



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1487

Case No. 1558

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, President; Ms. Jacqueline R. Scott; Ms.
Brigitte Stern;

Whereas, on 29 December 2007, a former staff member of the United Nations, filed an
Application containing pleas which read, in part, as follows:

“II. PLEAS

2.1. The Tribunal is respectfully requested to:

2.1.1. find that the Application is receivable

2.1.2. find that the JAB [Joint Appeals Board] denied the Applicant his right to the timely
submission of the Applicant's Observations.

2.1.3. find [that] the Administration and the JAB gave unacceptable and conflicting reasons for the
delay of three years for the submission of the JAB report to the Secretary-General.

2.1.4. find that the Executive Director did indeed fail to reveal in his press releases his comments
to the Town [Hall] Meeting and to the OIOS [Office of Internal Oversight Services] that he had
been previously informed by the Applicants of their allegations.

2.1.5. direct the Administration to provide to the Applicant and Counsel any and all
documentation related to the barrings....

2.1.6. find that the OIOS failed to quote its policies to the [Applicant] especially with respect to whistle-blower protection and failed to extend whistle-blower protection to the Applicant.

2.1.7. find that the OIOS functions with respect to taking testimony and whistle-blower protection were misrepresented to the Applicant in its Report.

2.1.8. find that the JAB failed to determine that the Applicant does enjoy a right to whistle-blower protection.

2.1.9. find that the Executive Director misstated the OIOS' findings as set forth in the report.

2.1.10. find that [...] the Executive Director failed to convey to the OIOS a good faith reporting of communications from the [Applicant] concerning [his] allegations and failed to take appropriate action with respect to the allegations [...].

2.1.11. find that the Executive Director failed or refused to recognize whistle blowing as a legitimate function of staff.

2.1.12. find that the OIOS Report did not 'clear the UNODC [United Nations Office on Drugs and Crime] of corruption'.

2.1.13. find that the JAB did not faithfully represent the Tribunal's Andronov decision, 1157, and the Tribunal's meaning is ascribed to 'individual decision'

2.1.14. find that the JAB did not faithfully represent that a press release can be and was a notification of an administrative decision.

2.1.15. find that the JAB engaged in 'cherry-picking', i.e., selecting those pleas that the JAB wished to consider and effectively dismissing the remainder and to denounce this practice that deprives the Applicant of key Chapter 11 rights.

2.1.16. find that a) the JAB provided no legal basis for its argument as to why the Executive Director lacked authority to make such decisions; b) authority of officials is not grounds for a finding of irreceivability and is grounds for consideration of the merits of a case.

2.1.17. find [that] the JAB dismissed the Applicant's argument that the Executive Director did not substantiate his decision of "unfounded" allegations, a term no used by the OIOS.

2.1.18. confirm that the Executive Director did engage in abuse and misrepresentation of his authority and his office by taking the decision that the Applicant '...cannot have a future in the Organization'.

2.2. Remedies:

Direct the Secretary-General to:

a) issue a public apology to the Applicant ... by means of a UNIS [United Nations Information Service] press release for:

- i) having misrepresented the findings of the OIOS Report, ... in particular with respect to 'unfounded allegations'; having 'cleared UNODC of all charges of corruption'; and having stated that he had not previously been informed of the charges[;]

ii) the punitive decision taken against the Applicants having decided that they can have no future in the United Nations;

b) withdraw comments made about [the] Applicant in [Press Release] SOC/NAR/884; ...

c) issue a statement that the Applicant is welcome to work in the United Nations;

d) issue an administrative instruction that good faith reports of mismanagement, misconduct, [and] corruption are legitimate and welcome;

e) issue a public statement that the United Nations will extend whistle-blower protection in all cases to those who make reports concerning allegations in good faith;

f) issue a statement underscoring the inappropriateness of the UNOV [United Nations Office at Vienna]/JAB's refusal to provide a copy of Respondent's Reply until 12 March 2004, almost three months after it came into its possession, even though the JAB had been requested on 9 and 15 December 2003 to provide such a document ... and Counsel had been assured on 15 December 2003 by the JAB that it would do so ...;

g) issue a statement apologizing for the memos of the ALU [Administrative Law Unit] and the UNOV/JAB stating incorrectly that the request for administrative review from [the Applicant] had not been received when it had already been recorded in the JAB report of [8] January 2004;

h) issue an apology for the inordinate delay of almost three years between the last meeting of the JAB Panel and the adoption of its Report.”

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 9 June 2008, and once thereafter until 9 July;

Whereas the Respondent filed his Answer on 7 July 2008;

Whereas the Applicant filed Written Observations on 12 August 2008;

Whereas on 31 December 2008, the Applicant requested the Tribunal to hold an oral hearing in his case;

Whereas on 22 October 2009, the Applicant requested the production of additional documents and a postponement of his case until said documents have been produced;

Whereas on 12 November 2009, the Tribunal considered and rejected the Applicant's request for the production of additional documents, the postponement of his case, as well as his request for an oral hearing;

Whereas the Applicant filed an additional communication on 15 November 2009;

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

“[Applicant’s] Professional Record

... The [Applicant] was recruited as Senior Crime Prevention and Criminal Justice Officer with the Office for Drug Control and Crime Prevention in Vienna (presently the United Nations Office on Drugs and Crime (UNODC)) at the P-5 level with an initial 3-months fixed-term appointment on 1 December 2000.

... On 1 March 2001 his appointment was modified to a one-year intermediate term appointment under the 200-series Staff Rules at the L-5 level as Senior Inter-Regional Adviser in Crime Prevention. On 28 February 2002, his appointment was extended for one year through 28 February 2003. On 1 March 2003 his appointment was again extended for 10 months through 31 December 2003. At this time he served as Interregional Adviser in the Human Security Branch of UNODC at the L-5 level.

... On 29 October 2003 the [Applicant] resigned in a letter to the Executive Director of UNODC as of 31 December 2003. On 26 November 2003 a letter was sent by the Executive Director addressed to the [Applicant] stating that the latter had decided to resign with immediate effect and that he accepted this resignation. In an email to the Chief, Staff Administration Unit, sent on 27 November 2003, the [Applicant] accepted the resignation with immediate effect, but wanted to state for the record that it was the Executive Director’s proposal that his resignation would be effective immediately.

... The [Applicant] resigned from UNODC, effective 26 November 2003.

Summary of Facts

... Beginning in early 2003, an anonymous source began to advise the Investigations Division of OIOS that questions had been raised within UNODC concerning the travel arrangements by a Senior Crime Prevention Expert who had been in the Centre for International Crime Prevention, and thereafter in the Anti-Corruption Unit of the Rule of Law Section in the Division for Operations of UNODC. Initial inquiries by OIOS ascertained that an internal inquiry was being conducted by a manager in UNODC. OIOS asked to be advised of the results of that inquiry, but only summary findings were provided. When requests for details were not answered, OIOS decided to conduct its own inquiries and additional information from both the original source and other persons was subsequently collected. As the inquiry by the OIOS continued, additional allegations of a possible conflict of interest emerged ...

... On 29 October 2003 the [Applicant] resigned by way of a letter to the Executive Director of UNODC as of 31 December 2003.

... On 3 November 2003, the Financial Times issued an article entitled: 'The Americas: Adviser quits over 'corruption' at the UN agency'. The article names the [Applicant] as the senior official who resigned and quotes content from his letter of resignation, a copy of which was obtained by the Financial Times. Several other international newspapers referred to the resignation letter as well.

... Following the public dissemination of the [Applicant's] letter of resignation dated 29 October 2003, the ... UNIS issued a press release on 3 November 2007 stating that the Executive Director of UNODC had requested [O]IOS to investigate the corruption allegations made.

... On 17 November 2003, the [Applicant] forwarded to the entire UNODC mailing list an email by [Mr. B.] dated 16 November 2003, addressed to the Executive Director of UNODC, in which, after repeating his claims and proposals for improvements in the fight against corruption within UNODC, [Mr. B.] stated that he would not be able or willing in good conscience to continue working for UNODC after his contractual term ended. In the same forwarding email the [Applicant] also made reference to his own letter of resignation.

... On 26 November 2003, the same day the [Applicant] resigned from UNODC, OIOS, represented by the Under-Secretary-General for Internal Oversight Services, presented its report including the results of its investigation of allegations of corruption and mismanagement at UNODC in a Town Hall Meeting to the staff in Vienna. The OIOS report contained the following recommendations:

Recommendation 1: Given the finding of conflict of interest by the then Chief of Operations Branch in the arrangement, signing and/or supervision of contracts for his wife, including when he was Field Representative in Barbados, it is recommended that appropriate action be instituted.

Recommendation 2: As the evidence demonstrates that the contract by Special Service Agreement for the editing of the Anti-Corruption Tool-Kit was awarded to the wife of the Chief of the Operations Branch without his participation or supervision, but was done in accordance with UNODC and UNOV procedures, this allegation is not substantiated and it is recommended that the Chief be cleared of this allegation.

Recommendation 3: As the evidence demonstrates that the allegations of improper use of travel and conflict of interest in the arrangements for editing of the Anti-Corruption Tool Kit which were made against the Senior Expert, are unsubstantiated, it is recommended that he be cleared of those allegations.

Recommendation 4: The Senior Expert sought to identify the person who had made the complaints against him and by so doing created an atmosphere of threat and intimidation. Such action usually has the effect of inhibiting even the most well-founded complaints and violates the principles of transparency. It is recommended that in order to counter the action of the Senior Expert, the Executive Director issue a message to the staff in Vienna to remind them that complaints made in good faith are encouraged to be made through proper channels to include UNODC Management, OIOS and the Ombudsman's Office.

Recommendation 5: The allegations of retaliation are not substantiated. The project contract of one staff member expired and due to lack of project funding was not being renewed until UNODC managers made a special arrangement with a donor government

to extend his contract through November 2003. The lack of new funding for the project is the cause of expiry of this contract. The other complainant elected to resign although he was scheduled to be renewed when his fixed-term contract expired at the end of December 2003. In the absence of evidence of retaliatory conduct on the part of UNODC managers, it is recommended that they be cleared of this allegation.

Recommendation 6: Given the admissions by many of those interviewed including the subjects of this inquiry that they are unfamiliar with the Staff Rules and Regulations on staff conduct, it is recommended that UNOV Personnel, in consultation with OIOS and the UN Office of Legal Affairs, be asked to prepare and present a course for UNODC managers.

Recommendation 7: This investigation has revealed that channels that are available in UNOV to resolve disputes and/or conciliate staff and management differences were either disregarded or not sufficiently used. It is therefore recommended that the newly established Ombudsman's Office at UNOV be made full-time and that its visibility and role in conflict resolution be strengthened in cooperation with the Ombudsman's Office at UNHQ.

Recommendation 8: It is recommended that the findings of this investigation be made known to UNOV and UNODC staff.'

... The report was later that day published on the UNODC website together with a press release by UNIS quoting the report and the Executive Director (Press Release SOC/NAR/884). The Press Release was entitled 'Investigation Clears United Nations Office on Drugs and Crime (UNODC) of allegations of corruption and mismanagement'.

... The Press Release states in the fourth paragraph:

'The Executive Director of the UNODC had requested a thorough investigation of the general, as well as the specific, allegations raised by [the Applicant], an inter-regional adviser, in a recent letter of resignation made available to the international press. [The Applicant's] allegations were supported by another employee whose contract expires at the end of the month.'

... The Press Release further contains, inter alia, the following statement by the Executive Director of UNODC:

'Having carefully reviewed the OIOS' findings, which clear the UNODC of corruption, the Executive Director has decided that the two employees who raised these unfounded allegations cannot have a future in the Organization.'

... On 28 November 2003, the Counsel for the [Applicant] sent to the Vienna Joint Appeals Board (hereinafter 'JAB') a request for suspension of action by the [Applicant] and [Mr. B.] regarding the statement by the Executive Director to the effect that '...the two employees who raised these unfounded allegations cannot have a future in the Organization'.

... On 4 December 2003 the JAB Secretariat requested the Counsel for the [Applicant], inter alia, for more information as to whether any request for administrative review had been submitted preceding the request for suspension of action.

... On 9 December 2003 the [Applicant] sent an email [to Mr. B.] and copied ('cc:'), among others (including the entire UNODC mailing list), to the Under-Secretary-General for Management (USGM) and to the Administrative Law Unit (ALU). The content of the email was addressed to the USGM and the subject within the email reads: 'Request for administrative review of [Mr. C's] decision as per the United Nations Press Release SCO/NAR/884, specifically that I have 'no future in the organization'[']'.

... On 11 December 2003 a revised request for suspension of action by the [Applicant] and [Mr. B.] was submitted to the JAB Secretariat dated 9 December 2003.

... The decision of the Secretary-General on the request for suspension of action dated 13 January 2004 was transmitted with the JAB Report to the [Applicant] on 20 January 2004. The Secretary-General informed the [Applicant] that he accepted the JAB's findings and conclusions and accordingly decided not to grant the request. The JAB did not recommend any suspension of action since the Panel had difficulties deciding the effects of which decision the [Applicant] requested the suspension of as the [Applicant] had himself repeatedly announced that he was not willing to continue employment with UNODC. The [Applicant] resigned with immediate effect on 26 November 2003. Therefore, the Panel found that the contested 'decision' ... had already been implemented.

... Further correspondence between the [Applicant's] Counsel and the JAB concentrated on the issue of receivability of the email of 9 December 2003 as a request for administrative review. With fax of 11 March 2004, the Secretary of the JAB reiterated to the Counsel that the JAB would not decide on the receivability of requests for administrative review and this issue had to be discussed with the ALU.

... On 1 March 2004, the Counsel for the [Applicant] requested an extension of the deadline for submission of an appeal for the [Applicant] and [Mr. B.] until 9 April 2004. The Presiding Officer of the JAB granted an extension to file an appeal on behalf of [Mr. B.] on 4 March 2004. In a response letter to the Presiding Officer dated 5 March 2004, the Counsel for the [Applicant] asked for confirmation on the presumption he had made that the extension applied to the [Applicant] as well. In response, the Secretary of the JAB reiterated in her fax of 11 March 2004 that the JAB does not decide on the receivability of requests for administrative review and this issue had to be discussed with the ALU [...] and that therefore he could not presume that the extension also applied to the [Applicant].

... On 9 April 2004, the Counsel submitted to the JAB on behalf of the [Applicant] and [Mr. B.] a common statement of appeal, against the statement of the Executive Director, UNODC, announcing the results of the [OIOS] Report, as set forth in Press Release SOC/NAR/884 of 26 November 2003 which states: '[H]aving carefully examined the OIOS findings, which clears the UNODC of corruption, the Executive Director has decided that the two employees who raised these unfounded allegations cannot have a future in the Organization.' This common statement of appeal was received by the JAB on 15 April 2004.

... The Presiding Officer of the JAB decided to accept the appeal in its format of a common statement of appeal with the understanding that the JAB would consider it as two separate appeals, considered by two different panels and resulting in two separate reports given the difference in facts in both cases.

... On 27 April 2004, the common statement of appeal was forwarded to the Respondent and his reply was received on 5 June 2004.

... The Respondent's reply was forwarded to the [Applicant] for observations on 22 June 2004 setting a deadline to 23 July 2004. A common statement of observations, dated 5 July 2004, was received at the JAB Secretariat on 2 August 2004.

... On 13 August 2004, the Respondent, the [Applicant] and his Counsel were informed on the composition of the Panel. The Respondent raised no objections on the composition of the Panel. Following an issue as to the legibility of the transmission of the correspondence of 13 August 2004 by fax to the Counsel for the [Applicant], the said correspondence was re-sent on 18 August 2004 extending the deadline for disqualification in writing to 27 August 2004. The Counsel requested the disqualification of one of the proposed Panel Members on 26 August 2004, which was rejected by the Presiding Officer. Subsequently, on 31 August 2004 the JAB Panel was constituted.”

The JAB submitted its report on 20 August 2007. Its considerations, conclusions, and recommendations read, in part, as follows:

“Considerations

Receivability

50. Considering *receivability ratione temporis*, the Panel considered that there was an intention by the Appellant to submit a request for administrative review with his email of 9 December 2003. Under Staff Rule 111.2 (a) requests for administrative review must be addressed to the Secretary-General. In this case, the Appellant sent an email to (‘To’) [Mr. B.] and the USGM] ... whose office receives requests for administrative review, was, only copied (‘cc:’), along with the entire UNODC mailing list. However, the content of the email was addressed to the USGM and the subject within the email reads: ‘Request for administrative review of [Mr. C’s] decision as per the United Nations Press Release SCO/NAR/884, specifically that I have ‘no future in the organization’.’

51. The Panel further noted that there was no request for clarification by the office of the USGM and further that the ALU, also addressed in copy (‘cc:’) in the email, did not acknowledge receipt. Given the ambiguity of the format in which the request was presented, the Panel observed that the ALU would have had an opportunity to respond to the Appellant that the request put forward could not be acknowledged as such.

52. Although bearing in mind that the JAB does not decide on the receivability of requests for administrative review, the Panel found that, in this case, there had been an intention to file a request for administrative review by the Appellant and therefore decided to consider the appeal

from this point of view. The Panel further decided to consider the appeal receivable *ratione temporis* in accordance with Rule IMF of the Rules of Procedure and Guidelines of the JAB, which reads as follows:

‘An appeal is receivable only if it complies with the time-limits set forth in Staff Rule 111.2(a) and (b), or of the Panel considering the appeal decided to waive the time-limits.’

53. Considering receivability *ratione materiae*, the Panel noted that what the Appellant is contesting is the statement by the Executive Director, UNODC, announcing the results of the OIOS Report, as set forth in Press Release SOC/NAR1884 of 26 November 2003, which reads, *inter alia*:

‘[H]aving carefully examined the OIOS findings, which clear the UNODC of corruption, the Executive Director has decided that the two employees who raised these unfounded allegations cannot have a future in the Organization.’

54. The Panel considered whether a specific administrative decision could be identified or a non-observance of the Appellant’s terms of appointment be demonstrated. The United Nations Administrative Tribunal has defined the notion of ‘administrative decision’ in Judgement No. 1157 *Andronov*, 2003:

‘It is acceptable by all administrative law systems, that an ‘administrative decision’ is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order.’

55. First, this statement does not contain an individual decision, which should concern the staff member individually and not as a group. The Panel also found that the statement the Appellant is contesting does not identify the Appellant by name as such. However, apart from the contested statement, the Press Release provides several other instances where the Appellant is identified by name and can therefore, when the contested statement refers to the two employees, undoubtedly be linked to the Appellant. The Panel noted further that before the Press Release was issued, the Appellant’s name had already appeared in the UNIS press release of 3 November 2007 ... as well as in the international press. Although the Panel had not found any evidence that clearly established that the Appellant had shared his letter of resignation with the international press, the fact is that the allegations described in the Appellant’s letter of resignation were made public and part of the exact content was reproduced in the international press.

56. Second, it is the Panel’s view that a statement in a press release as such cannot be considered as a unilateral decision made by an Administration. Nonetheless, the Panel noted that a press release could inform about an administrative decision taken against a staff member, but this is not at issue in the present appeal, since the Appellant alleges that the statement in the press release contains the actual administrative decision.

57. Third, the Panel found that this statement does not affect the staff member’s legal rights. In this context, the Panel noted, that the reference in the statement to ‘Organization’ in a capitalized form refers to the United Nations as a whole. The Panel concurs with the statement in the Respondent’s reply that the Executive Director has no

such authority and cannot have taken a decision in this regard and that the authority to take such a decision could only rest with the Secretary-General of the United Nations himself. The Panel also observed that there was no documentation in the Official Status File that could harm the [A]ppellant's future career in the Organization.

58. As far as future employment with UNODC is concerned, the Panel noted that the Appellant himself resigned in a letter dated 29 October 2003 to the Executive Director. Moreover, the Panel also stresses its observation in the preceding paragraph that there was no documentation in the Official Status File that could harm the Appellant's future career in the Organization, which includes UNODC as an Office established within the UN Secretariat.

59. In conclusion, the Panel found that no specific administrative decision could be identified or a non-observance of the Appellant's terms of appointment be demonstrated under the terms of Staff Regulation 11.

...

Conclusions and Recommendations

61. The appeal was found non-receivable, *ratione materiae*.

Special Remarks

62. Notwithstanding the above, the Panel wishes to note the following:

63. The Panel found the contested statement in the Press Release: 'having carefully examined the OIOS findings, which clears the UNODC of corruption, the Executive Director has decided that the two employees who raised these unfounded allegations cannot have a future in the Organization' as well as the other statements in the Press Release directly or indirectly relating to the Appellant and [Mr. B], *infra dignitatem*.

64. The Panel further observed that the Press Release contains the following statement by the Executive Director:

'The Office's integrity was wrongly put in doubt and the OIOS independent investigation had put the record straight. Personal grudges are an understandable part of life: however, they should not be turned into slander using the megaphone of international media.'

65. The Panel noted that the Executive Director, employed as an international civil servant, does not have the freedom of private persons to take sides or to express convictions publicly on controversial matters and calls for constant sensitivity to how statements may look to others and requires punctilious avoidance of any expressions that could be interpreted as biased or intolerant as called for by the Standards of Conduct in the International Civil Service.

66. In that respect, and in adhering to the highest standards of conduct for international

civil servants, the Panel noted that if there had been a case of alleged misconduct against the Appellant, the proper recourse available under the internal justice system, by means of instituting disciplinary proceedings, should have been followed, thereby safeguarding the integrity of the Office and ensuring due process rights of the Appellant.

67. As regards the Appellant's remedial request as to the Executive Director of UNODC issuing a statement apologizing for the memos of [the] ALU and [the] JAB for stating incorrectly that the request for administrative review from the Appellant had not been received when it had already been recorded in the JAB report of [8] January [2004], paragraph 18 that it had been received, the Panel noted, first, that the JAB cannot make a recommendation on its own alleged mistake and, second, that it does not lie within the authority of the Executive Director of UNODC to issue statements on alleged mistakes made by [the] ALU and [the] JAB, but is rather an issue for the United Nations Administrative Tribunal to determine if an application is made to that effect."

By letter of 7 November 2007, the Deputy-Secretary-General informed the Applicant that the Secretary-General had accepted the findings and conclusions of the JAB and decided to take no further action in his case.

On 29 December 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The appeal before the JAB was receivable.
2. The JAB violated the Applicant's right to due process, by deliberately causing excessive delays; by preventing the Applicant from being able to submit his Observations on the Respondent's reply on time; and by arbitrarily dismissing certain pleas by the Applicant and deliberately ignoring them.
3. The statement made by the Executive Director, UNODC, constituted a disguised disciplinary measure violating the Applicant's rights.
4. The Applicant and his counsel were denied access to the Applicant's Official Status File.
5. The Administration refused to provide the Applicant and his counsel with any documentation related to the barrings.
6. The Applicant challenges the way in which the investigation undertaken by OIOS was conducted and the findings of the report issued on 25 November 2003.

Whereas the Respondent's principal contentions are:

1. The appeal before the JAB was not receivable *ratione materiae*.
2. The delay in the submission of the JAB report was not deliberate and caused no injury to the Applicant.
3. Counsel was not denied access to the Applicant's Official Status File.
4. The charges made and disseminated by the Applicant were "unsubstantiated, unprovable, and unfounded".

The Tribunal, having deliberated from 12 to 25 November 2009, now pronounces the following Judgement:

I. The Applicant joined the United Nations on 1 December 2000 under a fixed-term contract as a Senior Crime Prevention and Criminal Justice Officer in the UNODC. He was appointed as a Senior Interregional Adviser on 1 March 2001 and then as an Interregional Adviser in the Human Security Branch of UNODC. The Applicant resigned on 29 October 2003 and the resignation was accepted on 26 November 2003, his actual last day of service with the United Nations. The circumstances of this resignation will be described below.

II. In early 2003, an anonymous source drew the attention of the Investigations Division of OIOS to problems of corruption involving staff of UNODC. It was after he had publicly identified himself as the anonymous source, along with one of his colleagues from UNODC, that the Applicant submitted his letter of resignation to the Administration. Upon receipt of that letter, the Executive Director of UNODC requested OIOS to open an investigation into these allegations of corruption.

III. In the course of its investigation, OIOS interviewed more than 30 staff members of the UNOV and UNODC. When the Applicant himself was interviewed, he made allegations of corruption in UNODC, but was unable to provide evidence in support of the allegations. He had, however, disseminated those allegations of corruption to several donor Governments. The international press had also taken up the matter. On 25 November 2003, OIOS issued its report, in which it found that the allegations made against staff of UNODC were unjustified and that, accordingly, there was no need for any further investigation.

IV. On 26 November 2003, the OIOS report was posted on the Internet site of UNODC, together with a press release from the Executive Director of UNODC stating, *inter alia*, that:

“Having carefully examined the OIOS’ findings, which clear the UNODC of corruption, the Executive Director has decided that the two employees [the Applicant and his colleague] who raised these unfounded allegations cannot have a future in the Organization”.

V. On 28 November 2003, the Applicant filed with the JAB, in accordance with staff rule 111.2 (c)(i), a request for suspension of action regarding the Executive Director’s decision that he could not have any future in the Organization. The JAB submitted a report to the Secretary-General on 8 January 2004 recommending that the request for suspension should not be granted because, on the one hand, the Applicant had left the Organization of his own volition and not as a result of any decision by the Administration, and, on the other hand, the Applicant had not explained what irreparable harm would have

resulted to him from the implementation of the alleged decision, since he had already left the Organization voluntarily. The recommendations of the JAB were accepted by the Secretary-General.

VI. On 9 April 2004, the Applicant filed with the JAB an appeal against the statement of the UNODC Executive Director of 26 November 2003. The Applicant's contentions related mainly to the Executive Director's decision, set forth in the electronic press release of 26 November 2003, that the Applicant no longer had any future in the Organization. The Applicant believed that that decision was a disguised disciplinary measure, taken in the absence of any properly constituted disciplinary procedure and in the absence of any charge against him, since OIOS had not seen fit to formulate charges against him. Lastly, the Applicant claimed that the Executive Director had accused him in the press release of having made "unfounded" allegations, although the OIOS report mentioned only "unsubstantiated" allegations.

VII. The JAB issued its report on 20 August 2007. It attributed that unusually long delay to the very heavy workload which the secretariat of the JAB at Vienna had had to undertake because of a change in the organization of its operations. The JAB first considered the receivability *ratione temporis* of the Applicant's appeal, insofar as it was not clear whether a request for administrative review had been submitted before the request for suspension of the contested decision had been filed. The JAB deduced from the various communications sent by the Applicant to the Administration, however, that he clearly had the intention to submit a request for administrative review of the decision and that this was sufficient to establish the competence *ratione temporis* of the JAB. The JAB determined, however, that it was not competent *ratione materiae* to consider the Applicant's contentions. On the one hand, the statement made by the Executive Director in the press release could not be considered as a unilateral administrative decision and, on the other, that so-called decision did not affect any of the Applicant's rights. He had left the Organization of his own volition and not as a result of a decision by the Administration.

VIII. Despite the rejection of the Applicant's contentions, the JAB saw fit to make some special remarks to give its views on the statements made by the Executive Director in the press release. The JAB accordingly stressed that as an international civil servant, when acting in that capacity, the Executive Director does not have the freedom to express his personal convictions and must always exercise a degree of restraint. The JAB also clarified that if there were concerns about alleged misconduct by the Applicant, the proper way of confirming or dispelling those concerns was a disciplinary inquiry. In the special remarks, the JAB also addressed the question of the Applicant's request for an apology by the Executive Director, who had claimed not to have received the request for administrative review from the Applicant even though the request had been mentioned in the JAB report of 8 January 2004.

IX. On 7 November 2007, the JAB report was transmitted to the Applicant along with the Secretary-General's decision to follow its recommendations. The Applicant filed an appeal against that decision before the Tribunal on 29 December 2007.

X. In the Application, no fewer than 18 pleas are made by the Applicant, relating to very diverse issues which do not all have an immediate connection with the decision which is being appealed. Before reviewing these pleas, the Tribunal will therefore attempt to clarify the content of the Applicant's claims with regard to the contested decision.

XI. The Tribunal first observes that the Applicant's main plea is to contest the decision of the JAB that it was not competent *ratione materiae* to take up the Applicant's contentions since they did not relate to any properly constituted "administrative decision". The Applicant requests the Tribunal to find that the JAB committed an error of law and to find that the Executive Director's press release may be considered to be an administrative decision. The Applicant dwells at some length on the conduct of the Executive Director who issued the contested press release, conduct which the Applicant considers to be abusive. In this regard, he requests the Tribunal to find that it is a disguised disciplinary measure.

XII. A number of other pleas are concerned with the way in which the JAB prepared its report of 20 August 2007. The Applicant complains that the JAB disregarded the prescribed time-limits without providing an acceptable reason, engaged in "cherry-picking" by selecting, without any explanation, the pleas which it wished to consider and those it preferred to dismiss, and interpreted in an erroneous manner the jurisprudence of the Administrative Tribunal which it cited.

XIII. These first two categories of pleas do indeed fall within the scope of appeals which may be made before this Tribunal. In addition, there is the contention that the Administration allegedly denied him and his counsel access to the documents which would have been necessary for preparing his case before the Tribunal.

XIV. The other pleas made by the Applicant are much more tenuously linked with the contested decision and suggest that the Applicant wanted the Tribunal to revisit the actions of the various services involved in this matter (processing of charges of corruption), which would be outside the Tribunal's mandate. These pleas essentially concern the way in which the investigation undertaken by OIOS was conducted and the findings of the report issued on 25 November 2003.

XV. The impression gained from the Applicant's pleas is that the Applicant is not content with contesting a decision allegedly taken in disregard of his "terms of appointment or the contract of employment, including all pertinent regulations and rules", pursuant to staff regulation 11.1, but is seeking

to call in question the Administration's actions in general. This impression is confirmed by the content of the Applicant's requests.

XVI. The Applicant makes no request for compensation. He requests the Tribunal, however, to direct the Administration to issue a public apology to him for the damage allegedly caused by the issuance of the press release and by the way in which the preliminary phases of the case were conducted in the JAB. The Applicant also requests the Tribunal to direct the Administration to issue, in the form of an administrative instruction or public statement, some kind of guarantee that the conduct which the Applicant is complaining about will not occur again in the future. The Applicant, for example, requests the Tribunal to direct the Administration to issue an administrative instruction that good faith reports of corruption, mismanagement or misconduct are welcomed by the Administration and to issue a public statement that the Organization will extend whistleblower protection to all persons who make such reports in good faith.

XVII. Even before considering the substantive requests made by the Applicant, the Tribunal must recall that it is neither the General Assembly, nor the Secretary-General, and that those are the only two bodies entrusted with the regulation of personnel issues. As it has already had occasion to note more than once:

“[...] neither a JAB nor the Tribunal is a vehicle available to a staff member to be used to lobby management or to seek to persuade management to effect what the staff member would perceive to be improvements in his working conditions or the terms of his employment, unless that staff member seeks to establish that the matter of which he complains arises from the non-observance of the terms of his appointment or that it arises from the infringement or denial of some employment right. Both the JAB and the Tribunal are parts of the justice system whose primary objective is to right employment wrongs and to provide remedies to staff members who establish that they have been wronged in relation to a condition of employment or been denied an employment right.” (Judgement No. 1145, *Tabari* (2003), para. II; Judgement No. 722, *Knight et al.* (1995), para. VII).

Accordingly, the Tribunal cannot entertain the Applicant's request that it take on a quasi-regulatory role, which it does not possess. The Tribunal must confine itself to considering requests from applicants who complain about conduct by the Administration which violates the terms under which these applicants are employed by the United Nations in order to remedy the damage which might have resulted.

XVIII. The Tribunal will now briefly summarize the arguments of the Respondent. First, the Respondent argues that the JAB correctly determined that there was no administrative decision which could impact the Applicant's rights. Second, the Respondent maintains that notwithstanding the very long delay used by the JAB, that delay had been explained to the Applicant and had caused him no injury. Third, the Respondent affirms that neither the Applicant nor his counsel were denied access to relevant documents at the UNOV in violation of their respective rights. The Respondent also notes that this issue is the subject of another application before the Tribunal and that, in the present case, it was not the subject of a request for an

administrative review, the precondition to establish the competence of the JAB and thereafter of the Tribunal.

XIX. In the event that the Tribunal deems the Applicant's requests to be receivable, the Respondent also makes the following observations regarding the Applicant's allegations concerning the way in which the OIOS investigation was conducted and the content of the OIOS findings. First, the Respondent maintains that, contrary to the Applicant's claims, the OIOS report cleared the staff of UNODC, and that there is no need to revisit the matter. Second, the Respondent asserts that while the Applicant complains that the Executive Director referred in his press release to "unfounded" allegations rather than "unsubstantiated" allegations as in the OIOS report, this semantic difference is without significance in this case.

XX. The Tribunal will now compare the arguments of the two parties. It will first consider the central issue, namely, whether or not it was legitimate for the JAB to determine that it was not competent *ratione materiae* because it found that the contested statement did not constitute an "administrative decision". In order to reach that conclusion, the JAB referred to the Tribunal's earlier jurisprudence, and, in particular, to the *Andronov* decision of 2003, according to which:

"[i]t is acceptable by all administrative law systems that an "administrative decision" is a unilateral decision taken by the Administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as **implied** administrative decisions." (Judgement No. 1157, *Andronov* (2003), para. V). [Emphasis added]

It follows from this jurisprudence that the formalistic criterion of an administrative decision as regards form is extremely flexible since an administrative decision may be made through the adoption of a legal instrument, but also through the commission of certain acts or even through abstention by the Administration. The requirement, however, is much more rigorous with regard to the end criterion of an administrative decision: to be categorized as such, the instrument, act or abstention must produce legal consequences. Even more specifically, in order to constitute a decision against which recourse may be sought, an administrative decision must affect the staff member's rights. (See, in this regard Judgement No. 1458 (2008), para. IV).

XXI. In the present case, what the Applicant is contesting is the content of the Executive Director's press release that was posted on the Intranet of UNODC whereby the Executive Director "has decided that

the two employees [the Applicant and his colleague] who raised these unfounded allegations cannot have a future in the Organization”. With regard to this press release, when viewed as a statement by a senior United Nations official, the Tribunal shares the reservations expressed by the JAB in the “special remarks” set out at the end of its report. The Tribunal must also stress, however, that this statement was all the more inappropriate, in that the Executive Director was taking a position outside any formal context and that his statement, therefore, could only be regarded as personal comments made in a forum for the dissemination of official public information.

XXII. The Tribunal shares the finding by the JAB that the press release cannot be considered as an administrative decision. Despite the wording used (“the Executive Director has decided”), no decision had been taken with regard to the Applicant since none of his rights had been or could be affected; the Applicant had submitted his letter of resignation on 29 October 2003, nearly one month before the alleged decision. His departure from the Organization resulted solely from his personal decision. It is clear from the facts of the case, and particularly from an exchange of e-mails with the other staff member who had participated in the dissemination of allegations of corruption, that this decision by the Applicant was irreversible. In these circumstances, the Executive Director’s press release, although awkwardly drafted, could not have any consequence for the Applicant’s rights. The Executive Director’s action was clearly motivated by a concern to allay the tensions and emotions caused by grave accusations which proved to be unfounded. The matter had taken on such proportions (the international press had been alerted to this so-called “scandal”) that it was necessary, within the Organization, to dispel any suspicion within the services concerned. It was undoubtedly with that intention that the Executive Director made the statement, at the risk of abandoning his obligation of restraint, and not with the intention of interfering in the Applicant’s career within the United Nations, a career which, in any case, had come to an end on the Applicant’s own initiative.

XXIII. In these circumstances, the statement made by the Executive Director, which cannot be regarded as an administrative decision which damaged the Applicant’s rights, cannot be regarded as a disguised disciplinary measure. Here the Tribunal must clarify, since the Applicant is criticizing the Administration for not having conducted a disciplinary inquiry in this regard, that this procedure can be followed only with regard to staff members. In the present case, no disciplinary inquiry could be undertaken with regard to the Applicant because he had left the Organization. Moreover, no staff member may require the Organization to initiate or carry out a disciplinary procedure. The Applicant cannot therefore reproach the Administration for not having carried out an inquiry when his decision to resign had made an inquiry moot.

XXIV. The Tribunal accordingly finds that the JAB was right in affirming that it was not competent *ratione materiae* to consider the Applicant’s request. Consequently, all the other requests by the Applicant to find that the OIOS investigation was not properly conducted or that its findings were not properly

formulated are also not receivable. As the Tribunal noted in the presentation of the Respondent's arguments, many of these requests far exceed the scope of this appeal and it is not for the Tribunal, contrary to what the Applicant claims, to find that the OIOS report did not clear UNODC of corruption charges, that the Executive Director failed to recognize whistleblowing as a legitimate function of staff, or that the Executive Director incorrectly referred to "unfounded" allegations rather than "unsubstantiated" allegations.

XXV. The Tribunal will now analyse the Applicant's pleas to find that the JAB did not respect the Applicant's rights to due process. The Tribunal can summarize these various allegations in two categories: first, that the JAB allegedly, without any acceptable reason, deliberately caused excessive delays or prevented the Applicant from being able to submit his observations on the Respondent's reply on time; second, that the JAB allegedly arbitrarily dismissed certain pleas by the Applicant and deliberately ignored them.

XXVI. The Tribunal notes that the Applicant's requests are extremely aggressive and that he claims to be able to interpret the silence of the Tribunal, should it not take a position on these requests, as confirmation of his claims. The Tribunal notes first that it is not in the habit of neglecting the slightest request brought to its attention. Furthermore, the Tribunal must stress that no Applicant can claim to be able to interpret the silence of the Tribunal as he sees fit. Consequently, in view of the tone of defiance which is sometimes adopted in the Applicant's submission, the Tribunal must clarify that if the Applicant believed that no specific response had been made to one of his numerous requests, the reason would be that the Tribunal had deemed that such request was not within its competence or that it was responded to in a more general manner in the consideration of the Applicant's main pleas. The silence of the Tribunal cannot therefore be interpreted as confirmation of the Applicant's allegations.

XXVII. The Tribunal will now consider the way in which the JAB examined the Applicant's appeal. It has to determine, in view of the Applicant's allegations, whether the JAB deliberately sought to harm the interests of the Applicant. The question arises first with regard to the fact that the JAB was very late in sending the Respondent's reply to the Applicant, although it had been transmitted to the JAB on 17 December 2003. The Applicant did not receive the Respondent's observations until 12 March 2004. With respect to this contention, the Tribunal notes, as does the Applicant, that the Respondent has not made any specific comment. The Tribunal also notes, however, that the Applicant does not explain how this delay, which according to the Administration was "accidental", could have been "deliberate" in order to favour the Administration. The Applicant stresses the point that it is clear that this was a "refusal" by the JAB to communicate to him the Respondent's observations, rather than an "oversight", but he produces no evidence in this regard. The Tribunal also notes that if the delay put the Applicant in an awkward position, the period of uncertainty for him did not result in harm to him because once the observations were

transmitted to him, the Applicant was able to acquaint himself quickly and accurately with the Respondent's observations, which were set out on a single page, as is evident from his response to the Respondent's observations. Consequently, the Tribunal rejects the Applicant's request that it should find that the JAB deliberately delayed in communicating the Respondent's written observations.

XXVIII. The Applicant also criticizes the JAB for taking too long to prepare its report. The Applicant requests the Tribunal, in particular, to find that the reason given by the JAB to explain the delay is unacceptable and to determine the real reason for the delay. The period of more than three years which elapsed between the time when the Applicant filed his appeal to the JAB and the time when it issued its report is certainly excessively long. The JAB attributed it to the fact that an internal restructuring of its secretariat had caused these delays. During this restructuring, the JAB had been able to process certain cases more rapidly than others. The Applicant maintains that these explanations are dishonest and that the JAB processed the appeals that came before it in a discriminatory manner. However, the Applicant provides no evidence to support these allegations except for the information that some cases were settled more quickly than others. In the Tribunal's view, this difference in processing is attributable simply to the fact that the JAB never claimed to have suspended all work during the internal restructuring of its services and that it had therefore been able to process cases as and when possible. The Tribunal sees no reason to doubt the sincerity of the reasons put forward by the Administration, which demonstrate the organizational difficulties which may confront any administration at some point in its existence. Consequently, the Tribunal must reject the Applicant's request that it declare that the reasons put forward by the Administration are unacceptable and seek other explanations which clearly do not exist. However, the Tribunal considers that the 3 years' delay in issuing the JAB's report is unduly long, and constitutes a violation of the Applicant's due process rights.

XXIX. The Tribunal will now consider the Applicant's contention that the Executive Director claimed not to have been aware of the Applicant's request for administrative review even though that request was mentioned in the JAB report of 8 January 2004. In respect of this allegation, the Applicant requests that the Administration give him an apology. However, the Applicant does not indicate in what way this might have caused him some kind of harm. Consequently, the Tribunal need not consider this request.

XXX. Lastly, the Tribunal will consider the Applicant's contention that his rights were violated because he and his counsel were denied access to the UNOV to assemble the documents required to build the case. Here, the Tribunal must note that this request was not submitted first to the JAB. Consequently, and pursuant to article 7, paragraph 1 of the Statute of the Tribunal, this request is not receivable.

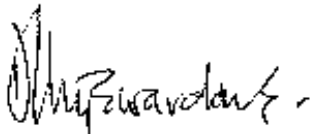
XXXI. The Tribunal notes that the Applicant generally insinuated that the JAB had shown bias in processing his case. The Tribunal wishes to stress, however, that it is, to the contrary, clear from the JAB

report that the JAB properly took into account all the Applicant's contentions – there is nothing to suggest that it engaged in “cherry-picking”, as its report covers the Applicant's basic legal claims – and that it sought to protect all his rights. In particular, the JAB demonstrated goodwill in finding that the Applicant had indeed intended to make a request for administrative revision of the contested decision even though that request had not been made in the appropriate manner. In these circumstances, it is very clear that the JAB acted with professionalism and neutrality and that its findings cannot be contested on this basis by unfounded allegations.

XXXII. For the foregoing reasons, the Tribunal:

1. Considers that there was an undue delay in the appeals procedure before the JAB, which violated the Applicant's due process rights;
2. Decides *proprio motu* that a compensation of US\$2000 should be awarded for the violation of the Applicant's due process rights, 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
3. Rejects all other pleas.

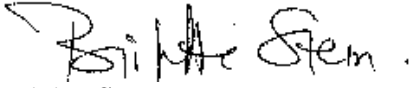
(Signatures)



Dayendra Sena **Wijewardane**
President



Jacqueline R. **Scott**
Member

Handwritten signature of Brigitte Stern in black ink.

Brigitte **Stern**
Member

New York, 25 November 2009

Handwritten signature of Tamara Shockley in black ink.

Tamara **Shockley**
Executive Secretary