

on 1 December 2022 that consisted of correspondence from the Permanent Mission of Denmark to the Office of Legal Affairs (“OLA”).

Facts

6. The Applicant, a national of Denmark, was assigned male gender at birth. According to the Applicant, in November 2020, they appeared before the competent authority in Denmark and gave a solemn declaration to the fact that they now identify as female and requested to have a new passport issued to acknowledge that fact.⁵ A new passport was issued on 17 May 2021 with “Sex” marked as “X”.⁶ The Applicant submits that the “X” under Danish law, as it stood at the time, documents that one identifies with the opposite gender than the one assigned at birth.

7. On 25 September 2021, the Applicant wrote to the UNSOS Chief Human Resources Officer (“UNSOS/CHRO”) requesting recognition of their gender identity by having their gender in Umoja re2(hi)-2(ng021,)-55F 3(r)-7710(oppos)8(i)-2(t)-2(e)

and on 3 March 2022

28/12/2021. On 11 March 2022, the Permanent Mission of Denmark confirmed to OLA that: under Danish Passport Law, passport applicants may receive one of the following three markings under the heading “Sex” in their Danish passport: F, M or X; the Applicant’s “Sex” in their Danish passport, in accordance with the Passport Law at the time, has been changed from “M” to “X” based on the Applicant’s declaration of “experience of belonging to the other gender”; and under Danish Passport Law, the Applicant is not recognized as female, which would have been indicated as “F” in the passport.¹⁷

16. In a memorandum dated 16 March 2022, OLA informed UNSOS that it had received confirmation from the Permanent Mission of Denmark that, under Danish Passport Law, the Applicant is not recognized as female. It accordingly recommended that, in accordance with ST/SGB/2004/13/Rev.1 (Personal status for purposes of United Nations entitlements), UNSOS not grant the staff member’s request to change gender in Umoja to female.¹⁸

17. The UNSOS Head of Mission (“HoM”) informed the Applicant, via memorandum dated 29 March 2022, that:

a. Based on the confirmation from the Permanent Mission of Denmark under Danish Passport Law they are not recognized as female, thus the Organization is unable to meet their request for a change of gender from male to female in Umoja.

b. T

d.

21. BEK nr. 2693 is inapplicable to this case because it was promulgated on 28 December 2021 with an effective date of 1 January 2022 whereas the Applicant's passport was issued on 17 May 2021. Since there is no retroactivity clause in BEK nr. 2693, it has no effect in this case. Additionally, this legislation cannot retroactively rescind the gender status that was vested in the Applicant by the issuance of their new passport. As confirmed by the Permanent Mission of Denmark, the applicable legislation is Proclamation No. 1337. The use of the term "gender" in the unofficial translation provided by the Ministry of Foreign Affairs is incorrect and should be changed to "sex" because Danish passports refer to "sex" not to "gender" and there are only two sexes but multiple genders. Thus, it is factually impossible to belong to "the other gender".

22. Pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), the Applicant has the right to: "be treated with dignity and respect"; "a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority" and to "timely appropriate corrective action" if/when prohibited conduct occurs. While the Organization figures out the mechanism to accommodate staff members with gender markers other than male or female, the Applicant should be registered as female as an interim measure for the following reasons:

- a. They have declared severally to the Organization and their national authorities that they identify as female.
- b. Being referred to as male, Mr. or with male pronouns in official registers and correspondence is harassment under ST/SGB/2019/8 as this is unwelcome, offensive and humiliating to the Applicant, and interferes with their work.
- c. Under the Temporary Special Measures on Gender Equality ("TSM")²³, the Applicant's registration as "male" is an unfair and arbitrary distinction that holds them to the wrong standard when being considered for promotion or

²³ ST/AI/2020/5.

reassignment. When registered as a male, the Applicant would have to be better qualified than a female candidate to be selected and even then, only after referral to the Executive Office of the Secretary-General (“EOSG”). As “transgender”, a term not identified in the TSM, the TSM would not apply to the Applicant.

d. The Organization has a duty of care towards staff members. Relying on para. 32 of A/73/152 (Protection against violence and discrimination based on sexual orientation and gender identity), the Applicant submits that a prolonged wait for recognition of gender identity often contributes to several social problems, including drug and alcohol abuse. The Organization would be responsible for any such problems that may arise by prolonging the waiting period for the Applicant.

23. The Organization has erroneously conflated “gender” with “sex”. Pursuant to paragraphs 13 and 79 of A/HRC/47/27 (The law of inclusion: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), “gender and sex do not substitute each other [...]” “They are autonomous concepts used to describe two different aspects of the human experience.”²⁴

24. All people, including lesbian, gay, bisexual and transgender (“LGBT”) persons, are entitled to enjoy the protections provided for by international human rights law.²⁵ ST/SGB/2019/8 incorporates elements of the Universal Declaration of Human Rights entitling staff members to being “treated with dignity and respect” and “free of any form of discrimination”. The Bulletin even lists “gender identity” as a protected category in Section 1.2.

25. The Applicant seeks the following remedies:

²⁴ Application, annex 07 (p. 2, para. 1).

²⁵ A/HRC/19/41, section II.A, para. 5.

28. The Respondent could not stipulate or disprove whether the Danish word “køn” used in the Applicant’s passport denotes “sex” or “gender. In the “unofficial translation” of BEK nr. 2693 af 28/12/2021 provided by the Permanent Mission of Denmark to the Organization, “køn” appears to be translated as gender and not “sex”.²⁶ The Respondent submits that: the response that the Ministry of Foreign Affairs provided to the Applicant on 4 March 2022 is not the official response that the Permanent Mission of Denmark provided the Organization; in line with ST/SGB/2004/13/Rev.1, “gender” as recorded in Umoja is based on the information in staff members’ national passports or national identity cards and is used interchangeably with “sex”; and the applicability of ST/AI/2020/5 is based on legal sex or legal gender as determined by the relevant authority and indicated in a national passport or identity card.²⁷

29. Relying on *Larriera*²⁸ and *Ernst*²⁹, the Respondent submits that it cannot interpret the legislation of a Member State and that the role of the Administration in requests for change of personal status by staff members is to verify the personal status of the staff member with the Permanent Mission of the competent Member State and act in accordance with that verification as officially communicated to the United Nations.³⁰ In this respect, the Respondent points out that the Permanent Mission of Denmark informed the Organization that the “correct/currently applicable” Danish legislation is article 4.5 of BEK nr. 2693 af 28/12/2021 and that the Applicant is not female under this law.³¹

30. Under art. 10.5(b) of the UNDT Statute, the Tribunal may not award compensation: (i) absent proof of harm suffered

established³³; and (iii) based on a general allegation of future or hypothetical harm³⁴. In this case, the Applicant is not entitled to any remedy because they have not produced any evidence of harm due to the contested decision and their claim of loss of opportunity is speculative. Should the Applicant believe that they have not received full and fair consideration in a selection process for a specific position, the Applicant retains the right to contest that hypothetical selection decision once it is made.

Considerations

31. Noting that the argument employs inchoate terminology, especially different acceptations of the word “gender”, the Tribunal, at the onset, will clarify the terms used herein.

32. The Applicant, admittedly, is a biological male. The Tribunal will refer to this characteristic as sex. The Applicant claims to have female gender acknowledged by the Danish Passport Law and requests that the same be reflected in the United Nations systems related to staff’s personal status. The Tribunal will refer to this claimed characteristic as legal gender. The Applicant’s claim is based on their declared identification with female gender, to which category the Tribunal will refer as gender identity. This said, the Tribunal considers that the question of gender identity is not necessarily coterminous with legal gender, the first being a personal conception of

application, to have the correction made in sweepingly referenced “United Nations administrative systems”, will not result in broadening of the Tribunal’s cognisance over any other administrative system than Umoja.

34. Regarding the first issue, the parties base their dispute on the unofficial translation of the Danish Passport Law, which has been supplied by the Permanent Mission of Denmark and by the Applicant. As results from the argument and documents presented, the Danish Passport Law recognizes that a person may be gender non-compliant with the biological sex and thus, upon request, have X inserted in the rubric “sex”. Much time in this dispute has been spent on establishing what were the precise legal conditions for such designation, relevant for the time of the Applicant’s obtaining the “X” marker in their national passport. In part, it was possibly attributable to the fact that the relevant correspondence persistently referred to “current applicable legislation“, instead of asking, as precisely ordered by the Tribunal in Order No. 156 (NBI/2022), about the state of legislation at the time when the Applicant obtained the designation X in their passport.³⁶ Eventually, the response obtained from the Permanent Mission of Denmark is not unambiguous, although it would appear that in the earlier correspondence the Permanent Mission of Denmark may have provided information congruent with that of the Danish MoFA.³⁷ The Tribunal, in any event, finds that the response obtained by the Applicant from the MoFA of Denmark, the authenticity of which was not questioned, has not been rebutted.

35. At this junction, the Tribunal is compelled to take issue with the Respondent’s Counsel’s statement included in the supplementary submission in response to Order No. 156 (NBI/2022), where it is averred that “It is not for the Respondent to prove or disprove whether the Applicant’s or the Danish Permanent Mission’s translation of any document is ‘adequate’. Nor can the Respondent or the Dispute Tribunal interpret the legislation of a Member State”.³⁸ The Tribunal recalls that the Respondent is bound to act in the public interest.

Organization. As long as the Respondent derives consequences for the staff member's terms of appointment from the content of the national law, it is his obligation to have the content of the national law established correctly. The staff member is under the burden of proving their personal status, and any changes to, it through official documents and the Respondent, where necessary, is competent to seek information at the Member's State representation. This, however, does not relieve the Respondent from conducting a further inquiry in the face of apparent incompleteness, error or, as in this case, contradicting information originating from the same Member State agency. When necessary for the determination of the material facts, the Respondent, just as the Dispute Tribunal, must also interpret the national laws, ultimately – with the assistance of an expert. The Tribunal further notes that sources cited by the Respondent are inapposite: the whole dispute that gave rise to *Larriera* 2022-UNAT-1271 was about interpreting legislation of the Member States, moreover, para. 32 certainly does not say that the Tribunals cannot do it. *Ernst* UNDT/2011/047 para. 30, on the other hand, only “recalls that no national laws or regulations are directly applicable to staff members of the Organization”, in the context of an applicant's demand that the Organization mirror the employment regulation of one of the Member States, as such has nothing to do with the present issue.

36. The same level of diligence is expected regarding issues arising from unofficial translations. The Tribunal regrets that the Respondent, having available to him not only hundreds of Danish-speaking staff, but also translation services of the Organization, did not find it appropriate to undertake a basic inquiry enabling him to stipulate or disprove that the word *køn* in the Danish Passport Law means, as maintained by the Applicant, both sex and gender.

37. Procedurally, given that the Applicant has made a *prima facie* case, the Respondent could have stipulated on both issues, sought evidence to the contrary, or considered it not relevant and accept that determination will be in accordance with the Applicant's averment, of which possibility the Respondent was informed in the Tribunal's Order. However, given the obligations toward public interest, the

Case No.: UNDT/NBI/2022/071

J T J E(Ca)26(udg8(20m8(N)-12(Nnt)15N)6(o.)11(:)-8(

which is understood as a conception of oneself or a societal concept. Therefore, the Tribunal concedes, in accordance with the Applicant's averment, that, for the temporal frame relevant here, the marker X did not include a third category of "intersex". The Tribunal disagrees, however, that this marker would be binding as to the designation of legal gender. To attach such weight to the X would be incorrect, considering the highly subjective and possibly varied in time conception of gender identity and the on-demand procedure for obtaining the X designation in the passport. Rather, the Tribunal considers that X only means that sex is not being marked as F or M because of a variety of possible gender identity and gender expression issues, which should not stand in the way of the holder's use of the passport. This understanding is confirmed by the still expanding basis for the X designation, the latter broadened after the issuance of the Applicant's passport, and is consistent with the Council of Europe current trend, or a postulate, to review, *inter alia*, the necessity of including sex/gender markers in official identity and other documents.⁴¹ Conversely, as clearly confirmed by the Permanent Mission of Denmark, the Applicant is not recognized as female under the Danish Passport Law, which would have been indicated as "F" in the passport.⁴²

42. The Applicant does not demonstrate, nor, for that matter, did the Respondent inquire in his two-year correspondence with the Permanent Mission of Denmark, whether gender non-compliance would change the Applicant's personal status under the Danish law in any other way than non-disclosure of sex in the passport. As stated, however, by the Applicant in their MER, and admitted in the CMD, they are still recognized as male under the Danish Civil Registration System ("CPR"). According to the Applicant – and corroborated by information volunteered by the Permanent Mission of Denmark⁴³, the latter uses a binary designation scheme and generates even numbers for females and odd numbers for males for the purpose of social security. Effecting a change of køn designation in that system is also possible upon a declaration, it only requires a wait time/reflection period of six months. Whereas the Applicant maintains

⁴¹ CoE Report <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe>

that making the latter declaration would not alter their legal status other than obtaining access to health care specific for women while losing access to health care specific for men, they decided not to take such a step as yet.

43. In conclusion, the Tri

contradict the letter or the purpose of the law. At present, the Tribunal does not find such a contradiction.

46. The Respondent confirms that “gender” as recorded in Umoja, and by extension informing the application of ST/AI/2020/5, is based on the information in staff members’ national passports or national identity cards. “Gender” in this context is used interchangeably with “sex”, as recorded on the relevant document.⁴⁴ The Tribunal notes that there is a certain inconsistency in relying on “sex” as recorded in – at least most of - passports (or identity cards) and yet calling it “gender”, without any apparent reason and without defining what gender means in this context. There is a further inconsistency in deferring to passports on the one hand, and recording the Applicant as male, which their passport does not affirm. The Tribunal understands that the Respondent is revisiting this area with the help of a working group. This said, on the content of the Danish law as put before the Tribunal, there is no basis to record the Applicant as female, which is what they are requesting and what the impugned decision was about.

47. Finally, the Tribunal is, obviously, bound by norms expressing international standards and competent to refuse to apply a provision that would contradict them.⁴⁵ In the present case, however, it sees no violation of international standards. As a person non-compliant with their biological sex, the Applicant has the right to an outward expression of gender identity, respect for their identification and should be protected against improper discrimination on this basis. This does not translate to automatic access to entitlements or policies attaching to female sex or legal gender. The Respondent devised a certain policy and determined its scope. The Applicant, in a particular case, might challenge the policy itself as improperly discriminatory. They, however, fail to show that they are encompassed by it.

⁴⁴ Respondent’s response to Order 156 (NBI/2022) dated 17 November 2022.

⁴⁵ See A/RES/61/261, para. 4; *Trevino* 2022-UNAT-1231, paras. 58-68; *Mashour* 2014-UNAT-483, paras. 36-40; *Applicant* UNDT/2012/114, paras. 80-82.

Judgment

48. The application fails and is therefore dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart

Dated this 6th day of December 2022

Entered in the Register on this 6th day of December 2022

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi