



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/018

Judgment No.: UNDT/2013/132

Date : 30 October 2013

English

Original : French

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

LUBBAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Alexandre Tavadian, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM
Sophie Parent, ALS/OHRM

Introduction

1. The Applicant was recruited by the United Nations as a P-3 statistician at the Economic and Social Commission for Western Asia (ESCWA).

2. By application filed with the United Nations Dispute Tribunal on 28 March 2012, the Applicant contests (i) the Administration's implicit refusal to take a decision on an investigation by the United Nations Office of Internal Oversight Services (OIOS) into allegations about his involvement in a network of traffickers of forged passports, (ii) the Administration's refusal to cease defaming the Applicant despite his repeated objections, and (iii) the alleged breach of his right to confidentiality.

3. In addition, the Applicant requests (iv) a formal communication stating that the allegations of his involvement in a network of traffickers of forged passports are unfounded, (v) the removal of his name from all reports pertaining to such a network, (vi) a halt to all forms of defamation against him by OIOS and (vii) damages equivalent to 12 months' salary.

4.

28. On 8 May 2013, OIOS requested the Applicant to answer further questions and, to that end, e-mailed the questions to him on 11 May 2013.

29. On 27 May 2013, the Applicant e-mailed his answers to the questions to OIOS, while stressing that the investigator was biased and should be replaced.

30. On 9 July 2013, the Tribunal ordered the Applicant to produce those questions and answers.

31. On 12 July 2013, the Tribunal received and examined the documents.

Considerations

32. The Tribunal must first consider whether the application in this case is receivable.

33. The Applicant maintains that the absence of a response from OIOS constitutes per se an administrative decision subject to challenge before the Tribunal.

34. In his reply, the Respondent maintains that the application is not receivable *ratione materiae* because OIOS decisions are not within the jurisdiction of the Tribunal. Moreover, the absence of a response from OIOS does not constitute an administrative decision subject to judicial review because it has no impact on the Applicant's employment rights. Lastly, the Tribunal has no jurisdiction to rule on defamation claims.

35. The Tribunal must first consider whether the acts, decisions or omissions imputable to OIOS are within the Tribunal's jurisdiction.

36. This Tribunal has already held that OIOS decisions are subject to challenge before this Tribunal (*Comerford-Verzuu* UNDT/2011/005):

Resolution 48/218 B provides that the purpose of OIOS “is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization” (para. 5(c)), and bulletin ST/SGB/273 states that “[t]he purpose of this Office ... is to assist the Secretary-General in fulfilling his internal oversight responsibilities” (para. 1). What is more, the bulletin reaffirms, as does the resolution (para. 5(a)), that the Office “shall exercise operational independence under the authority of the Secretary-General” (para. 2).

The Tribunal considers that, while it is clear from the foregoing that the General Assembly intended to confer “operational independence” on OIOS—which prevents any staff member, even the Secretary-General, from giving it instructions in its investigative work—the General Assembly must, in stating that the Office acts under the authority of the Secretary-General, have intended to acknowledge that the Secretary-General was administratively responsible for any breaches or illegalities

OIOS might commit. In fact, contrary to what the Respondent contends, in an organization like the United Nations it would be inconceivable for one of its offices to be able to act without potentially engaging the liability of the Organization and thus of the Secretary-General, in his capacity as

General's administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.

To the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned.

38. In the present case, the Tribunal considers that the fact that OIOS opened an investigation of a matter allegedly involving the Applicant and mentioned his name in various communications sent to a number of countries in relation to that investigation constitutes an administrative decision subject to challenge before this Tribunal.

39. The Tribunal must now consider whether the absence of a response from OIOS constitutes an administrative decision subject to challenge before this Tribunal.

40. It has been consistently held that the failure to take a decision is in itself a decision subject to review by an administrative tribunal, within the meaning of article 2 (1) (a) of the Tribunal's statute (*Nwuke* 2010-UNAT-099; *Rahimi* UNDT/2011/089; "...not taking a decision is also a decision", *Tabari* 2010-UNAT-030).

The Tribunal notes that administrative decisions that are subject to review by the Tribunal are not always presented as affirmative decisions. They are sometimes in the form of a failure to act, which may be characterized as an implied administrative decision (*Zeid* UNDT/2013/005).

41. In the present case, the Tribunal considers that the Office's silence over the course of a multi-year investigation consti

44. In the present case, the Tribunal must