United Nations AT/DEC/1451

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1451

Case No. 1531 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas, on 3 February 2007, a former staff member of the United Nations filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 20 April 2007, the Applicant after making the necessary corrections, filed an Application containing pleas which read, in part, as follows:

"II. PLEAS

1. [R]eversal and/or [rescission] of the decision and [r]uling of the JDC [Joint Disciplinary Committee].

2. [R]eversal and/or [rescission] of the decision of the UNHCR [United Nations High Commissioner for Refugees].

3. Payment of the Applicant's [s]alary and allowances for the entire period of suspension without pay ….

4. Payment of the Applicant's [s]alary in lieu of Notice of Termination of the Applicant's employment at the date of separation ….

5. Payment of all Terminal benefits due and accruing to the Applicant [until] the effective date of [s]eparation.

6. Payment of [c]ompensation for [h]ardship, violation of due process rights and undue delay in determining the Applicant's [c]ase due to actions, inactions and decision of UNHCR."

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 22 October 2007, and twice thereafter until 21 December;

Whereas the Respondent filed his Answer on 17 December 2007;

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

> **"II. SUMMARY OF EMPLOYMENT HISTORY**
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> … The Applicant joined the UNHCR Branch Office in Nairobi as Assistant Protection Officer at the NO-A step IV level on 18 February 1998 [citation omitted] on a short-term appointment of three months. This initial appointment was extended on several occasions for short and one-year periods until 1 January 2000 when the Applicant was granted an indefinite appointment.
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> … Effective 1 February 2000, the Applicant received a salary increment based on the certification of his supervisors that his services were satisfactory and effective 7 March 2001 he was placed on Special Leave With Pay for an initial period of two months pending the criminal investigation of corruption allegations.
>
> … On 7 May 2001, following his arrest on 19 April 2001 and the filing of an initial set of criminal charges of conspiracy to commit a felony in the local court on 23 April 2001, the Applicant was suspended from service without pay for an initial period of one month [citation omitted]. The Applicant's suspension without pay was extended on multiple occasions until 7 October 2004.
>
> … Effective 9 November 2004, the Applicant was summarily dismissed and separated from the Organization for serious misconduct."
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> …
>
> **"IV. SUMMARY OF RELEVANT FACTS**
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> … Allegations of corruption at the UNHCR Branch Office-Nairobi began to emerge in late 1999. Consequently, beginning in mid-November 2000, a joint investigation was conducted by the Kenyan Police and the UN OIOS [Office of Internal Oversight Service], and information was collected regarding the allegations of corruption involving several individuals, including the Applicant. Based on that investigation, it was agreed that a more thorough investigation was required. However, due to security concerns resulting from allegations of death threats against UN staff members considered to be supportive of the investigation, it was decided that UN staff based in Nairobi should not be involved. A more thorough investigation did not begin until March 2001.
>
> … In January 2001, a general staff meeting was convened at UNHCR Branch Office-Nairobi at which the Nairobi UNHCR Representative … officially informed the staff that an investigation into corruption had been initiated and that the findings of two previous reports had proved inconclusive.
>
> … On 5 March 2001, the OIOS-led United Nations International Task Force (UNITF) began an investigation and conducted interviews with a variety of witnesses.

… On 19 April 2001, the Applicant's house was raided and searched by a squad of local law enforcement agents, OIOS officials, and members of the UNITF. The Applicant was then 'invited' to the local police headquarters to make a statement and placed under arrest according to Kenyan Police Charge Sheet No. 111/532/2001. He remained in custody until 1 May 2001.

… On 21 April 2001, the Applicant was interrogated by [an investigator] of OIOS and members of the UNITF in the presence of the Kenyan police. At the end of the session, [this investigator] reportedly instructed a Kenyan police officer to formally read the charges to the Applicant and to record his statement.

… On 23 April 2001, the Applicant was charged by the Chief Magistrate's Court with five counts of 'conspiracy to commit a felony contrary to Section 393 of the Penal Code Chapter 63 Laws of Kenya'.

… On 23 April 2001, OIOS informed UNHCR that the Applicant and two other staff members had been arrested on 19 April 2001 by Kenyan police officials who had been working with the UNITF. The OIOS further informed that the three staff members (including the Applicant) appeared on 23 April 2001 before the Chief Magistrate and were charged with conspiracy to commit a felony under Article 393 of the Kenya Penal Code by threatening to kill UNHCR and American Embassy officials in Nairobi. They were also charged with cheating under Article 315 of the Kenya Penal Code by [deceiving] refugees into paying sums of money for resettlement.

… On 4 May 2001, the Respondent indicated that the conduct of the staff members, as described in the criminal charges against them, appeared to be of such a nature and gravity that suspension from service was warranted as there was a danger to other staff members and a risk that evidence would be concealed or destroyed. The Applicant was advised that his suspension was without pay in view of the exceptional circumstances of the case against him, and that he would be informed of the allegations against him shortly, in accordance with the applicable UN procedure[s]. He was reminded that, in accordance with the Court's instruction, he was not authorized to go near the UNHCR Office and, should the court restriction be lifted, he would be allowed to enter UN or UNHCR premises only with the express permission of the UNHCR Representative.

… On 16 May 2001, the Applicant was charged by the Chief Magistrate of Nairobi with six counts of cheating contrary to Section 315 of the Penal Code Chapter 63 Laws of Kenya and 3 counts of 'attempting to cheat' contrary to Section 315 of the Penal Code as read with Section 389 of the Penal Code Chapter 63 Laws of Kenya. According to Charge Sheet No. 111/531/2001 (court file No. 851/2001), the case was presented by the Kenyan Police and the complainants were the UNHCR and several named refugees.

… On 21 May 2001, according to the Respondent, [the] Principal Magistrate (Kenya), ruled that, under Kenyan law, the three criminal defendants (including the Applicant) were not entitled to review the Prosecution's evidence against them prior to the trial.

… On 22 May 2001, the Applicant and others filed an application with the High Court for orders to stay proceedings in the lower court and for a Constitutional reference. The applications were heard and granted in June 2001 and in February 2003[,] respectively.

… On 20 June 2001, OIOS informed UNHCR that the suspended staff members had filed a civil case against UNHCR. On 25 June 2001, OIOS forwarded UNHCR documentation related to the High Court Ruling of 22 June 2001 concerning the criminal case and the applications of individual staff members to a civil court regarding their suspension and other administrative decisions taken by UNHCR.

… On 26 June 2001, UNHCR requested OLA's [Office of Legal Affairs] advice concerning the OIOS investigation into allegations of corruption against some of its Nairobi staff members and the law suit filed by some UNHCR staff members in the local Kenyan courts against UNHCR for wrongful suspension and termination.

… On 2 July 2001, OLA responded to UNHCR, confirming, *inter alia*, that UNHCR had immunity from the legal process in the local courts and that the immunity from legal process of the staff members concerned had been waived.

… On 1 November 2001, OIOS sent a letter to the UNHCR Inspector-General [IG] transmitting UNITF investigation report ID [Investigations Division] Case No. 0279/00, which included selected testimony against the Applicant. The ID/OIOS explained in the covering memorandum that it was unable to release any evidence against the Applicant because of an existing court order not to release any evidence to him or the other arrested UNHCR staff members before the trial.

… On 12 November 2001, the [IG]/UNHCR … wrote to the UNHCR Legal Affairs Section (LAS) regarding UNHCR and affiliated staff (4 UNHCR staff and 2 ARTES staff) connected with the criminal investigation in Kenya, transmitting to the Legal Office the documentation received from OIOS and suggesting the possibility of further extending the Applicant's suspension without pay, and advertising and filling his post under replacement capacity, as 'it was likely that the legal case against [the Applicant] *et al* would not be concluded in the very near future'.

… On 2 December 2001, the UNHCR Branch Office-Nairobi sought further instructions from UNHCR Headquarters on the Applicant's suspension without pay, inquiring whether extensions could be made for more than two months. At the same time the UNHCR Branch Office requested authorization to advertise the Applicant's post and to fill it under 'replacement capacity'.

… In December 2001, the UNHCR Deputy High Commissioner (DHC), [IG]/UNHCR Inspector-General, the Chief of [LAS]/UNHCR … and the Chief of OIOS met and the latter initially upheld OIOS' refusal to provide documentary evidence on the Applicant. She later agreed to send the files on the understanding that UNHCR would not use them to institute disciplinary proceedings.

… On 21 December 2001, the Secretary-General transmitted a report to the General Assembly (A/56/733) on the Investigation into allegations of refugee smuggling at the Nairobi Branch Office of the [UNHCR]. The General Assembly took note of the OIOS findings and concurred with its recommendations.

… On 1 February 2002, the UNHCR Branch Office/Nairobi reviewed the cases of the Applicant, *et al.* over and beyond the periodic extensions of the suspensions and considered whether to commence disciplinary proceedings. The Applicant was informed that his suspension without pay was extended 'in light of evidence which has been brought to [UNHCR's] attention by the [OIOS].'

… On 6 February 2002, the [LAS]/UNHCR … advised the UNHCR Branch Office that it was evaluating whether or not to begin disciplinary proceedings and would most likely revert to the Office shortly in that regard.

… On 18 March 2002, [the] Counsel to ARTES, met with the Assistant Deputy Prosecutor (ADP) (Kenya) in charge of the prosecution of the three criminal defendants, including the

Applicant. As reported by [the Counsel to ARTES], the ADP advised him that 'the sharing of evidence with the criminal defendants for the purposes of UN disciplinary proceedings would not violate Kenyan law nor interfere with the prosecution' and that 'any such evidence to the accused employees would not compromise the criminal prosecution'.

… On 26 March 2002, UNHCR requested the advice of OLA on how to proceed. From March to May 2002, UNHCR held several consultations with OIOS and OLA as to whether or not to initiate disciplinary proceedings against the Applicant, *et al.*

… On 14 May 2002, OLA responded to UNHCR's request, indicating, *inter alia:*

i. There were other important considerations which outweigh the legal conclusion and that 'the organization's first priority must be to facilitate a successful criminal prosecution of any guilty employees while ensuring the safety of all witnesses and UN employees,' notwithstanding the legal opinion of the Kenyan ADP that the UN could proceed with its disciplinary actions against [the Applicant], *et al*. and that it would not violate Kenyan Law or compromise the criminal prosecution.
ii. Under UN rules, if disciplinary proceedings are commenced, staff have the right to see the [O]rganization's evidence against them;
iii. From a purely legal standpoint, assuming that the advise of the Kenyan ADP is correct that sharing of evidence with the criminal defendants for the purposes of UN disciplinary proceedings would not violate Kenyan law nor interfere with the criminal prosecution,
iv. UNHCR should attempt to seek an agreement with the affected staff not to have their contract renewed and that no disciplinary proceedings would be brought against them, citing the UNAT cases of Emblad -No 859 (1997) and Wield, which illustrate that the Secretary-General can take action under the [S]taff [R]ules, if he considers such action justified in light of all the facts available to him.
v. It understood that it was 'complicated for UNHCR to suspend disciplinary proceedings against these staff members while awaiting the outcome of the Kenyan criminal prosecutions' and it therefore recommended revisiting these issues, if appropriate, after some additional time (for instance, six months) if it appears that there has been no substantial progress in the criminal prosecutions.

… On 16 January 2003, the UNHCR Representative in Kenya again requested authorization from UNHCR Headquarters to advertise the Applicant's post on 'a permanent basis', claiming, *inter alia*, that 'to date, the substantive trial in some of [the] cases [have not begun] because of a preliminary constitutional matter brought by the staff concerned' while 'in the case where the trials actually started, no definite conclusions [were] yet in sight'. The UNHCR Representative contended that 'given the recent OIOS decision that it [would] no longer follow up on any aspect of these or the other cases that arose from the investigations, it [was] difficult to visualize when they might ever be concluded, never mind successfully'. Accordingly, he suggested extending the suspension without pay of the Applicant, *et al*., through 31 December 2003 with a proviso that the duration might be altered should there be any 'crucial developments'.

… On 21 February 2003, the Division of Human Resources Management [DHRM]/UNHCR agreed in principle with the proposal of the UNHCR Representative and advised him that the Deputy High Commissioner would be requested 'to rescind the appointment to the National Officer post', i.e. of the Applicant, and that provision[s] should be made for his salary and associated costs to be paid against another vacant post or budget allocation, should the staff member be cleared to return to work.

… On 18 March 2003, at a meeting of the UNHCR Inspector-General and the Attorney General of Kenya, UNHCR was informed *inter alia* that it could proceed with its administrative and disciplinary proceedings vis-à-vis the four staff members concerned, including the Applicant.

The Attorney General of Kenya indicated that the proceedings could have been initiated irrespective of the court proceedings and that the evidence could be shared with the defendant.

… On 7 April 2003, the Applicant's suspension without pay was extended to 31 December 2003. A final extension was later provided until 7 October 2004.

… On 23 May 2003, the Applicant was notified that he should make himself available for an interview with two officials from the UNHCR Inspector-General's Office [IGO] in order to resolve his status and pursuant to provisions set forth in IOM 37-FOM 35 of 24 May 2002. He was reminded of his obligation to cooperate with UNHCR and its representatives as it conducted inquiries in accordance with UN staff regulation 1.2 (r). The Applicant acknowledged receipt of this notification on 24 May 2003.

… On 28 May 2003, the Applicant was interviewed by officials from the … [IGO]/UNHCR. At the end of the interview the Applicant provided the investigators with a copy of his 'Appeal for Reconsideration of My Case' dated 30 November 2001. When asked by the investigators why he had not submitted the document earlier, the Applicant explained that he was not told how to go about it.

… On 18 July 2003, the IGO/UNHCR completed its preliminary investigation of allegations against the Applicant and issued a memorandum to the Director of [DHRM]/UNHCR transmitting the preliminary investigation report INV/01/013 on the Applicant pursuant to IOM/37/2002, Field Office Memorandum-FOM/35/2002 of May 2002 and UN Administrative instruction ST/AI/371 of 2 August 1991.

… On 14 August 2003, UNHCR again sought OLA's advice as to whether it could proceed with disciplinary proceedings against the Applicant, *et al*. After consulting with OIOS, OLA confirmed to UNHCR on 14 November 2003 that they might proceed with the internal process.

… On 22 December 2003, UNHCR forwarded to the UNHCR Representative in Kenya a sealed envelope containing a confidential letter addressed to the Applicant. This letter was forwarded to the Applicant's home address by registered mail and was collected by him … in March 2004.

… On 17 March 2004, the Applicant's Counsel wrote to UNHCR confirming receipt of the report and the charges on 13 March 2004 and transmitting the Applicant's response. The Applicant did not provide any substantive response, citing the ongoing criminal action in the Kenyan court. The Applicant's attorney argued sub-judice and double jeopardy and indicated that he would continue to represent his client in seeking to have the criminal charges dismissed on that basis.

… On 14 June 2004, UNHCR recommended that the Secretary-General summarily dismiss the Applicant for serious misconduct.

… By letter of 6 September 2004, the Applicant was informed of the Secretary-General's decision to summarily dismiss him effective the date of receipt of the said letter, for which he acknowledged receipt on 11 October 2004 [citation omitted]. The Applicant was advised that he could appeal the decision in accordance with UN staff rule 110.4, and he was advised that he could request a review of the decision by a JDC in accordance with para. 24 of ST/AI/371.

… On 7 October 2004, following several unsuccessful attempts to hand deliver the notification letter to the Applicant, UNHCR sent the letter to the Applicant's home address by registered mail.

… On 8 November 2004, a Note for the File was prepared by a Senior Human Resources Assistant at the UNHCR branch office/Nairobi, wherein it was recorded that, in view of the fact that the notification letter remained uncollected at the post office for a considerable period of time, UNHCR had decided to effect the summary dismissal decision as of 7 October 2004.

… On 9 November 2004, the Applicant was notified about the need to undergo an exit medical exam or to provide a written waiver.

… On 10 November 2004, UNHCR Branch office/Nairobi approved the Applicant's Personnel Payroll Clearance Action (P.35) No. 04HA82 and his Attendance Records in connection with the Applicant's summary dismissal effective 7 October 2004 and forwarded them to UNHCR Headquarters in Geneva. On the same day the Applicant acknowledged receipt of a confidential envelope with the summary dismissal decision from UNHCR Headquarters in Geneva.

… On 12 November 2004, the Applicant's counsel … issued a letter to [the] HRO, UNHCR Branch Office in Nairobi inquiring, *inter alia*, as to the correct effective date of the summary dismissal and separation.

… On 23 November 2004, UNHCR Headquarters authorized the UNHCR [Branch Office]/Nairobi to change the effective date of summary dismissal and separation to 9 November 2004, the date of receipt of the notification letter by the Applicant according to a certificate of posting from the Post Office.

… On 3 December 2004, the date of summary dismissal was confirmed in a letter from … [the] UNHCR Branch Office, as 9 November 2004."

On 10 February and 3 June 2005, the Applicant requested that the JDC review the decision to summarily dismiss him from service. On 30 June 2006, the JDC adopted its report. Its considerations, conclusions and recommendations read, in part, as follows:

"VI. THE JDC's FINDINGS

92. The Panel was convened to consider a request to review the Respondent's decision to summarily dismiss the Applicant for serious misconduct. The Panel was guided by the jurisprudence of the United Nations Administrative Tribunal (UNAT) and, in particular, by two UNAT judgments, namely, decision no. 941 *Kiwanuka* (1999) and decision no. 1011 *Iddi* (2001). Accordingly, the Panel acknowledged the Respondent's broad discretionary authority in disciplinary matters, including but not limited to, the determination of facts which may constitute misconduct, the determination of the gravity of the misconduct and the choice of the penalty. However, the Panel also noted that the discretionary authority of the Respondent in disciplinary matters was not absolute and was to be exercised subject to the pertinent legal principles and Regulations and rules of the Organization and in strict observance of due process.

93. The Panel noted that in this type of disciplinary case, where a *review* is requested by the Applicant, the initial burden of proof in contesting the decision of the Secretary-General on the grounds that it was tainted by … substantive errors of fact and law and/or procedural irregularity rests with the individual making the allegations, i.e. former staff member/the Applicant. The Panel therefore examined the facts of the case before it and considered the contentions of both parties in light of the Staff [Regulations and Rules] and the UNAT jurisprudence (e.g. Judgment No. 515 *Khan* (1991), Judgment No. 542 *Pennacchi* (1991), Judgment No. 1011 *Iddi* (2001), UNAT judgment No. 1051 *Selebwa* (2002)).

94. The Panel noted that the UNAT has developed jurisprudence and refined definitions in reviewing the kind of quasi-judicial decision involved in the case before it. In such disciplinary

cases the Tribunal generally examines the following criteria as established in the case of Kiwanuka and reiterated in Judgments 1011 *Iddi* (2001) and *Uggla*, namely:

a. Veracity of the facts, i.e. whether the facts on which the disciplinary measures were based have been established;
b. Appropriate legal description of the facts, i.e. whether the established facts legally amount to misconduct or serious misconduct;
c. Absence of substantive irregularity, i.e. whether there has been any substantive irregularity (omission of facts or consideration of irrelevant facts);
d. Absence of procedural irregularity;
e. Absence of abuse of discretion, i.e. whether there was an improper motive or abuse of authority or arbitrariness or consideration of extraneous factors etc;
f. Legality of the penalty, and
g. Proportionality of the penalty, i.e. whether the sanction imposed was proportionate to the offence.

A. Veracity of facts and prima facie case of misconduct

95. The [JDC] reviewed the facts as presented by both parties and assessed their probative value in determining whether the Respondent has satisfied the legal requirement in presenting a sound prima facie case against the Applicant. The [JDC] first considered allegations of cheating or attempted cheating and noted that the Preliminary Investigation (PI) by OIOS/IGO reported that a number of refugees had alleged that the Applicant had offered resettlement in return for payment. The [JDC] considered the totality of the accusations and the evidence presented in support thereof and believed that, collectively, the Kenyan Police, OIOS, and [the] IGO investigations produced an extensive number of refugee interviews, file reviews and other credible evidence to demonstrate a pattern of illegal activity on the part of the Applicant. The [JDC] believed that the evidence was sufficiently detailed, credible and consistent to support the first charge against the Applicant.

96. In the absence of a convincing defense by the Applicant and based on the nature of the case, the [JDC] could not dismiss the volume of testimony from witnesses who claimed that the Applicant was involved in an illegal scheme in which he received or demanded money from refugees in exchange for facilitating their resettlement. The [JDC] found the Applicant's defense unconvincing and incomplete. There were too many unexplained decisions and circumstances surrounding several resettlement case files associated with the Applicant. His refusal to cooperate with the JDC … in reviewing the case, at his own request, was also considered significant.

97. The [JDC] also found that, even if there had been a culture of widespread corruption in the Branch Office, as alleged by the Applicant, no staff member was exempt from the obligation to maintain the highest standards of conduct. Considering the evidence presented by the Respondent, as well as the uncooperative behaviour of the Applicant, the [JDC] found that he did not demonstrate the standard of conduct to be expected from staff of the Organization. The [JDC] is unanimous in its view that the Applicant failed to demonstrate why the decision of the Secretary-General should be set aside, and he did not provide a credible alternative explanation to refute the charges against him. The [JDC] rejected his defense on the basis of the violation of the principles of sub-judice and double jeopardy.

98. The above notwithstanding, the [JDC] noted several inconsistencies in the Respondent's case against the Applicant and expressed concern that the Respondent was unable to provide the [JDC] with several pieces of evidence in support of its charges against the Applicant. The [JDC] also noted that when documents were requested, they were not always produced in their entirety or in a timely manner.

99. The [JDC] found that the interview records of some 25 refugees mentioned in the

criminal charge sheet No. 111/531/2001 contained a variety of factual and procedural inconsistencies. All the interview records were produced essentially for the criminal investigation conducted by the Joint Task Force rather than by the IGO investigators, and these statements and interview records could not be corroborated by UNHCR. Some interviews were with witnesses who remained nameless and only two out of 25 interview records were provided to the JDC.

100. With regard to the specific allegations of a felony, the [JDC] examined the Respondent's claim that there was 'direct detailed evidence**'** to the effect that the Applicant conspired with two other staff members to issue death threats. The [JDC] noted that, although Charge Sheet No. 111/532/2001 mentioned that there were 'about 20 witnesses' to this charge, in the disciplinary proceedings the Respondent cites the testimony of only one person. Furthermore, that person was interviewed twice on consecutive days by UNITF investigators, but only the second interview was included as evidence in the Applicant's disciplinary dossier. When the [JDC] obtained from the Respondent a transcript of the first interview, it discovered that the content of the two interviews varied considerably. The [JDC] noted further that this witness was not a totally disinterested party to the alleged 'conspiracy' and to the alleged corruption activities and that the Applicant provided to the investigators reasonable alternative explanation of his meeting in town with other suspended staff members. In view of all these findings, the [JDC] could not make a definitive conclusion regarding this charge against the Applicant.

101. When commenting on the Applicant's interview with the criminal investigators, the Respondent noted the Applicant's failure 'to explain large cash deposits into his savings account'. However, the dossier included no documents about the amounts of the 'large cash deposits' and/or about their implied relationship to the 'cheating' allegations against the Applicant. The JDC … requested the Respondent for the supporting evidence as to the Applicant's salary and relevant bank statements, but no documents were provided. Without such records, the [JDC] could not evaluate the veracity of the Respondent's allegation.

102. The [JDC] noted a further inconsistency regarding the timing of the criminal charges against the Applicant and others on the one hand and the OIOS' information to UNHCR about the fact on the other hand. Thus, in a fax message from UNHCR to OLA dated 26 June 2001, it is stated that on 23 April 2001 UNHCR was informed by OIOS that the Applicant and others were arrested by the Kenyan police and charged in the Kenyan Court with conspiracy and also with cheating. Furthermore, the UNHCR's letter to the Applicant dated 4 May 2001 about suspending him from service also made references to both sets of charges as justification for the Respondent's decision to suspend the Applicant. However, as evidenced by the official Police Charge Sheet 111/532/2001, the Applicant was charged with 'Cheating' only on 16 May 2001. The [JDC] therefore wondered why and on what basis OIOS informed UNHCR of [the] charge … on 22 April 2001.

103. Based on these and other discrepancies in the evidence provided by the Respondent, the JDC … expressed concern that the UN investigation into the allegations of misconduct should have been conducted more carefully and thoroughly. Transcripts and records should have been maintained for future reference based on consistent and standardized investigatory procedures.

B. Appropriate legal description of the facts

104. The [JDC] had no doubt that the allegations against the Applicant, if established in part or in total, constituted acts of serious misconduct in the context of the UN Staff Regulations and Rules and UNAT jurisprudence. Having reviewed the facts of the case, the [JDC] found the *prima facie* case sufficiently well-established despite the inconsistencies and discrepancies identified above and agreed that the Applicant did engage in serious misconduct.

105. The [JDC] agreed with the allegations of serious misconduct and the discretionary authority of the Secretary-General to order summary dismissal. It was satisfied that 'it is within the Secretary-General's discretion to determine whether a staff member has met the standards of

conduct required by the Charter and the Staff Rules and Regulations'. (Cf. Judgments No. 424, *Ying* (1988); No. 425, *Bruzual* (1988 and No. 479, *Caine* (1990)).

C. Absence of substantive irregularity

106. The [JDC] noted that substantive irregularities may include, but are not limited to, omission of facts or consideration of irrelevant facts, and that the term applies to all facts and not only to the primary facts on which the disciplinary measures were based. The [JDC] examined some of the issues [that] the parties [contend constituted] substantive irregularities and, while noting the occasional omission of facts and inclusion of irrelevant information, agreed that these irregularities were not sufficient to recommend a change in the decision of the Respondent.

107. On the issue of double jeopardy and sub-judice, the [JDC] concurs with the Respondent's argument that these issues do not apply. The [JDC] believes that, from a strictly legal perspective, double jeopardy would prohibit a defendant from being tried for a crime after having already been tried for the same crime. In this case, however, the [JDC] noted that one proceeding is before a national criminal court and the other is an internal disciplinary proceeding. The Applicant is therefore not exposed to double jeopardy even though both proceedings are based on similar facts.

108. The [JDC] agrees that the Respondent is not bound to await the outcome of the criminal proceedings in Kenya to initiate his own disciplinary action. However, it was noted that the rationale presented by OLA and OIOS for not sharing evidence with the staff member who was a defendant in a criminal case in Kenya appears to be inconsistent with UN [R]ules and practice. The Respondent's decision to initiate disciplinary proceedings was taken only after extensive delay in the criminal proceedings and following agreement by the Kenyan authorities to make the evidence available to the Accused/[the Applicant].

109. As the Respondent noted, UNAT judgments 1050 *Ogalle* (2002) and 436 *Wiedl* (1988) support the discretionary authority of the Respondent to conduct disciplinary proceedings against staff members who also face criminal proceedings based on the same facts irrespective of the court's final decision. The [JDC] is of the view that once UNHCR was convinced of the staff member's guilt, they should, in good faith and after observing the due process rights of the staff member, have expedited the disciplinary proceedings without prejudice to the criminal proceedings in the Kenyan court. The outcome of the proceedings in the Kenyan court is irrelevant to the determination of whether the staff member's conduct conformed to the standards expected of him as a staff member of the United Nations. Given the Respondent's broad discretion with regard to disciplinary matters, UNHCR should have proceeded with disciplinary action much earlier than it did. The [JDC] believes that the Secretary-General has a duty to protect the rights and interests of the staff and to place priority on the timely resolution of all disciplinary actions.

110. The [JDC] is of the view that UN and Regulations and Rules dictate that evidence must be shared with all parties, except where the JDC deems it inappropriate. The [JDC] observed that the judgment on the constitutional motion before the Kenyan courts provides that all statements, evidence and exhibits should be shared with the accused, unless there were valid grounds for non-disclosure. On a broad constitutional principle, the [JDC]believed that allowing controlled access to information would have caused no prejudice to any party and would be the right thing to do. The court held that the state is obliged to produce an accused person with copies of witness statements and relevant documents unless such non-disclosure is justified by law of state security and other reasons such as security or safety of witnesses.

111. The [JDC] noted the UNAT [Judgement No. 1246 (2005)], which concluded, based on *Idriss*, No 983 of 2000, that under normal circumstances no accusation may be made on the basis of anonymous testimony, when the accused person requires identification in order to better prepare his defense. In all cases, testimony must be gathered in such a way and contain the necessary elements in order to allow the Tribunal to reach a decision. In reaching the … decision, [in No.

1246] the Tribunal recalled its decision in *Ch'ng* #1058 of 2002, in which it found that procedural irregularities under the particular circumstances of the case should not lead to quashing the decision taken against the Applicant but ordered that the Respondent should pay the Applicant compensation.

112. The UNAT has expressed the view that, in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member should be paid while on suspension unless there is proof of exceptional circumstances. At the time of the Applicant's suspension, there was no such proof as there had been no investigation. The staff member was therefore suspended on allegations of criminal misconduct. The [JDC] found that 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 [Regulations and Rules] (Judgement No. 388, *Moser* (1987).

113. As decided in the *Wiedl* case, the Secretary-General is entitled to take into consideration the action of a national court irrespective of what that court decides. Therefore nothing prevents the Secretary-General from taking action under staff [r]egulation 10.2 if he considers such action justified. Since the decision to proceed with disciplinary proceedings is within the legitimate discretion of the Secretary-General, if he fails to exercise that discretion in a timely manner, he bears the responsibility and must be prepared to compensate staff for a violation of rights.

114. The [JDC] noted the lengthy delay of the Respondent in initiating disciplinary proceedings against the Applicant and reviewed the relevant jurisprudence of the UNAT. The [JDC] questioned the justification provided by the Administration for the delay and concluded that the extended delay was not justified. The [JDC] was particularly concerned at the substantive delay by the IGO/UNHCR in conducting its independent preliminary investigation into the alleged misconduct of the [Applicant]. The [JDC] found that, despite the criminal proceedings, UNHCR should have conducted its own preliminary investigation much earlier.

115. With regard to the Applicant's complaints concerning the conduct of the investigation and the behavior of OIOS officials, the [JDC] reviewed the Applicant's contentions in light of the available documents and relevant provisions of the ST/AI/371 and UNAT precedent (judgement 960 *Quasem*). The [JDC] found that, under ST/AI/371, the Respondent was entitled to appoint *ad hoc* investigators and investigative bodies such as a joint task force. Accordingly, the [JDC] concluded that although OIOS officials may have exhibited a heavy handed approach in their conduct of the investigation, there was no evidence to suggest that witnesses were requested to lie, as alleged by the Applicant.

D. Procedural irregularity

116. The [JDC] considered the facts of the case as related to the Applicant's contentions of procedural irregularities. Contrary to the Respondent's assertions, the [JDC] did find evidence of procedural irregularities, particularly in connection with the suspension of the Applicant. This was not, however, considered sufficient reason to overturn the decision [to summarily dismiss the Applicant].

E. The suspension

117. The Applicant argues that his suspension without pay was unjustified and improper and exceeded the Respondent's discretionary authority. The [JDC] considered staff rule 110.2, which provides that:

> '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 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'.

118. The [JDC] also considered paragraph 5 of ST/AI/371, 'Revised disciplinary measures and procedures', which provides that:

> 'On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether suspension is warranted. Suspension under staff rule 110.2 (a) is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant suspension without pay, in both cases without prejudice to the staff member's rights'.

119. The [JDC] noted the following principal contentions of the Applicant: (i) he was suspended from duty prior to being informed of the charges against him; (ii) the reasons given for his suspension changed throughout the disciplinary process; (iii) the decision to suspend him was illegal in so far as 'he did not pose a threat to any evidence or to other staff members'. The [JDC] noted that indeed a 'procedural irregularity' was committed by suspending the Applicant from duty without notifying him of the charges against him. The [JDC] concluded that the Applicant experienced hardship while waiting to be informed of such charges notwithstanding the criminal charges already against him.

120. The [JDC] relied on the UNAT judgement in case No. 1060, *Baddad* (2002) where it is stated that an Applicant seeking relief need not show evidence of injury to be compensated for violation of his due process rights. In that decision, it found significant the ILO [International Labour Organization] Administrative Tribunal Judgment No. 495, *Olivares Silva* (1982), which states: 'The first and greatest safeguard against the operation of prejudice lies in the procedural requirements which every set of staff regulations contains and whose main objective is to exclude improper influence from an administrative decision… [P]roof of prejudice is rendered unnecessary when procedural requirements have not been observed'.

121. The [JDC] considered the Respondent's reasons for suspending the Applicant without pay, among them whether the perceived nature and gravity of the criminal charges amounted to 'exceptional circumstances'. It did not accept the reason given by the Respondent for the continuous extension of the Applicant's suspension without pay and found that the Respondent had violated the provisions of [staff rule] 110.2 (a) and (b).

122. Regarding the argument that the Applicant should not have been suspended because he did not pose a threat to any evidence or to other staff members, the [JDC] noted that the ST/AI/371 qualifies this criterion by prefacing it with 'as a general rule'. Under the circumstances, the Respondent could suspend the Applicant pending determination of a disciplinary measure. It was instructive to note, however, that in November 2001, in a letter from the Chief, OIOS, to the IGO/UNHCR, the former indicated that OIOS 'does not have copies of the detailed criminal complaints specifying the charges against the five complainants but UNHCR may wish to proceed on the basis of the documents provided'. Yet UNHCR did not proceed and this caused more delay. OIOS also recommended that UNHCR should first proceed on a disciplinary course and that the Kenyan authorities be seized of the matter to be dealt with criminally. Clearly OIOS recognized the different jurisdictions and their separate responsibilities and advised UNHCR to proceed.

123. The [JDC] noted that the Respondent suspended the Applicant from service without conducting a preliminary investigation, without reviewing the facts and evidence, and without informing him of the charges of misconduct as required by [staff rule] 110.2 and paragraph 3 of the ST/AI/371. Furthermore, at the time of the decision to suspend the Applicant without pay, the Respondent promised in writing to inform him of the allegations against him within a reasonable period in accordance with the applicable UN procedure. However, the Applicant was not informed of the allegations against him until almost three years later, i.e. on 13 March 2004. Contrary to [staff rule] 110.2 (a), the Respondent extended the Applicant's suspension without pay for over

two years without providing a reason or formal charges of misconduct. While keeping the Applicant suspended without pay, the Respondent also suspended the UN disciplinary proceedings. The [JDC] concluded that the Applicant had been unjustly treated by the Respondent and should be appropriately compensated.

124. While the Respondent confirmed through UNHCR, OLA and OIOS that the immunity from legal process of the staff members concerned had been waived in accordance with section 21 of the Convention on the Privileges and Immunities of the United Nations, the information provided to the [JDC] was insufficient. The information received did not indicate who requested the waiver for immunity and when it was actually waived. The [JDC] took note of the Respondent's inability to provide the relevant documents as well as UNHCR's apology for not being in possession of a copy of the request for waiver of immunity.

F. Absence of abuse of discretion

125. The Respondent took extraneous factors into account in suspending the staff member without having carried out his own preliminary investigations in the criminal allegations. However, guided by the jurisprudence of the UNAT (e.g. Judgment 1060 *Baddad* (2002)) on the matter, the [JDC] did not find [that] the decision [to summarily dismiss] the Applicant reflect[ed] any abuse of discretion.

G. Legality and proportionality of the penalty

126. Taking into account the seriousness and nature of the Applicant's misconduct, the findings and analysis of the facts and the interpretation of the relevant rules of law, the [JDC] agreed that the penalty of summary dismissal should stand. It found the dismissal to be both legal and proportionate to the charges. The [JDC] also found, however, that compensation should be paid for violation of the Applicant's due process rights.

CONCLUSION AND RECOMMENDATIONS

127. The [JDC] concluded that, notwithstanding the identified deficiencies in the case against the Applicant,

i. the Respondent's decision of summary dismissal should stand for the reasons indicated in its report, in particular because the Applicant failed to adequately and convincingly refute the charges against him;

ii. the Applicant should be paid his salary and other emoluments for the extended period in which he was suspended without pay, i.e. from 7 May 2001 to 23 May 2003, when the Respondent commenced internal disciplinary proceedings;

iii. the Applicant should be paid compensation in the amount of 6 months net base salary for violation of his due process rights and the undue delay and hardship to which he was subjected by the actions and decisions of the Respondent.

128. The Panel made no further recommendations with regard to this case."

On 15 September 2006, the Director, Division of Human Resources Management, transmitted a copy of the report to the Applicant and informed him as follows:

"The High Commissioner has examined your case in the light of the JDC's Report, as well as the entire record and the totality of the circumstances. He agrees with the JDC that your conduct amounted to serious misconduct for which summary dismissal was an appropriate sanction.

> On the recommendation with regards to payment of salary for the extended period of suspension without pay, the High Commissioner disagrees with the JDC. The exceptionally long period of suspension without pay was justified by security concerns, which prevented UNHCR from sharing the disciplinary charges with you prior to 2003. This in the view of the High Commissioner constitutes exceptional circumstances justifying the suspension."

On 20 April 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Disciplinary procedures were not expeditiously followed by the Respondent and his due process rights were violated, including, being placed on special leave without pay for an unjustifiable period of time.

2. The Organization used the disciplinary process to legitimate the criminal case against him. He was suspended from duty based solely on the criminal allegations against him in the Kenyan courts.

3. The decision to summarily dismiss him should be reversed and rescinded.

4. He should be paid all entitlements due and additional compensation for the harm caused to his person and career.

Whereas the Respondent's principal contentions are:

1. The Applicant's due process rights were respected throughout the disciplinary process.

2. In disciplinary matters, the Secretary-General has broad discretion and this includes determining what actions constitute serious misconduct warranting summary dismissal.

3. The Secretary-General validly exercised his discretionary authority in the decision to summarily dismiss the Applicant for serious misconduct.

4. The outcome of the criminal case lodged against the Applicant in the Kenyan courts is not binding on the Secretary-General.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The first issue is whether the Respondent was entitled to summarily dismiss the Applicant on grounds of serious misconduct. In reviewing the Secretary-General's exercise of discretion to impose disciplinary sanctions, the Tribunal has consistently followed the guidance in Judgement No. 941, *Kiwanuka* (1999), para. III:

> "In reviewing this kind of quasi-judicial decision and in keeping with relevant general principles of law, in disciplinary cases the Tribunal generally examines (i) whether the facts upon the disciplinary measures were based have been established; (ii) whether the established facts legally maount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi)

> whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. This listing is not intended to be exhaustive." (See also Judgement No. 898, *Uggla* (1998), para. II.

II. The Tribunal notes that the JDC made a careful evaluation of the facts presented by both parties, specifically addressing the above factors, as far as relevant. The JDC found that the evidence was sufficiently detailed, credible, and consistent to support the charge of "cheating" or "attempted cheating" by extorting payment from refugees for services that were free. The JDC further found the Applicant's defence unconvincing and incomplete. In the JDC's view, there were too many unexplained decisions and circumstances surrounding several resettlement case files associated with the Applicant. Moreover, the JDC considered significant the Applicant's refusal to co-operate with the JDC Panel in reviewing the case, at his own request.

III. The Applicant challenges the JDC's factual findings on several grounds. He first contends that the JDC failed to appreciate that the statements of the refugees interviewed were inconsistent, as noted in paragraphs 98 and 99 of the JDC Report. This criticism, however, disregards the JDC's finding that, notwithstanding some inconsistencies, "the totality of the accusations and evidence presented... collectively" demonstrated a "pattern of illegal activity on the part of the Applicant." The Tribunal further notes that the complaints had been filed by numerous refugees who were unrelated to each other, well before any investigation had been launched, and well before they had been offered funds or a "witness protection programme". Moreover, some of the inconsistencies (e.g. the new registration of a complainant under a false name and recognition as refugee without interview records only one day after the witness alleged he had paid a bribe to the Applicant) tended to support the refugees' complaints.

IV. Secondly, the Applicant contends that the JDC failed to consider his statement of 30 November 2001 as well as the interview of the Applicant conducted by officials from the Inspector-General's Office on 28 May 2003. The Applicant's contention on this point is readily dismissed. The JDC Report specifically referred to and considered both documents before reaching the conclusion to reject the Applicant's evidence as "unconvincing and incomplete" with too many "unexplained decisions and circumstances". The Tribunal is further satisfied that in assessing the evidence before it, the JDC was entitled to take account of the Applicant's failure to co-operate with the JDC. As stated in Judgement No. 941 *Kiwanuku* (1999), para. VIII:

> "If a prima facie case [of misconduct] is made the Applicant, must provide a proper explanation or evidence to rebut that case. Otherwise, the conclusion of misconduct could be reached." (Judgement No.897 *Jhuthi* (1998), para. IV).

V. Thirdly, the Applicant submits that, having made a finding that "the UN investigation into allegations of misconduct should have been conducted more carefully and thoroughly", the JDC "still went ahead to condemn the Applicant". In the Tribunal's judgement, any defects in the preliminary investigation

process were not sufficiently serious to undermine the JDC's primary findings that the evidence presented to them was sufficiently strong to require a credible explanation by the Applicant, and that no such explanation was forthcoming. Similarly, the absence of documents about the amount of alleged large cash payments into the Applicant's savings account did not undermine the JDC's evaluation of the evidence as a whole, and the credibility of the Applicant's denials. Accordingly, there is no basis on which the Tribunal could overturn the conclusions of the JDC in this respect, and the High Commissioner was fully entitled to accept their conclusion that the Applicant's conduct constituted serious misconduct.

VI. In view of the above, the Tribunal finds that the sanction of summary dismissal under staff rule 110.4 (c) was not a disproportionate penalty. Article 101, para. 3 of the UN Charter, stipulates that paramount consideration must be given to employing staff of "the highest standards of efficiency, competence and integrity", a principle which is further elaborated in the Staff Regulations. The offence was plainly incompatible with the continued service as a staff member of a humanitarian organization which is mandated to protect and support refugees.

VII. The Applicant next asserts that there was a substantive irregularity in that he was subjected to "double jeopardy" while the charges against him were *sub judice* in a Kenyan criminal court. This argument is erroneous because the principle of "double jeopardy" would prevent a defendant from being tried twice for the same crime on the same set of facts. In the instant case, however, the one set of proceedings was before a national criminal court, and the other was an internal disciplinary hearing, subject to the principles of international administrative law. In Judgement No.436, *Wiedl* (1988) the Tribunal held that judgements of national courts are not binding on the Secretary-General in the exercise of his discretionary power, and that "irrespective of the [national court's] judgment, it would not have prevented the Respondent from taking action under staff regulation 10.2 if he considered such action justified in the light of all the facts available to him". The Tribunal further recalls that the Secretary-General is entitled to take action in the absence of a judgement rendered by a national court in respect of a matter which could form the basis of a criminal charge under national law, or even following an acquittal by a national court. The Applicant's argument on this point must therefore fail. Similarly, the Tribunal rejects the Applicant's argument that UNHCR was a "judge in its own cause" because it was both the complainant in the national criminal court as well as the body presiding over his disciplinary case. However, if this latter submission were correct, this would lead to the absurd result that an employer, who has reported suspected criminal behaviour by a staff member to the criminal authorities, could never institute disciplinary proceedings against that staff member.

VIII. Finally, the JDC turns to the Applicant's claim that the Respondent erred in suspending him without pay for an extended period of time. Under staff rule 110.2, the Secretary-General is entitled to exercise reasonable discretion in suspending a staff member during an investigation into suspected

misconduct pending completion of disciplinary proceedings. This should "normally" be for a period not exceeding three months, and should be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate. The Respondent acknowledges that the suspension without pay in this case was lengthy but submits that "taking into account the Organisation's obligation not to interfere with the judicial processes of a Member State, and the protection of witnesses, the length of the suspension without pay was unavoidable". The Respondent further states that the launching of disciplinary proceedings would have required the production of documents, which contained the identity of witnesses, whose security had to be protected, and that this amounted to "exceptional circumstances" justifying the prolonged suspension without pay.

IX. The Tribunal stated in Judgement No. 941 *Kiwanuka* (1999):

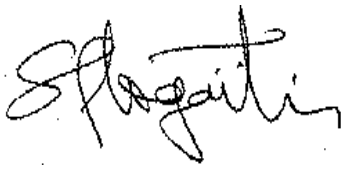
> "The Tribunal is of the view that, in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member should be paid unless there is proof of exceptional circumstances. The discretionary authority of the Respondent to suspend without pay in exceptional circumstances 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 is satisfied that the Respondent has proved "exceptional circumstances" in this case. The Organisation had legitimate concerns about the safety of witnesses, and it was not until March 2003, that it became clear that the Organisation could institute internal disciplinary proceedings without interfering with the criminal proceedings in Kenya. The preliminary investigation was then launched and the proceedings were not unduly delayed by the Administration. Moreover, when he was put on notice of the charges against him, the Applicant did not provide any substantive defense. For the foregoing reasons, the Tribunal upholds the High Commissioner's decision to reject the recommendation of the JDC that the Applicant be paid his salary and other emoluments for the extended period of his suspension without pay.

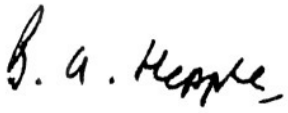
X. The JDC also recommended that the Applicant should be paid compensation for violation of his due process rights and for the undue delay and hardship to which he was subjected by the actions and decisions of the Respondent. The JDC's recommendation appears to be based on its finding that the Applicant was suspended without pay "without a preliminary investigation, without reviewing the facts and evidence, and without informing him of the charges of misconduct". Although it is correct that the Applicant was not informed about the specific charges against him until 22 December 2003 (received by him on 13 March 2004), the Tribunal has already indicated that this delay was not unreasonable given the necessary suspension of internal disciplinary proceedings pending the criminal proceedings. In order to formulate precise charges, the Administration would have had to disclose documents and reveal the identity of witnesses whose safety was of genuine concern. Accordingly, the Tribunal finds that the High Commissioner was entitled to refuse the JDC's findings and recommendations in this respect.

XI. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

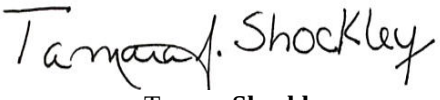


Spyridon **Flogaitis**
President



Bob **Hepple**
Member

Agustín **Gordillo**
Member



Geneva, 31 July 2009

Tamara **Shockley**
Executive Secretary