



ADMINISTRATIVE TRIBUNAL

Judgement No. 1357

Case No. 1434

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, Vice-President; Sir Bob
Hepple;

Whereas, on 7 July 2005, a former staff member of the Office of the United Nations High
Commissioner for Refugees (hereinafter referred to as UNHCR), filed an Application that did not fulfil all
the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 1 September 2005, the Applicant, after making the necessary corrections, again filed
an Application containing pleas which read as follows:

“Section II: PLEAS

- a. Reversal or rescission of the decision of the UNHCR and the [Joint Disciplinary Committee (JDC)].
- b. Reinstatement into employment ...
- c. Salary and allowances for the entire period of suspension without pay. The period amounts to 43 months (...).
- d. Indemnity in lieu of notice.
- e. All terminal benefits due to the Applicant, taking into consideration that [he] was in ... service for over 10 years (...).
- f. A written apology ... for the mistreatment and torture the Applicant suffered at the hands of the [Office of Internal Oversight Services (OIOS)].

- g. Compensation for the said mistreatment and torture.
- h. Compensation for the loss, difficulties, suffering, inconvenience and embarrassment which the Applicant has undergone since suspension in May 2001.
- i. Any other relief that the ... Administrative Tribunal may deem fit.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 6 March 2006 and once thereafter until 6 April;

Whereas the Respondent filed his Answer on 27 March 2006;

Whereas the statement of facts, including the employment record, contained in the report of the JDC reads, in part, as follows:

“Employment history

... The [Applicant] first joined UNHCR Regional Office (...) in Mombasa, Kenya, on 1 May 1992 under a special project contract as a Messenger/Clerk/Driver at the GL3 level, ending in March 1993. Effective 1 April 1994, the [Applicant] worked under a [four-month] short-term appointment as a Driver, also in Mombasa ... On 2 January 1995, the [Applicant] was granted a short-term appointment as a Clerk, also at the GL3 level. Effective 1 July 1995, his appointment was converted to [the] 100 Series (fixed-term appointment). On 1 July 1996, the [Applicant] was appointed as a Telephonist/Receptionist at the level GL3 in Nairobi, Kenya. He was later moved from that post to the Transport Section. His contract was subsequently extended for two successive periods of two years. Effective 1 January 2000, his contract was converted into indefinite appointment. The [Applicant] separated from service on 27 September 2004.

Background

... In late 1999, allegations of corruption at [the] UNHCR Branch Office in Nairobi, Kenya, began to emerge. As a result of a request by UNHCR, [OIOS] and the Kenyan police conducted an investigation of these allegations.

... From 7 March [until] 6 June 2001, the [Applicant] was placed on Special Leave with Full Pay [(SLWFP)] pending investigation of the case. The [Applicant] was suspended without pay from 7 June [until] his separation from service, effective ... 27 September 2004.

... On 19 April 2001, the [Applicant] was arrested by the Kenyan police and charged under the Kenyan Law with cheating, fraud and making murder threats as well as interfering with witnesses. He pleaded not guilty to all those charges. ...

... On 26 March 2002, UNHCR sought the advice of the Office of Legal Affairs (OLA) on whether UNHCR could begin disciplinary proceedings and issue allegations against the UNHCR staff members implicated in the Nairobi corruption scandal ...

... By memorandum dated 14 May 2002, OLA advised UNHCR to suspend disciplinary proceedings against the said staff members in view of the requirement of ensuring the safety of witnesses and successful prosecution in Kenya. OLA suggested that the issue of continuing the disciplinary cases, should the trial in Kenya take too much time, could be revisited at a later stage.

... On 13 February 2003, the [High Court of Kenya] requested that ... material be provided to the defense counsel of the [Applicant]. ...

... As of April 2003, the Inspector General's Office (IGO), UNHCR, conducted a preliminary investigation regarding the case. On 18 July ..., the IGO issued a preliminary investigation report on the case of the [Applicant], indicating that evidence suggested that he had committed serious misconduct.

... On 14 August 2003, the then Chief, Legal Affairs Section, UNHCR, requested ... advice from OLA on whether UNHCR could now proceed with the said disciplinary cases.

... By memorandum dated 14 November 2003, OLA replied that UNHCR could proceed.

... By letter dated 22 December 2003, UNHCR issued allegations of misconduct against the [Applicant].

...

... [O]n 6 September 2004, [the Applicant was informed] that the Secretary-General had decided to summarily dismiss him for serious misconduct in accordance with the second paragraph of staff regulation 10.2. ...”

On 22 October 2004, the Applicant lodged an appeal with the JDC in New York. The JDC adopted its report on 5 May 2005. Its considerations, conclusion and recommendation read, in part, as follows:

“Considerations

...

46. Regarding the [Applicant's] suspension, it bears recalling that [he] was suspended *with* pay from 7 March to 6 June 2001. [He] has not challenged either this suspension or its duration (three months). However, [he] has challenged the fact that he was suspended without pay from 7 June 2001 until his separation from service on 27 September 2004, a period of 39 ½ months. While the Panel concurs with the exceptional circumstances of the case that required the requestor to be suspended without pay, it does have reservations about the unusually long duration of the entire suspension (42 months). The Panel accepts that OLA's advice to suspend disciplinary proceedings was based on the best advice available at that time, including from the Kenyan authorities themselves. However, it would have preferred that the Organization move more swiftly in the processing of this case.

...

49. In respect of the facts upon which the Secretary-General's decision was based, the Panel finds that the large number of statements made by witnesses unrelated to one another, the proof uncovered by the IGO about files containing irregularities, and the requestor's discrepancies in responding to some of the allegations, provide an adequate basis for a *prima facie* case of misconduct to be made. While the Panel noted the requestor's declarations that he had done nothing wrong and that the entire case amounted to a conspiracy against him, it was not swayed by the evidence brought before it by the requestor and is indeed troubled by the fact that while the requestor has attempted to show insufficient evidence in respect of some of the charges made against him, he has not been able to answer all the charges. Specifically, the voluminous evidence, presented in the Preliminary Investigation Report (...) carried out by IGO, the requestor denied all the allegations made against him and indicated that he did not know the witnesses and

that he had had limited contact with the refugees. The Panel was not persuaded by his arguments as he did not submit adequate evidence to prove his assertions.

50. The Panel found no evidence of substantive irregularities in the case. In respect of other irregularities, the Panel considered very carefully the requestor's claim that he had been tortured and assaulted by persons claiming to represent the [United Nations]. This is a serious charge and the Panel spent time reflecting upon it. ... On balance, [however,] the Panel finds insufficient evidence to support the requestor's claim that he was assaulted.

...

53. On whether the summary dismissal was unlawful and disproportionate, the Panel finds that the Secretary-General does have the discretion to summarily dismiss officials in cases of misconduct. Moreover, given the seriousness of the charges and the extent of the misconduct, the Panel finds that summary dismissal was proportionate.

54. Lastly, the Panel found no evidence of arbitrariness.

Conclusion

55. In summary, the Panel has given due consideration to the weight of evidence submitted by both the requestor and UNHCR. In the Panel's view, the Secretary-General's decision to summarily dismiss the requestor on the grounds that he had committed misconduct within the meaning of staff rule 110.1 was the correct one. The Panel also concludes that the requestor failed to provide credible explanations to set aside the evidence collected against him or the conclusion reached by the Secretary-General. It agrees that the decision of the Secretary-General was based on facts and was proportionate to the seriousness of the charges.

53. At the same time, the Panel notes that the period of unpaid suspension exceeded what is provided in staff rule 110.2 (a). While the Panel empathizes with the position of the requestor regarding this issue and it would have preferred that the Organization move more swiftly in this case, however, given the fact that several United Nations bodies (OIOS, UNHCR, OLA), as well as Kenyan authorities were involved, and given the seriousness of the misconduct and the need to have the requestor removed from the premises so as not to pose a threat to UNHCR staff members or refugees, the Panel felt that the need to suspend the requestor without pay was justified as there were exceptional circumstances that warranted the Secretary-General to take such a decision.

Recommendation

54. The Panel recommends that the original decision of the Secretary-General should stand.”

On 18 May 2005, the Officer-in-Charge, Department of Management, transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JDC's findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on his appeal.

On 1 September 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The evidence against him is compromised and untruthful.
2. His due process rights were violated due to mistreatment and bias.
3. His suspension without pay was irregularly and excessively long.

4. The Respondent ignored his acquittal by the Kenyan court.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant was a valid exercise of the Secretary-General's discretionary authority.
2. The Applicant's due process rights were not violated.
3. Proceeding with the disciplinary case against the Applicant before all criminal charges pending against him in the Kenyan courts had been disposed of was proper.
4. The outcome of the Applicant's criminal charges in the Kenyan courts was not binding on the Secretary-General.
5. The investigation into the allegations against the Applicant was not improperly motivated, nor was it tainted with bias or other extraneous factors.

The Tribunal, having deliberated from 30 October to 21 November 2007, now pronounces the following Judgement:

I. The Applicant entered the service of UNHCR on 1 May 1992, as a GL3 level Messenger/Clerk/Driver, UNHCR Regional Office, Mombasa, Kenya. After serving on various contracts, effective 1 July 1995, his appointment was converted to the 100 Series. At the time of the events which gave rise to his Application, he was serving in the Transport Section, UNHCR Branch Office, Nairobi.

In late 1999, allegations of corruption at the Nairobi Branch Office emerged. At the request of UNHCR, OIOS and the Kenyan police launched an investigation. The Applicant's name was connected with allegations of cheating and extortion and later, threats, including death threats, made against staff members and potential witnesses.

On 7 March 2001, the Applicant was placed on SLWFP pending investigation of the case, and the paid suspension was extended until 6 June. On 19 April, the Applicant was arrested by the Kenyan police and charged with a series of crimes. Thereafter, he was suspended without pay and remained in that status until his separation from service on 27 September 2004.

On 14 May 2002, OLA advised UNHCR to suspend disciplinary proceedings against the Applicant while the criminal proceedings were underway, in part because of concerns about the safety of witnesses should their identity be disclosed to the Applicant. On 13 February 2003, however, the High Court of Kenya instructed that material requested by the Applicant's criminal defense attorney, including witness identification, be provided to the Applicant's counsel, thus rendering moot any such concerns. In light of the disclosure of such information to the Applicant, through his counsel, UNHCR commenced the investigation process. In April, the IGO began to conduct a preliminary investigation. In its report dated 18 July, it indicated that evidence suggested that the Applicant had committed serious misconduct.

In response to a request dated 14 August 2003 from UNHCR as to whether it could proceed with disciplinary proceedings, on 14 November, OLA responded in the affirmative. On 22 December, UNHCR issued allegations of misconduct against the Applicant. The Applicant provided comments on the allegations but, on 6 September 2004, he was advised that the Secretary-General had decided to summarily dismiss him for serious misconduct in accordance with staff regulation 10.2. On 22 October, he appealed this decision to the JDC. In its report dated 5 May 2005, the JDC upheld the Secretary-General's decision, finding that it was "based on facts and was proportionate to the seriousness of the charges" and concluding that "the [Applicant had] failed to provide credible explanations to set aside the evidence collected against him or the conclusion reached by the Secretary-General". The JDC registered its concern regarding the lengthy period of suspension without pay, noting it "empathize[d] with the position of the [Applicant] regarding this issue and ... would have preferred that the Organization move more swiftly in this case", but concluded that the suspension was justified by "exceptional circumstances", "given the fact that several United Nations bodies (OIOS, UNHCR, OLA), as well as Kenyan authorities were involved, and given the seriousness of the misconduct and the need to have [the Applicant] removed from the premises so as not to pose a threat to UNHCR staff members or refugees". Accordingly, the JDC recommended that the decision to summarily dismiss the Applicant be maintained. On 18 May, the Applicant was advised that the Secretary-General agreed with the JDC's conclusions and recommendation. On 1 September, the Applicant filed his Application with the Tribunal.

II. The Applicant appeals the decision of the Secretary-General to summarily dismiss him from service. He claims that the summary dismissal was unwarranted by the facts, that it was improperly motivated, procedurally deficient and taken in disregard of his rights to due process. He also appeals the decision by the Secretary-General to suspend him without pay for more than three years.

III. The Tribunal will first address the issue of summary dismissal, a disciplinary sanction. In its longstanding jurisprudence on the issue of disciplinary measures, the Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and ... its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision". (See Judgements No. 210, *Reid* (1976), para. III; and No. 300, *Sheye* (1982), para. IX.) In disciplinary cases, the Tribunal examines, inter alia:

- (i) whether the facts on which the disciplinary measures were based have been established;
- (ii) whether they legally amount to misconduct or serious misconduct;
- (iii) whether there has been substantive or procedural irregularity;
- (iv) whether there was an improper motive or abuse of discretion;
- (v) whether the sanction is legal; and,

- (vi) whether the sanction imposed was disproportionate to the offense. (See Judgements No. 890, *Augustine* (1998); and No. 941, *Kiwanuka* (1999).)

IV. In the instant matter, the JDC conducted a full hearing on the issue at hand on 20 April 2005. Counsel for the Applicant was present and the Applicant, the Representative of the Secretary-General and a UNHCR Legal Officer participated via video-conference. The JDC considered at great length the complicated aspects of this case. The panel concluded that the Organization had made a *prima facie* case against the Applicant for serious misconduct and that the Applicant had failed to provide adequate evidence to rebut the Organization's charges. Specifically, the panel concluded that:

“[i]n respect of the facts upon which the Secretary-General's decision was based, the Panel finds that the large number of statements made by witnesses unrelated to one another, the proof uncovered by the IGO about files containing irregularities and the [Applicant's] discrepancies in responding to some of the allegations, provide an adequate basis for a *prima facie* case of misconduct to be made. While the Panel noted the [Applicant's] declarations that he had done nothing wrong and that the entire case amounted to a conspiracy against him, it was not swayed by the evidence brought before it by [him] and is indeed troubled by the fact that while [he] has attempted to show insufficient evidence in respect of some of the charges made against him, he has not been able to answer all the charges. Specifically, the voluminous evidence, presented in the Preliminary Investigation Report ... carried out by IGO, the [Applicant] denied all the allegations made against him and indicated that he did not know the witnesses and that he had had limited contact with the refugees. The Panel was not persuaded by his arguments as he did not submit adequate evidence to prove his assertions.”

The JDC found no substantive irregularities in the case and specifically found no merit in the Applicant's charge that he had been tortured by OIOS. The Panel noted that UNHCR had no record of any charge being brought to its attention at the time of the alleged torture. The Panel also noted, *inter alia*,

“that [the Head, Human Resources Service, UNHCR,] could not have been the addressee of the [Applicant's] letter in 2002 as he had not taken up his position at that time, the lack of a contemporaneous statement made to the Kenyan police by the [Applicant], the fact that the signed statement made by the [Applicant] to the IGO investigators in 2003 made no mention of this assault, and the questionable nature of the doctor's certificate of the [Applicant's] injuries”.

The JDC concluded that the Applicant had failed to prove that the decision to summarily dismiss him was the product of improper motives or abuse of power or that it was based on arbitrariness. Finally, the JDC concluded that the sanction imposed by the Secretary-General was neither unlawful nor disproportionate, given the serious nature of the Applicant's conduct.

The Tribunal finds no basis for disputing the findings of the JDC. It is impressed with the careful and thorough way in which the panel considered the facts and the legal issues, and the Tribunal agrees with the conclusions reached by the JDC. Therefore, the Tribunal finds that the summary dismissal of the Applicant was both appropriate and proportionate to his conduct.

V. The Tribunal turns now to the issue of the Applicant's suspension without pay, pending disciplinary proceedings.

The provisions of staff rule 110.2 govern suspension during investigation and disciplinary proceedings in the following terms:

- “(a) If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate. The suspension shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.
- (b) A staff member suspended pursuant to paragraph (a) shall be given a written statement of the reason for the suspension and its probable duration.
- (c) If a suspension pursuant to paragraph (a) is without pay and the charge of misconduct is subsequently not sustained, any salary withheld shall be restored.”

Administrative instruction ST/AI/371, dated 2 August 1991, entitled “Revised Disciplinary Measures and Procedures”, further provides that “as a general principle, suspension may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible”.

VI. In Judgement No. 1182, *Njuki* (2004), the Tribunal held:

“The Tribunal is of the opinion that the Staff Regulations and Rules provided this period of 90 days having considered it to normally be sufficient time in which to conduct and conclude an investigation into allegations which are serious enough in nature so as to warrant suspension from duty. Furthermore, it was envisaged that such suspension from duty would normally be with pay.”

However, the Tribunal has upheld the Administration's decision to suspend a staff member without pay in exceptional circumstances, albeit noting that the “decision to suspend a staff member without pay is a harsh measure”. (See Judgement No. 994, *Okuome* (2001).) In *Kiwanuka* (*ibid.*), the Tribunal held:

“The Tribunal is of the view that, in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member should be paid unless there is proof of exceptional circumstances. The discretionary authority of the Respondent to suspend without pay in exceptional circumstances is not absolute and must function within the requirements of due process and the pertinent rules and regulations (Judgement No. 388, *Moser* (1987)).”

The Tribunal has also upheld the Administration's discretion to exceed the period of three months provided for in staff rule 110.2 (a), finding that “although the staff rule speaks of suspensions ‘normally’ not exceeding three months, it is plain that a suspension may be for a longer period if the nature of the investigation so requires”. (See Judgement No. 615, *Leo* (1993).) However, the Tribunal “has emphasized

the significance of the Respondent's providing a reason when extending the suspension for more than three months. (Cf. Judgement No. 4, Howrani (1951).)" (See Judgement No. 987, *Edongo* (2000).)

In *Edongo (ibid.)*, the Tribunal addressed the Applicant's claims that the Respondent's decisions to suspend him for a total of five months, with pay, "were procedurally irregular since the Respondent failed to establish the requisite grounds necessary to impose a suspension under staff rule 110.2 and ST/AI/371". The Tribunal dismissed the Applicant's contention "that the Administration failed to demonstrate or inform him of the reasons for the extended suspension", finding

"[t]he record does indicate that the Applicant was informed that the reasons for the extended suspensions were not only based on the fear that if the Applicant was at the workplace there was a risk of evidence being destroyed or concealed but also that additional time was required to complete the investigation".

The Tribunal concluded in *Edongo*, that

"the Respondent did not take excessive time in carrying out its investigation, which included seeking and obtaining the necessary responses from the appropriate parties and deliberating thereon. It is clear that the five-month suspension of the Applicant was not undue and irregular and was warranted in the circumstances."

Similarly, in Judgement No. 1175, *Ikegame* (2004), the Tribunal disagreed with a conclusion of the JDC that the Applicant's 13 month suspension with pay was unwarranted, in the following terms:

"The Tribunal notes that at the time of the suspension, the Applicant had already admitted her alteration of [a] cheque ... This was reason enough for the Respondent to be concerned about allowing the Applicant to encumber the D-1 post to which she had recently been promoted, as the Applicant would be in a position of leadership and responsibility. In that position, her admitted forgery was sufficient reason to have shaken the Respondent's confidence in her ability to comport herself with the honesty and integrity expected of all United Nations staff members and particularly of such a high ranking staff member. Although the Tribunal notes that while the 13 month suspension was significantly longer than the three months normally intended under staff rule 110.2, *the Applicant suffered no financial harm as a result*. While the Tribunal recognizes that the Applicant may have been stigmatized by such a lengthy suspension, it notes that her improper conduct – the alteration of the cheque, which she admits – was the basis for the suspension, and having chosen to alter the cheque in violation of the United Nations standards, rules and regulations, the Applicant cannot be heard to complain about the foreseeable consequences, which included suspension." (Emphasis added.)

VII. In both *Edongo* and *Ikegame*, however, the Applicants were suspended with pay. Where a staff member is suspended without pay, the Tribunal has critically scrutinized both the decision and the duration of the suspension.

In *Kiwanuka (ibid.)*, the Applicant was initially suspended without pay on 1 July 1996. In April 1997, his suspension was converted to suspension with pay, retroactive to 1 December 1996. He was thus ultimately suspended without pay for a period of five months. The Tribunal found that

"the Respondent's decision to suspend the Applicant's salary for an extended period of time was unjustified. The qualifying factors surrounding the investigation made it clear that there were no

circumstances which could be categorized as exceptional. The Respondent failed to take measures expeditiously to resolve the matter. The Applicant's continued suspension from duty without pay was unnecessary. As a result, the Applicant was denied his right to due process."

Whilst the Tribunal in *Kiwanuka* upheld the Respondent's decision to summarily dismiss the Applicant for serious misconduct, it found that his "unjustifiably prolonged suspension of duty without pay ... amounted to a denial of due process", for which it awarded compensation of six months' net base salary.

Equally, in *Okuome (ibid.)*, the Tribunal concluded that as "the Applicant failed to meet the highest standards of integrity required by a staff member and ... his conduct constituted serious misconduct", "the Secretary-General did not violate [his] due process rights by summarily dismissing him". However, the Tribunal awarded the Applicant compensation of three months' net base salary "in light of the Respondent's prolonged delay in concluding the disciplinary proceedings while keeping the Applicant suspended without pay". In that case, the Applicant was suspended with full pay until 3 May 1995, the date on which he was charged with misconduct, from which date onwards he was suspended without pay until 11 April 1996, when he was summarily dismissed; a period slightly in excess of eleven months. According to the Tribunal:

"While the Tribunal finds that the allegations of serious misconduct warranted a thorough investigation, and notes that the findings of the audit investigation led to the suspension of 25 staff members in addition to the Applicant, it finds that the time taken to complete the disciplinary proceedings was exaggerated and unduly prolonged. The fact that 25 other staff members were involved does not justify keeping the Applicant without means of support for such a lengthy period of time." (See *Okuome (ibid.)*.)

Finally, in *Njuki (ibid.)*, the Tribunal criticised the Applicant's suspension without pay for a period of almost one year, finding:

"In the present case ... the Applicant was suspended from duty, without pay, for a period far exceeding that which is provided in staff rule 110.2 (a). The Respondent submitted no explanation why such a prolonged period was required. The Tribunal believes that the 90 day period specified in staff rule 110.2 (a) cannot be extended arbitrarily or without good reason, especially when the staff member is placed on suspension from duty without pay. Furthermore, the Administration's motives for any such extension are subject to consideration and scrutiny by the Tribunal."

The Tribunal upheld the Applicant's substantive claims and also awarded him "compensation equivalent to all salary and allowances to which he would have been entitled, for the entire period less the 90 days stipulated in staff rule 110.2 (a) during which [he] was suspended without pay".

VIII. In the present case, the Applicant was placed on SLWFP pending investigation of his case, on 7 March 2001. The SLWFP was extended until 6 June 2001, from which point he was suspended without pay until his separation from service on 27 September 2004. While the Tribunal has upheld suspension without pay, and suspension in excess of ninety days, as discussed above, it finds it intolerable for a staff

member to be suspended without pay for a period in excess of three years. The financial implications of such an extended suspension are extremely severe, even if, as foreseen by staff rule 110.2 (c), the charges against a staff member are not sustained and his or her withheld salary is restored. It is virtually impossible to recreate the financial situation a staff member would have been in had such suspension not taken place. In the Applicant's case, of course, staff rule 110.2 (c) is not relevant as he was not exonerated. He was left, however, without the means to support himself and unable to clear his name for an unacceptably lengthy period.

IX. When the Applicant was initially informed that he was being suspended without pay, the then Head, Human Resources Service, UNHCR, wrote to him as follows:

“OIOS has informed me that you have been charged before the Chief Magistrate with several offences, namely cheating several refugees and conspiracy to threaten to kill three of your colleagues and two officials of the United States Embassy in Nairobi, including the US Ambassador.

The conduct described in the charges appears to be of such a nature and gravity that your suspension from service is warranted. There is a danger to other staff members and a risk that evidence will be concealed or destroyed.

For the foregoing reasons, I have decided to suspend you for an initial period of one month in accordance with staff rule 110.2 (a). Your suspension shall be without pay in view of the exceptional circumstances of this case. ...”

Thereafter, the ongoing need for the Applicant's suspension was never explained or elaborated upon. The Applicant was regularly advised that his suspension was being continued, but the letters contained nothing more than the following *pro forma* statement:

“Dear [Applicant],

Further to my letter dated ..., please be advised that your suspension without pay is extended for a further period of two months.

In view of the sensitive content of the present letter, I have asked that it be hand-delivered to you and that you be requested to acknowledge receipt in writing.

Yours sincerely,
[Head, Human Resources Service, UNHCR]”

These mere iterations of the extension of the Applicant's suspension cannot be considered to provide the reasoning required to justify prolonged suspension, per *Howrani (ibid.)* and *Edongo (ibid.)*.

X. Finally, it would appear that UNHCR found the repeated extensions of the Applicant's suspension a bureaucratic irritation as, on 16 January 2003, the UNHCR Representative in Kenya sent the following memorandum to the Director of Human Resources Management at UNHCR Headquarters in Geneva:

“ ...

5. The other issue concerns how the suspensions have been handled thus far. As you know, originally, they were effected valid on each occasion for two months. At the end of each period the suspensions would be extended again a process involving email reminders to Headquarters, letters from HQs to be personally handed to and signed by the staff concerned, etc. On the latest extensions, the suspensions were for the first time extended for a period of three months. The whole process, it has to be said, is extremely cumbersome. Especially since the cases are likely to drag on even through to the end of this year, our suggestion is that the suspensions should be made effective to 31 December 2003. Obviously, should there, in the mean time, be crucial developments relevant to the duration of the suspensions, they would be altered accordingly.

...”

Thereafter, the Applicant's suspension was extended, in one personnel action, from 7 April until 31 December 2003, a period of almost nine months, or three times the period envisaged in staff rule 110.2. The Tribunal notes that when that extension expired, no action was taken until after the Applicant had been summarily dismissed. On 19 October 2004, his suspension without pay was retroactively extended from 1 January until 27 September 2004, the date of his dismissal.

The Tribunal must register its extreme concern at such a lackadaisical and even callous attitude towards procedure, the staff rules and the rights of the Applicant. Far from being concerned with the fact that one of their staff members had been suspended without pay for, at that time, a period of close to two years, UNHCR was apparently more concerned with the burdensome nature of the paperwork process required to maintain the Applicant's suspension without pay.

XI. The JDC found that the Applicant's suspension was justified by “exceptional circumstances”, in view of the number of Offices involved, the seriousness of the alleged misconduct and the need to have the Applicant removed from the premises. The Tribunal cannot agree: suspension without pay for such an extended period of time is not acceptable. Staff members, even those accused of criminal acts, are entitled to due process and, if the proceedings against them cannot be - or are not - concluded in a timely fashion, the Organization should normally bear the financial consequences of such delay.

Moreover, the Respondent's assertion that disciplinary proceedings could not be undertaken against the Applicant because the Administration did not want to disclose witness identities pending criminal proceedings is not supported by the jurisprudence of the Tribunal, which held in Judgement No. 983, *Idriss* (2000) that, under extreme circumstances, witness identities may be kept confidential:

“... When substantial grounds exist for believing that the disclosure of witnesses' identities would endanger them, the Tribunal finds that it is reasonable to protect the anonymity of such witnesses, provided that in so doing, the person accused would still have sufficient information to address meaningfully the allegations made against him. Obviously there are cases in which it is essential for the accused person to know the source of the allegations against him in order to enable him to challenge the honesty, reputation or reliability of a witness. There are also cases in which a witness must be identified so as to afford 'due process' to a person with an alibi or a

similar defence. In such cases the Tribunal is satisfied that the rights of an accused person to a fair hearing are superior to those of a person seeking anonymity. Under those circumstances the matter should not proceed unless there is disclosure of the identity of the accuser or witness as the case may be.

... The Tribunal is satisfied that no such circumstances, as outlined above, are apparent here. The accused was afforded a proper and reasonable opportunity to deal with the charges of misconduct in the course of the investigation ..., notwithstanding that certain of the names of the witnesses were withheld from him and notwithstanding that he was given limited 'extracts' from testimony rather than the full unedited records."

In any event, as from 13 February 2003, when the High Court instructed that the witness identification be disclosed to the Applicant's counsel, there was no reason why disciplinary proceedings could not immediately commence. The investigation and preliminary stages could have been completed in the interim.

Accordingly, the Tribunal, mindful of the jurisprudence it has considered in paragraph VII above, awards the Applicant compensation.

XII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant, by way of compensation, US\$ 25,000 with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

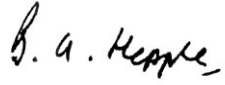
(Signatures)



Spyridon **Flogaitis**
President

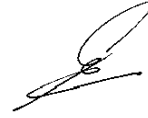


Jacqueline R. **Scott**
Vice-President



Bob Hepple
Member

New York, 21 November 2007



Maritza **Struyvenberg**
Executive Secretary