



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KISAMBIRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES UNDER ART. 10.2 OF
THE STATUTE**

Counsel for Applicant:

Lennox S. Hinds

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 7 April 2014, the Applicant, a P-3 Population Affairs Officer, Population Division, Department of Economic and Social Affairs, filed an application on the merits contesting the decision of 24 December 2013 by the Under-Secretary-General (“USG”), Department of Management, “not to grant [him] full-time release from his assigned duties as a Population Affairs Officer [to serve] his term as President of the United Nations Staff Union [(“UNSU”)]”.

2. Three days later, on 10 April 2014, the Applicant filed a motion for interim measures under art. 10.2 of the Tribunal’s Statute requesting that the Tribunal “suspen[d] the decision of the [USG] denying him full-time release from his assigned duties ... during his term as President of the [UNSU] starting on 2 January 2014”. In this motion, the Applicant alludes to his further request of 20 March 2014 whereby he asked the Secretary-General to reconsider the contested decision in light of an 18 March 2014 decision by the newly constituted UNSU Arbitration Committee.

3. The New York Registry transmitted the Applicant’s motion for interim measures to the Respondent on Friday, 11 April 2014. The Respondent duly filed his reply on Tuesday, 15 April 2014.

Background

4. As the Respondent has pointed out in his reply to the motion for interim measures, this is the seventh request for extraordinary relief filed by various parties disputing the UNSU elections of December 2013—*see Lane* Order No. 341 (NY/2013) (Judge Ebrahim-Carstens); *Lane* Order No. 18 (NY/2014) (Judge Ebrahim-Carstens); *Lane* Order No. 31 (NY/2014) (Judge Ebrahim-Carstens); *Kisambira* Order No. 32 (NY/2014) (Judge Greceanu); *Tavora-Jainchill* Order No. 36 (NY/2014) (Judge Greceanu); *Tavora-Jainchill* Order No. 45 (NY/2014) (Judge Greceanu).

5. The facts and background to this case have been previously addressed by the Tribunal in some of the orders referred to above and shall not be repeated herein. Essentially, the Applicant's main contention is that he is being wrongfully denied his lawful right to time release to conduct his duties as the duly elected President of the UNSU following the Staff Union's December 2013 election. However, it is common cause that a similar claim is being made by Ms. Tavora-Jainchill who disputes the validity of the elections and insists that she remains the President of the UNSU.

Submissions

6. With respect to the *prima facie* unlawfulness of the decision, the Applicant submits that the Respondent is in breach of the relevant legal instruments which provide that a staff representative, in particular the duly elected President of the UNSU, shall be released from his or her assigned duties during his term of office and granted official time to conduct his or her staff representational activities. The Applicant contends that the Respondent cannot determine the validity of the UNSU elections, nor whether the Applicant is duly qualified since such prerogative rests solely with the Arbitration Committee. Furthermore, the Arbitration Committee having ruled on three occasions that the electoral process was valid and not in violation of any provisions of the UNSU Statute and Regulations, the Administration is bound to accept the results of the elections and has no right to withhold its duty to grant the Applicant full-time release.

7. With regard to urgency, the Applicant contends that members of the UNSU have been deprived of proper representation for the past 15 weeks due to the *status quo*, whilst the appointments of certain staff members are subject to questionable termination due to restructuring. The absence of a functional Staff Union is depriving its members of representation in violation of their fundamental rights, including the current abolishment of their posts.

8. As regards irreparable harm, the Applicant alleges that the denial of his full

time release to perform his mandate deprives the UNSU members of their entrenched right to representation and freedom of association pursuant to the Staff Regulation and Rules as well as international standards. The deprivation of such fundamental rights results in irreparable harm.

9. The Respondent contends that the application is not receivable because the Tribunal has no jurisdiction to grant interim relief in matters concerning the internal affairs of the UNSU. The Respondent contends that the Application should be rejected because, *inter alia*, the outcome of the UNSU elections is disputed, the disputes concerning the facilities to be provided accrue to duly elected UNSU officials as officeholders of the UNSU and not in their personal capacity, and because the Applicant has failed to request management evaluation of the Respondent's alleged silence on a revisit of the 24 December 2013 decision by the USG following the 18 March 2014 decision by the UNSU Arbitration Committee.

10. The Respondent further contends that when considering the criteria for relief under art. 10.2 of the Tribunal's Statute, aside from the jurisdictional bar to examining the lawfulness of the decision, the Applicant has not proved that he would suffer from an irreparable harm or that the case is particularly urgent.

Consideration

11. In terms of art. 10.2 of the Tribunal's Statute, the Dispute Tribunal may, at any time during the proceedings, order an interim measure to provide *temporary* relief to either party provided the three requirements of *prima facie* unlawfulness, urgency and irreparable harm are met. This relief may include an order to suspend the implementation of the contested administrative decision.

12. A motion filed under art. 10.2 of the Tribunal's Statute is, by its nature, a request for urgent *interim* relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is generally not subject to appeal, and which requires consideration by the Judge within five days of the service of

the motion on the Respondent (see art. 14.3 of the Tribunal's Rules of Procedure). Such motions disrupt the normal day-to-day business of the Tribunal. Therefore, parties approaching the Tribunal with motions for interim relief must do so timeously, on well-grounded basis and with circumspection, making full disclosure of all relevant facts (including circumstances adverse to an applicant and within the applicant's knowledge), to enable the Tribunal to grant the interim relief on the papers before it, as a motion for interim measures may stand or fall on its founding papers. An application for interim measures must contain all the essential averments to sustain such a motion and all the elements to satisfy the required criteria. The proceedings are not meant to turn into a hearing on the merits or to decide the case on the merits.

13. The purpose of an *interdict pendente lite*, or interim measure, is not to grant final, but only *temporary* relief pending the outcome of substantive proceedings. In the instant case, any decision regarding the facilities to be afforded to the UNSU President would require a determination as to the legitimacy and validity of the UNSU election process, on which, if indeed the Tribunal has jurisdiction to make such determination, there appear to be substantial disputes of fact and law which cannot be decided on the papers. Jurisdictional issues aside, for the Tribunal to grant the interim measures requested by the Applicant would require it to rule on the propriety of the UNSU elections and the resultant election of the Applicant as President. This would be an abuse of the provisions relating to interim measures. The grant of an interdict is not definitive of the parties rights, should not be final in effect, nor have the effect of disposing of the substantive case. The application for interim measures therefore stands to be rejected.

14. Although the Tribunal need not address compliance with the requirements of art. 10.2 of its Statute in light of the above findings, the following observations need to be made. The Applicant's motion does not contain the basic averments necessary to sustain an urgent application of this nature. It is settled case law that in the absence of any one of the three criteria of *prima facie* unlawfulness, urgency and irreparable

harm, an application must fail (see *Chollet* Order No. 21 (NY/2014); *Kisambira* Order No. 32 (NY/2014); *Tavora-Jainchill* Order No. 36 (NY/2014); *Tavora-Jainchill* Order No. 45 (NY/2014)).

15. The Tribunal also finds that the Applicant has failed to demonstrate that he would suffer from any irreparable harm should the decision not be suspended pending adjudication on the merits of the case. As expressed under general principles of law and in the jurisprudence of the United Nation Tribunals, irreparable harm has to have direct consequences on an applicant (*Planas* 2010-UNAT-049), and which may not be adequately compensable by money (*Baldini* Order No. 103 (NY/2013)). In this instance, the Applicant alludes to a harm at large and has averred that the denial of his time release deprives staff members of their right to freedom of association. The Applicant does not articulate or identify how the contested decision causes any type of irreparable harm to his own rights, and it is not for the Tribunal to supplement the Applicant's pleadings, nor to rectify or speculate on this question.

16. Similarly, with regard to urgency the Applicant alludes to the abolishment and termination of staff members' posts and the inability of the incumbent first and second Vice-Presidents to also properly represent the staff membership at large. It is settled law that an Applicant cannot contest a decision that does have any direct legal consequences on his or her terms of employment. The Applicant has therefore also failed to satisfy this criterion.

17. The Tribunal notes that this is just one of a spate of urgent applications filed by various staff members who contend they were affected by the disputed recall of polling officers and the Staff Union elections of last year. None of these applications have been successful to date and, despite careful reasoning by the Judges, have been followed by similar cut and paste applications requesting the same or similar relief. They have disrupted the day-to-day business of the Tribunal unnecessarily, while substantive cases remain pending. Some of the applications, including the instant one, have been inadequately pleaded, and stand to be struck out with costs. Indeed, in *Hassanin* Order No. 69 (NY/2014), the presiding Judge expressed a warning,

“a salutary reminder to staff and their legal representatives that, in an appropriate case, conduct of this kind will incur the risk of an order for costs”. In this particular case, the pleadings have not even addressed the essential averments necessary to sustain this application yet the need to address this urgent request for an interim motion, which was placed before me as the only Judge currently at the duty station, has unnecessarily disrupted my attendance on other pressing matters. The Respondent has not prayed for costs in this case and the Tribunal would not ordinarily make such an order without hearing from the parties, which would only incur further costs. Furthermore, there is lack of clarity whether these cases are funded by the individual applicants concerned or from the common fund of membership subscriptions. Whilst no order for costs is made, nevertheless, the Tribunal reiterates the salutary warning.

18. In view of the above findings that the granting of the requested relief would result in a final ruling rather than one temporary in nature, and that the Applicant has failed to satisfy the criteria for interim measures, the Tribunal finds that the present motion stands to be rejected.

Order

19. The request for an interim measure is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 17th day of April 2014