ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

ORDER No. 2020-1

Ms. "PP", Applicant v. International Monetary Fund, Respondent
(Applicant's Second Request for Provisional Relief)

The Administrative Tribunal of the International Monetary Fund,

- considering that on November 26, 2019, Applicant filed a Second Request for Provisional Relief with the Administrative Tribunal;
- considering that on December 11, 2019, Respondent filed a Response to Applicant's Second Request for Provisional Relief and Request for Reasonable Compensation;
- considering that on December 20, 2019, Applicant filed a Response to the Fund's Demand for Costs; and
- having considered the arguments of the parties,

unanimously adopts the following decision:

INTRODUCTION

1. This is the second request for provisional relief brought by Applicant in connection with an Application filed with the Tribunal on August 12, 2019. In that Application, Applicant challenges the decision of the Director of the Human Resources Department (HRD) that Applicant "failed to afford . . . fair and reasonable treatment" to a G-5 household employee and "engaged in conduct that reflected adversely on the Fund," in violation of Staff Handbook, Ch. 11.01 (Standards of Conduct), Annex 11.01.8 (Requirements for the Employment of G-5 Employees). As a "disciplinary" measure, the HRD Director decided that Applicant would receive a formal written reprimand (Staff Handbook, Ch. 11.02 (Misconduct and Disciplinary Procedures), Section 8.1(ii)), which is to remain in her personnel file for three years.

2. The HRD Director also took another decision, characterized by the Fund as an "administrative" decision, which Applicant also contests in her Application. The "administrative" decision (a) directed Applicant to end the employment of a different G-5 employee—who remains employed in Applicant's household—and (b) stated that the Fund would not be able to support applications made by Applicant for G-5 visas in the future. The decision states that the HRD Director was "obliged to make the [decision] in the interests of the Fund," due to the "position communicated to [the Fund] by the [U.S.] State Department." It is the "administrative" decision that has given rise to each of Applicant's requests to the Tribunal for provisional relief.

TRIBUNAL'S DENIAL OF APPLICANT'S FIRST REQUEST FOR PROVISIONAL RELIEF

3. Applicant's first request for provisional relief, which was made in the Application, sought an order: "(1) prohibiting the Fund from requiring [the current G-5 employee]'s dismissal from [Applicant]'s home during the pendency of this case; and (2) requiring the Fund to secure all necessary visa actions by the State Department (*e.g.* an I94 renewal) to permit [the G-5 employee]'s continued employment by [Applicant] during the pendency of this case." In *Ms. "PP", Applicant v. International Monetary Fund, Respondent (Applicant's Request for Provisional Relief and Respondent's Motion to Dismiss in Part),* IMFAT Order No. 2019-1 (October 10, 2019), the Tribunal denied Applicant's first request for provisional relief.

4. In reaching its decision in Order No. 2019-1, the Tribunal considered the following questions: Does Applicant seek suspension of a decision contested in the Tribunal? Has Applicant shown "irreparable harm" to her in the absence of the provisional relief she seeks? May Applicant assert a request for provisional relief based on alleged "irreparable harm" to the current G-5 employee?

5. In denying the first prong of Applicant's request for provisional relief, which sought an order "prohibiting the Fund from requiring [the current G-5 employee]'s dismissal from [Applicant]'s home during the pendency of this case," the Tribunal decided as follows. Applicant had "not met the essential requirement for provisional relief, which is to show that 'irreparable harm' will result in the absence of the relief she seeks." Order No. 2019-1, para. 39. In the view of the Tribunal, Applicant had "not shown that separation of the G-5 visa holder from her employment will result in 'irreparable harm' *to Applicant*." *Id.*, para. 40. (Emphasis added.) The Tribunal observed that Applicant had been on notice for more than a year that her current G-5 employee must leave her household and had had ample opportunity to make alternate employment arrangements with non-G-5 visa holders. *Id.* With respect to Applicant's attempt to assert alleged "irreparable harm" on behalf of her current G-5 employee, the Tribunal decided that Applicant had not met the requirements for securing provisional relief as envisaged by the Commentary on the Statute. The Tribunal observed that the Fund's rules and the Tribunal's Statute concern themselves with the employment relationship between the Fund and its own staff members and that provisional relief was not warranted by the circumstances of the case. *Id.*, paras. 41-43.

6. In denying the second prong of Applicant's request, which sought an order "requiring the Fund to secure all necessary visa actions by the State Department (*e.g.* an I94 renewal) to permit [the G-5 employee]'s continued employment by [Applicant] during the pendency of this case," the Tribunal concluded that the request did not seek suspension of a decision contested in the Tribunal and denied it on that ground. *Id.*, para. 37.

7. In Order No. 2019-1, para. 24, the Tribunal additionally observed that, according to the Fund, the household employee's G-5 visa had expired in April 2017 but that she remained in the United States under an I-94 Form, which was valid until November 4, 2019. The Tribunal stated that it "understands that the G-5 employee will be required to leave the United States by that date unless she has been granted a new G-5 visa, which, in light of the contested decision, would require that she find employment with a G-4 visa holder other than Applicant." *Id.*

8. The pleadings currently before the Tribunal indicate that the G-5 visa holder remains in Applicant's employment.

APPLICANT'S SECOND REQUEST FOR PROVISIONAL RELIEF

9. Following the issuance of Order No. 2019-1, an exchange of communications ensued between the parties relating to efforts by the G-5 employee to renew her I-94 Form. On October 18, 2019, the Fund advised Applicant's counsel that the Fund "cannot take steps to support or be involved in any way in the renewal of [the G-5 employee]'s I-94, as long as she remains in [Applicant]'s employ." The Fund additionally stated that "[i]f the U.S. authorities renew the I-94, then the Fund will be open to discussing a postponement of up to six weeks from the date of the Tribunal's recent decision [i.e., Order No. 2019-1] denying provisional relief, to allow [the G-5 employee] to find alternative G-5 employment and leave [Applicant]'s employ," but that "if [the G-5 employee]'s I-94 is not renewed, then she must leave [Applicant]'s household upon its expiry, which we understand will be on November 4." On November 22, 2019, the Fund confirmed that it "cannot take steps to support or be involved in any way in the renewal of [the G-5 employee]'s I-94," unless the State Department "directly inform[s] us that they have changed their position and now support the renewal of [the G-5 employee]'s visa while she continues to be in the employ of [Applicant] . . . ."

10. Applicant thereafter filed with the Tribunal her Second Request for Provisional Relief. In that Second Request, Applicant seeks "an Order that the Fund transmit the I-94 application to USCIS so that the U.S. Government can decide the issue of [the G-5 employees]'s visa."

11. Applicant asserts that the "U.S. Government has never issued a decision requiring [the G-5 employee]'s ouster" and that Applicant "believes that the U.S. Government will grant the visa." Applicant requests that the "Fund's decision to block the I-94 application be lifted, and that the Fund be required to pass the application on to USCIS." Applicant states that she "comes to the Tribunal asking only to have the Fund let the U.S. Government pronounce on [the G-5 employee]'s visa."

12. In its Response, the Fund maintains that "[e]very issue raised in Applicant's second request for provisional relief is directly answered by the Tribunal's ruling in response to her first request" and that the Second Request "amounts to nothing more than an effort to re-litigate the matter." The Fund submits that the current request, in "seeking an order compelling the Fund to take action on her employee's behalf vis-à-vis the U.S. Government," is no different from that prong of Applicant's earlier request that was denied on the ground that it did not seek suspension of a decision contested in the Tribunal and should be dismissed on the same basis.

13. The Tribunal observes that Applicant's Second Request for Provisional Relief bears a strong resemblance to the second prong of her first request for provisional relief. In the first request, Applicant sought an order "*requiring the Fund to secure all necessary visa actions by the State Department (e.g. an I94 renewal) to permit [the G-5 employee]'s continued employment by [Applicant] during the pendency of this case*." In her Second Request, Applicant seeks an order that the "*Fund transmit the I-94 application to USCIS so that the U.S. Government can decide the issue of the [G-5 employee]'s visa*." In Order No. 2019-1, the Tribunal denied the second prong of Applicant's first request on the ground that it did not seek suspension of a decision contested in the Tribunal.

14. In her pending Second Request, Applicant asserts that the Fund's refusal to convey the I-94 application is "part and parcel of the HRD Director's decision challenged in the Application." In the view of the Tribunal, even assuming that the decision from which Applicant now seeks provisional relief were "part and parcel" of the decision contested in the Application, that request would still fail. Although the Second Request emerges from facts arising following the issuance of the Tribunal's Order No. 2019-1, the Second Request suffers from the same defects as the request denied by that Order.

15. As with Applicant's first request for provisional relief, in which she contended that her '"claim for relief in the form of retaining [the current G-5 employee] as a G5 employee depends on [that employee] being *in situ* when the Tribunal issues its Judgment,"' Order No. 2019-1, para. 31, Applicant again seeks the Tribunal's intervention in her quest to retain the services of the G-5 employee in her household during the pendency of the Tribunal proceedings. In her Second Request, Applicant refers to her "effort to preserve the *status quo ante* while her claims are heard."

16. As the Tribunal explained in Order No. 2019-1, para. 34, provisional relief is an "extraordinary measure that the Tribunal will order only in limited circumstances." The ordinary rule, as stated at Article VI, Section 4, of the Statute, is that the "filing of an application *shall not* have the effect of suspending the implementation of the decision contested." (Emphasis added.) At the same time, the associated Commentary[1] on the Statute, p. 27, allows that the "statute would not preclude the tribunal from ordering such measures if warranted by the circumstances of a particular case."[2]

[1] The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009).

[2] The Commentary relating to Article VI, Section 4, provides in full:

> Section 4 follows the principle applicable to other tribunals that the filing of an application does not stay the effectiveness of the decision being challenged. [footnote omitted] This is considered necessary for the efficient operation of the organization, so that the pendency of a case would not disrupt day-to-day administration or the effectiveness of disciplinary measures, including removal from the staff in termination cases. This rule is also consistent with the principle, strictly applied in the employment context, that an aggrieved employee will not be granted a preliminary injunction unless he would suffer irreparable injury without the injunction. In this regard, courts are loath to conclude that an injury would be "irreparable," given the nature of the employment relationship and the possibility of compensatory relief if the employee ultimately succeeds in his claim. With respect to potential cases where an applicant in G-4 visa status has been terminated and would otherwise be out of visa status under U.S. law pending the pursuit of administrative remedies and the outcome of his case before the tribunal, it would be preferable to address this as an administrative matter in the staff rules on leave. Apart from this situation, it is difficult to envisage a situation in which the harm to an applicant, in the absence of interim measures, would be "irreparable," as that concept has been construed by the courts. Nevertheless, the statute would not preclude the tribunal from ordering such measures if warranted by the circumstances of a particular case.

17. The Tribunal has reviewed the arguments of the parties and the documents Applicant attaches to her Second Request for Provisional Relief. In the view of the Tribunal, Applicant has not substantiated the argument that her pending request "materially differs" from her earlier request. Applicant has not offered any additional evidence in support of the view that she has "met the essential requirement for provisional relief, which is to show that 'irreparable harm' will result in the absence of the relief she seeks." Order No. 2019-1, para. 39. Nor does she establish a basis for the Tribunal to conclude that she may raise a claim for provisional relief on the grounds of alleged "irreparable harm" to the G-5 employee. The Tribunal accordingly concludes that the provisional relief Applicant now seeks is not "warranted by the circumstances" (Commentary on the Statute, p. 27) of the case.

18. The Tribunal additionally observes that the same principles that underlie the finality of the Tribunal's Judgments (Statute, Article XIII, Section 2), that is, "promoting judicial economy and certainty among the parties," *Ms. "NN", Applicant v. International Monetary Fund, Respondent (Request for Revision of Judgment No. 2017-2)*, IMFAT Order No. 2018-1 (May 1, 2018), para. 1 (and cases cited therein), likewise counsel against the Tribunal's re-opening questions already resolved by Order No. 2019-1. Accordingly, for all of the reasons set out in Order No. 2019-1, and for the reasons that support the finality of that decision, the Tribunal denies Applicant's Second Request for Provisional Relief.

RESPONDENT'S REQUEST FOR REASONABLE COMPENSATION

19. In responding to Applicant's Second Request for Provisional Relief, the Fund has made a Request for Reasonable Compensation pursuant to Article XV[3] of the Tribunal's Statute. The Fund asserts that the Applicant's Second Request for Provisional Relief is "manifestly without foundation" in terms of Article XV. "As a deterrent to such tactics going forward," the Fund requests (without quantifying such costs) that the Tribunal "order that the costs associated with responding to this filing—and any future actions required to address any ongoing efforts by Applicant to circumvent the Tribunal's prior Order—be borne by

[3] Article XV provides:

> 1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:
>
> > a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or
> >
> > b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.
>
> 2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, as determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant.

Applicant." Applicant has been afforded an opportunity to respond to this Request, which she did on December 20, 2019.[4]

20. In the view of the Tribunal, it is not necessary to resolve at this juncture the question whether the Fund is entitled to compensation under Article XV for the costs it has incurred in responding to Applicant's Second Request for Provisional Relief. The Tribunal will be better positioned to weigh the considerations raised by Respondent's Request for Reasonable Compensation at a later stage of the proceedings, for example, in the context of rendering a Judgment on the merits of the Application. Accordingly, it defers its decision on the Fund's Request.

[4] For purposes of rendering this Order, the Tribunal has taken account of those pleadings only insofar as they inform its decision on Applicant's Second Request for Provisional Relief.

ORDER

For the reasons set out above:

1. Applicant's Second Request for Provisional Relief is denied.

2. The Tribunal's decision on Respondent's Request for Reasonable Compensation is deferred until a later stage of the proceedings.

Catherine M. O'Regan, President

Andrés Rigo Sureda, Judge

Edith Brown Weiss, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
January 13, 2020