UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/047
Judgment No.: UNDT/2010/041
Date: 09 March 2010
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LIYANARACHCHIGE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Rose Dennis, Office of Staff Legal Assistance (OSLA)

Counsel for respondent:
Susan Maddox, Administrative Law Unit (ALU)

Introduction

1. The Applicant filed the present application on 17 August 2009 before the United Nations Dispute Tribunal (UNDT) to contest the validity of the Secretary-General's decision dated 8 May 2009 to summarily dismiss him. That measure was based on charges of "sexual exploitation and abuse", "transportation of unauthorized passengers on multiple occasions in the United Nations (UN) vehicle assigned to [him], and "non compliance with the standard of conduct expected as an international civil servant."

2. As a remedy the Applicant seeks that the decision taken by the Secretary-General be rescinded and that he be retroactively reinstated in his former position in the United Nations; the Applicant also prays the Tribunal to order that he be paid all salaries and benefits retroactively from the date of his separation from service until the date of the Dispute Tribunal's judgment and that compensation be also paid for moral damage.

The facts

3. The Applicant joined the Organization on 10 November 2002 as a Vehicle Mechanic with the United Nations Mission in Sierra Leone. On 1 January 2006, he was reassigned to the United Nations Operations in Côte d'Ivoire (UNOCI) as a Transport Assistant, under a 100-series appointment at the FS-4 level.

4. Between 21 and 23 February 2007, the *Police Criminelle d'Abidjan* in Côte d'Ivoire raided five local businesses suspected of operating illegal brothels. The raids resulted in the apprehension of numerous suspected victims of human trafficking and forced prostitution, as well as several suspected procurers.

5. On 5 March 2007, the Office of Internal Oversight Services (OIOS) received a copy of a Code Cable issued by the Special Representative of the Secretary-General for the UNOCI to the Under Secretary-General for Peacekeeping Operations. The Code Cable detailed the apprehension of twenty-five women, including one minor, who were alleged to have been trafficked for the purpose of prostitution in Abidjan bars, and five suspected procurers. Of the victims, four women from the "Bar Lido" establishment located in Abidjan, one of whom was a minor, claimed that the owners of the establishment trafficked them from the Philippines to Abidjan.

6. On 6 March 2007, the OIOS initiated an investigation in cooperation with the Ivorian Judicial Police, the International Organization for Migration (IOM) and Interpol concerning staff members of the UNOCI in relation to the raid in Abidjan.

7. On 7 and 8 March 2007, the IOM facilitated OIOS' access to the victims, who at the time were housed in an IOM shelter in Abidjan after the raid. The investigators conducted interviews with the women who stated *inter alia* that they had been compelled to work as prostitutes under conditions of debt-bondage[1]. In addition, two of the four prostitutes, referred to as V01 and V03, identified the Applicant as one of their clients. The details of the interviews were as follows:

    - On 7 March 2007, V03, an adult prostitute of 26 years-old, informed the investigators that she had been paid for sexual services by three UNOCI staff members, including the one known to her by the name of "Stanley". In her statement to the OIOS, she gave a detailed

[1] The victims' monthly wage for twelve months was to be applied towards the liquidation of the "debt" incurred by them to their "employers" for the costs of their relocation from the Philippines to Côte d'Ivoire and for lodging at the Bar.

description of "Stanley" as "slim, wearing glasses, had an artificial eye, a small mustache, of medium height and about 40 years-old". Subsequently, V03 identified the Applicant as "Stanley" from a photographic array of seven male ONUCI staff members, all wearing spectacles, and similar in appearance. V03 stated that she had sexual intercourse with Stanley on two occasions. He had brought her to his house in his United Nations (UN) vehicle. It was between 08.00pm and 09.00pm. He lived in a building close to the Bar Lido. V03 also stated that the Applicant then paid her CFA 10, 000 (approximately USD 20). According to V03 the Applicant had also used the sexual services of her friend named Judith on several occasions.

- On 8 March 2007, V01, another adult prostitute of 19 years-old, stated to the OIOS investigators that, between October 2006 and December 2006, a man driving a UN marked vehicle paid CFA 45, 000 (approximately USD 90) to the male employee at the Bar Lido for her to accompany him to his home and engage in sexual intercourse with him after which he paid her the sum of CFA 3,000. In her statement to OIOS, V01 described the man as "kind of fat and wore glasses". Subsequently, she identified the Applicant from a photographic array of seven male ONUCI staff members, all wearing glasses, similar in appearance. She informed the investigators that he had also procured sexual services from V03, and had paid the bar owner at the Bar Lido for sexual services from another prostitute called Judith.

8. In its report dated 15 July 2008, the OIOS investigators found that two UNOCI personnel procured the services of prostitutes on multiple occasions, in violation of the Secretary-General Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse (ST/SGB/2003/13). In addition, five staff members were found to have violated the Mission policy

by transporting unauthorized passengers in UN vehicles. The Applicant was one among other UNOCI staff members who were identified by the two women from a photographic array for having engaged in sexual exploitation and abuse. The Applicant was also found to be in violation of the Mission policy by transporting unauthorized passengers in a UN vehicle assigned to him without permission.

9. By memorandum dated 27 August 2008 the Human Resources Policy Service of the Office of Human Resources Management (OHRM) at the UN headquarters informed the Applicant that, based on the findings and conclusions contained in the OIOS report, the Under Secretary-General for Management had referred his case to the Assistant Secretary-General for Human Resources Management for appropriate action on the basis of the following charges:

    - Sexual exploitation and abuse in contravention of ST/SGB/2003/13 on Special measures for protection from sexual exploitation and sexual abuse.
    - Improper use of the UN property in that he transported passengers in the UN vehicles assigned to him without authorization; and
    - Non compliance with the standard of conduct expected as an international civil servant.

10. In his reply to the OHRM dated 8 October 2008, the Applicant denied all the allegations proffered against him.

11. By memorandum dated 8 May 2009 the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-General had decided to summarily dismiss the Applicant "*for serious misconduct in accordance with the second paragraph of [the] United Nations*

staff regulation 10.2". The Applicant acknowledged receipt of that letter on 19 May 2009.

12. On 18 August 2009, the Applicant filed an application with the United Nations Dispute Tribunal (UNDT) contesting the Secretary-General's decision of 8 May 2009 to summarily dismiss him.

13. On 8 January 2010, the Tribunal through its Registry issued pre-hearing directions to the parties to which Counsels for the Applicant and the Respondent replied on 21 January 2010.

14. A hearing was held in Nairobi on 26 January 2010. Attending for the Applicant was Ms. Rose Dennis of the Office of Staff Legal Assistance participating via video-conference from New York and the Applicant participating via audio-conference from Sri Lanka. Attending on behalf of the Respondent was Ms. Susan Maddox from the Administrative Law Unit of the Office of Human Resources Management, participating via video-conference from New York. Five witnesses were called to testify before the Tribunal. Counsel for the Applicant called four witnesses, all former housemates of the Applicant, and Counsel for the Respondent called one of the OIOS investigators involved in the investigation in Abidjan to testify.

Witness Statements

15. In his testimony, the Applicant stated that he was living with his friends in Abidjan, Côte d'Ivoire. He had never attended the Bar Lido as he was having his meals regularly at the restaurant Gracelia belonging to Ms. Connie, whose real name was Maricon Haberto. He never met any girls at the Bar Lido. He strongly denied that he had taken girls from Bar Lido to his place to have sexual intercourse with them after making payment for such services to a

person in the Bar Lido. The Applicant called four witnesses on his behalf. They all worked in Abidjan and used to live in the same residence located in "Deux Plateaux".

16. The first witness, Mr. Alokabandara, stated that he shared the same residence as the Applicant between July 2006 and March 2007. He never saw the Applicant bring any women to the residence when he stayed there. He did not know Connie or the Gracelia Restaurant.

17. The second witness, Mr. Fernando, stated that he did not know the Bar Lido but he used to go to the Oasis Bar. He stated that the name was changed at some point from Oasis to Lido. He used to go out to a bar once or twice a month with the Applicant and other friends. The Applicant never brought any girls to the residence as their rules prohibited this. The witness stated that he did see girls in the bar in Abidjan and even talked to them. The girls told him that they had come to Abidjan to make money to send to their families in the Philippines. He did not know that the girls were prostitutes. At times there were parties at the residence he shared with the Applicant and girls would attend but they were not from any of the bars in Abidjan. However, the Tribunal notes a contradiction in his statement made to the OIOS, wherein the witness did state that the girls coming to the parties were working in bars. He also used to attend the Gracelia restaurant belonging to Connie. He saw many women at that restaurant and there were rumours that they were prostitutes.

18. The third witness, Mr. Rajaratnam, who also worked in Abidjan, came to know the Applicant as he had stayed in the Applicant's house from 22 July to mid- August 2006. He often socialised with him and would regularly go to his place in the evening. He never saw any woman being brought by the Applicant to the residence. He came to hear about the Bar Lido after the investigation had started in the present matter.

19. The fourth witness, Ms. Connie, owner of the Graciela restaurant, stated that her restaurant was quite close to the UN office in Abidjan. She confirmed that the Applicant used to have his meals there and would come with his colleagues. Her place was mainly frequented by UN staff. She had not heard about the Oasis bar. There were also many natives from the Philippines who used to attend her restaurant. She did hear about the Bar Lido but she never went there.

20. The last witness, Ms. Anne Eyrignoux, who was part of a team of OIOS investigators, testified on behalf of the Respondent. She stated that the investigation by the OIOS in the case was initiated in March 2007. At that time, she was an investigator with the UNOCI in Côte d'Ivoire. A Code Cable was received from the Special Representative of the Secretary-General for the UNOCI informing that the police in Côte d'Ivoire had raided certain premises and women had been located in bars. There were about twenty-five women. From the interviews of the women, the witness stated that it transpired that they had been trafficked from the Philippines and forced to work as prostitutes. They were working in the Bar Lido and claimed that there were staff members of the UN amongst their clients.

21. The witness continued that given the gravity of the allegations a team of investigators contacted the Human Rights section of the UNOCI. The names of four of the women were obtained and they were all taken under the care of the IOM. Protection was afforded to them as they claimed they had been trafficked. On 7 March 2007, the investigator went to the UNOCI Headquarters in Abidjan and contacted one Ms. Tagani who was responsible of the victims at the shelter where they had been taken. The investigator wanted to interview the women but as they were in a state of shock those responsible for the shelter informed her that the women could be interviewed

only if they were agreeable to that. Ms. Tagani also informed the witness that the interviews had to be short.

22. On 7 March 2007, Ms. Eyrignoux interviewed the women who were referred to as VO1 and VO3. According to Ms. Eyrignoux, VO1 stated to her that she had been trafficked from the Philippines by a team of procurers. She had been recruited in the Philippines by one Cherry Torres and taken to the Bar Lido to prostitute herself. In respect of the Applicant, VO1 stated that, between October and December 2006 two men of Indian origins came to the Bar Lido, paid a procurer at the bar and took her to a house in an UN vehicle and had sex with her. VO1 described the Applicant as a "kind of fat" man wearing glasses.

23. The investigator further submitted that VO3 who at the material time was 26 years-old also stated that she had been trafficked and forced into prostitution in the Bar Lido in Abidjan. She had been told by V03 that one Indian man whose name was Stanley and who wore glasses had sex with her on two occasions. She described the man as slim. V03 also described him as having an artificial eye and a small moustache. Before leaving the Bar Lido the man gave money to the procurer and she left with the Indian man in a UN vehicle. The time was between 8:00 pm and 9:00 pm.

24. Witness for the Respondent further submitted that both VO1 and VO3 were shown a photo array that had been prepared with the help of the staff of the UNOCI. The two women had not seen the photo array before and no mention had been made of this in the course of their interviews. They were not prompted in any manner. On seeing the photo array VO1 identified the Applicant from picture 3 on that photo array as being the person who had come to the Bar Lido in October 2006 and had paid the procurer. She added that the Applicant had also paid for the services of VO3. In view of the

Applicant's statement that the two women may have seen him in some other bar or restaurant the witness was asked whether this point was cleared with the two women. The witness answered that on 6 March 2007 the investigators had no idea about the activities of women from the Philippines in Abidjan and that the Applicant had not explained why the two women might have seen him in the Gracelia restaurant.

25. The investigator further testified that no signed statements had been taken from the two women after they had identified the Applicant from the photo array. Ms. Eyrignoux explained that this was not done as the investigators were only allowed a short time with each woman because they had to be taken out of Abidjan very fast for security reasons. In fact the two women had to be moved from the shelter where the investigator met them on 7 March in view of what was considered to be suspicious movements during the night. The non-governmental organization that was taking care of the two women refused that they be interviewed through the phone for security reasons.

26. When asked to explain how the two women could be credible in view of the contradiction in their account of the Applicant's physical size, that is VO1 saying he was "kind of fat" and VO3 saying he was "slim", the witness explained that VO1 was at the time 19 and VO3 was 26. The latter was more mature. The witness added that she would rely more on the perception of VO3 because VO1 was young, very fragile and naïve. In fact, the witness was not looking for fat or slim persons but for Indian looking one.

27. The witness was also questioned on dates and times appearing on some of the witness statements taken by the OIOS. On one document dated 7 March 2007 the time 7:20 am is mentioned. The witness explained that this was not the time at which VO1 and VO3 were interviewed. In fact they were interviewed between 2 and 5:00 pm. The time 8:00 to 8:15 appearing on a document dated

7 March indicates the time at which the photo array was prepared. It was shown to VO1 and VO3 on 8 March at 8:00 am or 8:15 am.

Applicant's Submissions

28. In support of his Application dated 18 August 2009, the Applicant challenges the decision to summarily dismiss him on the ground that there were both substantive and procedural irregularities during the investigation.

29. On the substantive level, the Applicant avers that the Respondent committed errors of fact and found insufficient evidence. The Respondent made erroneous conclusions merely based on the testimonies which did not prove that the Applicant exchanged money for sex with the two prostitutes or took them to his home. In addition, the prostitutes' descriptions of the Applicant were inconsistent. One of the prostitutes, V03, described him as being "slim" whereas the other, V01, described him as "kind of fat". The Applicant argues that the Respondent abused its discretion and did not meet its burden of proving that the Applicant engaged in any conduct constituting sexual exploitation and abuse in violation of ST/SGB/2003/13 nor that the Applicant improperly used the UN property by transporting passengers in the UN vehicle assigned to him without authorization.

30. In respect of due process, the Applicant argues that he was denied due process throughout the investigation process. The record shows that OIOS had "to be very brief with the victims" and the "interview was conducted in limited English" as the prostitutes "did not properly speak and understand language". Moreover, he was not given the opportunity to cross-examine the witnesses referred to as V01 and V03.

31. In the light of the foregoing, the Applicant submits that the charges of sexual exploitation and improper use of a UN vehicle should be dropped. The Applicant denies the allegations that he attended the Bar Lido and has paid for sexual services. He also avers that the charges for improper use of the UN property for transporting passengers in a UN vehicle without authorization can only stand if the charge against him of having exchanged money for sex with V01 and V03 is substantiated.

32. In respect of remedy, the Applicant submits that the Tribunal should order that:

- the decision taken by the Secretary-General be rescinded;
- that the Applicant be retroactively reinstated in his former position in the United Nations;
- that he be paid all salary and benefits retroactively from the date of his separation from service until the date of the Dispute Tribunal's judgment; and,
- that the Applicant be paid compensation for moral damage.

Respondent's Reply

33. The Respondent filed its reply on 19 October 2009, supported by a large number of exhibits.

34. On the burden of proof, the Respondent argues that under the consistent jurisprudence of the United Nations Administrative Tribunal (UNAT)[2] once a *prima facie* case of misconduct is established, the staff member must provide satisfactory proof to justify the conduct in question. The Administration's burden of proof is not of the standard as in criminal proceedings, where a

[2] See Judgments No. 1103, *Dilleyta*, (2003), No. 1023, *Sergienko*, (2001), No. 897, *Jhuti*, (1998) and No. 484, *Osmola*, (1990)

prosecutor must prove the guilt of an accused beyond a reasonable doubt. Rather the Administration must present "adequate evidence in support of its conclusions and recommendations […] [i]n other words, sufficient facts to permit a reasonable inference that a violation of the law has occurred"[3].

35. The Respondent submits that in other words the Secretary-General does not need to prove that the alleged conduct took place. The Secretary-General is required, when considering whether to impose a disciplinary measure, to determine if the evidence is such that it is more likely than not that the alleged conduct occurred.

36. In the present matter, the Respondent argues that the Applicant was positively identified by V01 and V03 from a photographic array of similar appearing men wearing glasses when the presence of the Applicant's artificial eye was not discernable. In addition, the Applicant was identified with a more detailed description given by V03. The Respondent stresses that the positive identification of V01 and V03 provided the Secretary-General with sufficient evidence that it was more likely than not that the Applicant engaged in the alleged conduct.

37. The Respondent avers that the Applicant failed to provide countervailing evidence against his positive identification by two separate witnesses as a man who took them to his home in an official UN marked vehicle, to whom they had provided sexual services in exchange of money.

38. With regards the validity of V01 and V03's testimonies, the Respondent argues that the Applicant's explanation as to why V01 and V03 may have identified him remains entirely speculative. It assumes that V01 and V03's positive identification of the Applicant as a person with whom they each had

[3] See Judgment No. 1023, *Sergienko*, (2001)

had sexual intercourse was ill-motivated or intentionally false. The Respondent avers that V01 and V03 had no reason to falsely accuse a person they may have seen at a gathering or in a restaurant as a person who had paid them to have sex with them.

39. Contrary to the Applicant's assertion that the investigation had been conducted in haste and the evidence of V01 and V03 was uncorroborated, the Respondent submits that, in the employment context, the Organization cannot compel witnesses to give testimony and has limited resources to expend to determine the facts of a case.

40. The Respondent finally submits that the facts underlying the charges have been properly established. The findings made are reasonably justifiable and are supported by the evidence. The established facts legally amount to serious misconduct.

Tribunal's Review of the Case

41. One of the main evidentiary issues in this case is the identification of the Applicant. Neither the Applicant nor the witnesses were physically present for the purpose of identification. Instead the investigators used a photo array. It is generally agreed that there are many difficulties inherent in the identification process, resulting from the vagaries of human perception and recollection. It is insufficient that the evidence of identification given by a witness has been honestly given; the true issue in relation to identification evidence is not whether it has honestly been given but rather whether it is reliable.

42. It has also been observed that the manner in which mistakes regarding evidence of identification can arise, the scrutiny to which such evidence must be subjected and the precautions which must be taken to ensure that identification affords a fair and reliable method of preventing a miscarriage of

justice, are very crucial. Evidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, is an unsafe basis for an adverse finding against a person facing a charge.

43. Both VO1 and VO3 had seen the Applicant whom they identified from the photo array. Ms. Eyrignoux who was closely involved in the investigation stated that both women spontaneously and without hesitation recognised the Applicant on the photo array. Concerns have been expressed about the use of photo arrays for identification purposes. It is not disputed that the use of the standard identification parade aligns the suspect with people of similar stature and origin as him. The witnesses are then asked whether they can pick him/her up. Such a procedure cannot be resorted to in all cases. This is so because the witnesses may not be available in the place or jurisdiction where the investigation is taking place or because the suspect may not be physically available or there is a need to protect witnesses as in the present case given the nature of the case under investigation.

44. In the case of *Fatmir Limaj et al v. Prosecutor*[4] , the International Criminal Tribunal for the Former Yugoslavia (ICTY) observed:

> "A particular concern with photo spread identification is that the photograph used of the Accused may not be a typical likeness even though it accurately records the features of the Accused as they appeared at one particular moment. To this, the Chamber would add, as other relevant factors, the clarity or quality of the photograph of the Accused used in the photo spread, and the limitations inherent in a small two-dimensional photograph by contrast with a three-dimensional view of a live person. It is also a material factor whether the witness was previously familiar with the subject of the identification, i.e. whether he is "recognising" someone previously known or "identifying" a stranger. While the Chamber has not been prepared to disregard every identification made using a photo spread

[4] Case No. IT-03-66-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Judgment, 30 November 2005

> of one or more of the Accused in the present case, it has endeavoured to analyse all the circumstances as disclosed in the evidence, and potentially affecting such identifications, conscious of their limitations and potential unreliability, and has assessed the reliability of these identifications with considerable care and caution. Among the matters the Chamber regarded as being of particular relevance to this exercise was whether the photograph was clear enough and matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accused and the photo spread identification, whether the identification was made immediately and with confidence, or otherwise, whether there were opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media" .

45. The above observations were made in the course of a criminal trial where the duty of the prosecution is to prove the case against the accused beyond reasonable doubt. That means that the evidence including identification evidence must not be open to a reasonable doubt. In disciplinary proceedings the standard of proof is not as high as in a criminal trial. However, it is the view of the Tribunal that there cannot be different degrees of proof when it comes to identification. Either there is evidence capable of identifying a person or not. In view of the use of a photo array for the purpose of identification during the investigation, the Tribunal considered the word of caution expressed in the case of *Fatmir Limaj*. It was the view of the Tribunal that the identification evidence used by the Respondent did not contain any of the flaws referred to by the ICTY in the *Fatmir Limaj* case. The photo array used was of a good quality; it contains a large number of photographs of males some of whom are wearing glasses; the two women were previously familiar with the Applicant; not a very long time elapsed between the time that the two women had seen the Applicant and the identification process; the two women did not have the opportunity to see the Applicant in other circumstances and thus be prone to pick on him. On the contradiction on the physical size of the Applicant, the Tribunal does not consider this to be material to such a point that the evidence of identification should be rejected.

Both VO1 and VO3 recognised the Applicant on the photo array, both of them stated in the course of the investigation that he was wearing glasses, a fact not denied by the Applicant; both of them added that the Applicant had an artificial eye, a fact confirmed by the Applicant. The overwhelming evidence of identification cannot simply be brushed aside by the contradiction referred to above.

46. In view of the contradiction that surfaced on the identification issue the Tribunal feels that the issue of how the investigation process was conducted needs to be addressed. When the investigator Ms. Eyrignoux was cross examined she stated that she did not ask the witnesses any more questions about the contradiction. She formed the view that the testimony of VO3 was more convincing on the identification issue as VO3 was about 26 years old and therefore more mature whereas VO1 was about 19 and appeared more fragile. The Tribunal observes that according to the investigation procedure applicable at the material time "the conduct of the investigation should demonstrate the investigator's commitment to ascertaining the facts of the case".[5] The rules of fairness should also be complied with and this requires collection and recording of clear and complete information establishing the facts, whether incriminating or exculpatory".[6]

47. It is unfortunate that the investigation did not seek to clear that contradiction on the identification issue. Admittedly, as the evidence has shown the circumstances were such that the witnesses who were victims of human trafficking needed to be removed from Côte d'Ivoire as fast as possible for their security. This however cannot justify the flaws on such an important aspect of the investigation. A shrewd investigator should have immediately reacted to this and sought clarification. The Tribunal would recall that the right to a fair trial on a criminal charge is considered to start running not "only

[5]OIOS Investigation Manual paragraph 2.1.2, Standards of Investigation
[6] OIOS Investigation Manual paragraph 2.3.4, Fairness during Investigations

upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned."[7] This would equally be applicable to investigation that may lead to disciplinary proceedings under the fairness requirements as expounded in the OIOS Investigations Manual.[8] Notwithstanding the fact that this contradiction was not cleared, as stated above (paragraph 46) the evidence against the Applicant was overwhelming.

48. In the case of *Diakite*[9], the Tribunal adopted the following reasoning:

> "The Tribunal has first to determine whether the evidence in support of the charge is credible and capable of being acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected en bloc. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.
>
> Once the Tribunal determines that the evidence in support of the charge is credible the next step is to determine whether the evidence is capable of leading to the irresistible and reasonable conclusion that the act of misconduct has been proved. In other words, do the facts presented permit one and only conclusion that proof has been made out? The exercise involves a careful scrutiny of the facts, the nature of the charges, the defence put forward and the applicable rules and regulations."

[7] Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary (N.P. Engel, Arlington: 1993)
[8] OIOS Investigation Manual paragraph 2.3.4, Fairness during Investigations
[9] UNDT Judgment No. 2010/024, dated 8 February 2010

49. On the involvement of the Applicant in the acts he was charged with, the Tribunal has no hesitation in accepting the evidence presented by the Respondent. Both VO1 and VO3 related the circumstances in which they were taken from the Bar Lido, the payment made by the Applicant to the procurer, the travel in the UN vehicle. The Applicant called witnesses on his behalf to establish that he had never taken women to his house where some of the witnesses were also residing. The alleged act of misconduct took place between October and December 2006. The evidence of witness Alokabandara is not very relevant as that witness stated in his testimony that during that period he may have been on home leave or training. Witness Fernando stated that the Applicant never brought any girl to his house. This evidence could not stand in the light of the overwhelming evidence presented by the Respondent. Witness Rajaratnam who also worked in Abidjan came to know the Applicant. He had stayed in the house of the Applicant from 22 July to mid August 2006. He often used to socialise with him and would regularly go to his place in the evening. He never saw any woman being brought by the Applicant to the residence. Since he left the residence of the Applicant in mid-August 2006 it is hard to see how he could be sure that the Applicant did not bring any woman to his house.

Due Process

50. Staff members who are charged with misconduct and are subject to disciplinary proceedings are entitled be treated fairly in that the requirements of due process must be observed (UN Staff Rule, 110.1 and ST/AI/371). The requirements of due process as expounded in the OIOS Investigations Manual of March 2009 are that the staff member should be,

(i) informed in writing of the formal allegations;

(ii) provided with a copy of the documentary evidence of the alleged misconduct;

(iii) notified that he or she can request the advice of another staff member or retired staff member to assist in his or her response;

(iv) given reasonable opportunity to respond to the allegations.

Witnesses Confrontation

51. One of the important issues that are arising in disciplinary matters is whether a staff member should be afforded an opportunity of confronting witnesses and cross examine them. Given the manner in which the disciplinary proceedings are managed such confrontation almost never occurs. In the present case the Applicant was not given an opportunity to confront the two main witnesses VO1 and VO3 whose evidence was decisive in establishing the charges against him. The question that falls to be decided is whether such a failure has flawed the whole process.

52. In a criminal trial witnesses must be made available for cross examination or at least an opportunity must be given to the accused to cross examine them. In relation to the International Covenant on Civil and Political Rights (ICCPR), it has been observed that the right to call, obtain the attendance of and examine witnesses under the same conditions as the prosecutor is an essential element of 'equality of arms' and thus of a fair trial[10]. The European Court of Human Rights has reviewed on several occasions the admissibility of indirectly administered evidence. The Strasbourg Court held unanimously that,

[10] Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary (N.P. Engel, Arlington: 1993)

"In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at a pre-trial stage is not in itself inconsistent with paragraphs 3(d)[11] and 1[12] of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings"[13].

53. Though due process is an important requirement of disciplinary proceedings, such proceedings are not part of a criminal trial and cannot equate to criminal proceedings. Even in criminal trials the European Court jurisprudence supports the view that the rights expressly conferred by Article 6(3)[14] of the European Convention are not absolute rights but rather mere factors which must be considered in answering the broader question whether the accused

[11] Article 6, paragraph 3 (d) of the European Convention on Human Rights (ECHR) reads, "Everyone charged with a criminal offence has the following minimum rights […] (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".
[12] Article 6 (1) of the ECHR reads as follows " In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
[13] Kostowski v. The Netherlands (1990), 12 EHRR 434
[14] Article 6 (3) of the ECHR reads as follows: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

had a fair trial as required by Article 6(1)[15]. In the case of *Bricmont v Belgium* (1989)[16] the European Court condoned the use of statement where the witness was excused from further questioning which the defence had requested, partly because of his age and ill-health. In another case, *Artner v Austria* (1992)[17], it condoned the use of the statement where the key witness, who had been questioned by the police and by the investigating judge, but not by the defence, could not be heard because she could not be traced. The majority of the Court found that the existence of other incriminating evidence, coupled with the defendant's role in avoiding a confrontation with the witness at the pre-trial stages, justified the reception of the statement.

54. All the rights that an accused enjoys in the course of a criminal trial may not necessarily be available to a person who is subjected to disciplinary proceedings. The exercise that the Tribunal should undertake in such a situation is an analysis of whether the basic interests of a staff member were safeguarded in the light of the nature of the charges, the nature and complexity of the investigation, the need to afford protection to witnesses, whether the absence of confrontation is so detrimental to the interest of the staff member, whether the absence of witnesses so weakens the evidence in support of the charges that it cannot be relied upon and whether overall the proceedings were fair.

55. The evidence shows that the Applicant was informed in writing of the charges and was communicated a copy of the investigation report. He was asked to file his response which he did and denied all the charges. The Tribunal takes the view that notwithstanding the fact that the two main witnesses who identified him were not called at the hearing were not prejudicial to the Applicant. He was in presence of all the elements of the charges and the facts

[15] Idem, page 20.
[16] ECHR Series A 158, Application No. 10857/84
[17] ECHR Series A 242 A, Application No. 13161/87

surrounding them and was thus in a position to make a comprehensive response. There was therefore no breach of the due process requirements.

56. The sanction taken against the Applicant was the appropriate sanction in view of the charge of having resorted to the services of women for sex, women who, as the undisputed evidence has demonstrated, were the victims of human trafficking.

57. In this connection the Tribunal recalls that the United Nations Convention against Transnational Organized Crime came into force on 29 September 2003. This Convention was supplemented by two Protocols:

- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol) of 2000, and,
- The Protocol against the Smuggling of Migrants by Land, Sea, and Air (the Smuggling Protocol), which came into force on 28 January 2004.

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

58. Finally, the Secretary General's bulletin[18] in no uncertain terms condemns the resort to women for sex in consideration for money. Both sexual abuse and sexual exploitation are viewed with the utmost gravity in the bulletin and they *constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal*.[19]

59. In the light of the foregoing, the Tribunal decides **to reject this application**.

Judge Vinod Boolell

Dated this 9th day of March 2010

Entered in the Register on this 9th day of March 2010

Jean-Pelé Fomété, Registrar, UNDT, Nairobi

[18] Special measures for protection from sexual exploitation and sexual abuse, ST/SGB/2003/13
[19] Special measures for protection from sexual exploitation and sexual abuse, ST/SGB/2003/13, Section 3.2.(a)