UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/091
Order No.: 135 (NBI/2018)
Date: 7 September 2018
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOURE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Lance Bartholomeusz, UNHCR

Elizabeth Brown, UNHCR

Introduction

1. The Applicant is the United Nations High Commissioner for Refugees (UNHCR) Representative to Cote d'Ivoire. He serves on an indefinite appointment at the D1 level and is based in Abidjan.

The Application

2. On 3 September 2018, the Applicant filed this application challenging the Respondent's decision to begin deducting US5,000 for maintenance payments to his ex-wife from his salary as of July 2018.

3. The Respondent filed his reply on 4 September 2018.

4. The Applicant is a Mauritanian. He married his Burundian wife in Mauritania, and the couple have two children. In the face of two competing divorce judgments, the Applicant contends that the Respondent's decision to enforce the 2015 judgment from Ghana, instead of that issued by the Mauritanian courts in 2014, is *prima facie* unlawful.

Applicant's Contentions

5. Citing the provisions of sections 1 and 3 of ST/SGB/1999/4 on Family and Child Support Obligations of Staff Members, the Applicant argues that the Respondent is obliged to enforce the judgment of the "competent court" and to seek the advice of the Office of Legal Affairs if the "Organisation is presented with conflicting family support court orders." As no such advice was sought, the Applicant submits that the Respondent's decision to enforce the Ghanaian judgment ("the Ghanaian judgment") is prima facie unlawful. The Applicant argues that the impugned decision has placed him in such a precarious financial situation so as to satisfy the tests of urgency and irreparable harm for the purpose of this application.

Respondent's Contentions

6. The Respondent argues that the Applicant has failed to meet the tripartite test for an injunction to be properly granted in this case. The Applicant has not established that there are serious and reasonable doubts about the lawfulness of the decision to commence deductions as required by the Ghanaian judgment. The Applicant has not exercised due diligence to have the Ghanaian judgment set aside, and has not acted in a timely fashion in applying for both management evaluation and this stay, all of which serves to undermine the credibility of his arguments on urgency. The Applicant has also failed to demonstrate that he would suffer irreparable harm if the application for suspension of action is denied.

Issues

7. This Tribunal is required to decide whether the Applicant meets the tripartite test for the granting of an order to suspend the implementation of the contested decision pending the adjudication of his management evaluation request.

8. More specifically, the tripartite test for the granting of interim relief requires that the Applicants demonstrate the following three elements:

a. that the decision appears to be prima facie unlawful;

b. that there is a particular urgency justifying a Suspension of Action; and

c. that the implementation of the contested decision would cause irreparable harm.

Facts

9. The Applicant is a UNHCR staff member who initially joined the Organization in 1994 on a short-term appointment as Associate Field Officer in Saudi Arabia at the P-2 level. Following a number of reassignments and promotions, he

currently serves as the High Commissioner's Representative in Abidjan, Côte d'Ivoire, a position at the D-1 level.

10. In 2009, the Applicant married Ms. Nadia Nsabimbona (hereinafter Ms. N) a national of Burundi. The facts related to the place and date of the marriage appear to be in dispute between the Applicant and Ms. N, as the Applicant maintains that the marriage took place in Mauritania, while Ms. N contends that the marriage took place in Burundi. UNHCR has two certificates of marriage on record, one dated 25 August 2009 issued in the Republic of Burundi and one dated 22 September 2009 issued in the Islamic Republic of Mauritania, The Applicant had two children with Ms. N, Almamy Chaka Toure, born on 17 July 2010 and Racine Shima Toure, born on 9 April 2013. The Applicant registered the two children with UNHCR as his dependents on 26 March 2010 and 10 May 2013 respectively.

11. On 29th July 2015, the High Court of Ghana issued a judgment in favour of Ms. N. The Court ordered, inter alia, that the marriage between the Applicant and Ms. N be dissolved, and made further orders covering, inter alia, custody of the children, payment of rent and maintenance in the total sum of US$5,000, transfer of ownership of a property to Ms. N and payment of a lump sum of US$ 150,000 to her.

12. A copy of the Ghanaian judgment was addressed to UNHCR under cover of a letter dated 7 December 2015 from Ms. N's solicitors. The letter stated that the Applicant had been notified by the court of the filing of the divorce petition and that hearing notices had been served upon him "but he refused, failed and/or neglected to enter appearance. "

13. On 11 December 2015, UNHCR acknowledged receipt of the letter dated 7 December and requested clarification as to whether the Ghanaian judgment was final, and if so, any documentary evidence to that effect. Ms. N's solicitors responded the same day to confirm that the Ghanaian judgment was final, and that the Applicant has a statutory right to appeal within three months of the judgment, though this right of

appeal does not impact the enforceability of the judgment. No documentary evidence was provided to that effect.

14. UNHCR also wrote to the Applicant on 11 December 2015 to inform him of the notification received from Ms. N 's solicitors and to remind him of his obligation to comply with family support obligations. The Applicant responded on the same day noting that the marriage and divorce declared by him to UNHCR took place in Mauritania in 2009 and 2014 respectively and, therefore, contested the competence of the Ghanaian court to pronounce upon the marriage that took place in Mauritania.

15. On 9 February 2016, UNHCR responded to Ms. N's counsel noting that the Ghanaian judgment does not coincide with UNHCR's records regarding the Applicant, and highlighting that according to UNHCR 's records, Ms. N and the Applicant were married in 2009 in Mauritania and were granted a divorce in Mauritania in 2014. Ms. N responded on 16 February 2016 and alleged that she was not informed nor notified of any marriage or divorce in Mauritania, nor was she present or represented at a marriage or divorce ceremony. Ms. N further alleged that the marriage took place on 8 August 2009 in Burundi. Ms. N further noted that she filed for divorce in Ghana as she was a resident there, and that the Applicant was served all court documents related to the proceedings in Ghana but the Applicant never responded nor appeared. Ms. N accordingly asserted the validity of the Ghanaian judgment and sought UNHCR's support in facilitating compliance by the Applicant.

16. UNHCR's Personnel Administration and Payroll Section sent a memorandum to the Applicant dated 14 April 2016 referring to Ms. N's request in relation to the Ghanaian udgment, and noting that UNHCR would apply the provisions of ST/SGB/1999/4 of 20 May 1999 on Family and Child Support Obligations of Staff Members. This memorandum recalled the fundamental duty of all staff members in United Nations Staff Rule 1.2(b) to comply with local laws and honour their private legal obligations, including the obligation to honour orders of competent courts. The

memorandum accordingly requested the Applicant to comply with the Ghanaian judgment in accordance with Section 2.2(a) of ST/SGB/1999/4 within 30 calendar days from the date of receipt of the memorandum, and noted that the Organization would commence deductions after the 30 days deadline should the Applicant fail to submit proof of compliance.

17. On 4 May 2016, the Applicant responded contesting the jurisdiction of the Ghanaian courts, highlighting that the marriage and divorce recorded by UNHCR occurred in Mauritania (in 2009 and 2014 respectively). The Applicant attached a decision issued by the Tribunal de Nouakchott in the Islamic Republic of Mauritania detailing child support obligations including USD $500 per month per child, which the Applicant highlighted he remained in compliance with by making regular monthly payments.

18. On 30 May 2016, UNHCR requested the Permanent Mission of the Republic of Ghana to the United Nations Office and Other Organizations in Geneva (the Ghanaian Permanent Mission in Geneva) to verify the authenticity and enforceability of the Ghanaian judgment. In the absence of a response from the Ghanaian Permanent Mission in Geneva, in May 2017, UNHCR requested the Office of Legal Affairs, UN Secretariat to contact the Permanent Mission of Ghana to the United Nations in New York (the Ghanaian Permanent Mission in New York). The follow-up correspondence to the Ghanaian Permanent Mission in New York was sent on 6 June 2017.

19. On 23 October 2017, the Permanent Mission replied, attaching a letter from the Office of the Judicial Secretary of Ghana confirming that the Judgment was genuine and enforceable. The Office of the Judicial Secretary also confirmed that the Applicant was served out of the jurisdiction with all the processes but he neither entered an appearance nor filed an answer to the Petition, and the trial therefore proceeded without him leading to the final judgment in favour of Ms N. The

Permanent Mission also confirmed that the Applicant had not filed an appeal against this judgment.

20. On 20 November 2017 the Deputy Director, DHRM, wrote to the Applicant informing him of the response from the Permanent Mission of Ghana, namely that the Ghanaian judgment was final and enforceable and requested him again to comply with this judgment and submit proof thereof within 30 days, failing which the Director, Division of Human Resources Management would consider authorizing deductions from his emoluments in accordance with the terms of the judgment.

21. On 15 December 2017, AB & David, Lawyers for Business and Projects in Africa, acting as Ghanaian counsel for the Applicant, responded to the letter from the Deputy Director, DHRM dated 20 November 2017, alleging that prior to the decision of the Ghanaian court, the Applicant's marriage to Ms N had already been legally dissolved in accordance with the laws of the Islamic Republic of Mauritania, that Ms N was aware of the divorce proceedings and the outcome and that they would be filing a fresh action in the Ghanaian court against the judgment. The letter also stated that copies of the court documents would be sent to UNHCR in due course, however, such documents were never received.

22. On 5 January 2018, the Deputy Director, DHRM responded to AB& David reiterating the relevant provisions of the UN Staff Regulations and Rules and requesting that the Applicant comply with the Judgment . The Deputy Director also highlighted the provisions of Paragraph 2.3 of ST/SGB/1999/4, namely that if the staff member contests the order, he or she must submit a new order of a competent court, setting aside or vacating the original order or staying the original order pending appeal or proof that he or she has otherwise amicably resolved the matter with his or her spouse or former spouse.

23. On or about 16 January 2018, the Applicant wrote to the Head, Legal Affairs Service requesting that UNHCR undertake the same process for the Mauritanian

judgment and seek to certify its validity from the Permanent Mission of the Islamic Republic of Mauritania. On 19 February 2018, UNHCR wrote to the Permanent Mission of the Islamic Republic of Mauritania to the United Nations Office and Other Organizations in Geneva (the Mauritanian Permanent Mission) to seek confirmation whether the judgment of 25 August 2014 on Confirmation of Divorce from the Court of the Moughataa of Sebkha of the Islamic Republic of Mauritania is a final enforceable udgment, and seeking the Permanent Mission's support in obtaining a full copy of the judgment.

24. By e-mail dated 6 July 2018, the Head, Legal Affairs Service, wrote to the Applicant informing him that in the absence of compliance with the Ghanaian judgment, the Director, DHRM had decided to commence monthly deductions of US$5,000 from his monthly emoluments. A few hours later on 6 July 2018, the Mauritanian Permanent Mission responded to UNHCR in a Note Verbale dated 6 July 2018 that the Mauritanian judgment was issued by a competent tribunal without an objection recorded on the record.

25. By further e-mail dated 19 July 2018, the Deputy Director, DHRM informed the Applicant that while a response had been received from the Mauritanian mission, the Director, DHRM had decided to maintain the deductions, taking into account a number of factors, including, inter alia, the needs of the family members, the ample notice given to the Applicant, the Applicant's total remuneration and the ample opportunity and amount of time for the Applicant to seek revision of the Ghanaian judgment.

26. The Applicant responded by email dated 19 July 2018 reiterating his position with regards to the validity of the Mauritanian judgment. On 20 July 2018, the Deputy Director, DHRM noted the Applicant's response and reiterated that the decision to commence deductions would be executed.

27. Subsequently, on 3 September 2018, the Applicant filed a Management Evaluation Request, contesting the decision to commence deductions from his July salary along with this Application for Suspension of Action.

Considerations

28. Applications for suspension of action are governed by art. 2 of the UNDT Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides as follows:

> 1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.
>
> 2. […]
>
> 3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.
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> 4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal. The impugned decision must be shown to be *prima facie* unlawful, that the matter must be particularly urgent and that implementation of the decision would cause the applicant irreparable harm. All three elements must be satisfied for the court to grant the injunction being sought, as the test is a cumulative one.

29. The test is conjunctive, namely, if the Applicant fails to meet any one part of the test, his application cannot succeed.

30. Additionally, a suspension of action application will only succeed where an applicant can establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.[1]

Has the Applicant satisfied the tripartite test?

31. At this stage, the Applicant need only show prima facie unlawfulness. The legal presumption of regularity may be rebutted by evidence of failure to follow applicable procedures, the presence of bias in the decision-making process, and consideration of irrelevant material or extraneous factors.[2] The Applicant bears the burden of showing such irregularity in the impugned decision, and/or the circumstances surrounding it, so that there is doubt as to the lawfulness of the process.

1. *Prima Facie* Unlawfulness

32. To conclude that the impugned decision is prima facie unlawful "the Tribunal need not find that the decision is incontrovertibly unlawful."[3] The threshold required is that of "serious and reasonable doubts" about the lawfulness of the impugned decision[4] The Applicant has failed to meet this threshold and establish that the decision is prima facie unlawful.

[1] See for example Order No. UNDT/NBI/O/2010/017 *Omondi;* Order No. 494 (NBI/2016) *Newland*.
[2] *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.
[3] *Nwuke* UNDT/2012/116.
[4] *Loose vs. SG*, Order No. 259 (GVA/2017).

33. According to Staff Rule 1.2 (b), staff members are bound and should generally comply with final and executable national court orders.[5] Furthermore, the Organization will take certain actions in accordance with ST/SGB/1999/4 when staff members fail to comply with family support court orders.[6] In this case, careful consideration was given to multiple factors in arriving at a decision to make deductions.

34. The crux of the Applicant's case is that the Ghanaian court was not competent to decide on the divorce and support payments and that the Mauritanian judgment should prevail over the Ghanaian judgment on the basis that the Ghanaian judgment "lacks credibility as it is completely unreasonable" and that the "first judgment by a competent court in Mauritania prevails over the later judgment by a non-competent court in Ghana".

35. At one point, UNHCR requested the Office of Legal Affairs, UN Secretariat to intervene with help in determining whether the Ghanaian judgment was genuine and enforceable. OLA was empowered to make the choice, not UNHCR, as to which judgment to choose for enforcement since the issue poses a substantive legal question. Regardless, the appropriate course of action for the Applicant to take in these circumstances would have been to apply to set aside the Ghanaian judgment to the extent he considered the Ghanaian court lacked jurisdiction. The Applicant was served with notice of the proceedings but nevertheless chose not to appear. Furthermore, he instructed local counsel in Ghana to inform the Respondent that he intended to apply to set aside the Ghanaian judgment and that the relevant documents

[5] 2017-UNAT-797.

[6] ST/SGB/1999/4 of 20 May 1 999 is applicable to UNHCR as it was incorporated by Inter-Office Memorandum – Field Office Memorandum No. 77/1999 of 23 August 1999 Family and Child Support Obligations. Furthermore, pursuant to the memorandum dated 24 December 1980 from the Under-Secretary General for Administration, Finance and Management to the High Commissioner, the High Commissioner has authority to make deductions from salaries and other emoluments of UNHCR staff members in accordance with staff rule 3.18 (c) (iii). The High Commissioner delegated this authority to the Director of Human Resources by means of Inter-Office Memorandum – Field Office Memorandum No. 28/2013 of 13 May 2013 Administration of UNHCR staff under the Staff Regulations and Staff Rules.

would be provided to UNHCR. However, to the Respondent's knowledge, no further steps were taken and no documents were provided to UNHCR in this regard. The UNAT held in *Benamar* that

> although a decision of a national court may be subject to criticism by the parties, it must be obeyed if and to the extent that it is enforceable. Consequently, the parties should generally comply with an executable judicial decision; otherwise they would be taking justice into their own hands, which is not acceptable according to general principles based on the rule of law.[7]

36. For these reasons, the Applicant has failed to establish that there are serious and reasonable doubts about the lawfulness of the decision to commence deductions in accordance with the Ghanaian judgment.

2. Particular Urgency

37. This Tribunal has previously held that a request for interim relief shall be rejected if the urgency of the matter is caused by the Applicant's own makings and is therefore self-inflicted.[8]

38. It is important to recall that the Applicant was initially informed of the Judgment by UNHCR and requested to comply as early as April 2016. The Applicant was again requested on multiple occasions to comply with the Judgment. In December 2017, the Applicant's legal counsel informed the Respondent that the Applicant would be initiating proceedings in the Ghanaian courts seeking, inter alia, a stay of execution and that copies of court documents would be sent in due course. The Respondent provided ample time for the Applicant to seek amicable settlement or produce another court order setting aside or staying the Ghanaian judgment.

[7] 2017-UNAT-797.
[8] *Dougherty v. Secretary-General*, UNDT/2011/133; *Evangelista v. Secretary-General*, UNDT/2011/212.

However, he failed to do so, or to demonstrate that any steps had been taken in this regard.

39. Deductions commenced only with the Applicant's July 2018 salary and a further deduction was made from the Applicant's August 2018 salary. Instead of immediately pursuing his challenge following the July decision, the Applicant waited over one month before filing a Management Evaluation Request and an Application for Suspension of Action. The Applicant's delay in applying for a suspension of action in a timely manner undermines the credibility of any allegation of urgency.

3. <u>Irreparable Harm</u>

40. In *Fradin de Bellabre*,[9] this Tribunal held that "harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed." Mere financial loss is not enough to satisfy this requirement.[10] According to the jurisprudence of this Tribunal, harm to professional reputation and career prospects or harm to health are required for irreparable damage to exist.[11]

41. The Applicant does not articulate or identify how the contested decision causes any type of irreparable harm to his employment prospects, professional reputation or to his health. He simply makes a bare assertion that the situation is affecting him mentally and if unresolved might negatively impact his performance as Representative. The Applicant implicitly invites the Tribunal to speculate on this question.

42. In similar circumstances, this Tribunal dismissed an application for suspension of action and held as follows:

[9] UNDT/2009/004.
[10] *Baldini v. Secretary-General*, Order No. 103 (NY/2013); *Kisambira v. Secretary-General*, Order No. 80 (NY/2014); *Mcletchie v. Secretary-Genera1*, UNDT/2012/014.
[11] *Mcletchie v. Secretary-General*, UNDT/2012/014.

> It is generally accepted that financial loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage. At this stage, the Applicant need only show prima facie unlawfulness. The legal presumption of regularity may be rebutted by evidence of failure to follow applicable procedures, the presence of bias in the decision-making process, and consideration of irrelevant material or extraneous factors. The Applicant bears the burden of showing such irregularity in the impugned decision, and/or the circumstances surrounding it, so that there is doubt as to the lawfulness of the process.[12]

43. Furthermore, the Applicant has not provided clear evidence to demonstrate that his financial situation is such that he is unable to subsist or meet his other obligations as a result of compliance with this judgment. The Applicant has provided a brief snapshot of his financial situation in June 2018 from which it is not possible to determine his complete financial situation. For example, he has not provided any information on his assets and liabilities or any other income. Nor has he provided the full picture regarding his bank accounts. For example, he provides only a single line on a particular day for his UBS bank accounts and only one month for his UNFCU accounts.

44. Consequently, the Applicant failed to demonstrate that he would suffer irreparable harm if this Application is rejected.

Remedy sought

45. For these aforesaid reasons, the Respondent the Applicant has failed to demonstrate that he meets the tripartite test for the granting of a suspension of action.

[12] *Mcletchie v. Secretary-General,* UNDT/2012/014.

More specifically, the contested decision is not prima facie unlawful, there is no particular urgency involved and the Applicant will not suffer irreparable harm if this Application is dismissed.

Observations

46. In the event that the Management Evaluation Unit upholds the impugned decision, and the Applicant files a substantive challenge before the Tribunal, the Tribunal will use its best endeavours to schedule the matter for an expedited consideration and disposal.

47. The Applicant is also advised to seek the assistance of counsel for effective representation before the Tribunal, should he wish to file a substantive application.

Conclusion

48. The application for a stay of enforcement of the periodic maintenance provision of the Ghanaian divorce judgment pending management evaluation is hereby rejected.

(Signed)

Judge Alexander W. Hunter, Jr.
Dated this 7th day of September 2018

Entered in the Register on this 7th day of September 2018

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi