

Judgment No. 2023-UNAT-1381



Counsel for Appellant:

indication that the passport holder identified as the “opposite” sex to the one assigned at birth.³ It is unclear whether this passport categorisation “X” applied to persons who had undergone relevant surgical or other medical changes, and/or to those like AAQ who had not undergone such procedures but identified as being of the other gender.

6. AAQ subsequently submitted their new passport to the Organization and requested the Respondent to recognize their gender identity as female in Umoja. In light of this request, the Office of Legal Affairs (OLA) made enquiries to the Permanent Mission of Denmark to the United Nations in New York (Permanent Mission of Denmark), including specifically whether AAQ had changed their gender to female under Danish law.

7. The Permanent Mission of Denmark had lengthy e-mail correspondence with OLA, and AAQ also corresponded with the Danish Ministry of Foreign Affairs. Significant confusion arose about the applicable legislation and its translation. At this time, however, it is not disputed that the applicable Danish legislation was Proclamation No. 1337 of 28 November 2013, as amended by Proclamation No. 953 of 28 August 2014. The non-official translation of the relevant Paragraph 4, Section 5 provided by the Permanent Mission of Denmark⁴ and the Ministry of Foreign Affairs⁵ was:

(5) The Local Council may give permission to use the gender designation “X” if a passport applicant who has reached the age of 18 submits a written declaration to the effect that the wish to use the gender designation “X” is based on the experience of belonging to the other gender, or if the person in question provides documentary evidence for having previously been given a new civil registration number (CPR No.) pursuant to § 3(6) of the Danish Act on the Civil Registration System.

8. The relevant Danish legislation was subsequently amended in December 2021, which is after the date when AAQ received their new passport. The Permanent Mission of Denmark provided OLA a non-official translation of the revision, being:⁶

(5) The Local Council may give permission to use the gender designation “X” if a passport applicant submits a written declaration to the effect that the wish to use the gender designation “X” is based on the experience of belonging to the other gender, the person in e

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Denmark, which resulted in a determination that AAQ was not recognized as female under the laws of Denmark. The MEU concluded that the Organization had acted in accordance with applicable rules in not approving AAQ's request to change their gender identity to female in Umoja.

13. On 20 August 2022, AAQ filed an application with the UNDT contesting the decision denying their request to have their gender identity changed in Umoja (UNAT/2022/1381, paras. 51-53).

words, the passport categories for “sex” were based only on the biological sex of the holder in the cases of M and F and, where X was marked, the holder fell into neither category. AAQ was not recognised as female by Denmark by virtue of non-assignment of an “F” in their passport as AAQ wished to be shown in Umoja.

17. The UNDT found, indeed, that AAQ was still recognized as male by Denmark’s Civil Registration System (known by the abbreviation CPR) and as confirmed by the fact that they were, as are all males in that country, allocated an odd numbered social security number, while females were allocated even numbers. The UNDT noted that AAQ could have changed their registration in CPR to “

UNAT granted the Appellant's motion for an extension of time to submit this evidence.¹⁵ Submissions on this issue were completed by 13 October 2023.

21. AAQ provided a sworn statement addressing this issue. They

activities on how gender and/or sex is recorded in Umoja. This was responded to on 3 October 2023, and we are grateful to counsel for the Secretary General for enquiring of the Administration and reporting to us. Those enquiries establish:

In 2022, the Administration established a working group to consider, among other things,

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28. AAQ submits that the UNDT found “without basis” that the designation “X” in the Appellant’s passport was not a pronouncement on gender. The Appellant maintains that an official pronouncement that an individual has “the experience of belonging to the other sex” cannot be anything other than a pronouncement on gender. Since female is the other sex that the Appellant has the experience of belonging to, AAQ states that the Danish authorities have officially recognized their gender as being female.

29. AAQ submits that the three reasons that the UNDT gave for finding that the Danish authorities’ recognition of their gender did not have a legal quality, were erroneous.

30. First, AAQ argues that the UNDT’s suggestion that because the concept of gender identity is subjective in nature, it should have less legal weight, has no basis in law. The experience of a staff member of male sex who identifies as female cannot be anything other than subjective.

31. AAQ submits that to decline to legally recognize transgender individuals on the basis of the subjective nature of their experience is contrary to the mission of United Nations entities that campaign for legal recognition of transgender identities and self-determination in gender recognition.

32. AAQ also refutes the UNDT’s suggestion that the concept of transgender identity is one that has varied over time. The UNDT referenced the change in Danish law that broadened the categories of individuals who might receive the designation “X” in a passport, thereby suggesting that gender identity as recognized by the Danish state was somehow fluid. The Appellant argues that they received the designation “X” because they “had the experience of belonging to the other sex”, which, for the Appellant, is the female gender.

33. With respect to what the UNDT termed the “on -demand procedure for obtaining the X designation in the passport”, AAQ says that this is best practice established by the Council of Europe and that this should not militate against legal recognition of the Appellant as a transwoman.

34. AAQ submits that the UNDT erred in fact and law by relying on the fact that AAQ is still recognized as male in the Danish Civil Registration System. AAQ avers that if they were to change their civil registration to female, they would be offered medical services for individuals who were born women (such as gynecological services) and be denied medical services that would be more appropriate for them, such as screening for prostate cancer, given that AAQ is still a biological male

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39. AAQ seeks an award of moral damages for psychological harm including for the reason that the Administration fails to use pronouns matching AAQ's gender identity and repeatedly addresses them with male pronouns.

40. In reply to the Respondent's assertion that their claim to moral damages must fail because there is no independent evidence of harm, they say that such corroboration is unnecessary. AAQ submits that the Organization's continued application over the last two years of an admittedly inappropriate gender marker ("M") represents evidence of harm in and of itself. AAQ states that the Organization has harmed them by denying them one of the most fundamental aspects of their identity.

41. AAQ expresses their desperation to resolve this gender identity issue without delay noting that they have received appropriate legal recognition in the form of a New York Identity Card showing their sex as "F". AAQ discloses that this legal recognition is the subject of a separate case pending before the Dispute Tribunal.

The Secretary-General's Answer

42. The Secretary-General submits that the UNDT correctly dismissed AAQ's application because the UNDT correctly found that AAQ is not recognized as female under Danish law.

43. The Secretary-General submits that the legal framework governing the determination of personal status of staff members is set forth in ST/SGB/2004/13/Rev. 1, where it states that the personal status of a staff member is determined "by reference to the law of the competent authority under which the personal status has been established". The Secretariat verifies personal status of staff members under this Bulletin through the Permanent Mission to the United Nations of the country of that competent authority.

44. The Secretary-General submits that the UNDT properly dismissed AAQ's application because the Permanent Mission of Denmark verified that under the laws of Denmark, AAQ is not recognized as female.

45. The Secretary-General submits that AAQ's arguments that the Danish authorities have pronounced on their gender are not in line with the verification from the Permanent Mission of Denmark. The UNDT properly considered the question of what was AAQ's legal gender

under Danish law if AAQ's biological sex is male and gender identity is female and concluded that the response of the Permanent Mission of Denmark indicated that AAQ is not female.

46. The Secretary-General reminds us that notwithstanding the fact that the "X" marker in AAQ's passport indicates that AAQ has "the experience of belonging to the other sex", the Permanent Mission of Denmark has repeatedly confirmed that AAQ is not female. Moreover, the Permanent Mission has advised that if AAQ wishes to be recognized as female under Danish law, this can be done through the Danish Civil Registration System, an option that AAQ has not pursued.

47. The Secretary-General contests AAQ's argument that the United Nations classifies staff members by gender in Umoja, rather than by sex. The Secretary-General submits that status in Umoja is based on the personal status as verified by the relevant Member State, which for AAQ is not female, according to the Permanent Mission of Denmark.

48. The Secretary-General disputes AAQ's argument that the UNDT concluded that neither designation of male nor female was accurate. To the contrary, the Secretary-General submits that the UNDT correctly concluded that even though AAQ's passport does not record them as being male, there is also no basis to record AAQ as female, which was the request underlying the contested decision.

49. The Secretary-General

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decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are

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the inordinate delay in the rebuttal process was not an administrative decision “unless it was shown that it had, by itself, a direct and negative impact on [her] conditions of service”.³⁰ We affirmed, reasoning: ³¹

... On appeal, Ms. Fairweather did not provide any evidence that she had applied for the long-service step or for taking the YPP exam. She only alleges that the possibility of applying for the long-service step or taking the YPP exam would have been denied due to the delay in the rebuttal process of her performance appraisals.

... We do not agree with the Appellant’s reasoning. It is now clear that the Appellant did not apply for the long -service step or for taking the YPP exam.

... In the absence of applications for the long-service step or the YPP exam, the Appellant cannot seek to backtrack and presume the direct negative legal consequences of a decision that might have existed but never did.

... Consequently, the absence of a decision in response to a request for a rebuttal of performance appraisals had no direct legal effect and was neither an administrative decision nor an implied decision.

58. In AAQ’s submissions to the UNDT, they argued that if they were recorded in Umoja as male as they currently are, then pursuant to the Temporary Special Measures on Gender Equality,³² if they were to apply for a role within the Organization they would be held to a tougher standard to be considered for promotion, and possibly unfairly denied an appointment they might have received if they had been considered a female³³ Such a scenario involving an actual outcome of a selection process would produce a direct and adverse effect meeting the jurisdictional criteria for the Tribunals to consider the lawfulness of the refusal to record them as female. But such a scenario was, at the time of AAQ’s challenge to the decision refusing to change their gender in Umoja, a hypothetical and future possibility. As in *Fairweather*, we cannot presume direct negative legal consequences from selection processes that have not yet occurred.

59. The Appeals Tribunal has also found non-receivable administrative decisions that had no direct impact on the benefits and entitlements of the staff member. In *Avramoski*,³⁴ we held that the staff member could not challenge decisions that might impact them in the future, but needed to wait for an administrative action that actually affected them. In that case, the

³⁰ *Ibid.*, para. 8.

³¹ *Ibid.*, paras. 40-43.

³² Administrative Instruction ST/AI/2020/5.

³³ Impugned Judgment, para. 22(c).

³⁴ *Avramoski v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-987.

staff member disputed the “Entry on Duty” date in Umoja with respect to her appointment (which was noted as 2008), wished to amend the date (to 2000), and challenged the refusal by the Administration to do so. The UNDT had found the application receivable on the grounds that the refusal to amend ED(f) (e)-10.1 (a)-0.6 (c)4.4 (at)-64 (ot)-6.8 U.1 (o)nm tacha(u)-5.1 an(e)-3.ima

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