

CSAT APL /20 (No 1)

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IN THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the matter of

JULIUS NDUNGU KABERERE

Applicant

AND

THE COMMONWEALTH SECRETARIAT

Respondent

Before Mr Christopher Jeans QC, President

RULING ON APPLICATION (EX PARTE) TO REDACT JUDGMENT

RULING

The judgment shall not be redacted

REASONS

(A) Background: Mr Kaberere's application

1. On 26th July 2013 the Tribunal issued its judgment dismissing Mr Kaberere's claims. The judgment was published on the Tribunal's website.

2. On 26th September 2013 Mr Kaberere requested a review of the Tribunal's judgment. I directed that a panel be established to conduct the review. Such a panel has now been convened. It comprises five members of the Tribunal who were not party to the judgment. The panel is scheduled to conduct the review in March 2014.

3. On 11th December 2013 Mr Kaberere wrote to me as follows:

"I have become aware that CSAT has now published on its webpage the Judgment in Julius Kaberere v Commonwealth Secretariat. I therefore wish to make an urgent request to the Tribunal to redact the published Judgment online, so that it does not bear my full names but rather my initials "JK" as per the established practice within CSAT and other International Administrative Tribunals.

As currently published, the Judgment has the effect of scaring away my potential employers, who themselves will not have the benefit of a deeper explanations [sic] of all the issues contained thereof. In any case I am in the process of finalising my application for review by the five Judge Review Panel that you have agreed to constitute and saw no reason for an early publication of the judgment before my review is heard and determined.

I therefore hope you and CSAT consider my request to have this redacted if it must be published at this time."

(Emphasis and underlining are in the original)

4. I will refer to the application in Mr Kaberere's letter as "the application to redact"

(B) Statute, Rules and Procedure

5. The Statute and Rules of the Tribunal contain no material provisions dealing with the identification of parties or the redaction of judgments.

6. Rule 23 provides that the Tribunal, or when the Tribunal is not in session, the President, "*after appropriate consultation with the members of the Tribunal, and in the interests of justice may.... deal with any matter not expressly provided for in the present Rules*".

7. Since the Tribunal is not in session, it is for me to deal with the application to redact "*after appropriate consultation with the members of the Tribunal*"

Consultation process

8. It appeared to me to be appropriate to consult all the members of the Tribunal who remain in office in relation to the application to redact.

9. I considered whether those members appointed to the review panel should be included in the consultative process.

10. I decided that they should be included for the following reasons:

(i) The issue raised by Mr Kaberere raises important questions of principle and practice for the Tribunal as a body. I was keen to have the views of as many members as might wish to contribute.

(ii) There are seven individuals (including myself) who are current members of the Tribunal. Excluding the five members who are to sit on the appeal panel would, to say the least, have severely truncated the process.

(iii) There is no prejudice to Mr Kaberere or to the Secretariat in involving the review panel members in the consultation process.

11. I also considered whether the consultation, or a ruling following the consultation, should await the hearing or decision of the Review panel. I decided that it should not.

12. Mr Kaberere understandably seeks an early ruling on the issue. I could see no advantage in delaying either the consultative process or ruling and no prejudice to Mr Kaberere or the Secretariat in proceeding with either.

13. I am extremely grateful to all the Tribunal members who have expressed their views to me.

14. It is appropriate to record that here was a strong consensus on the matter. and that no dissenting views were expressed.

Substance

15. There is no general principle of the law of international organisations which requires that parties' names be redacted from judgments or otherwise anonymised.

16. Some International Administrative Tribunals use numbers, rather than names, as the titles to their judgments. Others use names. The practice of this Tribunal has not been entirely consistent through its history; but the issue does not appear to have been previously addressed in principle. Mr Kaberere's application has made it appropriate now to address it.

17. In the absence of any relevant provision in the Tribunal's governing Statute or Rules, or any general requirement of the law of international organisations, the starting point must be "open justice". Open justice entails that judgments should be available for examination by the public and that the identities of parties (or of others who feature in the judgments) should not be redacted or anonymised unless there is a special justification for doing so.

18. I would not purport to lay down prescriptively a list of special justifications for redaction. Potentially they might include, by way of example only, national security, inter-governmental or commercial confidentiality and respect for private life.

19. Plainly the Tribunal would need to take account of international human rights both in identifying potential justifications and in conducting "balancing exercises" which might arise.

20. Mr Kaberere's application to redact does not raise any factor which could qualify as a special justification.

21. His expressed concern is that the published judgment may have the effect of discouraging potential employers from engaging him.

22. I very much hope that this will not be so. It is, however, one of the ordinary hazards of litigation in the democratic world that unfavourable judgments, and unfavourable findings within those judgments, may come to wider notice. It is not a ground for redacting the name of a party (or, I would add, the name of others who feature in a judgment) that there may be reputational consequences.

23. Mr Kaberere's secondary point is that the review is pending and that there is "no reason" for what he describes as "early publication" of the judgment pending that review.

24. However the judgment was not published "early". It was published after promulgation in the ordinary way.

25. There is no general principle that judgments should not be published, or identities revealed, merely because a review process (or some similar process in the nature of an appeal) may potentially be triggered, or because such a process is in fact pending.

26. On the contrary, the principle of open justice entails that publication should not be delayed pending an actual or possible review unless special justification exists. No special justification exists here.

Timing

27. A further feature of the present case is that Mr Kaberere's application to redact was made only after the judgment was published on the website.

28. I have rejected Mr Kaberere's application on the basis set out above that there is no special justification for granting it. I have not rejected it because of its timing.

29. I should, however, record that in a case where a special justification for redaction did exist, consideration would need to be given to the timing of the application. If the judgment had already been published at the time of application, the Tribunal would have to consider the reasons for, and effect of, the delay in applying and specifically whether the application should be refused because it had been made too late.

30. In future, any litigants who wish to seek some form of redaction or anonymisation would be well advised to make their applications at an early stage and not to delay them until after publication of the judgment.

31. I re-iterate however, that the ruling in this case is made as a matter of principle and not by reference to the timing of the application.

CHRISTOPHER JEANS QC, President

23rd February 2014