



**Before:** Judge Agnieszka Klonowiecka-Milart  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Yehuda Goor, AAS/ALD/OHR, UN Secretariat

## Introduction

1. The Applicant serves with the United Nations Support Office in Somalia (“UNSOS”), based in Mogadishu, Somalia.<sup>1</sup>
2. On 9 February 2022, the Applicant filed an application for suspension of action before the United Nations Dispute Tribunal in Nairobi, seeking suspension of what is termed as an implied adverse administrative decision denying a request to register as female in accordance with the gender identity.

## Facts

3. On 17 May 2021, the Applicant obtained a new national passport from Denmark, the home country, where sex is marked as ‘X’, based on own declaration of gender identification.<sup>2</sup>
4. On 25 September 2021, the Applicant wrote to the Officer-in-Charge, Human Resources Section, UNSOS, requesting to have gender reflected as “female” in *Umoja*.<sup>3</sup>
5. On 23 November 2021, the Director, General Legal Division, Office of Legal Affairs wrote to the Permanent Mission of Denmark, seeking advice whether the Applicant is considered as female by the laws of Denmark.<sup>4</sup> Whereas the parties agree that a response has been issued, the Tribunal has no evidence on the record as to what response was obtained, nor is the Applicant in possession of it.<sup>5</sup> The Respondent, however, states that the Applicant is not legally recognized as female.<sup>6</sup>

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<sup>1</sup> Application, section I.

<sup>2</sup> Application, annex 2.

<sup>3</sup> Application, annex 1.

<sup>4</sup> Application, annex 3.

<sup>5</sup> Application, section VII, para. 5.

<sup>6</sup> Reply, section B, para. 9.

6. On 5 February 2022, the Applicant requested management evaluation of the contested implied decision.<sup>7</sup> The Management Evaluation Unit (“MEU”) is yet to respond.

## **Submissions**

### *Receivability*

#### *The Respondent’s submissions*

7. The Respondent contends that the application is not receivable *ratione materiae* on two grounds. Firstly, that there is no administrative decision that was made with respect to the Applicant’s request, as admitted by the Applicant: “to date I have had no reply to my request, only a verbal information that the case has been referred to DMSPC”.<sup>8</sup> Thus, the Applicant’s request is still actively being considered by the Administration. Additional inquiries and hence additional time are required for the consideration of the Applicant’s request due to the limited documentation submitted by the Applicant and the novelty of the issue at hand. Therefore, this case is not the type nor at the stage where an implied administrative decision can be established.<sup>9</sup>

8. Secondly, the Respondent submits that the application is not receivable because, while disguised as a request for suspension of action, it seeks to obtain final relief and modify the *status quo*. If the present application were granted, the Applicant’s request for management evaluation would be rendered moot.

9. The Respondent, therefore, prays that the application should be dismissed as not receivable *ratione materiae*.

#### *The Applicant’s submissions*

10. The Applicant submits that the application is clearly receivable *ratione*

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<sup>7</sup> Application, annex 4.

<sup>8</sup> Reply, section C, para. 11.

<sup>9</sup> Ibid.

*materiae*, because there exists a pending management evaluation request. It is for the MEU to determine if the request on the merits is receivable, but not for this Tribunal at this stage. The MEU is yet to issue its decision.<sup>10</sup>

11. On the Respondent's second argument that this application is seeking a final relief, the Applicant contends that the request is only to maintain the *status quo* in relation to receiving full and fair consideration for the job applications. Should it take long (as the Applicant expects) to register the new gender, the positions will almost certainly be filled, without giving the Applicant full and fair consideration. The Applicant emphasizes that the gender change is already decided and it is only the recognition by the Organization that is pending. The Applicant maintains that this Tribunal has already determined that assessing the Applicant as a male candidate, on a *prima facie* basis, amounts to denying the Applicant full and fair consideration.<sup>11</sup>

### **Considerations**

12. The Tribunal finds that the matter involves an administrative decision refusing a correction of the designation of gender in the official records, that is, in *Umoja*. Noting that the Respondent rightly points out that the issuance of such decisions is to be inferred from the passage of time since the staff member's explicit request, the Tribunal considers that five months that soon will have passed since the Applicant's request, was sufficient for the Administration to respond expressly this way or another. In particular, given that the Respondent confirms the receipt of the clarification of the pertinent law from the Permanent Mission of Denmark, which negates legal recognition of the Applicant's gender as female, there seems no reason for the matter to "remain under active consideration". The matter here is not about *ought* but about *is*. It is thus not about whether the Administration's recruitment policies ought to promote gender nonconforming persons equally with women who look like women, fulfill biological and societal functions of women and are historically recipients of stereotypes attaching to these functions; further, it is not

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<sup>10</sup> Applicant's comments on the Respondent's reply, filed on 11 February 2022, para. 6.

<sup>11</sup> *Ibid.*, para. 7.

about whether it ought to be prepared to respond to ensuing status recognition issues, such as presented by procedures that content themselves with a declaration; eventually, it is not about whether the designation of gender in Umoja ought to accommodate a category of gender nonconforming persons. The question here is about how the Applicant's status, such as it is under the laws of Denmark, fits in a binary system of Umoja such as it is now.

13. This said, the Tribunal recalls that under art. 2.2 of its Statute, it is competent 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, that is, indeed, to order maintaining the status which, prior to the issuance of the impugned decision, had been uncontested. The competence of the Tribunal does not extend over issuance of any type of interim relief, such as to replace administrative inaction with its own regulatory decision. As the application seeks to modify, rather than freeze, the *status quo*, it is not receivable.

14. This constatation relieves this Tribunal from considering substantive prongs of the test under art 2.2 of the UNDT Statute.

## **ORDER**

15. The application is rejected.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 15<sup>th</sup> day of February 2022

Entered in the Register on this 15<sup>th</sup> day of February 2022

*(Signed)*

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi