ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

ORDER No. 2019-1

Ms. "PP", Applicant v. International Monetary Fund, Respondent (Applicant's Request for Provisional Relief and Respondent's Motion to Dismiss in Part)

The Administrative Tribunal of the International Monetary Fund,

- considering that on August 12, 2019, Applicant filed an Application with the Administrative Tribunal, which included a Request for Provisional Relief;

- considering that on August 19, 2019, the parties were advised that the President of the Administrative Tribunal, pursuant to Rule XXI, paras. 2 and 3,[1] had decided to modify the application of the Rules of Procedure to provide for an expedited exchange of preliminary pleadings to facilitate the Tribunal's decision on Applicant's Request for Provisional Relief (along with related Requests for Production of Documents and for Anonymity) in advance of its disposition of the merits of the Application;

- considering that on September 4, 2019, Respondent filed (a) a Response to Applicant's Requests for Provisional Relief, Production of Documents and Anonymity ("Fund's Response"), and (b) a Motion to Dismiss in Part ("Fund's Motion");

- considering that on September 12, 2019, Applicant filed a Comment on the Fund's Response and the Fund's Motion ("Applicant's Comment");

- considering that on September 26, 2019, Respondent filed a Further Comment on Applicant's Comment ("Fund's Further Comment"), which was transmitted to Applicant for her information;

- considering that on October 2, 2019, Applicant sought to file a Comment on New Evidence Produced by the Fund on September 26, 2019 ("Applicant's Comment on New Evidence"), and Respondent was afforded an opportunity to respond to that submission, as to both its admissibility and its contents;

[1] Rule XXI provides in pertinent part:

> 2. The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder.
>
> 3. The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules.

- considering that on October 9, 2019, Respondent submitted a Response to Applicant's Comment on New Evidence; and

- having considered the arguments of the parties, while meeting in session,

unanimously adopts the following decision:

INTRODUCTION

1. In her 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). The HRD Director further decided, as a "disciplinary" measure, 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. In addition to the "disciplinary" decision, the HRD Director took another decision, characterized by the Fund as an "administrative" decision. That 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. That 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."

3. Applicant challenges both the "disciplinary" and the "administrative" decisions. It is in respect of the "administrative" decision that Applicant's Request for Provisional Relief arises. Likewise, it is Applicant's challenge to the "administrative" decision that Respondent seeks to dismiss by its Motion to Dismiss in Part.

APPLICANT'S REQUEST FOR ANONYMITY

4. Applicant has requested anonymity, which the Tribunal may grant where "good cause has been shown for protecting the privacy of an individual." (Rules of Procedure, Rule XXII.) Applicant notes that anonymity traditionally has been granted in misconduct cases. Respondent supports Applicant's request for anonymity, given that the case involves allegations of misconduct on the part of Applicant, as well as matters of personal privacy involving members of Applicant's household.

5. Shielding the identities of persons involved in disputes concerning "alleged misconduct . . . or matters of personal privacy such as health . . . or family relations" is a core ground for granting anonymity to applicants pursuant to Rule XXII. *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 14; *see also Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 11 (challenge to fairness of misconduct proceedings); *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 20 (challenge to misconduct decision).

6. The instant case involves a challenge to a misconduct decision, and the evidence to be brought out in it has implications for the personal privacy of Applicant and other persons. For these reasons, the Tribunal grants Applicant's request for anonymity.

ADMISSIBILITY OF APPLICANT'S COMMENT ON NEW EVIDENCE

7. On October 2, 2019, Applicant sought to file a Comment on New Evidence. That submission develops argumentation based on documents provided by the Fund as part of its Further Comment of September 26, 2019, and it also responds to the Fund's request to strike a document from the record. (*See* below.) Respondent was afforded an opportunity to respond to Applicant's submission, as to both its admissibility and its contents.

8. On October 9, 2019, the Fund submitted a Response to Applicant's Comment on New Evidence. Respondent states that it does not object to Applicant's commenting on the later produced documents. At the same time, it asks the Tribunal to disregard portions of Applicant's Comment on New Evidence that relate to the merits of the challenged disciplinary decision, which will be the subject of further pleadings on the merits of the case.

9. The Tribunal concludes that it will take account of Applicant's Comment on New Evidence and the Fund's Response to it, insofar as these pleadings inform the decisions to be taken in this Order.

APPLICANT'S REQUESTS FOR PRODUCTION OF DOCUMENTS AND RESPONDENT'S REQUEST TO STRIKE A DOCUMENT FROM THE RECORD

10. In her Application, Applicant made three Requests for Production of Documents. To facilitate decision on Applicant's Request for Provisional Relief, the Tribunal asked the Fund to respond to Document Requests Nos. 2 and 3 as part of the expedited exchange of preliminary pleadings. Specifically, the Fund was asked: (a) whether it had any responsive documents; (b) if it had responsive documents, whether it opposed their production and on what grounds; and (c) if it did not oppose their production, to include such documents with its Response.

Applicant's Document Request No. 2

11. Applicant's Document Request No. 2 seeks: "production of all written communications, notes of conversation, and all other materials relating to the Fund's communications with any and all parts of the U.S. Government, including specifically the State Department, with regard to the situations of [Applicant] and [the current G-5 employee]." The Fund has responded that it had previously provided to Applicant (and the Grievance Committee) "all known, non-privileged materials related to conversations with the State Department regarding the situation of [Applicant] and [the current G-5 employee]." It attached these documents to its Response for the benefit of the Tribunal.

12. Subsequently, in its Further Comment, the Fund stated that in producing the documents requested in Request No. 2 it inadvertently had omitted two documents; it attached those documents to that later submission. Applicant submits that the Fund has in its possession further undisclosed documents. The Fund asserts that it has now produced all documents responsive to Request No. 2.

13. In cases in which the Fund asserts that it has no documents responsive to a request made under Rule XVII, and the applicant has not proffered evidence suggesting that such documents exist, the Tribunal ordinarily will deny the request on the ground that the applicant has not established that she was denied access to responsive documents (Rule XVII, para. 1). *See, e.g., Mr. "LL", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-1 (April 5, 2019), para. 12. In this case, the Tribunal concludes, given that the proceedings on the merits of the case shall continue, that the Fund remains under a continuing obligation to produce any documents responsive to Applicant's Document Request No. 2. This obligation includes that the Fund shall respond, in its Answer on the merits, to the document requests Applicant asserts at paragraph 17 of Applicant's Comment on New Evidence.

Respondent's Motion to Strike

14. In its Further Comment, the Fund additionally stated that it had inadvertently produced an email from an HRD official to a Fund counsel, "seeking legal advice," which it asserts is "privileged attorney-client communication." Respondent maintains that it has "not waived privilege with respect to this document inadvertently produced" and requests that the document and all references to it (including in Applicant's Comment, p. 8 and note 21) be stricken from the record. The Fund makes this request "[a]s a matter of courtesy and convention, and to defend the underlying principle" of attorney-client privilege but asserts that the document's content does not change the understanding of the facts or issues of the case.

15. Applicant, for her part, maintains that there is no basis for the Fund's request to withdraw a document already produced and submits that the document in question is "exceptionally relevant" to the question of the interactions between the Fund and the U.S. State Department in relation to Applicant's case.

16. In the view of the Tribunal, it is clear that the document in question is shielded by attorney-client privilege and there is no reason to disbelieve the Fund's claim that the document was disclosed inadvertently in the course of producing other requested documentation. In these circumstances, the document will be struck from the record. Neither the document, nor Applicant's references to it, shall be taken into consideration by the Tribunal.

Applicant's Document Request No. 3

17. Applicant's Document Request No. 3 seeks: "production of a written report on the history and scope of the Fund's G5 program, including all controversies, revocations of privileges, and any other noteworthy events, involving the Fund's G5 program." The Fund objects to Request No. 3 as overbroad, unduly burdensome, and improperly infringing on the privacy of other staff members. The Fund maintains that "neither Article X of the Tribunal's Statute nor Rule XVII of its Rules of Procedure foresees requiring the Fund to create a 'written report' as part of the discovery process. Rather," says the Fund, "the discovery process is intended for the production of existing documents and evidence. . . ." The Fund also states that it has previously produced to Applicant numerous documents responsive to the request for information on the G-5 program generally.

18. In accordance with Rule XVII, para. 2, the Tribunal may deny a request for production of documents if the "documents or other evidence requested are irrelevant to the

issues of the case, or . . . compliance with the request would be unduly burdensome or would infringe on the privacy of individuals." The Tribunal concludes that Applicant's request that the Fund create a written report on the history and scope of the G-5 program would be "unduly burdensome" in terms of Rule XVII and overbroad in seeking documentation beyond the scope of the controversy in this case. Accordingly, Applicant's Document Request No. 3 is denied.

FACTUAL BACKGROUND

19. The key facts pertinent to the disposition of the matters addressed in this Order may be summarized as follows.

20. Applicant is a staff member of the Fund, serving at its Washington, D.C. headquarters. Applicant holds a G-4 visa. G-4 visas are issued by the U.S. Government specifically to employees of international intergovernmental organizations. Applicant currently employs in her household a G-5 visa holder; that category of visa is designated for the household employees of G-4 visa holders.

21. In July 2017, Applicant briefly employed a second G-5 visa holder, while continuing to retain the first. The second employee departed the household and returned to her home country within days of arrival. Shortly thereafter, she filed complaints of unfair treatment with both the U.S. State Department and the IMF Ethics Office. The facts surrounding that G-5 employee's time within the household and the termination of the employment relationship between her and Applicant are disputed between the parties. These underlying facts and circumstances form the foundation for the misconduct decision that Applicant contests in her Application. What is important for deciding Applicant's Request for Provisional Relief and Respondent's Motion to Dismiss in Part are the facts pertaining to the taking of the "administrative" decision.

22. The G-5 visa holder's complaint to the IMF Ethics Office was investigated by the IMF Office of Internal Investigations (OII). Applicant was afforded opportunities to respond to the Notice of Investigation as part of the investigatory process. At the conclusion of that process, Applicant submitted Comments on the Report of Investigation. Thereafter, the HRD Director took her decision in the matter.

23. The operative parts of the HRD Director's decision of June 11, 2018, provide as follows:

> ***Decision on Disciplinary Action***
>
> Assuming you provide me with proof of [a contractually required] payment of the above amount to [the former G-5 employee] by June 25, 2018, the disciplinary measure I consider appropriate in the circumstances will be a formal written reprimand to remain on your personnel file for three years. I will notify you of my final decision on disciplinary action after June 25.
>
> *I had also decided to impose, as a second disciplinary measure, forfeiture of Fund support for any new G-5 employee for four years from July 24, 2017 and until you have completed*

> *management training, approved by my office, including training in how to hold difficult conversations and resolve stressful situations with employees. However, I have received information from the State Department, as described below, which requires administrative action by the Fund that makes this second disciplinary measure redundant.*
>
> ***Impact of U.S. State Department Action***
>
> As you know, [the former G-5 employee] also filed a complaint with the United States Department of State. The Department has advised me that, based on their appreciation of the facts, they have lost confidence in your ability to maintain a proper relationship with a G-5 domestic worker and that this will impact your ability to obtain a G-5 visa in future. HRD explained to the Department that the Fund's investigation found no evidence suggesting unfair treatment of your current G-5 employee . . . . The Department in turn explained that their practice is not to authorize a G-5 visa in future where there is any evidence of non-compliance with any G-5 program requirements. They also indicated that they consider it would adversely affect the Fund's reputation for a Fund-supported G-5 employee to remain in your employment.
>
> Due to the position communicated to us by the State Department, I am obliged to make the following decisions in the interests of the Fund:
>
> i. I must direct you to end [the current G-5 employee]'s employment in your household no later than September 10, 2018.
>
> ii. The Fund will not be able to support applications made by you for a G-5 visa in future.
>
> It is important to understand that the two decisions immediately above are administrative, and not disciplinary, in nature.
>
> [The current G-5 employee] remains free to seek work as a G-5 employee in another household. The Fund is ready to assist her in advertising her services on the World Bank Bulletin Board and should she wish to do so, she should contact . . . .

(Emphasis added.) In a follow-up decision of July 24, 2018, the HRD Director, on the basis of Applicant's having paid the former G-5 employee a "contractually required payment," implemented the written reprimand on Applicant's personnel file for a period of three years as the "final decision" as to the "disciplinary" measure.

24. As to the "administrative" decision, although the HRD Director's June 8, 2018, decision directed Applicant to end the current G-5 employee's employment "no later than September 10, 2018," the HRD Director has suspended that decision a number of times.

According to the Fund, the current employee's G-5 visa had already expired in April 2017, but she is permitted to remain in the United States under an I-94 Form, which remains valid until November 4, 2019. The Tribunal 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.

CHANNELS OF ADMINISTRATIVE REVIEW

25. On October 2, 2018, Applicant sought reconsideration by the HRD Director of the misconduct decision, based on what she contended was material new evidence. That request was denied on October 19, 2018.

26. On November 27, 2018, Applicant filed a Grievance with the Fund's Grievance Committee, challenging the finding of misconduct against her and the HRD Director's "disciplinary" and "administrative" decisions. Applicant's Grievance sought, as provisional relief, suspension of the decision that Applicant terminate the employment of her current G-5 employee during the pendency of the Grievance Committee proceedings.

27. On June 8, 2019, the Grievance Committee rendered a decision granting a motion by the Fund to dismiss, for lack of jurisdiction, that portion of the Grievance challenging the decision to bar Applicant from employing G-5 employees, including the current employee. The Grievance Committee concluded that it followed that Applicant's request for provisional relief, i.e., to suspend that decision during the pendency of the Grievance Committee proceedings, must be denied. The Committee additionally opined that, in any event, Applicant had not shown that she would suffer "irreparable harm" as required for granting interim relief. The Grievance Committee did not address the merits of the underlying misconduct case against Applicant.

28. Following the Grievance Committee's decision, the HRD Director again suspended implementation of the decision that Applicant terminate the employment of her current G-5 employee, pending consideration by the Administrative Tribunal of a request for provisional relief, if such request were filed by August 12, 2019.

29. On June 25, 2019, the parties agreed, pursuant to Article V(4)[2] of the Tribunal's Statute, to bring the case *in toto* directly to the Tribunal, and the case was formally removed from the Grievance Committee docket.

30. On August 12, 2019, Applicant filed her Application with the Administrative Tribunal. The decision that Applicant terminate the employment of her current G-5 employee accordingly remains suspended until the Tribunal rules on the Request for Provisional Relief.

APPLICANT'S REQUEST FOR PROVISIONAL RELIEF

31. Applicant requests that the Tribunal grant provisional relief in the form of an order:

> (1) prohibiting the Fund from requiring [the current G-5 employee]'s dismissal from [Applicant]'s home during the

[2] Article V(4) provides: "For purposes of this Statute, all channels of administrative review shall be deemed to have been exhausted when the Managing Director and the applicant have agreed to submit the dispute directly to the Tribunal."

> 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.

Applicant contends 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."

32. Applicant asserts that "*she, and her G5 employee* . . . , will suffer irreparable injury as a result of the Fund's challenged decision, as 'irreparable' is understood pursuant to the Fund's official Commentary on Article VI(4), if provisional relief is not urgently granted." (Emphasis added.) Applicant states that, in the absence of the provisional relief she seeks, the G-5 employee will be sent back to her home country "without a job, or any particular job prospects." Applicant also states that the employee "[d]espite substantial effort" has not been able to secure a comparable replacement position with another G-4 household in the Washington area. Applicant asserts that the G-5 employee's "avoidable banishment to poverty" is a "textbook example of irreparable harm." Applicant further submits that Applicant's children will "have their beloved nanny removed from their home" and that "[h]arming children is another textbook example of irreparable harm."

33. Respondent, for its part, maintains that the Tribunal does not have jurisdiction over Applicant's challenge to the decision that she seeks to have suspended because the decision was effectively made by the U.S. Government rather than by the Fund, and that, in any event, Applicant has not shown "irreparable harm" in the absence of the requested relief. Respondent additionally asserts that harm will arise to the Fund, and to other staff members, because further extension of the current G-5 employee's stay in the United States may place the Fund's entire G-5 program in jeopardy. Respondent cites a Diplomatic Note of the U.S. Secretary of State warning international intergovernmental organizations that if G-5 program requirements are not met, the U.S. Government may "suspend participation in the program by declining to accept pre-notification requests of upcoming domestic workers for the mission member, or for all members of the mission if warranted by the circumstances." (U.S. Secretary of State Diplomatic Note, September 19, 2018.)[3] The Fund maintains that the "Tribunal is required to take the consequences of any provisional relief into account, [citing Commentary on the Statute, p. 27] and the consequences in this instance could be wide-ranging and significant."

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[4] on

[3] The Diplomatic Note is consistent with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which it references. Respondent additionally includes evidence that the State Department has decided to "temporarily hold off domestic worker registration renewal appointments" with respect to G-5 visa holders employed by Fund staff members, while the Fund complies with a requested review of all current G-5 contracts and wages.

[4] 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 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." 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.

35. The Tribunal has not previously found ground to order provisional relief. *See Mr. "KK", Applicant v. International Monetary Fund, Respondent (Requests for Provisional Relief)*, IMFAT Order No. 2015-1 (November 13, 2015) (denying requests for provisional relief where requests did not seek suspension of any decision contested in the Tribunal); *Mr. "LL", Applicant v. International Monetary Fund, Respondent (Suspension of the Pleadings and Denial of Provisional Relief)*, IMFAT Order No. 2016-1 (June 28, 2016) (denying provisional relief where applicant failed to show irreparable harm). In *Ms. "NN", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2017-2 (December 11, 2017), paras. 9-14, the applicant sought an order that the Fund maintain her G-4 visa status during the pendency of her Tribunal case and for a "reasonable time" thereafter. The Tribunal decided that the applicant's request for provisional relief was premature, given the Fund's discretionary decision to extend her administrative leave without pay and, consequently, her G-4 visa status. In the circumstances, the Tribunal concluded that it was inappropriate to render a decision on Applicant's request for provisional relief at that juncture. The parties in *Ms. "NN"* disputed the applicability in the circumstances of the case of a staff rule providing

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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).

for extension of leave without pay pending decision on an appeal of termination of appointment.

36. The following questions arise: 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?

37. The Tribunal observes that the second prong of Applicant's Request for Provisional Relief, that is, that the Tribunal order the Fund to "secure all necessary visa actions by the State Department" to permit her current G-5 employee to remain in Applicant's employment during the pendency of the Tribunal proceedings, does not seek suspension of a decision contested in the Tribunal. On that ground, the Tribunal denies that part of Applicant's Request for Provisional Relief.

38. The first prong of Applicant's Request for Provisional Relief, that is, to suspend the Fund's decision that Applicant terminate the employment of her current G-5 employee during the pendency of the Tribunal proceedings, plainly does seek suspension of a decision contested in the Tribunal. Respondent, however, disputes that that challenge is properly before the Tribunal. That is the purport of the Fund's Motion to Dismiss in Part.

39. The Tribunal observes that potential obstacles stand between Applicant and the extraordinary measure she seeks, including the possibility that the Tribunal does not have jurisdiction over the decision she contests. The Tribunal need not decide, however, whether Applicant is able to surmount that hurdle because the Tribunal concludes that she has 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.

40. In the view of the Tribunal, Applicant has not shown that separation of the G-5 visa holder from her employment will result in "irreparable harm" to Applicant. Applicant has been on notice for more than a year of the decision that the G-5 employee must leave her household and has had ample opportunity to make alternate employment arrangements with non-G-5 visa holders.

41. As to the question whether Applicant may assert a claim for provisional relief on behalf of the G-5 employee, the Tribunal previously has summarized the Commentary's reference to provisional relief as follows: "[I]f an applicant could show that, in the absence of interim measures, implementation of the contested decision *would cause him or her* irreparable harm during the period between the filing of an application and the rendering of the Tribunal's Judgment, the Tribunal could grant provisional relief." *Mr. "LL"*, Order No. 2016-1, para. 12. (Emphasis added.) The Tribunal observes that the Commentary on the Statute seems to acknowledge that the Fund's wrongful termination of employment of a *G-4 staff member* might be considered "irreparable harm," and that this possibility should be addressed in the staff rules.[5] Unsurprisingly, neither the Commentary, nor the staff rules,

[5] *See* Commentary on the Statute, p. 27 ("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."). It was in this context that the issue of provisional relief arose in the case of *Ms. "NN"*.

address the circumstance that arises in this case, i.e., loss of employment by a G-5 visa holder as a collateral consequence of a disciplinary action taken by the Fund against the G-4 employer/staff member.

42. The Fund's rules and the Tribunal's Statute concern themselves with the employment relationship between the Fund and its own staff. *See generally Ms. K. Abu Ghazaleh, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2015-2 (November 11, 2015), para. 41 ("underlying logic and purpose of the Statute . . . is to provide a judicial mechanism for the resolution of employment disputes arising between the Fund and its staff members"; dismissing for lack of jurisdiction contractual employee's challenge to element of dispute resolution process governing contractual employees). The Tribunal accordingly concludes that, in asserting alleged "irreparable harm" on behalf of her current G-5 employee, Applicant has not met the requirements for securing provisional relief as envisaged by the Commentary on the Statute.

43. For the reasons elaborated above, provisional relief is not "warranted by the circumstances" (Commentary, p. 27) of the case and Applicant's Request must be denied.

RESPONDENT'S MOTION TO DISMISS IN PART

44. In tandem with its Response to Applicant's Request for Provisional Relief, Respondent has filed a Motion to Dismiss in Part. That Motion seeks to "dismiss the portions of the case . . . that relate to the decision to terminate Applicant's eligibility to be a G-5 employer." The Fund contends that the decision concerning Applicant's G-5 eligibility is not properly before the Tribunal because it is not a decision of the Fund but rather is a decision of the U.S. State Department that the Fund cannot change. The Fund submits that Applicant's challenge is not to an "administrative act" of the Fund, as defined by Article II[6] of the Statute, and the Tribunal accordingly lacks jurisdiction over it. In Respondent's words: "[T]he Fund has not made the decision to deny use of the G5 program to Applicant: the U.S. Government has, and the Fund has no right to be in noncompliance with the U.S. Government's decision."

45. Applicant, for her part, maintains that the Fund "actively colluded with the State Department" in relation to Applicant's case, that it was the "Fund rather than the State Department which determined the outcome requiring [Applicant] to fire [the current G-5 employee]," and that the "Fund actively inculpated its own staff member before the State Department."

46. In its Further Comment, Respondent asserts that the Fund and the U.S. Government, having received separate complaints from the former G-5 employee alleging mistreatment by Applicant, came to different conclusions as to the effect those allegations should have on Applicant's eligibility to employ G-5 employees. According to Respondent, the Fund was inclined to address the finding of misconduct in a way that would have been more favorable to Applicant, that is, in a manner that would not have affected employment of her current G-5 employee, but that the decision by the U.S. Government "superseded" that of the Fund.

47. In Applicant's Comment on New Evidence, she argues that documents newly produced with the Fund's Further Comment provide additional support for the view that the

[6] Article II of the Statute limits the Tribunal's jurisdiction *ratione materiae* to challenges to the legality of an "administrative act," defined as "any individual or regulatory decision taken in the administration of the staff of the Fund."

Fund and the U.S. State Department collaborated (improperly, in her view) in the investigation of the complaints made against her by her former G-5 employee and the resulting sanctions.

Admissibility of the Motion

48. This is the first time that the Tribunal has been asked to dismiss *part of* an Application prior to a full exchange of pleadings on the merits of the case. Neither the Tribunal's Statute nor its Rules of Procedure explicitly contemplate a Motion to Dismiss *in Part*. What the Rules do state is: "Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to *dismiss the application* if it is clearly inadmissible." (Rule XII(1).) (Emphasis added.) *See also* Statute, Article X(2)(d) (Tribunal shall adopt Rules of Procedure including provisions concerning "summary dismissal *of applications* without disposition on the merits"). (Emphasis added.) There is nothing in the Commentary on the Statute to suggest that anything other than summary dismissal of an application *in toto* is contemplated. *See* Commentary on the Statute, p. 33.

49. The question is whether Rule XII excludes the possibility of filing of a Motion to Dismiss in Part. In the view of the Tribunal, there may be circumstances in which a Motion to Dismiss in part will be admissible.

50. In the instant case—in the unusual context of an expedited exchange of preliminary pleadings, fashioned under Rule XXI to facilitate the Tribunal's decision on a Request for Preliminary Relief in advance of its disposition of the merits of the Application—the Tribunal finds ground to admit the Motion to Dismiss in Part. The Tribunal so concludes because the Motion's argumentation is closely related to one of Respondent's key arguments in favor of denying Applicant's Request for Provisional Relief, that is, that the decision Applicant seeks to suspend by that Request is not a decision she may contest in the Tribunal.

Merits of the Motion

51. Turning to the merits of the Motion to Dismiss in Part, the Tribunal observes that although the Fund's Motion to Dismiss in Part is related to Applicant's Request for Provisional Relief, the Tribunal has not found it necessary to decide the essential issue raised by the Fund's Motion in order to dispose of Applicant's Request. In the view of the Tribunal, it will better serve the interests of justice to decide the issues of the case, including the relationship between the HRD Director's decision and the actions of the U.S. State Department, following a full briefing on the merits of the Application. *See Mr. "LL"*, Order No. 2016-1, paras. 5-6 (Tribunal's summary dismissal jurisprudence counsels against the piecemeal review of related claims).

52. Accordingly, the Tribunal decides to dismiss the Fund's Motion without prejudice to its raising the same arguments for dismissal in its pleadings on the merits. *See, e.g.*, *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 169 (challenge by Fund to justiciability of some claims in the course of answering others on the merits).

ORDER

For the reasons set out above:

1. Applicant's Request for Anonymity is granted.

2. Respondent remains under a continuing obligation to produce any documents responsive to Applicant's Document Request No. 2.

3. Respondent's Motion to Strike a document from the record is granted.

4. Applicant's Document Request No. 3 is denied.

5. Applicant's Request for Provisional Relief is denied.

6. Respondent's Motion to Dismiss in Part is dismissed without prejudice to Respondent's right to raise in its pleadings on the merits a challenge to the justiciability of Applicant's challenge to the "administrative" decision.

7. The proceedings on the merits shall resume in accordance with the schedule notified to the parties along with this Order.

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.
October 10, 2019