Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KUATE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Jean-Jacques Kouembeu Tagne

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR
Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Conduct and Discipline Officer at the P-3 level, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO").[1] By an application filed on 22 March 2019, he challenges a decision to make deductions from his salary to be paid to his wife to satisfy child support obligations since November 2015 to present, as well as recoveries of other related entitlements made by the Organization.[2]

2. The Respondent filed a reply on 26 April 2019, in which it is argued that with respect to the child support decision, the claim is not receivable *ratione materiae* and, if found receivable, the contested decision was lawful.[3] As concerns the recovery decision, the Respondent's contention is that it was lawful.

Facts

3. The Applicant joined the Organization on 16 February 2006 as a P-3 Training Officer. On 8 July 2014, he was appointed as a P-3 Conduct and Discipline Officer on a fixed-term appointment ("FTA") with MONUSCO.[4] On 14 September 2014, the Applicant's spouse joined the United Nations as a staff member serving at the FS-4 level.[5]

4. On 6 March 2015, the Tribunal de Grande Instance du Wouri in Cameroon issued Civil Judgment No. 77 ordering the Applicant to pay his spouse child support in the amount of Central African CFA Francs ("CFA") 1,500,000 (approximately USD2700) monthly.[6] On 28 April 2015, the Applicant appealed Judgment No. 77 before the Littoral Court of Appeal in Cameroon. On 14 August 2015, by Judgment

[1] Application, section I.
[2] Application, section V.
[3] Reply, section A, para 1.
[4] Application, section VII, para 1 and reply, annex 1.
[5] Reply, para7.
[6] Reply, annex 2.

No. 265, the Court of Appeal dismissed the Applicant's appeal.[7] The Applicant's wife requested MONUSCO to implement execution of the child support order.[8]

5. While the child support proceedings were still in progress, on 7 May 2015, the Applicant also initiated divorce proceedings before the Tribunal de Grande Instance du Wouri in Cameroon. On 26 November 2015, the same Tribunal issued Order No. 791 authorizing the couple to live separately. The Tribunal also awarded custody of two children to each parent and ordered that each parent provide support for the two children in their care.[9] The Order included an immediate enforceability clause ("*par provision*").[10] The Applicant informed MONUSCO accordingly.[11]Although the case documents mention an appeal against Order No. 791 filed by the Applicant's wife, the Tribunal has not succeeded in obtaining from the Applicant any information on the result.[12] It transpires, however, that the appeal still had not been heard nearly two years later, at the date of the issuance of the divorce judgment[13], whereupon it may have become moot.[14]

6. On 6 June 2017, the Applicant received a letter from MONUSCO, Chief Human Resources Officer ("CHRO") reminding him of his responsibility to provide child support in the ordered amount and requested him to immediately comply with the court order of 14 August 2015 (i.e., Judgment No. 265, upholding Judgment 77). By the same letter, the CHRO indicated that within 30 calendar days, the Applicant was to provide the Organization with proof: (i) that he was paying the child support as per the Court's order; (ii) that he had amicably resolved the matter with the mother of the children; or (iii) the court order in question had been set aside, vacated or stayed by a competent court pending appeal. The CHRO also reminded the Applicant that should

[7] Reply, annex 3.
[8] Reply annex 17.
[9] Reply, annex 4.
[10] Ibid. *in fine.*
[11] Reply annex 17.
[12] Applicant's response to Order No. 230 (NBI/2020), filed on 4 December 2020.
[13] Reply, annex 7: Judgment No. 730 p.18.
[14] Applicant's response to Order No. 230 (NBI/2020), filed on 4 December 2020, see also paras 47-49 of this Judgment.

he fail to provide the evidence in the stated timeframe, the Organization would honour Judgment No. 265, including deductions from his emoluments.[15]

7. On 10 July 2017, the Applicant responded, stating that Judgment No. 77 was not executable because of the pendency of a divorce case that he had filed on 7 May 2015. He enclosed a memorandum from his attorney who set out that the child support order arising from Judgment No. 77 was not executable under Cameroonian law pending divorce proceedings, as the divorce court was the only one competent to decide such matters under art. 240 of the Cameroonian Law on Divorce Procedure, and the divorce court in the Applicant's case decided by Order No. 791 that the custody of the children was to be divided between the parents, with no financial obligation between the parents. [16] The attorney also indicated that under the laws of Cameroon, as well as regional regulations, in disputes like the present one, it was not permitted to seize salary.[17]

8. On 8 September 2017, the Tribunal de Grande Instance du Wouri issued Judgment No.730 in the divorce case. It awarded custody of the couple's four children to their mother and ordered the Applicant to pay the amount of CFA1500000 (an equivalent of approximately USD2700) monthly to his former spouse by way of child support.[18] The judgment, however, does not contain an immediate enforceability clause in its operative part.

9. On 18 October 2017, the Applicant appealed Judgment No. 730 before the Littoral Court of Appeal in Douala, Cameroon.[19] By Judgment No. 095/CIV dated 1 April 2019 (divorce appeal judgment), the Littoral Court of Appeal annulled Judgment 730 for its failure to adhere to the prescribed form. It did not, however, remand the case for re-trial, but ruled afresh on the matters under dispute: it mirrored Judgment 730 regarding the divorce, custody over the children and the child support obligation.

[15] Reply, annex 5.
[16] Reply, annex 6.
[17] Ibid.
[18] Judgment No. 730, reply, annex 7.
[19] Application, annex 16.

Information on the appellate judgment was provided by the Applicant only in September 2020, following this Tribunal's order.[20]

10. In summing up, the Applicant's litigation in child support and divorce matters are depicted in Table 1:

Table 1. Child support litigation

6 March 2015	**14 August 2015**	**26 Nov 2015**	**8 Sept 2017**	**July 2018**	**1 April 2019**
Judgment No. 77 awards custody of the couple's 4 children to the mother and obligates the Applicant to pay child support. ***Immediate enforceability clause*** **Reply, annex 2**	**Judgment No. 265** dismissing appeal against Judgment No 77. **Reply, annex 3**	**Order No. 791** preliminary ruling in the divorce case: separation authorized; custody divided between the parents; no child support obligation. ***Immediate enforceability clause*** **Reply, annex 4**	**Judgment No. 730** pronounces the divorce; awards the custody of the couple's 4 children to the mother; and obligates the Applicant to pay child support. ***No immediate enforceability clause*** **Reply, annex 7**	Commencement of deduction of USD 2700 per month on account of child support. **Application, sec. VII, para. 10; Reply, para. 17**	**Judgment No. 095/CIV** annuls Judgment No. 730, but pronounces afresh the divorce, the custody over the children and child support obligations as in Judgment No. 730.

11. On 14 June 2018, the Under-Secretary General for Management ("USG/DM") approved the ASG/OHRM's request to undertake salary deductions from the Applicant.[21] The approval pertained to execution of Judgment No. 77.

12. On 27 June 2018, the MONUSCO Human Resources Office informed the Applicant by email that the USG/DM had approved the decision to make deductions

[20] Applicant's submissions in response to Order No. 179 (NBI/2020), filed on 22 September 2020.
[21] Reply, annex 10.

from his salary for the payment of child support obligations.[22] This correspondence read:

> Dear [Applicant],
> NYHQ has informed us that USG has authorized deductions from your salary to pay for child support obligations in accordance with s.r.3.18(c) and ST/SGB/1999/4. Once the mission receives a copy of the approval to Payroll to implement the deduction, we will advise you accordingly.

13. On 5 July 2018, the Applicant's attorney sent a reply to MONUSCO opposing the deductions and informing that the divorce judgment, including its dispositions on child support (i.e., Judgment No.730) had been appealed. As such, he argued, the judgment was not enforceable and there existed no valid title for the child support claim. [23] In parallel, the Applicant sent an email referencing his attorney's letter and objecting to the deductions from his salary.[24]

14. Since the July 2018 payroll, the Organization has deducted approximately USD2700 monthly from the Applicant's salary to satisfy his child support obligations and to pay to his former spouse.[25]

15. On 18 September 2018, with a vague reference to Order No. 791 and Judgment No. 730, MONUSCO informed the Applicant that it would recover all the dependency allowances and related entitlements, as well as undertake deductions on account of child support, with a retroactive effect as of the issuance of Order No. 791.[26] By subsequent memorandum dated 24 September 2018, MONUSCO informed the Applicant "in reference to memorandum of 18 September", that based on Order 791 and Judgment No. 730, it would recover a total amount of USD40,385.60 as overpaid dependency allowances and provided specification of the amounts of recovery for each entitlement.[27]

[22] Application, annex 7.
[23] Application, annex 8.
[24] Application, annex 7.
[25] Application, section VII, para 10 and reply, para 17.
[26] Application, Annex 4.
[27] Application, Annex 6.

16. On 22 November 2018, the Applicant requested management evaluation challenging the deductions from his salary.[28] The Management Evaluation Unit first informed him that management evaluation would be late because it required analysis of a large volume of documents[29] and on 8 March 2019, i.e., over two months beyond the statutory deadline, it informed the Applicant that his request was not receivable as it was time-barred.[30]

17. By Order No. 179 (NBI/2020), issued on 16 September 2020, the Tribunal directed the Applicant to state the result of the appeal in Judgment No. 730 and to file a copy of the appellate judgment or any other court decision finally disposing of that case, which resulted in the submission of Judgment No. 095/CIV.

18. By Order No. 190 (NBI/2020), the Tribunal requested from the Respondent clarification of the apparent contradiction between his communication of 18 September 2018 and the invoked basis for the deductions, that is Order No. 791, which had divided the custody over the children without attaching any financial obligations between the parents. In response, the Respondent admitted that the communication of 18 September 2018 had been issued in error; informed that the actual recoveries had been made in recognition of the fact that Order No. 791 had divided the custody over the children between the parents; and that deductions on account of child support had only begun prospectively as of July 2018.[31]

19. By Order No. 230 (NBI/2020), the Tribunal requested information on what basis the Respondent accepted that Judgment No. 730 had been enforceable with respect to separation and child support obligations, despite the fact that it had been appealed and did not include an immediate enforceability clause. The Respondent explained that a query had been made with the Permanent Mission of Cameroon but remained unanswered, however, finality of Judgment No. 730 was not required to

[28] Application, annex 20.
[29] Application, annex 22.
[30] Reply, annex 13.
[31] Respondent's response to Order No. 190 (NBI/2020), filed on 20 October 2020.

consider the Applicant separated.

20. The summary of the Applicant's case with the Respondent, illustrating the Respondent's positions, is provided in Table.2

Table 2-Timeline for the United Nations litigation

6 June 2017	**10 July 2017**	**14 June 2018**	**27 June 2018**	**5 July 2018**	**July 2018**	**18 Sept 2018**	**24 Sept 2018**
MONUSCO HR calls upon the Applicant to provide proof of compliance or settlement or setting aside **Judgment 77**	Applicant's counsel informs MONUSCO that **Judgment 77** was not executable pending divorce case filed on 7 May 2015 and informs of **Order No 791**.	Deductions for child support approved by Under Secretary-General based on upheld **Judgment 77**	MONUSCO HR notifies the Applicant of the approval of deductions on account of child support	Applicant's counsel informs MONUSCO of appeal pendency in the divorce case and the applicable law in Cameroon which renders **Judgment 730** not enforceable	Commencement of deductions of USD 2700 per month.	MONUSCO notifies the Applicant of deductions of entirety of dependency allowances based on **Order 791;** retroactive deduction of child support since **Order 791** and all dependency allowances as of **Judgment 730** forward	Memo informing that the Applicant is considered "separated" based on **Order 791 and Judgment 730** and liable to a recovery of dependency allowances of USD 40,385.60
Reply, annex 5	**Reply, annex 6**	**Reply, annex 10**	**Application, annex 7**	**Application, annex 8**		**Application, annex 4**	**Application, annex 6**

Table 2-continuation of the United Nations litigation

22 Nov 2018	**8 March 2019**	**22 March 2019**	**26 April 2019**	**20 Oct 2020**	**4 Dec 2020**	**22 Dec 2020**
Applicant requests management evaluation of the decision indicating the date of notification of the Sept 2018 memoranda. **Application, annex 20**	Management Evaluation Unit finds the request time-barred. **Reply, annex 13**	Applicant files the present application	The Respondent files a reply invoking **finality of Judgment 77** as basis for deduction of child support.	In response to Order No. 190 (NBI/2020), the Respondent clarifies that there were no retroactive deductions for child support and para. 4 of 18 Sept 2018 memo was made in error.	Respondent, in response to Order No. 230 (NBI/2020) states that J**udgment 730** was enforceable, since sec. 1.7 of I/ST/2011/5 does not require that the separation be final; the Applicant's legal separation with impact on dependency entitlement was counted from the date of **Order No. 791** till the date of **Judgment 730**, and then was further recalculated based on **Judgment 730**	Respondent's closing submissions invoke J**udgment No. 77** as basis for deduction of child support.

Receivability

Respondent's submissions on receivability

21. The Respondent submits that the challenge relating to the child support is not receivable *ratione materiae*. The Applicant did not request management evaluation of the decision within 60 days. The Applicant was informed on 27 June 2018 that the USG/DM had granted approval for child support deductions from his salary. The decision was unequivocal. The child support decision was implemented with the July

2018 payroll. Since the Applicant did not request management evaluation until 22 November 2018, four months later, the application is not receivable.

22. The Respondent maintains that the memorandum of 18 September 2018 was merely a reiteration of the earlier decision and did not reset the deadline for management evaluation.[32]

Applicant's submissions on receivability

23. The Applicant explains in his management evaluation request and in the application that the email received from Human Resources in June 2018 was not formal. No official document was attached to this email and no "copy of approval" was ever rendered to the Applicant. It was not until 27 September 2018 that the documents allowed the Applicant to comprehend the content of the decision.

Considerations

24. In accordance with staff rule 11.2(c), "a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested". As a first step, therefore, it is necessary to identify the contested decision and the date of its notification.

25. It is documented that the Applicant received an email from MONUSCO Human Resources on 27 June 2018 on approval of deduction of child support from his salary. The Tribunal notes that the context of this email was known to the parties as illustrated by correspondence carried out since 2017 and pertaining to the question of enforceability of Judgment No 77.[33] The email originates from a competent organ within the Organization and is indeed unequivocal as to the fact that the decision had been taken; the only question was to await a copy of the memorandum for the purpose

[32] Respondent's closing submissions, para. 6.
[33] Reply, annex 6 and application, annexes 7 and 8.

of starting implementation in Umoja. Moreover, the Applicant himself recognized that the email conveyed a decision in stating in his application Section VII. 2.:

> En date du 27 juin 2018, le requérant reçois un email de son point focal, Mme Marie Bertha Legagneur (Ressources Humaines), l'informant que *NY (USG) a décide de faire des prélèvements* sur mon salaire pour le payement des obligations familiales des enfants (Child support obligations) [emphasis added].

26. Lastly, it is undisputed that the implementation of the decision commenced with the July 2018 payslip. Therefore, the Tribunal concludes that the application, inasmuch as it is directed against the June 2018 decision on deductions of child support from July 2018 till the date of the application, is not receivable.

27. As concerns communication on retroactive deductions on account of child support since 26 November 2015, expressed in the MONUSCO memorandum of 18 September 2018, the Tribunal does not agree that it was only a reiteration of the June 2018 decision: there is a substantive difference in both the disposition (retroactive deductions) and the invoked basis (Order No. 791); moreover, the communication does not mention authorization for this deduction. The Tribunal finds that the communication conveyed a new administrative decision and the application in its regard is receivable.

28. As concerns decisions on recoveries of entitlements related to dependency, as expressed by the memoranda of 18 and 24 September 2018, it is presently undisputed that the application is receivable.

Merits

Preliminary issues

29. Given the degree of contradiction as to the issues relevant for both the deduction and the recovery decisions, the Tribunal finds that a few preliminary remarks on the applicable law are merited. Deliberations on the receivable decisions of 18 and 24 September 2018 will follow in the further section of this Judgment. To the extent the

Tribunal refers to the June 2018 decision on child support deductions, it is by way of illustration and to provide context of intertwined issues.

30. The Tribunal, first, observes that the Respondent's first duty as employer is to pay the staff members their salary and entitlements in return for the work rendered. It is not a primary role of the Respondent to execute family support orders, as is expressed by the controlling legal act, ST/SGB/1999/4 (Maintenance, education and other support obligations of officials), whose section 2 establishes authorizing deductions as discretionary. This reflects the fact that making relevant determinations on the interface of municipal private law, in which the Organization has no expertise, may prove overly cumbersome and time-consuming, and still be erroneous in the end. It follows that a decision to authorize deductions must be based on a court order that is unequivocal. In this regard, the Tribunal notes that Judgment No. 77 was supplied with an immediate enforceability clause, which rendered it executable pending appeal, i.e., starting from 6 March 2015. The Respondent, however, chose to await the finality of the judgment, and yet another three years (14 August 2015 - 31 July 2018, see Table 1), and eventually approved the deductions lacking an unequivocal title available to him (see para. 52 below).

31. Second observation is that, while the Respondent asserts that he is "not bound by the Cameroonian law"[34], it is true that in the procedure for execution of family support orders under ST/SGB/1999/4, exemptions claimed by the Applicant based on his national or regional laws, are not applicable.[35] This said, it is the municipal law that controls the family status of a staff member and finality or executability of court orders in the context of ST/SGB/1999/4 and ST/AI/2009/1 (Recovery of overpayments made to staff members). In the event where the Organization chooses to define the meaning of any of such elements specifically for the purpose of its own operations, such definition must be express, as in section 2.3 of ST/SGB/1999/4. Still, the ultimate plane

[34] Reply, para. 27.
[35] See *Wang* 2014-UNAT-454, para. 32; *El Rush* 2016-UNAT-627, para. 14, in that the Organization is governed by its internal rules and regulations and not the national laws of its Member States, unless the Organization adopts such national laws as part of its internal law.

of reference in establishing *in casu* whether a definition from section 2.3 of ST/SGB/1999/4 or section 1.7 of ST/AI/2009/1 is met, remains the municipal law. Therefore, deference is owed to it where the Organization purports to deplete a staff member's salary in execution of municipal court orders. At the outset, the persons concerned, and especially the one requesting deductions, should be obligated to furnish all the pertinent information and documents. Moreover, specifically for the purpose of sorting out competing legal titles, ST/SGB/1999/4, section 2.4 foresees means of cooperation within the Organization as well as inter-entity. Ultimately, a failure to effectively obtain the relevant information should not be held against the staff member. Rather, it is this Tribunal's considered opinion that lacking clarity as to the disputed court order the Organization should err on the side of refraining from deductions. An example of the Organization acting uninformed of the content and legal significance of court orders in the present case, in addition to the unusual course of deciding the deductions of the child support, is the memorandum of 18 September 2018, as well as the failure to carry out management evaluation timely and completely.

32. Third observation is that no administrative issuance can explicitly foresee all relevant situations arising on the ground of municipal laws or, for that matter, in any area of their operation. That the AI or SGB does not literally refer to a certain scenario does not automatically authorize *a contrario* inferences unfavourable for the employee, where the overall purpose of the administrative issuance is not undermined by applying analogy. This purpose necessarily encompasses due protection of the staff member's salary. A demonstration of unfounded, unfavourable interpretation is the Respondent's insistence that the Applicant failed to "submit a proof of compliance with his child support obligations or proof of settlement or a new order setting aside or vacating the original Judgment No. 77 as per section 2.3 of the Bulletin", as if it were an absolute *numerus clausus* of the circumstances suspending the execution, which it is not, as can be seen from the fact that the SGB does not list extinguishing family support obligation *ex lege* such as may be foreseen by different legal systems (prominently among them - death of the beneficiary, marriage of the former spouse). Staff members are not always in a position to obtain from their courts an order phrased identically as section 2.3

foresees. The fact is that the Applicant indeed did not submit any of the expressly listed document; he, nevertheless submitted subsequent court decisions pronouncing in the very same matter of child support, which, in all appearances, effectively set aside an earlier decision, as such, at minimum, deserved attention and inquiry. In response, the Respondent indeed deferred deductions for child support for nearly three years, but only then to commence them when the appellate proceedings in the divorce case, involving child support issue, were still pending, with a justification that the Applicant did not conform to the letter of section 2.3 of the "old" title of Judgment No. 77. The timing of the child support deductions and unclear considerations underpinning it give an impression of a decision dictated by impatience with the protracted litigation rather than by any principled consideration, whereas the justification ultimately given is officious and does not accord with the spirit of the Bulletin.

Submissions

Applicant's submissions

33. Regarding the deduction of child support, both parties rely on ST/SGB/1999/4, section 2.3, which refers to a final decision to mean one that has "become executable". With respect to the child support issue, the Applicant's consistent position was that Order No. 791 rendered Judgment No. 77 moot. As concerns the child support decision of 18 September 2018, the Applicant maintains that it contradicts Order No. 791, even though it invokes it as its basis.

34. Further, the Applicant's case is that MONUSCO's decision to make deductions from his salary was based on a non-final court decision, i.e., the divorce Judgment No. 730. In Cameroonian law, for a decision to be accepted as final, the plaintiff must produce both a copy of the entire judgment and the certificate of non-appeal. This is not the case here. On the other hand, he, through Counsel, had submitted to MONUSCO a certificate of appeal in the divorce proceedings. He argues that under Cameroonian law, where a right to appeal is exercised within the prescribed time limit, the enforcement of the contested decision is suspended until the appeal body rules

otherwise. Moreover, on scrutinizing Judgment No. 730, no indication of the enforceability formula appears in it.[36]

35. It follows that MONUSCO's decision to make deductions and recoveries from his monthly salary pending the final decision of the Court of Appeal of Cameroon was unlawful.

36. The Applicant requests repayment of unlawfully made deductions and recoveries. He, moreover, submits that the processes have affected his health, causing him insomnia, violent headaches, nightmares, lack of concentration, heart palpitations and gastric pains, among others.

37. In view of the above, the Applicant thus requests the Tribunal by way of remedies to:

a. Order MONUSCO to remit to him all sums withheld by MONUSCO on the basis of the provisional divorce judgment of 2015;
b. Pronounce that it is irregular to deduct from his salary retroactively based on orders issued in proceedings that are ongoing;
c. Pronounce that all the children remain the Applicant's dependents until the final decision on the divorce case;
d. Pronounce that the Applicant keeps the status of "married" in all his administrative documents at MONUSCO until the final court decision;
e. Order MONUSCO to pay damages to the Applicant in the sum of USD60,000;
f. Find that the authors and accomplices of the "false" document (Court decision) upon which MONUSCO based itself to deduct his salary are guilty of fraud; and
g. Order MONUSCO to pay the legal fees for the Applicant's Counsel.

Respondent's submissions

[36] Application, section VIII 10.a.

38. The Respondent admits that the decision contained in the 18 September 2018 memorandum was in error and has not been implemented. The current position of the Respondent is that the child support deduction decision was lawfully executing a final Judgment No. 77.

39. The Respondent maintains that recovery decisions are lawful. Section 2.2 of ST/AI/2009/1 provides that when the Organization discovers that an overpayment has been made, the office responsible for the determination and administration of the entitlement shall immediately notify the staff member and the overpayments shall normally be recovered in full. This procedure was followed.

40. As for the basis for recovery, the Respondent relies on ST/AI/2011/5 (Dependency status and dependency benefits), section 1.7, which provides:

> [w]hen a staff member is divorced or legally separated from another staff member, the determination of who will receive the dependency benefit for the child(ren) will be based on which of the staff members has legal custody of the child[ren].

41. The Respondent's case is that section 1.7 of the AI does not require finality of a separation decision in order to consider a staff member legally separated for the purpose of distribution of dependency benefits between staff members. This distribution is regulated in sections 3.4 to 3.6, which provide:

> 3.4 Staff members in the Professional and higher categories and in the Field Service category who are paid salary and post adjustment at the dependency rate on account of a dependent spouse shall receive a dependency allowance for each dependent child.
>
> 3.5 If such staff members are not paid at the dependency rate on account of a dependent spouse, they shall be paid at the dependency rate with respect to the dependent child and receive a dependency allowance with respect to every additional dependent child.
>
> 3.6 When a staff member is married to another staff member or to a staff member of another organization of the United Nations common system and both are in the Professional and higher categories or in the Field Service category, only one may receive dependency benefits in the form

> of payment of salary and post adjustment at the dependency rate, which shall apply to the spouse having the higher salary level. The other spouse shall be paid at the single rate.

42. In line with the above, the Organization considered the Applicant legally separated effective 26 November 2015 based on Order No. 791. Also, based on the same order, effective 26 November 2015, the Applicant lost custody of two of his four children. However, the Applicant did not inform the Organization of the change in the custody of two of his four children as required by section 1.9 of the Dependency Administrative Instruction. As a result, between 15 November 2015 and 7 September 2017, the Applicant continued receiving dependency allowance and other related entitlements for these two children to which he was not entitled.

43. The Organization also recovered the overpayment of dependency allowance and other related entitlements that the Applicant received from 8 September 2017 to 30 September 2018, when he no longer had custody of any of his children based on Judgement No. 730.

44. In light of the foregoing, the Applicant is not entitled to the relief sought. The Applicant has not alleged, nor demonstrated, any procedural or substantive breach of his rights. Nor has he produced evidence of any harm, as required by art. 10(b)(5) of the Dispute Tribunal's Statute.

Considerations

45. The Tribunal notes at the outset that as of 1 April 2019 the argument has been overtaken in light of the issuance of Judgment No. 095/CIV by Littoral Court of Appeal in Douala, Cameroon, which pronounced the divorce and awarded custody of the children to the mother. There is no dispute that this Judgment is final and executable. The point of contention remaining is whether the decisions had previously been properly based on executable court decision(s).

46. Recalling its considerations in para. 31 and 32 *supra*, the Tribunal stresses that the essence of the argument is about enforceability rather than finality. Whereas section

2.3. of ST/SGB/1999/4 is express about this understanding, there is a need to qualify the Respondent's statement that section 1.7 of ST/AI 2011/5 does not require finality of a separation decision in order to consider a staff member legally separated. The Tribunal considers that the requirement of "legal separation" in section 1.7, as opposed to factual dissolution of the marital ties, denotes a formal act which takes legal effect within the legal system in which it emerged. Different arrangements falling under the notion of separation may be concerned; for example, while Order No. 791 authorized the spouses to live separately, it was a provisional measure regarding the residence, which did not amount to "*séparation de corps*" in the sense of the civil code of Cameroon.[37] Therefore, the crux of section 1.7 of ST/AI 2011/5 lies not in a separation decision, but rather in a legal division of custody between the parents. As recognized by the Respondent, this provision envisions that there may be a change in dependency status as a result of an interim step of legal separation or temporary custody while divorce proceedings may be ongoing.[38] However, where custody is regulated by a non-final court order, its legal significance must derive from immediate enforceability. In child custody and family support matters, municipal laws as a rule foresee an immediate enforceability clause, in order not to leave the situation of minors in a vacuum.

47. An immediate enforceability clause is found in both Judgment No. 77 and Order No. 791. Regarding the relation between the two legal titles, as shown by the Applicant's Counsel, the Civil Law of Cameroon, art. 238, foresees a preliminary ruling in the divorce proceedings to regulate "par provision" the relations between the spouses for the duration of the proceedings at the first instance, custody over the children among them.

> [Le juge] statue *à nouveau*, s'il y a lieu, sur la résidence de l'époux demandeur, sur la garde proviso ire des enfants, sur la remise des effets personnels, et il a la faculté de statuer également, s'il y a lieu, sur la demande d'aliments.

[37] Application, annex 28, Code Civil, Chapter IV.
[38] Response to Order No. 230 (NBI/2020), filed on 4 December 2020.

> *L'ordonnance sera exécutoire par provision*; elle est susceptible d'appel dans les délais fixés par l'art. 809 CPC [emphasis added].

48. The Tribunal therefore agrees with the Applicant that Order No. 791 had modified child support obligations resulting from Judgment No. 77, with immediate effect.

49. As concerns Judgment No. 730, the situation is less clear, as it has no immediate enforceability clause. The Tribunal notes, nevertheless that the Judgment invokes the court's powers to regulate all provisional matters by itself *par provision*.[39] Even though the court cited an unrelated legal provision, i.e., art. 38,[40] it is understood that the proper reference was to art. 238, which reads in the relevant part:

> Lorsque le tribunal est saisi, les mesures provisoires prescrites par le juge peuvent être modifiées ou complétées au cours de l'instance, par jugement du tribunal.

Moreover, the Tribunal takes note of art. 240, which states:

> Le tribunal peut, soit sur la demande de l;une des parties intéressées, soit sur celle de l'un des membres de la famille, soit sur les réquisitions du ministère public, soit même d'office, ordonner toutes les mesures provisoires qui lui paraissent nécessaires dans l'intérêt des enfants.
>
> Il statue aussi sur les demandes relatives aux aliments pour la durée de l'instance, sur les provisions et sur toutes les autres mesures urgentes.

50. The Tribunal takes it that provisional measures decided by the first instance judge stay in force until otherwise decided by the court before which the case is pending. This effect is *ex lege*. The Applicant's claim that appeals filed against Order No. 791 and subsequently, against Judgment No. 730, had suspensive effect on all provisional measures[41], is untenable, as it would mean that in a pending litigation the matter of child support is being placed in limbo for years. This would belie the notion and purpose of provisional measures and immediate enforceability; it has no basis in

[39] Reply, annex 7, Judgment No 730, page 19 line 2; Application, annex 8.
[40] Application, annex 8.
[41] Application, annex 8.

the provisions invoked by the Applicant; and it would systematically contradict the principle of protecting the interest of the child. The Tribunal further takes note that on the ground of the Civil Code of Cameroon, revoking alimony obligations by the appellate court does not affect the validity of provisional measures thus far applicable[42], and considers that, accordingly, the formal nullification of Judgment No. 730 did not affect the provisional measures that were in force until the issuance of the appellate judgment.

51. Accordingly, on the information provided to the Tribunal, the basis for the disputed decisions should have been, as of the dates of their issuance: Order No. 791; subsequently - Judgment No. 730; and ultimately - Judgment No. 095/CIV.

52. It follows that between the date of Order No. 791 and the date of Judgment No. 730, the Applicant had no child support obligations toward his wife, as he was entrusted with custody over two of their children, who were his dependents in the sense of ST/AI/2011/5. As of Judgment No. 730, the Applicant's child support obligations returned to the same arrangement as it had been previously determined under Judgment No. 77 whereupon he had no dependents in the sense of ST/AI 2011/5. The latter arrangement was confirmed (re-established) on appeal, which means that the status of child support obligations and no dependents remained unchanged.

53. The question of child support deductions based on applicability of Judgment 77, that is during the period from 6 March till 14 November 2015, does not arise in the case. It follows that the Respondent had incorrectly invoked Judgment No. 77 as the basis for deductions of child support from July 2018 onward, whereas the order controlling the situation was Judgment No. 730, and he incorrectly invokes it at present whereas the matter is controlled by Judgment No. 095/CIV. However, in substance, the child support deductions conform to amounts determined by the controlling judgments.

[42] Application, annex 28, Code Civil, commentary to art 205 point 5: […] admettant que l'effet des mesures provisoires prises par les décisions judiciaires susvisées ait pris fin à la date du prononcé de l'arrêt de la cour d'appel de Douala le 6 novembre 1964, il demeure évident que l'arrêt susvisé ne pouvait avoir l'effet rétroactif et que la pension alimentaire due pour la période antérieure, en vertu de l'ordonnance de non-conciliation devait être payée ». CS arrêt n°123 du 14 mars 1967, Bull. P. 1579.

54. As concerns the decision contained in the memorandum of 18 September 2018, it fundamentally misconstrued the terms of Order No. 791 in determining retroactive deductions of child support for the period when they were not due, as well as incorrectly suggest the recovery of the "entirety" of the dependency allowances. The decision has not been implemented and it is presently admitted that it was erroneous. However, the Respondent did not revoke it, used it as reference in the subsequent communication, and relied upon it in the reply. This necessitates rescinding this decision in order to provide the much-needed legal certainty.

55. Regarding the recoveries made, the Respondent did not err in determining the Applicant's dependency status by deriving consequences from Order No. 791, and, subsequently, from Judgment No. 730 as of the dates of the issuance. It follows that the decision of 24 September 2018 in the matter of recoveries conforms to the controlling judgments.

The claim to correct the Applicant's status in Umoja

56. The matter concerns decision of 24 September 2018, informing the Applicant that his status in Umoja would be altered from "married" to "divorced" as per Judgment No. 730. The Applicant's argument is the lack of finality of the divorce decision. The Respondent did not take a position regarding this claim.

57. It is recalled that regarding the question of receivability *ratione materiae* of claims to having the data in Umoja corrected, this Tribunal held in *Avramoski*:

> Where the entry is incorrect, however, there is a discord which may misinform administrative decisions which rely on it (for example calculation of entitlements) as well as the staff member as to his or her status, for example regarding the applicable regime of mandatory retirement age.[43] As a matter of principle, a staff member may, therefore, have legal interest in having the entry corrected. The Respondent maintains that the Applicant did not identify any benefits that have actually been negatively affected as a result of determining her EOD date […]. As a matter of law, however, they may be numerous, including: eligibility for continuous appointment, accrual of various

[43] S*iri* Order No. 306 (NBI/2015) Corr. 1.

> entitlements, regime determining retirement age and access to after service health insurance. The Tribunal will therefore examine the question on the merits.[44]

58. This position was consistent with the one expressed by the former United Nations Administrative Tribunal, which operated on the same definition of administrative decision as presently UNAT and UNDT, i.e., *Andronov*[45], and which allowed correction of a record in relation to EOD date as a receivable matter in and of itself.[46]

59. The Appeals Tribunal in *Avramoski*[47] disagreed. Whereas it invoked the definition of "administrative decision" as set out in *Andronov*, it found lack of receivability under art. 2 of the UNDT statute because:

> 41. [T]here was no evidence before the Dispute Tribunal that the EOD date or the refusal to amend it had a direct impact or legal consequences on the Appellant's terms of appointment or contract of employment.
>
> 42. [I]f the EOD date entry in 2008 had "no unlawful impact on the Applicant's terms of appointment including all her benefits and entitlements", it follows that the refusal to amend that date would also have no impact. As there was no direct impact or legal consequences to either the EOD date or the refusal to amend it, neither can be an "administrative decision" as per *Lee* […].

60. In essence, the Appeals Tribunal equalled receivability of a matter concerning entry of data in the official record with a prefatory/preparatory act contemplated in *Lee*.[48]

61. As a consequence, the Tribunal finds that a decision on making a specific entry or refusing to correct it is not appealable as such; a staff member may only appeal when an incorrect entry misinforms a decision causing concrete negative consequence for the

[44] *Avramoski* UNDT/2019/085.
[45] United Nations Administrative Tribunal Judgment No. 1157 (2003).
[46] United Nations Administrative Tribunal Judgment No.1135 para XXVI.
[47] 2020-UNAT-987.
[48] *Lee* 2014-UNAT-481.

terms of appointment or contract. In the present case, notwithstanding that the Applicant was not yet legally divorced at the date of issuance of Judgment No. 730, he did not suffer any negative consequences from the disputed entry in Umoja. Rather, the consequences attached to his loss of dependency entitlements, on which the Tribunal pronounced *supra*. The application with respect to correcting the record is not receivable.

Damages and costs

62. As it has been established that the Applicant did not suffer financial harm in the sense of art 10. 5 of the Tribunal's Statute, no compensation is due. As concerns moral harm claimed, even considering illegality of the decision of 18 September 2018, on the balance of the case, the Tribunal sees no grounds for awarding compensation. Moreover, the Applicant did not present evidence of harm stemming from any particular decision; rather, the document offered on point pertains to problems caused by the divorce proceedings[49] and not by the actions of the United Nations Administration. Lastly, although the Tribunal finds abuse of proceedings in the Respondent's capricious act which was the memorandum of 18 September 2018, it also considers that the Applicant abused proceedings by not providing material information timely and making outright unfounded submissions. The Tribunal therefore finds no basis for awarding costs of proceedings.

JUDGMENT

63. With respect to the decision of June 2018 on deductions on account of child support, and the decision of 24 September 2018 on recording the Applicant status as "divorced", the application is not receivable.

64. The decision of 18 September 2018 is rescinded.

65. All other pleas are rejected.

[49] Application, annex 27.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 5th day of March 2021

Entered in the Register on this 5th day of March 2021

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi