



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

KAVOSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Wangei Wahome Akedi

Counsel for Respondent:

Rebeca Britnell, UNHCR

Francisco Navarro, UNHCR

Introduction

1. On 8 August 2022, the Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application contesting the decision to impose on him the disciplinary measure of dismissal.
2. On 14 September 2022, the Respondent filed his reply.
3. On 19 April 2023, the Applicant filed a motion for interim measures that was rejected by Order No. 42 (GVA/2023) of 28 April 2023.
4. On 7 September 2023, the Applicant filed a rejoinder pursuant to Order No. 108 (GVA/2023).
5. On 13 September 2023, a case management discussion (“CMD”) took place with the participation of the Applicant, his Counsel and Counsel for the Respondent.
6. By Order No. 123 (GVA/2023) of 19 September 2023, the Tribunal instructed the parties to file further information on several issues discussed during the CMD.
7. On 28 September 2023, the Respondent, *inter alia*, submitted *ex parte* information concerning the current location of the alleged victim.
8. On 28 September 2023, Counsel for the Applicant filed a submission together with a large number of documents.
9. On 6 October 2023, the Respondent informed the Tribunal that the complainant would be available to testify, should the Tribunal decide to hold a hearing, and that her testimony would be given in Persian (Farsi).
10. By Order No. 137 (GVA/2023) of 9 October 2023, the Tribunal decided to strike from the record the Applicant’s 28 September 2023 submission. It also ordered the Applicant to refile his submission by 16 October 2023 in accordance with guidelines that the Tribunal provided to him in said Order. The Respondent was also ordered to file his comments on the Applicant’s submission by 23 October 2023.

11. Both parties filed their respective submissions by the given deadlines.

Consideration

12. The Tribunal will proceed to address the parties' submissions.

The Applicant's request for a hearing

13. In support of his request, the Applicant indicates that the Respondent has "failed to establish clear and convincing evidence to support [his] case against any of the Applicant's alleged misconduct". The Applicant also requests a "re-trial" on the basis that there was no interpreter during the investigation to facilitate interpretation from Farsi to English.

14. The Respondent submits that the evidence on record, including the investigation and witness statements, is sufficient for the Tribunal to conduct its judicial review and that this is in line with the Appeals Tribunal's ruling in seven similar cases of sexual misconduct.

15. The Tribunal recalls that where key facts are disputed, it is required to "make explicit findings pertaining to the credibility and reliability of the evidence and provide a clear indication of which disputed version it prefers and explain why" (see *AAC 2023-UNAT-1370*, para. 47).

16. Having reviewed the evidence on record and considering the parties' submissions, the Tribunal finds it appropriate to hold a hearing. However, the Tribunal recalls that its role in disciplinary cases is not to conduct a "de novo" investigation or a "re-trial" as the Applicant requests, but to undertake a judicial review (see *Samwidi 2010-UNAT-084*, para. 42, *Duparc et al. 2022-UNAT-1245*).

17. The Registry will contact the parties to check their availability as well as the availability of the relevant witnesses for the purpose of the hearing.

The witnesses

The witnesses identified by the Applicant

18. The Applicant identified 11 witnesses for the purpose of the hearing. To determine the witnesses to be heard, the Tribunal will assess the relevance of their testimony.

19. Most of the Applicant's proposed witnesses would testify about "the complainant's immigration status at the time", the "Applicant's character and good moral standing", "his professional work ethic", and "the hostility experienced by the Applicant from his former colleagues".

20. The Tribunal understands that whether the complainant is a refugee and a person of concern to UNHCR does not depend on her immigration status vis-à-vis Iranian authorities but on the recognition of it by UNHCR based on the refugee criteria that stems from the UNHCR Statute and related norms and standards, as indicated by the Respondent. It is therefore a question of law. However, the Tribunal considers it relevant to hear the testimony of Ms. I. K. in this respect.

21. The Tribunal also considers that witnesses whose proposed testimony relates to the Applicant's "character and good moral standing" as well as "his professional work ethic" are not relevant for the assessment of the facts under dispute. The Applicant was sanctioned for allegations of sexual exploitation and abuse ("SEA"), sexual harassment, breach of UNHCR rules on the use of IT equipment, and failure to cooperate with the investigation. Therefore, there is no link between the proposed testimonies and the allegations in this respect.

22. Similarly, the Applicant does not specify how the alleged "hostility experienced by him from his former colleagues" is related to the allegations of misconduct against him. Under such circumstances, the proposed witnesses' testimonies in this regard are also irrelevant.

23. For the reasons stated above, the Tribunal finds that the following testimonies are not relevant to the allegations of misconduct under judicial review:

- a. Mr. E. U.;
- b. Dr. S. A. K.;
- c. Ms. R. G.;
- d. Dr. B. J.;
- e. Mr. A. K.; and
- f. Ms. E. A.

24. Concerning Mr. N. M. M., the Tribunal notes that his testimony relates to whether the complainant had a boyfriend at the time that she claimed to be in a relationship with the Applicant. The Tribunal finds that this is not relevant to the assessment of the facts and the allegations of misconduct against the Applicant.

25. Turning to Dr. F. T., the Tribunal considers that her intended testimony that she was not in a sexual relationship with the Applicant is also irrelevant to the allegations of misconduct in the present case. The Applicant was not sanctioned for being in a sexual relationship with Dr. F. T.

26. The same applies to the testimony of Ms. A. (Z.) A. who intends to testify that she was in a relationship with the Applicant during the time of the alleged misconduct. The Applicant's relationship with this proposed witness is irrelevant to the allegations of misconduct against him.

27. Noting that Mr. J. M. has been identified as a potential witness by the Respondent, the Tribunal considers it appropriate to also allow the testimony of Mr. D. M.

The witnesses identified by the Respondent

28. The Respondent identified three witnesses for the purpose of the hearing.

29. The Tribunal considers that the testimony of the following witnesses is relevant to the allegations of misconduct under review and, therefore, their testimony will be heard:

- a. The complainant;
- b. Mr. J. M., former UNHCR Resettlement Expert; and
- c. Ms. E. C. R., Chief of the Refugee Status Determination Section in the Division of International Protection.

The witnesses identified by the Tribunal

30. In addition to the witnesses identified by the parties and for the sake of clarity, the Tribunal recalls that the testimony of the Applicant is required. Furthermore, the Tribunal considers it relevant to hear the testimony of the Senior Investigation Specialist, Inspector General's Office ("IGO"), UNHCR, in the case at hand, namely, Ms. E. R.

The Applicant's request for interpretation

31. In his submission, the Applicant indicates that he has "basic knowledge of the English language when writing and reading" and that he has "moderate knowledge of the English language while speaking". He requests interpretation from Farsi to English and vice-versa during the hearing. In support of his request, he submits that "there was no interpreter at the hearing before the IGO to facilitate the translation from Farsi to English".

32. However, the evidence on record does not support the Applicant's request. The Tribunal notes that the Applicant self-assessed his level of English as "proficient" on 3 January 2021 according to his UNHCR Summary Fact-Sheet. Furthermore, the case file contains several documents, such as his comments on the draft findings of the investigation record, showing his competence in English.

33. In this respect, the Tribunal considered it appropriate to grant the Respondent's request for leave to file additional evidence on the Applicant's proficiency in English.

34. A review of said evidence, introduced by the Respondent and that the Tribunal admits into the record, such as the Applicant's application to the position of Assistant Protection Officer in Shiraz, the recommendation for the Applicant's appointment to said position, and the audio recordings of his interview with the IGO shows, indeed, that the Applicant is proficient in English. His request for interpretation is, therefore, rejected noting that he is represented by Counsel in the present proceedings.

Additional measures for the hearing

35. First, the Tribunal informs the parties that interpretation from Farsi to English and vice versa will be provided for the complainant, whose testimony will be provided in Farsi.

36. Second, the Tribunal recalls para. 6 of its Order No. 123 (GVA/2023) informing the parties that if a hearing takes place, it will be held *in camera* to protect the identity of the complainant.

37. Depending on the parties' and the witnesses' availability, the hearing may be fully remote or hybrid if any of the parties or the relevant witnesses are available to provide testimony in person at the Tribunal's Court Room in Geneva.

38. Once the above is determined, other measures to ensure the safety and security of the complainant may be considered at a later stage.

The Applicant's additional evidence

39. The Tribunal notes, with concern, that despite the specific guidelines provided to Counsel for the Applicant in paras. 15 and 16 of Order No. 137 (GVA/2023), she filed 17 annexes without any explanation as to their individual relevance to the case, which puts an undue burden on the Tribunal and the Respondent to make sense of the filing.

40. Furthermore, the Tribunal observes that several of the documents filed as additional evidence are already part of the case record, e.g., annexes 6, 9, 12, 13, and 17, it was, therefore, unnecessary to resubmit them. In addition, some of the annexes were filed in Farsi without any English translation, namely annexes 1, 2, 5, and 11.

41. The Tribunal already indicated, *inter alia*, in para. 16 of Order No. 137 (GVA/2023), that its “role is not to attempt to understand the relevance of filings” and that it is in the “best interest of a party to present his/her case in a clear and concise way”.

42. Considering the above and recalling para. 17 of Order No. 137 (GVA/2023), which provides that the Applicant’s Counsel was given a “final deadline to properly comply with Order No. 123 (GVA/2023)”, the Applicant’s additional evidence filed on 16 October 2023 is not admitted in the case record.

The Respondent’s motion for leave to file a translation of excerpts of annex 17 to the investigation report

43. The Respondent indicates that annex 17 to the investigation report, filed as part of annex R-1(f) to his reply, contains message exchanges between the Applicant and the complainant retrieved from the Applicant’s official UNHCR phone during the forensic examination that the IGO conducted. The Respondent requested leave to file the translation into English of various of those messages, that were not included in the translated documents in annex 18 to the investigation report, and annexed them to his 23 October 2023 filing in response to Order No. 137 (GVA/2023).

44. Considering that the original messages were on the case record, were shared with the Applicant along with the investigation report, and that the English translation does not prejudice the Applicant whose mother tongue is Farsi, the Tribunal decides to admit said translations into evidence (annex R-26 to the Respondent’s 23 October 2023 submission).

Conclusion

45. In view of the foregoing, it is ORDERED THAT:

- a. The Tribunal will hold a hearing, *in camera*, in the present case;
- b. The following seven witnesses are hereby summoned to give testimony:
 - i. The Applicant;
 - ii. The complainant;
 - iii. Ms. I. K.;
 - iv. Mr. D. M.;
 - v. Mr. J. M., former UNHCR Resettlement Expert;
 - vi. Ms. E. C. R., Chief of the Refugee Status Determination Section in the Division of International Protection; and
 - vii. Ms. E. R., Senior Investigation Specialist, IGO, UNHCR.
- c. The Applicant's request for interpretation is denied;
- d. Interpretation from Farsi to English and vice versa will be only provided for the complainant's testimony;
- e. The Applicant's additional evidence filed on 16 October 2023 is not admitted and is consequently struck from the record; and

f. The Respondent's motion for leave to file a translation of excerpts of annex 17 of the investigation report is granted. Consequently, annex R-26 to the Respondent's 23 October 2023 submission is admitted into the record.

(Signed)

Judge Sun Xiangzhuang

Dated this 24th day of November 2023

Entered in the Register on this 24th day of November 2023

(Signed)

René M. Vargas M., Registrar, Geneva