UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/117
Judgment No.: UNDT/2010/094
Date: 14 May 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
François Loriot

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On the applicant's retirement from the United Nations in 2008 certain monies were withheld from his entitlements upon the ground that there were pending disciplinary proceedings concerning allegations of mismanagement that had resulted in financial loss. After exchanges of correspondence, eventually all the applicant's entitlements were paid. This case concerns the delayed release of USD13,829. The applicant's case is that this delay was not lawful because the charges were groundless. He also claims that the investigation (by the Procurement Task Force of the Office of Internal Oversight Services (PTF/OIOS)) which gave rise to the charges was both incompetently undertaken and did not fulfil his entitlement to full disclosure of the matters being considered, including the material forming the basis of the allegations formulated by the investigators and, ultimately, the allegations in the charges made against him. Inexplicably, the disciplinary proceedings have not been completed. Indeed, as a practical matter, it appears there has been no progress since the laying of the charges against him; it was apparently decided not to further delay payment of the applicant's entitlements, so the monies were released.

2. The proceedings relating to the non-payment of the applicant's entitlements were ordered by the Tribunal to be heard concurrently with those taken by him in connection with his candidacy for the position of Assistant Secretary-General, Department of Economic and Social Affairs (DESA) (which is the subject of a separate judgment, UNDT/2010/080). In previous decisions dealing with case management and other issues that have arisen in the course of these applications; I have referred to the candidacy case as the "first case" and the instant case as the "second case".

Scope of the case

3. During directions made early in the proceedings I indicated to the parties that I did not see it as either necessary or desirable to consider the substance of the charges myself and would not conduct an investigation into the underlying facts. I

left open the possibility that I would be prepared to consider whether there had been procedural unfairness such as to vitiate the investigation and, hence, the charges. Whether this would prove necessary depended on the legal and factual issues that arose and which were in the process of particularisation.

The disciplinary process

4. On 5 March 2008 PTF/OIOS informed the applicant that it was in the process of completing its investigation of which he was the subject. It appears that the most significant allegations were found to be unsubstantiated. He was invited to provide comments on the remaining allegations, of which he had already been informed, and which were again summarized in what appears to be considerable detail. He was informed that these were provisional findings and was invited to provide any further information or material as to why they should not be made. On 7 March 2008 the applicant responded and, pointing out that the provisional findings in respect of a specific issue had disregarded his account of the facts in apparent reliance on other documentation and statements that were not available to him, he asked to have access to the OIOS files relating to the issue so that he could "dispel any doubts that may remain on these minor allegations". On 10 March 2008 PTF/OIOS informed the applicant that, in effect, his account of the facts would be considered prior to the report being finalised but, since the matter was still in the investigative stage, he was not entitled to the statements he sought and it was not proposed to give them to him, based upon OIOS investigations policy; should charges ensue and the disciplinary phase commence, the material would then be made available. On 4 April 2010 the applicant provided a detailed (and apparently convincing) response to the allegations and repeated his request for access to the statements.

5. On 12 June 2008 the applicant wrote to the Under-Secretary-General for DESA (USG) complaining, inter alia, that "due process" had been disregarded in his case and providing a compendious list of wrongful behaviour, undue pressure, unfair aspects of the PTF/OIOS investigation and disclosure of the investigation to the press and the like. He reiterated that his ability to respond to the allegations was handicapped by not being provided with the PTF/OIOS report and the full text of the

conversations with the witnesses, part of which were, it appears, set out in the report. The applicant also sought extension of his contract beyond 31 July 2008 to enable him to respond to the investigation. On 15 July 2008 the USG declined this request but assured the applicant that "your right to appeal and administrative decisions taken after your retirement on the basis of the investigation report will be clearly maintained".

6. The applicant was then apparently given the report since, on 8 July 2008, he wrote to the USG claiming that there were many errors evident from the text itself and that he sought access to the underlying material to enable him to refute the conclusions of the investigators. This material included documents not so far provided, as well as the witness statements. In respect of the latter, the applicant stated that he needed access "to these statements in their entirety to determine whether other portions of the statements contain elements contradicting the findings of the investigators". The USG passed his letter on to the Under-Secretary-General of OIOS (USG/OIOS) seeking her "urgent and favourable consideration" of the applicant's request for access. She, in turn, informed the USG that much material had been already provided, but that the records of the conversations with witnesses would not be released before the matter reached the disciplinary stage.

7. On 22 July 2008 the USG wrote to the USG/OIOS reiterating the need to provide the report and other materials to permit a full response to the recommendations of the investigation, and providing some departmental information that had been requested.

8. On 30 July 2008 the applicant was "charged with" alleged misconduct, essentially described in terms of shortcomings in managerial oversight. No allegations of personal gain were made nor were the charges cast in language suggesting that they were so grossly negligent as to warrant characterization as misconduct. Indeed, "a senior UN official" was reported in the Washington Times on 1 August 2008 as stating that the Secretary-General felt "there was no evidence of fraud but credible evidence of mismanagement". The applicant was notified of his right to make a response to the charges. Although it was, of course, well known that

the applicant was due to retire on 31 July 2008, no mention was made either then or later of any decision to hold back any of his retirement entitlements, although this had been part of the recommendations in the report.

9. ST/AI/371 (revised disciplinary measures and procedures) requires the "preliminary investigation" (which is what OIOS conducted here) to be considered by the Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM) in order to decide "whether the matter should be pursued" (sec 5) and, if so, to "[i]nform the staff member in writing of the allegations and his or her right to respond" and provide "the documentary evidence of the alleged misconduct" (sec 6). The staff member's response, if any, is submitted to the ASG/OHRM (sec 8) who "*shall proceed*" to "[d]ecide that the case should be closed", in which event the staff member must be notified, or, "should the facts appear to indicate that misconduct has occurred, refer the matter to the joint disciplinary committee for advice" (sec 9) (emphasis added). Despite the applicant's timely response to the charges, the process required by sec 9 of the ASG/OHRM has still not taken place despite the extraordinary lapse of time. The mandatory character of the process is demonstrated by the above emphasized phrase. It is obvious, as it seems to me, that it follows that this must be done within a reasonable time.

10. As I explained in *[Applicant]* UNDT/2010/069, the capacity of the Secretary-General to continue disciplinary proceedings after separation of the staff member is limited, even accepting that for certain purposes (such as seeking recompense) it continues. In this case, however, once the Administration had decided to pay the applicant his entitlements, that purpose lapsed and, as it appears to me, the Secretary-General has no contractual entitlement to continue to subject the applicant to the disciplinary procedures, since no consequences could ensue. Although the Secretary-General might still conduct an investigation under his administrative powers in order to determine whether for example, the findings of the investigators were valid, in whole or in part, and any wrongdoing had occurred, the applicant could not be *required* to participate: in effect, therefore, the process would be one-sided. If the Secretary-General decides to conduct an investigation or some other process to determine whether some wrongdoing had or had not occurred, of course, the staff

member could be invited to take part but there would be no contractual obligation on him to do so. For completeness, I should mention that, if disciplinary proceedings had been commenced prior to the staff member's departure from the UN and the Secretary-General decided to proceed with further investigation or process of fact finding which resulted in an adverse outcome from a staff member's point of view, it is very likely that this would be regarded as extending the contractual entitlement of the staff member to access the internal justice system in respect of the outcome or some decision affecting or reflecting on him or her. Such a survival of the staff member's rights could be regarded as all the more necessary since there is no recourse in the domestic courts against the UN.

11. In this case, however, the undertaking of the USG that the applicant's retirement would not prejudice his rights to access the internal justice system in respect of any administrative decision that arose from the investigation (implicitly accepted by the applicant) effected a variation of the applicant's contract to permit him, should he wish to do so, to initiate proceedings in the internal justice system in respect of any such decision. So far, however, the Administration has consistently failed to make any decisions – at least any that were communicated to the applicant – based on the investigation. A decision to delay making a decision or not to make a decision is, of course, a decision and it cannot be doubted that the applicant is entitled, should he wish to do so, to require the respondent to decide whether or not to continue disciplinary proceedings.

12. Insofar as there was a decision to withhold the applicant's entitlements (merely evidenced by his not being paid), he was informed of the reasons only after having taken the issue to the Ombudsman, and then only informally and indirectly. It was his request for administrative review that resulted in his being informed, at long last, that the monies were withheld pursuant to paragraph 3.5 of ST/AI/2004/3 (Financial responsibility for gross negligence). In the letter responding to his request for administrative review (dated 11 November 2008) he was told that all but USD13,829 was ordered to be paid to him "on an expedited basis" – in the circumstances, a phrase loaded with irony – and this was in fact done a few weeks later. Release of this remaining portion (here in question) was said to "depend on the

course of the disciplinary proceedings". In light of the history of those proceedings, to suggest there was actually a "course" was a considerable exaggeration.

13. On 16 December 2008 the applicant was informed of the intention of the Administration to proceed against him pursuant to ST/AI/2004/3 and he was invited to provide any response he might wish to make within the usual timeframe. On 16 January 2009 a detailed response was provided. By 30 July 2009, the Administration, having again retreated into silence, the applicant sought either his money or management evaluation. Not unreasonably, his counsel said that, in the absence of any information of any kind from the Administration, he assumed that a decision had been made to close the matter without further "proceedings". In the words of the great Dr Samuel Johnson, however, this proved to be the triumph of hope over experience since, on 2 September 2009 the applicant was eventually informed by the Under-Secretary-General for Management that the Secretary-General had decided to withhold the remaining amount "pending the conclusion of the disciplinary and financial recovery proceedings". The applicant was informed that a decision on the latter would be made in a month. There was no indication of when a decision would be made on the former. On 9 September 2009 the applicant commenced proceedings in the Tribunal. Towards the end of October 2009, whilst the matter was subject to case management in the Tribunal, the balance outstanding was eventually paid. There was not and is still no word about the finalization of the disciplinary proceedings.

Procedural issues

14. In the first case I ordered the production of certain documents, which the respondent refused to provide. I have disposed of that case by judgment in favour of the applicant and made certain orders relating to compensation. I held that the applicant was entitled to judgment by default in light of the respondent's disobedience. Since, however, the documents in question do not concern this, the second case, it is not appropriate that judgment by default should be given in the applicant's favour, and it is necessary to consider his application on the merits. In both cases, I ruled that the respondent should not be permitted to appear in the

Tribunal to lead evidence or make submissions whilst it remained disobedient. I considered that this was not a denial of the rules of procedural fairness since the respondent was not denied the opportunity to participate fully in the proceedings. All that was necessary for this participation to be allowed was that he complied with my orders. He declined to do so and, accordingly, declined the opportunity to be heard.

15. On 18 March 2010, in the context of considering whether I should stay the order concerning participation in the proceedings and/or adjourn the proceedings pending the outcome of the appeal of my Orders in the first case, I directed the respondent to inform the Tribunal of the evidence that he would wish to adduce if he were permitted. (I decided to refuse a stay for reasons I have explained elsewhere and which do not need to be repeated here.) Counsel indicated that, if the justifiability of the Controller's reliance on the still uncompleted disciplinary process were an issue and it was claimed that initiation of the investigation upon which the initiating charges were based was not *bona fide* and the investigation itself was not competent were relevant issues, the respondent would seek to tender the investigation report, the charges, the applicant's response to the charges and other supporting documentation relating to the investigation and the disciplinary process to date.

16. As it happened, whilst this matter was subject to case management within the Tribunal, the applicant and the Tribunal were informed on 15 October 2009 that the Controller had "decided … to withdraw the financial recovery action against the applicant". The respondent's submission was that, since the applicant had received his money, his "application for relief is moot". This cannot be accepted. When the jurisdiction of the Tribunal is properly engaged, the mere fact that the Administration "corrects" the decision in question does not end the matter. Even when the parties settle their dispute, the leave of the Tribunal must be sought before the application may be withdrawn (on the assumption that the withdrawal is a condition of the agreement). However, where, as here, the applicant does not agree to withdraw the application, he or she must be entitled to the determination of the Tribunal about the decision of which a complaint is made. It is not for the respondent, unilaterally, to forestall the exercise by the Tribunal of the jurisdiction entrusted to it. Furthermore, there may well be an outstanding question of compensation to be decided or some

other ancillary order required. An applicant cannot be prevented from seeking an award of compensation because, for whatever reason, the Administration had decided to change the impugned decision in accordance with the staff member's application to the Tribunal. Accordingly, the respondent's claim that the application is moot must be summarily rejected.

The misconduct proceedings and the withholding of funds

17. On 1 July 2009 ST/AI/371 was superseded by ST/SGB/2009/7 (staff rules), which, amongst other things, prescribed in Chapter X an entirely new scheme for dealing with misconduct. In *Abboud* UNDT/2010/001 I explained in detail why the substantial differences had effectively repealed the old procedures. In the present case it is enough to point out that sec 9 of ST/AI/371 can no longer operate since joint disciplinary committees (JDCs) no longer exist. Accordingly, since 1 July 2009 the Administration could only proceed, if at all, under the new Chapter X. During the hearings in the *Abboud* matter I was informed from the bar table by counsel for the respondent that work was actively underway on a new administrative instruction prescribing the procedures to be applied to matters arising under Chapter X. Although I am, with some skepticism, willing to accept that the wheels are spinning, it appears the Administration's vehicle is regrettably bogged down, with little or no actual progress being made or, at least, apparent.

18. It is scarcely necessary to point out that this situation is extremely unfortunate, both from the perspective of the Organization and that of the staff member. The applicant here is in an impossible position, entirely resulting from the Administration's own making, although it is impossible to deduce whether its delay is caused by indecision about whether to proceed at all or, perhaps, what is the appropriate process for doing so. On the other hand, if the report to the press published on 1 August 2008 is correct – though it would appear that the requirement of sec 9(a) of ST/AI/371 (quite apart from common courtesy) to immediately notify the applicant of the decision, not to proceed with the allegations of misconduct, has not been obeyed – there is, as a matter of fact, no misconduct proceeding on foot. I note, however, that the letter of 11 November 2008 responding to his request for

administrative review suggested, at least at that stage, the disciplinary proceedings were still alive, though necessarily only in the sense that a decision was still to be made as to whether they would either be closed or sent to a joint disciplinary committee. At the end of the day, it appears that there has, in fact, been no decision to proceed with any misconduct charges against the applicant or, in other words, that "the facts appear to indicate that misconduct has occurred", as provided in sec 9(b) of ST/AI/371. Nor has the Secretary-General made any decision under rule 10.3 of Chapter X.

19. Under both the old staff rules and the new, misconduct involves the failure of the staff member to comply with the obligations imposed – as it is expressed – with the Organization's legal instruments, or to "observe the standards of conduct expected of an international civil servant": see rules 110.1 and 10.1(a) respectively. This says no more than that there can be no misconduct without a breach of the staff member's contract. But not every breach, of course, will be misconduct. In general, it may be said that some significant level of moral turpitude is required. Thus, gross negligence or recklessness could qualify, of course, but not a mere mistake or error of judgment. This distinction, as it happens, is made in ST/AI/2004/3 which applies specifically to recovery of loss caused by staff negligence or violation of legal instruments and excludes "[i]nstances where a … loss … results from inadvertent error, oversight or simple negligence, or inability to forsee the negative consequences of a chosen course of action…" (sec 1.2(a)). It is only where "gross negligence" is committed, defined as "negligence of a very high degree involving an extreme or willful reckless failure to apply the regulations and rules of the Organization", that losses are recoverable (see also sec 2). It is clear that conduct of this kind might also amount to misconduct, as is recognised in sec 1.4. Chapter X of the new rules simplifies the matter by providing that, where the staff member has been guilty of misconduct, reimbursement may be required if that misconduct is "wilful, reckless or grossly negligent".

20. Under the old rules, it seems, while the relevant conduct would almost certainly amount to misconduct, it was not essential to establish that it did. On the other hand, under the new rules, the conduct must *both* be misconduct *and* negligent

to the relevant degree. There is a question whether the level of negligence previously required was not significantly higher than the present, having regard to the requirement that it be an "extreme" failure (whether wilful or reckless). In the result, since the applicant's money was repaid in full, this question is not directly relevant.

21. For the purpose of withholding entitlements on separation, the only legal requirement prescribed by sec 3.5 of ST/AI/2004/3 is that the staff member must be "under investigation". The investigation in question is a preliminary investigation under sec 3.1, instigated by the relevant head of department or office for the purpose of establishing whether there was gross negligence which resulted in loss. The test for this instigation is merely "reason to believe" that the staff member may have been grossly negligent, causing loss. As I explained in *Abboud,* this is an undemanding test, amongst other things satisfied even if there is evidence of innocence, unless of course that evidence is so cogent and evidently reliable as to render it unreasonable to entertain the suspicion in question. The application of this test is dealt with further below.

Consideration

22. In principle, the mere fact that monies are withheld is a breach of the contract of employment unless it is done in accordance with a condition of the contract. Here, that condition concerned the existence of circumstances bringing the entitlement within ST/AI/2004/3. The monies may be retained and held pending the completion of the proceedings or, presumably, their being closed by decision of the ASG/OHRM under sec 4.4(a). It may be inferred that this is what happened here.

23. As I have already explained, the prerequisite for withholding the funds is not the guilt of the staff member of gross negligence, but the existence of a "reason to believe" that he or she is guilty and the monies are legally withheld even if it is proved that the allegations are not substantiated, as is clearly envisaged by sec 4.1. Since either the case is closed or the process proceeds (until 30 June 2009 to a JDC) it must be presumed that the monies were paid following a determination that the allegations of gross negligence were not substantiated. No other path to repayment is

provided and the Organization is estopped from relying on its own unlawfulness and claiming that it paid the money by some other process. Having embarked on the journey prescribed by ST/AI/2004/3, it cannot detour but must follow the path to the end – press the allegation of gross negligence or withdraw it – it cannot, as it were, simply stop the process by unilateral action without stopping the entire process, which necessarily involves a decision that the allegations are not substantiated.

24. As also explained above, the case of the applicant, of course, is that no misconduct whatever occurred, but he must go further than that in order to establish that his entitlements were illegally withheld. He must show that there was no *reason to believe* that he was guilty of gross negligence. Depending on the chronology of events – and here the monies were withheld when the ASG/OHRM had plainly determined under secs 4.1 and 4.2 that the allegations of gross negligence *appeared* to be substantiated – the applicant also needs to show that it was manifestly unreasonable to conclude that there was an appearance of guilt. Since there may be an appearance of guilt even when a person is completely innocent, the proof of innocence does not logically establish that it is unreasonable to consider that there was an appearance of guilt before that point, let alone the far lesser test of having "reason to believe" that gross negligence causing loss had been committed.

25. It is evident from those parts of the investigation report that have been tendered and the extracts and summaries that appear in the documents that it was not manifestly unreasonable to consider that the applicant *may* have been guilty of gross negligence in respect of the matter that led to the alleged loss of USD13,829. If his explanations were accepted, of course, he must have been completely innocent.

26. If, as the applicant claims, the investigation report were adversely affected by denials of procedural fairness, then it cannot be relied on by the respondent to justify a finding either that there was reason to believe the applicant had been grossly negligent, productive of loss, or that it appeared to establish such negligence. The applicant has alleged that the commencement of the investigation was itself *mala fide* but, in the many times he has reiterated this claim I have been unable to find any evidentiary basis even for suspecting that it might have been true. The fact is that,

despite the allegations, this is not the case he has in reality sought to make before the Tribunal by producing evidence rather than opinion. I do not say that his opinion is untrue, I simply find that there is no evidence that permits me to accept it.

27. The other case sought to be made on the applicant's behalf is that he was denied procedural fairness in being unable to obtain access to the complete conversations of the witnesses whose statements were relied on by the investigators to make adverse findings. The applicant said that he needed to check whether there were other parts of those conversations than those relied on to see whether there were any qualifications or other information that reduced the cogency of the cited material or otherwise should have made it less significant. I should say that I do not necessarily accept that the applicant should not have had access to this material before the investigation was closed (absent considerations of confidentiality, which were at no time claimed). The only reason given was that he was not entitled to it at that stage because that was the practice of OIOS. On its face, this is scarcely cogent, let alone reasonable. He had been invited to respond to the proposed or conditional findings but, without having access to all the material relied on by the investigators, how could he do so? The opportunity to respond at that stage, before a report is finalised, should not arbitrarily be limited simply because the practice is not to disclose the material. Put otherwise, decisions cannot lawfully be based on manifestly arbitrary or unreasonable grounds. The only proper reason for non-disclosure – again, confidentiality aside – is that it is not necessary in order for an adequate response to be made. That argument is extremely weak where parts of conversations with witnesses are relied on by the investigators, since it is obvious that other parts might also be relevant, not only because they might qualify what was relied on, but because they might support another matter that the staff member wishes to establish in his or her defence.

28. Whilst I do not doubt the necessity to enforce the obligation of the parties to undertake their contractual obligations in a manner consonant with the requirements of good faith (and those requirements need to be defined so that both management and staff are clear about what their duties are), I would question the legitimacy of an approach to good faith obligations that is not connected by some rational link to the

nature of the contract itself (that is to say, an object it or some aspect of it serves), the making of an implicit or explicit representation intended to be acted on, or a specific entitlement or obligation. The requirement of "due process" is an aspect of good faith. Reference to "due process" as *justifying* the imposition of a rule, as distinct from *characterizing* a rule, is thus, to my mind,,neither helpful or persuasive. The requirement does not (or ought not) exist in a vacuum and, as is stated above, should be linked to some other contractual element.

29. Here, the logical foundation for requiring disclosure of the evidence relied on is the right (assuming it to exist) of the staff member to make a case for his or her innocence for the ASG/OHRM to consider before deciding whether "the case is to be pursued". As is implied above, I should acknowledge some skepticism as to whether indeed the staff member has a *right*, as a general rule, to make a submission at this stage of the process, though it is no doubt reasonable to invite him or her to do so. The express provision of a right to respond to the allegations when formulated and conveyed (ie, after it has been decided that they are to be pursued) *ex hypothesi*, therefore, *after* the investigation is completed and it has been concluded that they appear to be substantiated, suggests that there is no *right* to respond to the content of the investigation at a previous stage. It is enough, perhaps, to say that if, in any particular case, it would be unreasonable for the ASG/OHRM to decide to pursue the case without obtaining input from the staff member, then the right would arise. This would depend on the nature of the alleged misconduct and the adequacy and character of the report. On the other hand, commonsense suggests that it would actually be sensible to give the staff member an opportunity to make a response before deciding to take the matter further and, confidentiality questions apart, it is difficult to see a good reason for refusing to provide all the relevant material. It would be consistent with sound principles of administrative action to act with a maximum degree of transparency (qualified by the particular requirements of the individual case) to provide the staff member with all the material relevant to the case being considered against him or her before deciding to proceed but, in light of the prescribed procedure to which I have drawn attention, I do not think (as I presently

see the position under ST/AI/371) that the requirements of good faith give rise to a legal obligation to do so before that decision is made.

30. Here, there was an opportunity provided for the applicant to respond to the provisional findings but he was denied the all the information that would have permitted him to do so for reasons which, as expressed, were patently unreasonable. Having taken the step of inviting a response, the Administration was not entitled to arbitrarily refuse to make full disclosure of the matters to which the response was necessarily directed, namely the evidence upon which the provisional findings was based. Accordingly, I conclude that the applicant was denied procedural fairness in the refusal of the investigators and then other officials of the Administration to provide the applicant with the complete interviews of the relevant witnesses.

31. In the end, however, I am not satisfied that this disclosure would have made any difference to the applicant's position. He was informed that, once charged, he would have access to the material he sought. He was charged. I do not know whether in fact he sought access but the evidence before me, tendered by the applicant himself, clearly shows that he was informed that he could have access if he sought it. He has not produced any material that suggests that the parts of the witness' conversations relied on by the investigators were misquoted, or taken out of context. Nor has he shown that they were in any way unfair, let alone that, if he had been given access to the complete documents, he would have been able to demonstrate sufficient doubt (together with the other matters upon which he relied) as to the cogency of the report to show that it did not give rise to the reasonable belief, or provide a sufficient basis for determining, that there was the appearance of substantiation of the existence of his negligence leading to the loss in question.

32. It follows that the preponderance of evidence establishes that the applicant's entitlements were lawfully withheld, in that the report disclosed matters which were objectively capable of justifying the conclusion that there was *reason to believe* he had been guilty of gross negligence resulting in financial loss, even though he may, on fuller examination of the relevant facts, have been found to be entirely innocent. Moreover, I am unable to conclude that the allegations did not *appear* to be

substantiated sufficiently to justify informing the applicant of his right to respond even though, again, on making that response, further consideration might well have justified closing the case, as appears to have happened here.

33. Given that the decision to refuse to give the applicant access to the whole of the material supporting the provisional allegations upon which he was asked to comment was unlawful, and that this is a valuable and important right, the question arises whether any award of compensation should be made to him for this breach although, in the result, it has not been shown that it was productive of actual prejudice. I consider that an award of nominal compensation of USD500 is appropriate.

34. It should be noted that I have not dealt with the alleged impropriety, adequacy or competence of the investigation and disciplinary proceedings in this judgment. Should the applicant seek to challenge the apparent decision to delay making a decision as to the proceedings' disposition or any subsequent administrative decision relating to these matters, a separate application would be necessary.

Conclusion

35. The respondent is to pay to the applicant the amount of USD500 compensation within 46 days of today's date. Otherwise, the application is dismissed in its entirety.

(*Signed*)

Judge Michael Adams

Dated this 14th day of May 2010

Entered in the Register on this 14th day of May 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York