

A.
v.
ICC

126th Session

Judgment No. 4003

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms H. A. against the International Criminal Court (ICC) on 18 December 2014, the ICC's reply of 19 June 2015, the complainant's rejoinder of 11 August, corrected on 1 September, and the ICC's surrejoinder of 24 December 2015;

Considering the applications to intervene filed by Mr A. K. and Mr E. P. L. on 8 October 2016 and 27 January 2017, respectively, and the ICC's comments thereon dated 18 January 2017 and 3 May 2017, respectively;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 13 of its Rules;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant seeks compensation for damages related to her arrest and detention in Libya while on an official mission.

The complainant was recruited by the ICC in December 2005 as an interpreter and translator. In June 2012 she took part in a mission to Libya which had been ordered by the ICC's Pre-Trial Chamber I in the context of proceedings concerning Mr G., a Libyan national against whom the ICC had issued an arrest warrant in 2011. The purpose of the mission was two-fold. On the one hand, a representative of the Office of the Public Counsel for the Defence (OPCD), who had been appointed

provisionally as Mr G.'s counsel, was to have a meeting with Mr G. on a privileged basis. On the other hand, two representatives of the Registry were to meet with Mr G. in order to discuss with him the possibility of appointing counsel of his choice. The complainant was to act as interpreter where necessary.

At the time of the mission, Mr G. was being held captive by local militia forces in Zintan. The complainant and her three colleagues arrived in Tripoli on 6 June 2012. They travelled to Zintan the following day. Meetings with Mr G. took place, but shortly afterwards the four ICC officials were detained by the Zintan authorities and charged with various criminal offences on the basis they had committed or been complicit in acts endangering national security. The OPCD counsel and the complainant were ultimately charged with unlawful possession of documents and a pen-shaped camera intended to be used to provide information related to national security, and knowingly destroying authentic documents for the benefit of a third party and to the detriment of others. The two other ICC officials were initially not detained, but they chose to remain with their colleagues and were in due course charged as accomplices. These events were the subject of extensive press coverage.

After intense diplomatic efforts, the complainant and her colleagues were released on 2 July 2012. The ICC gave assurances to the Libyan authorities that there would be a thorough internal investigation of the incident and that appropriate action would be taken, but the criminal charges against the ICC officials were not withdrawn.

On 24 July 2012 the Registrar of the Court asked the Independent Oversight Mechanism (IOM) to conduct an independent post-incident review. IOM issued a report in October 2012, in which it concluded that there were significant gaps in the ICC's mission planning framework. In particular, it found that there should have been a formal diplomatic agreement between the ICC and the Libyan authorities concerning the privileges and immunities of the ICC officials. Moreover, the activities that the officials intended to pursue during their mission had not been clearly defined in advance by means of an exchange of *Notes Verbales*. IOM also found that none of the security recommendations made by the

ICC's Field Security Unit during the preparation of the mission had been implemented.

In December 2012 the Libyan authorities forwarded a copy of their own investigation file concerning the actions of the complainant and her colleagues to the ICC. In January 2013 the Registrar decided to engage an external consultant to conduct a fact-finding inquiry, which, according to the consultant's terms of reference, was to "cover in particular the actions of the four ICC staff members in the performance of their duties, the circumstances of their arrest/detention, their conditions of detention and subsequent events directly involving them during their period of detention". The complainant declined to participate in this fact-finding process.

On 3 June 2013 the complainant submitted to the ICC a "request for compensation and/or other damages" in which, amongst other relief, she claimed moral and punitive damages in connection with her detention in Libya on the basis that the ICC had acted with malice, reckless disregard for her safety and gross negligence. In support of her request, she referred not only to the inadequate preparation of the mission, but also to the conditions of her detention and to events after her release, including the denial of her requests for assistance, restrictions on travel due to the pending criminal charges and the ICC's failure to protect her reputation by issuing a public statement denying media reports that she was a "spy".

The Registrar proposed a settlement, but this was refused by the complainant, whose repeated requests to be provided with a copy of the consultant's report had been denied. The Registrar then rejected the complainant's request for compensation in its entirety by a decision of 19 December 2013. He considered that the mission planning had complied with the applicable legal framework and that liability for the injuries suffered by the complainant lay primarily with the Libyan authorities. He found that some of the complainant's actions during the mission went far beyond her role as an interpreter and might constitute unsatisfactory conduct, but he decided not to initiate disciplinary proceedings against her. Nevertheless, in his view, these "shortcomings"

had raised suspicions with the Libyan authorities and had thus contributed to her arrest and to that of her colleagues.

The complainant lodged a request for review of that decision on 17 January 2014. At the same time, she filed a Motion to Recuse the Registrar, whom she accused of retaliating against her for having refused his offer of a settlement. However, as the Registrar did not reply to her request for review within the statutory time limit, the complainant referred the matter to the Appeals Board on 5 March 2014. By this time, she had obtained a copy of the consultant's report.

The Appeals Board issued its report on 26 August 2014. Referring in particular to the findings of the IOM report, it held that the ICC had not fulfilled all its obligations with regard to safety and security arrangements for the mission and that, accordingly, compensation was due. It also found that the Registrar's conclusions regarding the complainant's conduct during the mission did not appear to be supported by any evidence. However, the Appeals Board considered that the complainant had failed to establish that the Registrar had taken any retaliatory action against her. It unanimously upheld the appeal and recommended that the Registrar "reconsider conciliation with a view to settling the claim", and that an expert be engaged to provide advice as to the calculation of an appropriate settlement amount.

By a memorandum of 25 September 2014 the Registrar informed the complainant that, although he was "largely unable to agree with the analysis and findings of the [Appeals Board]" for the reasons set out in his reply to the appeal, he accepted its recommendation and would therefore revert to her shortly to propose an expert. In the event, this attempt to reach a settlement proved unsuccessful and the complainant filed a complaint with the Tribunal impugning the Registrar's decision of 25 September 2014.

The complainant asks the Tribunal to award her compensation for damages resulting from her imprisonment in Libya; from defamation in the press reports concerning her imprisonment; and from the fact the criminal charges are still pending against her in Libya, which places limitations on her travel. In addition, she claims 800,000 euros in moral damages and 400,000 euros in exemplary damages for the Registry's

failure to put in place the proper protocols for the mission, for abuse of power, malice and retaliation on the part of the Registrar, and for the ICC's continued denial of its duty of care to protect her dignity, reputation and safety. She also claims costs, including 60,000 euros in attorneys' fees, and such other relief as the Tribunal may deem appropriate.

The ICC accepts that it breached its duty of care under Staff Regulation 1.2(c) with respect to certain aspects of the preparations for the mission, and considers that this breach and the resulting moral injury suffered by the complainant would be fairly redressed by awarding her compensation in the region of 20,000 to 25,000 euros. However, it considers that her claims based on alleged retaliation, and those based on alleged harassment during her period of detention, are irreceivable for failure to exhaust the internal means of redress, and that her remaining claims should be dismissed as unfounded.

CONSIDERATIONS

1. On 3 June 2013 the complainant filed a claim for compensation pursuant to Staff Rule 106.9, which entitles staff members to compensation in the event of illness or injury attributable to the performance of official duties on behalf of the ICC. Her claim addressed the injuries caused to her by the mismanagement of the mission to Libya and her resultant 26-day incarceration, as well as her treatment by the ICC, specifically by the Registrar, upon her return. Her claim was denied by the Registrar in a decision dated 19 December 2013.

2. In the 19 December decision, the Registrar denied the complainant's claim on the basis that, according to "all information available", her behaviour had contributed to her detention and to that of two of her colleagues. He cited a report written by an independent consultant whom he had engaged to carry out a fact-finding inquiry and noted that the complainant's behaviour was "not compliant with ICC Mandatory Security Arrangements and/or may amount to unsatisfactory conduct". He decided "pursuant to Rule 110.1 of the Staff Rules, not to institute disciplinary action against [the complainant]", though he stated

that he would “address the above shortcomings with [the complainant’s] Section Chief [...], as part of the lessons learned for the future and see with her what appropriate steps may be undertaken to make sure that [the complainant] is reminded of the limits of her functions as an interpreter”.

3. The complainant submitted a request for review of the 19 December decision on 17 January 2014. She contemporaneously filed a separate Motion to Recuse asking that the Registrar and/or the Office of the Registry be recused from examining her request for review “to ensure that a neutral and disinterested body reviews the serious structural failures and decisions of personnel in the Registry regarding organization of [the Libya] mission, none of which [were] addressed in the Registrar’s Response to the Claim [for Compensation]”.

4. Prior to this, on 21 February 2013, IOM had released a revised version of its October 2012 post-incident review report. It concluded that “both in preparing the mission and in attempting to resolve the crisis, the Court was greatly hindered by a poor guidance framework and absence of advanced planning. By taking action, in both areas, to strengthen the Court’s systems, the ICC can hopefully avoid future similar crises and, when crisis is unavoidable, be able to react more robustly.” In the introduction to its report, IOM noted: “[t]hough all four staff members must be recognised for their fortitude, it should be particularly noted that [the complainant] acted with extraordinary professionalism and personal bravery, serving the Court and her colleagues in the most difficult of circumstances by serving as the only communications link between the other staff members and their captors and with the representatives of the Libyan government”.

5. The consultant’s report referred to in consideration 2, above, was submitted on 3 June 2013, but a copy of it was only given to the complainant on 11 February 2014. In this report, under the heading “problems observed”, it was found, inter alia, that there was a lack of adequate preparation for the mission in Libya.

6. The ICC Appeals Board, in its report dated 26 August 2014, concluded that the complainant's 16 January 2014 Request for Recusal was "inactionable" but that her internal appeal was admissible. It unanimously upheld the complainant's appeal and recommended that the ICC reconsider conciliation with a view to settling the claim. It also recommended that the ICC retain expert advice on the calculation of the settlement amount that would be fair and commensurate with the measure of liability incurred and the damage suffered. In its considerations, the Appeals Board did not find that the complainant had established retaliatory action on the part of the ICC, though it did find that the ICC bore some responsibility for the ordeal that the complainant had endured and that the complainant's own responsibility had not been established.

7. In the Registrar's decision dated 25 September 2014, he stated that he was "largely unable to agree with the analysis and findings of the [Appeals Board] on the admissibility and merits of [the complainant's] case for the reasons set out in the [ICC's] Response". Regardless, he decided to reconsider conciliation with a view to settling the claim and to retain expert advice on the calculation of a possible settlement amount. Attempts to resolve the matter were unsuccessful and, at least implicitly, the Registrar rejected the complainant's claims. No point was raised by the ICC in its pleadings about the finality of the impugned decision.

8. In support of her claims, the complainant raises the following grounds: denial of her claim for compensation was unjustified; breach of due process; retaliation by the Registrar; abuse of power; bad faith; and violation of the organization's duty of care.

9. The complainant requests hearings if they are deemed necessary by the Tribunal. Two of the complainant's colleagues and co-detainees, Mr P. L. and Mr K., have applied to intervene, in accordance with Article 13, paragraph 1, of the Rules of the Tribunal, on the basis that they are in a situation similar to that of the complainant in fact and in law.

10. The ICC contests the receivability of the complaint with regard to the claims of harassment and retaliation. It also contests the intervention of Mr K. on the ground that he was not in a situation similar to that of the complainant because: (a) Mr K. failed to seek any compensation until the filing of his application to intervene, four years after the incident; (b) the ICC had a legitimate expectation that any amount owed to him had been fully and finally settled upon his separation from service; and (c) the complainant seeks damages for other alleged incidents that could not be awarded to Mr K. The ICC expressly consents to the intervention of Mr P. L. insofar as it relates to the claim of breach of duty of care. It has recognized its liability with respect to the breach of its duty of care in relation to mission planning failures prior to the complainant's and Mr P. L.'s detention in Libya. It requests that the damages awarded be between 20,000 and 25,000 euros for "moral injury/emotional distress".

11. The Tribunal finds that the written submissions are sufficient to reach a reasoned decision, and, therefore, it shall not order oral hearings.

12. The application to intervene of Mr P. L. is allowed insofar as it relates to the claim of breach of the organization's duty of care and was accepted by the ICC. Mr K.'s application to intervene is rejected as he is not in a similar situation in fact and in law to that of the complainant, inasmuch as the complainant filed a timely claim for compensation whereas Mr K. did not.

13. With regard to the ICC's objections to receivability, the Tribunal finds that the claim regarding retaliation is receivable. The complainant had raised the question in her request for review and in her internal appeal, and it was considered by the Appeals Board in its report. Thus, the complainant has exhausted all internal means of redress. The Tribunal considers that the issue of harassment has not been addressed through the proper internal mechanisms. As the question relates to allegedly inappropriate behaviour of another staff member of the ICC, the proper mechanism is the procedure provided for in Sections 6 and 7

of Administrative Instruction ICC/AI/2005/005 on Sexual and Other Forms of Harassment. As the complainant has not followed that procedure, any claim based on alleged harassment is irreceivable and thus shall not be considered by the Tribunal.

14. The complainant submits that the 19 December 2013 decision involved errors of fact and law and, as such, cannot be considered as properly motivated. The Registrar, in that decision, cited the consultant's report and stated that, "[b]ased on all information available", he determined that the complainant's behaviour ("shortcomings" as described by the Registrar) resulted in raising suspicion against the complainant and one of her colleagues (Ms T.) and "thereby contributed to their arrest and detention" as well as to that of their other two colleagues on the mission. The Registrar found that "the preparation of this mission by the [ICC] was made in full compliance with its applicable legal and administrative framework" and that the ICC had "committed no violation which could engage its liability for what happened to [the complainant]". As noted by the Appeals Board, those assertions were unsupported by any evidence and, "[g]iven that it has not been established that [Ms T.'s] and the [complainant's] conduct was suspicious or worse still, criminal, it can hardly be said that in these circumstances they were directly responsible for the arrest and detention of Mr K. or Mr P. L."

15. The Tribunal finds that the reasons given in the 19 December 2013 decision to reject the complainant's claim for compensation were not supported by the evidence. Moreover, the Registrar relied on documents to which he refused to give the complainant access, while mischaracterizing the findings of those documents in a clear breach of her due process rights. He also misinformed the complainant that he had been ordered to destroy the consultant's report and therefore could not give her a copy while knowing full well that the disclosure of the report to the complainant had already been approved. This constitutes an act of bad faith. The Registrar's correspondence with the complainant shows that he repeatedly threatened her with charges of misconduct and possible disciplinary action unless she accepted the ICC's offer during

conciliation proceedings. This was an abuse of power and further evidence of bad faith.

16. The Tribunal recognizes that the complainant's ordeal in Libya was a direct result of the ICC's failure to properly prepare for the mission, specifically, its failure to: (a) establish a diplomatic basis by ensuring that a Memorandum of Understanding was established and/or *Notes Verbales* were exchanged with the Libyan authorities prior to the mission's initiation; (b) establish a mission plan which identified the objectives of the mission, the locations to visit and persons to be met, as well as naming the Head of Mission and clarifying the specific responsibilities of the team members; and (c) ensure that all security protocols were followed and advice was implemented to guarantee the safety and security of the staff members on mission. For these failures, and taking into consideration the damage suffered by the complainant and Mr P. L. during their period of confinement, the Tribunal awards moral damages in the amount of 140,000 euros to each of them. This amount addresses the damage to their psychological well-being as well as to their public and private relations – due to the stress, and difficulties in traveling, due to the ongoing charges against them in Libya and the defamation of their characters which would have been mitigated if the ICC had issued a statement asserting their innocence immediately instead of waiting until the Libyan accusations had been widely publicized.

17. The complainant was also subjected to continuous mistreatment by the Registrar in the period following her return from Libya. This behaviour amounts to abuse of power, bad faith and retaliation and warrants an additional award of moral damages which the Tribunal sets in the amount of 60,000 euros. The Tribunal finds that this is not a case for exemplary damages, particularly in view of the considerable efforts made by the ICC to secure the release of the complainant and her colleagues when they were detained in Libya.

18. Since the complainant succeeds, she is entitled to an award of costs, as is Mr P. L., whose application to intervene is allowed. The Tribunal sets the award of costs for Mr P. L. at 500 euros as he was not represented by a lawyer and did not need to provide extensive submissions in his application to intervene. The complainant, considering the complexity of the case, is awarded costs in the amount of 20,000 euros.

DECISION

For the above reasons,

1. The ICC shall pay the complainant moral damages in the amount of 200,000 euros.
2. It shall pay Mr P. L. moral damages in the amount of 140,000 euros.
3. It shall pay 20,000 euros in costs to the complainant and 500 euros in costs to Mr P. L.
4. All other claims are dismissed.
5. Mr K.'s application to intervene is dismissed.

In witness of this judgment, adopted on 10 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ