 11 January 2022, how the Applicant’s presence in the virtual courtroom would cause V01 distress; and
 - b. The Applicant to respond to the Respondent’s request concerning V01 by 14 January 2022.
6. On 11 January 2022, the Respondent requested a two-day extension to provide the medical evidence regarding V01’s testimony as V01 could not obtain the certificate earlier.
7. By email dated 12 January 2022, the Tribunal granted the Respondent the requested extension and instructed him to file the required medical evidence by 13 January 2022.

8. On 13 January 2022, the Respondent filed an *ex parte* submission regarding V01's medical evidence and testimony with the five *ex parte* annexes below, confirming that V01 would not be testifying at the oral hearing, even if the Tribunal granted the Respondent's request concerning her referred to in para. 3 above:

- a. Annex 1: V01's medical assessment of 1 December 2022 (document in German);
- b. Annex 2: Unofficial English Translation of Annex 1 above, showing that "[i]n the case of a direct encounter with the accused, a reactivation of the trauma or the psychological symptoms [...] cannot be ruled out".
- c. Annex 3: V01's letter to the undersigned Judge;
- d. Annex 4: Correspondence between V01 and the Respondent; and
- e. Annex 5: Ms. López's out-of-office notification.

9. By Order No. 3 (GVA/2022) of 14 January 2022, the Tribunal:

- a. Instructed the Geneva Registry to lift the *ex parte* status of the Respondent's 13 January 2022 main submission and of its annex 5;
- b. Ordered the Respondent to redact annexes 2 and 3 to his submission and refile them on an under seal basis; and
- c. Instructed the Applicant to file his response to the Respondent's request concerning V01 referred to in para. 3 above by 18 January 2022.

10. On 17 January 2022, the Applicant filed his response to the Respondent's request concerning V01 referred to in para. 3 above.

11. On the same day, the Applicant filed a motion concerning V01, requesting the Tribunal:

- a. To provide him with the unredacted versions of the documents submitted by the Respondent or to have them redacted by the Tribunal;

- b. To summon V01, reminding her of her obligation to testify and of the possible consequences of her refusal to do so, including being considered in contempt of court and potentially being referred for accountability;
- c. Should V01 not appear as summoned, to expunge her complaint, interview record and all evidence provided by her from the record and to decide the case on the remainder of the evidence; and
- d. In the alternative, to draw an adverse inference from V01's refusal to testify.

12. By Order No. 7 (GVA/2022) of 20 January 2022, the Tribunal denied the Respondent's request to allow V01 to testify without the Applicant being present during her testimony. To address V01's fear of a direct encounter with the Applicant, the Tribunal ordered that the Applicant turn off his camera during V01's testimony and that any cross-examination of V01 be conducted by the Applicant's Counsel, not by the Applicant.

13. By Order No. 8 (GVA/2022) of 20 January 2022, the Tribunal ordered, *inter alia*, that V01 appear to give evidence at the hearing on Tuesday, 25 January 2022, at 2.30 p.m. (Geneva time), pursuant to Order No. 1 (GVA/2022) of 6 January 2022 and rejected the Applicant's other requests listed in paras. 11.a, c and d above.

14. On 21 January 2022, at 11.33 p.m. (Geneva time), the Respondent filed his submission regarding Orders No. 7 and 8 regarding V01's medical evidence and testimony, requesting the Tribunal to reconsider its instructions about the conditions under which V01 was to testify set out in Order No. 7 (GVA/2022). The Respondent specifically requested that appropriate accommodations be made to prevent even a non-physical encounter between V01 and the Applicant, and that, in the event of oral testimony, V01 be allowed to have a staff member of her choice to attend the proceedings to provide her with emotional support.

15. On 24 January 2022, the Applicant filed his response to the Respondent's motion dated 21 January 2022 pursuant to the Tribunal's Practice Direction No. 5.

16. On the same day, the hearing commenced, pursuant to Order No. 1 (GVA/2022).

Consideration

17. In support of his request for reconsideration of Order No. 7 (GVA/2022), the Respondent submits, *inter alia*, that in view of the further medical assessment regarding V01's condition, received on 21 January 2022, V01's testimony in the presence of the Applicant is not medically advised. To substantiate his argument, he provided the Tribunal with medical evidence, namely an attestation dated 21 January 2022 signed by the Medical Director of the Medical Service at the Vienna International Centre, showing that "from a medical perspective, [V01's] overall health can equally be harmed by a non-physical encounter, i.e., knowing that the subject is actively listening and present during her witness statement".

18. In this respect, the Tribunal notes that there are no specific provisions in its Statute or Rules of Procedure governing the reconsideration of an order issued by itself. However, art. 36 of the Tribunal's Rules of Procedure provides that all matters that are not expressly provided for in the Rules shall be dealt with by decision of the Tribunal on the particular case, by virtue of the powers conferred on it by art. 7 of its Statute. Therefore, the Tribunal has an inherent power to reconsider its order.

19. However, it is well-established jurisprudence that an application for reconsideration of an order rendered by the Tribunal can only succeed under exceptional circumstances such as the discovery of a new evidence, and a misapprehension of facts or the law (see, e.g., *Caruso* Order No. 34 (NY/2018); *Veliz* Order No. 33 (NY/2019); *Rubvuta* Order No. 031 (NBI/2020); *Applicant* Order No. 88 (NY/2020)).

20. Having reviewed the parties' submissions and the evidence on record, the Tribunal finds that the further medical assessment regarding V01's condition dated 21 January 2022 contains new information, i.e., that V01's health can equally be harmed by knowing that the subject is actively listening and present during her witness statement. This amounts to exceptional circumstances justifying further

accommodation during V01's testimony to protect V01's health. Accordingly, the Tribunal finds it appropriate to grant the Respondent's request to reconsider its instructions regarding the conditions for V01's testimony set out in Order No. 7 (GVA/2022).

21. Having consulted with the parties during the first day of the hearing, the Tribunal has decided to allow V01 to testify without the Applicant being present during her testimony. V01 will also be allowed to have a staff member of her choice, i.e., the Staff Counsellor at the United Nations Office at Vienna ("UNOV"), to attend the proceedings to provide her with emotional support if needed.

22. To protect the Applicant's right to due process, he will be provided with a video recording of V01's testimony as soon as practicable. Following the Applicant's viewing of V01's recorded testimony, the Applicant's Counsel may further cross examine V01 on 27 January 2022.

Conclusion

23. In view of the foregoing, it is ORDERED that:

- a. The Respondent's motion to reconsider Order No. 7 (GVA/2022) is granted;
- b. The Applicant shall disconnect during V01's testimony scheduled on **Tuesday, 25 January 2022, at 2.30 p.m. (Geneva time)**, pursuant to Order No. 1 (GVA/2022) of 6 January 2022;
- c. The Geneva Registry shall provide the Applicant with a video recording of V01's testimony as soon as practicable;
- d. V01 shall be available to be further cross-examined by the Applicant's Counsel on **Thursday, 27 January 2022 at 2.30 p.m. (Geneva time)**; and

e. The Staff Counsellor, UNOV, shall not intervene in the proceedings in any manner. She is not allowed to make any comments or gestures or communicate in any way with any of the participants. She shall not disclose, use, show, convey, disseminate, reproduce, or in any way communicate without the Tribunal's prior authorization the information she obtained during the hearing.

(Signed)

Judge Teresa Bravo

Dated this 25th day of January 2022

Entered in the Register on this 25th day of January 2022

(Signed)

René M. Vargas M., Registrar, Geneva