



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

KAMUNYI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**  
James Ochieng Oduol

**Counsel for respondent:**  
Chacha Odera  
Miouly Pongnon, UNON

## **Introduction**

1. The Applicant is a former Security Officer who was attached to the Security and Safety Service at the United Nations Office at Nairobi (“UNON/SSS”). He alleges that his superiors made unlawful decisions and took unlawful steps in the course of and subsequent to investigations into his alleged behaviour by both UNON and the Kenya Police.
2. The investigations were into the disappearance of a firearm from the UNON Armoury and a plot to kill the Executive Director of the United Nations Human Settlements Programme (“UN-HABITAT”) who was also the Acting Director-General of UNON at the time.
3. The investigations lasted for over 2 years during which time the Applicant was not permitted to work although he remained on full pay. Following a report from an Office of Internal Oversight Services (“OIOS”) investigation, he was eventually charged with misconduct but no disciplinary action was taken against him. He was, however, reprimanded for his behaviour towards the Chief, UNON/SSS on one occasion.
4. The Kenya Police also conducted an investigation into the disappearance of the UN firearm. It requested the United Nations to waive the Applicant’s immunities. He was subsequently arrested and detained in custody by the Kenya Police for 4 days. The police found nothing to incriminate the Applicant.
5. When the Applicant was eventually returned to work at UNON he was transferred to a position with the Division of Conference Services (“Conference Services”) rather than to his former position as a Security Officer.

## **The Proceedings**

6. The Applicant submitted two separate appeals to the Joint Appeals Board (“JAB”), one in November 2008 and the other in February 2009. These were consolidated by the JAB but before they could be considered by the JAB, they were transferred to the United Nations Dispute Tribunal (“the Tribunal”) on 1 July 2009 following the introduction of the new system of administration of justice.

7. The matter was referred to mediation by the Tribunal but this was unsuccessful and the case proceeded to a hearing on the merits.

## **Issues**

8. The issues for determination are both factually and legally complex.
- a. Was the Applicant suspended on 26 May 2006 and, if so, was this lawful?
  - b. Was the placement of the Applicant on special leave with full pay on 29 May 2006 for an extended period in breach of staff rule 105(2)?
  - c. Did the United Nations follow the procedures set out in the relevant United Nations regulations and rules and administrative issuances with respect to the request by the Kenya Police to the United Nations to waive the Applicant’s immunity and in its response to his arrest and detention by the Police?
  - d. Was the reprimand of the Applicant for his refusal to hand over a loaded firearm to his supervisor unlawful in terms of the staff rules and the guidelines for investigation and done without due process or proper factual basis?

- e. Was the transfer of the Applicant from his position of Security Officer with UNON/SSS to Conference Services vitiated by lack of due process and in violation of the staff rules? and
- f. If any or all of these issues are found to be as alleged what remedies are due to the Applicant?

### **Summary of facts**

This summary provides an overview of the facts in the case. These will be amplified in the discussion of each issue.

9. The Applicant, Anthony Wahome Kamunyi, is a Kenyan national with over 10 years experience in Security and Safety. He was recruited by the United Nations as a Security officer at the G-3 level in 2004 and later promoted to the G-4 level. He is a qualified United Nations Firearms Instructor who was trained at the United Nations office at Vienna. In previous employment he served as a Forensic Ballistics Expert with the Kenya Police where he reached the rank of Inspector. He is a keen and successful competitor in firearms competitions. At all material times he was licensed under Kenya law to hold a firearm and carried a private firearm - a Ceska pistol.

10. In May 2006, three events occurred which are important background facts to the issues in this case.

11. First, on Mr. Kamunyi's account, at about 9 pm on 16 May 2006 he was driving along Thika Road in the Kasarani area of Nairobi, when the electrics on his car failed. He stopped to examine his vehicle and was accosted by three men one of whom was armed with an AK 47. Mr. Kamunyi was wearing his personal firearm which he managed to un-holster and throw into a nearby flower nursery. He escaped from his assailants by throwing himself onto an oncoming vehicle then telephoned a friend who alerted the police. The police rang Mr. Kamunyi on his mobile phone,

attended the scene and assisted him to find his firearm and the ammunition that had spilled out of it on impact. He was able to start his car and the police escorted him towards his home. The Kenya Diplomatic Police Unit later took a statement from him about that incident.

12. Second, on 19 May 2006, the then UNON Acting Director-General, Ms. Anna Tibaijuka received an anonymous e-mail which contained details of an alleged plot to kill her. The e-mail referred to the removal of a weapon and ammunition from UNON/SSS in the following terms:

“The plot involves exiting of a weapon, bullet [*sic*] proof vest and ammunition from the security and using them against you”.

13. This threat was reported to the Department of Safety and Security (“DSS”) at United Nations Headquarters as well as to the Kenya Diplomatic Police Unit. An inventory of all weapons and ammunition in the UNON/SSS Armoury undertaken on 20 May 2006 showed there were no weapons missing but on 22 May 2006 another count revealed that one United Nations Glock pistol was missing and could not be accounted for.

14. Third, on 24 May 2006, Mr. Kamunyi spoke to a Licensing Officer at Kasarani Police Station as he wanted an extension to his private firearms licence. During that call the officer told him that a firearm belonging to the United Nations had been recovered at Kasarani. Mr. Kamunyi advised him to inform UNON about this. On the same day the Kenya Police notified UNON/SSS that a Glock Pistol registered to UNON/SSS had been found in the Kasarani area of Nairobi on 23 May 2006. It was subsequently identified by UNON Security officers as the missing pistol with the same serial number.

15. The police also told UNON about the Thika Road incident on 16 May 2006 to which they had been called by Mr. Kamunyi. As this had occurred in the same area

where the Glock pistol had been found, the Police considered the two events (the incident reported by Mr. Kamunyi and the subsequent discovery of the Glock pistol) to be connected. They believed that Mr. Kamunyi may have been in possession of both his own and the UN firearm on the same night and they wished to interview him about this.

16. On 26 May 2006, the Chief, UNON/SSS, Peter Marshall, called Mr. Kamunyi to a meeting. Two DSS Investigators were also present. When Mr. Marshall requested that Mr. Kamunyi hand over his private weapon to him, Mr. Kamunyi refused. He was required to make a statement directly after the meeting about this. As a result of Mr. Kamunyi's refusal, Mr. Marshall ordered him out of the UNON grounds and to hand in his ground pass. There is a dispute as to whether he was suspended at that time or placed on special leave with full pay.

17. On 29 May 2006, the UNON Armourer reported the loss of a UN firearm to the Kenya Diplomatic Police Unit and Mr. Kamunyi was informed by the Chief, UNON Human Resources Management Services ("UNON/HRMS"), Suleiman Elmi, that he had been placed on special leave with full pay "until further notice". This leave was extended on 14 July 2006,

18. Also on 29 May, the Kenya Diplomatic Police wrote to Mr. Marshall seeking a waiver of Mr. Kamunyi's privileges and immunities as a United Nations staff member so he could be questioned about the theft of the missing UN firearm. Following a meeting between the Police Commissioner and Mr. Marshall, Mr. Kamunyi was arrested and confined by the Kenya Police from 9 June to 12 June 2006.

19. Following their investigation, the Kenya Police reported to UNON on 5 December 2006 that they did not have anything tangible to incriminate Mr. Kamunyi. The evidence they had gathered so far did not give any direction or conclusion to prove a case against any known person.

20. The Investigations Division, Office of Internal Oversight Services (“ID/OIOS”) then conducted two internal United Nations investigations. One was into the lack of controls in the UNON Armoury and related misconduct by senior staff members including Mr. Marshall. The other was an investigation into allegations of misconduct by Mr. Kamunyi arising from the plot against Ms. Tibaijuka and the suspicion that he had been involved in the theft of the UN firearm.

21. On 12 November 2007, the investigators reported that Mr. Kamunyi was possibly the author of the e-mail but the evidence was insufficient to make a conclusive finding against him. It found that he was possibly involved in the theft of the hand gun.

22. As a result of their reading some of Mr. Kamunyi’s e-mails the investigators believed that he had advised a private citizen to store a handgun in a private vehicle and did so himself in violation of Kenya law. It also concluded that his refusal to hand over his firearm to Mr. Marshall while he was on duty was not of the highest standards of competence and integrity. It recommended:

- a. That the Department of Security and Safety take appropriate action in regard to the conduct of UNON Security Officer Anthony Wahome Kamunyi; and
- b. That the Kenya Police be informed of the findings of this report for further investigation.

23. Based on the findings and conclusions contained in the ID/OIOS report, Mr. Kamunyi was not charged in relation to the theft of the firearm or the death threat but faced one formal charge of insubordination. He was then suspended from duty with pay on 4 February 2008. On 16 July 2008 he was advised by the Officer-in-Charge (“OIC”) of the Office of Human Resources Management (“OHRM”) that based on a review and analysis of the case she had decided not to pursue the case as a disciplinary matter. Instead Mr. Kamunyi was reprimanded for his refusal to hand

over his personal loaded firearm to his supervisor on 26 May 2006. He was also told that he was to be transferred from UNON/SSS to Conference Services.

24. The Kenya Police took no further action in the matter.

**Issue 1.**

25. Was the Applicant suspended on 26 May 2006 and, if so, was this lawful?

**The Law**

26. The former Staff Rules<sup>1</sup> apply in this case. Suspension of a staff member was covered in Chapter X on Disciplinary Measures and Procedures. Rule 110.2 of those Staff Rules stated:

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

27. Under paragraph 5 of ST/AI/371 (Revised disciplinary measures and procedures), if a preliminary investigation appears to indicate that a report of misconduct is well founded, the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”), on behalf of the Secretary-General,

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<sup>1</sup> ST/SGB/2002/1 dated 1 January 2002.



decides whether the matter should be pursued and, if so, whether suspension is warranted.

28. In summary, if a suspension is to occur it should follow two events: a charge of misconduct and a decision of the Secretary-General or his delegate. The staff member should also be given a written statement of reasons and the likely duration of the suspension.

29. Until 19 June 2006 the delegation at UNON to suspend with pay was vested in the ASG/OHRM. After that date the ASG/OHRM delegated the authority to the Director-General of UNON to suspend UNON staff members with pay during disciplinary investigations.

#### **Additional facts on Issue 1**

30. Mr. Marshall was in New York when the death threat was made. He urgently returned to Nairobi on 24 May 2006 along with two investigators from DSS. Before leaving he took advice from advisors at the United Nations Secretariat and instructed the then Acting Deputy Chief of Security at UNON, Prince Bruce, to conduct an inventory of the UNON Armoury.

31. On 24 May 2006, after the Kenya Police called about the recovery of the UN firearm, Mr. Marshall visited the Kasarani Police Station. He was told by Senior Superintendent Ruto that the Kenya Police had formed the view that Mr. Kamunyi had been involved in the theft and disposal of the Glock from the Armoury at the same time as his reported incident on Thika Road on 16 May 2006.

32. Mr. Marshall asked an auditor with OIOS for informal advice about the possible identity of the author of the death threat. He also arranged to interview Mr. Kamunyi over the loss of the Glock pistol and the death threat.

33. On 26 May 2006, Mr. Kamunyi reported to work for his shift having been told earlier that Mr. Marshall wanted to talk to him. When he arrived, the Armoury was closed. Since 2005 he had been authorized by the UN Armourer, Benson Matetai, to deposit his private firearm at the Armoury and collect it after work. These deposits were recorded in a register from at least 15 February 2006. On this occasion, before he could surrender his private firearm at the Armoury, as he usually did before being issued with his UN firearm, he was asked by Security Officer (“S/O”) Joram Mkunde to come to the meeting with Mr. Marshall.

34. Before the meeting started S/O Mkunde told Mr. Marshall that Mr. Kamunyi was still wearing his private firearm. What followed was recorded on a small tape recorder which Mr. Kamunyi took to the meeting. He said he did this as he did not know what the meeting was to be about and had found the invitation to be a bit unusual.

35. There is no dispute that at this meeting Mr. Kamunyi refused to hand over his private weapon to Mr. Marshall when requested. His manner and reasons for refusal are discussed under issue 4.

36. At the end of their encounter Mr. Marshall asked him to record a statement. He sat for about an hour with Alphonso Jasper, the then Assistant Chief of Security, and Mr. Bruce, who typed his statement. Mr. Kamunyi told the Tribunal that when he had finished with the statement, Mr. Marshall came in and said, “You have been suspended indefinitely. You cannot come to these grounds”. He said he had spoken to the highest authority and required him to surrender his ground badge and security badge.

37. Mr. Kamunyi asked the reason for the suspension but he did not get an answer nor was he given a letter of suspension. Mr. Kamunyi was escorted to the changing room by four security officers where he changed out of his uniform and was seen out of the UNON complex.

38. In his oral evidence Mr. Marshall denied that he had suspended Mr. Kamunyi. He said he had verbally placed him on special leave. To resolve this evidential conflict and in the absence of a formal letter advising Mr. Kamunyi of the actions being taken against him on 26 May 2006, I turn to other documentary evidence.

- a. In an e-mail to the Director-General on 27 May 2006 Mr. Marshall wrote “In order to ensure the safety of all concerned, he was subsequently escorted from the premises and placed on Special Leave with Pay, until further notice”.
- b. In his petition to the Secretary-General seeking the rescission of the suspension dated 29 May 2006, the Monday after the 26<sup>th</sup> of May, Mr. Kamunyi alleged he had been suspended indefinitely.
- c. Ms. Tibaijuka sent Mr. Marshall an email on 28 May 2006 in which she said that “I had apparently got the wrong impression from your initial brief that S/O Wahome was going to be suspended immediately. That is why, after you left, I managed to talk to A. Z of OLA in NY, who is the former Legal Counsel at UNHABITAT, to establish the rules...”
- d. A document filed by the Applicant before the hearing entitled ‘Facts and Issues not in Dispute’ says “that Peter B Marshall ... on Friday 26<sup>th</sup> May verbally suspended the applicant.”
- e. The Respondent’s document entitled ‘Factual Background’ which was filed before the hearing, said that (Marshall) verbally informed the Applicant of the decision to suspend him from duty until further notice.
- f. Mr. Marshall’s written statement of evidence submitted in advance of the hearing and accepted by him as correct says he suspended him from duty until further notice on Special leave with pay.
- g. In a letter sent to Mr. Kamunyi by Mr. Elmi, Chief, UNON/HRMS, on 29 May he stated “...you have been placed on Special Leave With Full Pay, **effective immediately** (*emphasis added*) and until further notice”.

39. I prefer the evidence of Mr. Kamunyi on this point and find that the preponderance of evidence is that on 26 May 2006 Mr. Marshall verbally suspended

Mr. Kamunyi. From Ms. Tibaijuka's email I infer that she had been told he had been or was to be suspended but once it was realised that this was not correct Mr. Marshall changed the wording. The suspension was a unilateral action taken by him. It was not made by the ASG/HRM. As will be seen in the discussion of issue 2 the error was apparent to UNON/HRMS who later attempted to rectify it.

40. There is no authority for the removal of a staff member's ground pass while they are on special leave. Such removal is only lawful if the Secretary-General suspends a staff member under ST/AI/371.

### **Applicant's submissions**

41. For the Applicant it was submitted that suspension is a disciplinary measure and only the Secretary-General has the power to suspend. In addition there is no authority for a verbal suspension. He relied on the mandatory requirements of staff rule 110(2). He alleged the suspension was fueled by improper motives and the decision should be declared null and void.

### **Respondent's submissions**

42. It is the Respondent's case that Mr. Marshall's action of 26<sup>th</sup> May 2006 was a security action within his powers, which was later ratified by a decision by UNON/HRMS on 29 May 2006.

### **Conclusion on Issue 1**

43. Mr. Kamunyi was verbally suspended on 26 May 2006. This suspension was in breach of the Staff Rules of the United Nations as they then stood. At that time the rules did not provide a means by which a staff member who was suspected of being a danger could lawfully be administratively removed from employment on a temporary basis unless a charge of misconduct had been made. This lacuna appears to have been

rectified in the Staff Rules dated 2 September 2010<sup>2</sup> by the introduction of staff rule 10.4 on Administrative leave pending investigation and the disciplinary process.

44. In the present case however the suspension was not made in conjunction with a charge of misconduct. The decision was not made by the ASG/OHRM who was the properly delegated person at that time. In addition Mr. Kamunyi was not given a written statement of reasons for the suspension and it was of unlimited duration. On all counts it was an unlawful suspension.

45. The Tribunal acknowledges that Mr. Marshall had responsibility for the security of UNON and that there was a heightened awareness of security issues as a result of the death threat and loss of the UN firearm. The circumstances however did not justify the breach of the United Nations Staff Rules.

## **Issue 2**

46. Was the Applicant lawfully placed on special leave with full pay (“SLWFP”) on 29 May 2006?

## **The Law**

47. Staff rule 105.2 of the former Staff Rules concerned special leave. It was located in Chapter V of the former Staff Rules under the heading Annual and Special leave, which provided for annual leave, special leave and home leave.

48. Under staff regulation 5.2 special leave could be authorized by the Secretary-General in exceptional cases. Staff rule 105.2 stated:

- (a) (i) Special leave may be granted at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the

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<sup>2</sup> ST/SGB//2010/6.

Secretary-General may prescribe. In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization.

(ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted.

### **Additional facts on Issue 2**

49. Five days after the suspension by Mr. Marshall, Mr. Kamunyi was given a letter from Mr. Elmi dated 29 May 2006 which stated:

“As a result of your meeting in Mr. Peter Marshall’s office on the evening of 26 May 2006, we wish to inform you that you have been placed on Special Leave with full pay, effective immediately and until further notice”.

50. Mr. Elmi told the Tribunal that he alone made a managerial decision to place Mr. Kamunyi on this leave. His reasons were that Mr. Marshall had complained to him about Mr. Kamunyi’s behaviour at the 26 May 2006 meeting and he thought he had enough information from talk around the compound to take immediate action. He believed that placing Mr. Kamunyi on SLWFP was a measure that would do no harm to either party but would prevent matters from getting worse. In light of the deterioration in the relationship between Mr. Kamunyi and Mr. Marshall as well as all the other matters he was hearing about, he considered that the situation was very tense and he made “a judgment call for the sake of peace”

51. When it was put to him that he did not have the power to make such a decision he explained that although there was no explicit power, when he thinks the situation demands action on his part as Chief of HRMS he has authority to make decisions on behalf of the ASG/OHRM.

52. Mr. Elmi was not aware at that time that Mr. Kamunyi had had his ground pass confiscated by Mr. Marshall. He said that normally a person on special leave has the right to enter the compound. The record shows that Mr. Kamunyi's ground pass was conditionally returned to him in March 2007 after intervention from the Director of Administrative Services.

53. The special leave was granted "until further notice". Mr. Elmi said this was to avoid the necessity to have repeated extensions. He did not see it as an indefinite placement. He accepted that the reasons he gave in his letter could have been "more descriptive".

54. Mr. Elmi wrote to Mr. Kamunyi on 14 July 2006 confirming the decision to maintain Mr. Kamunyi on SLWFP until further notice. He informed him that the decision to place him on SLWFP had been ratified by the ASG/OHRM. The matter was then referred to New York and Mr. Elmi had little further involvement in the case after this.

55. Nearly two years later in a letter dated 24 January 2008 which charged him with the disciplinary offence of insubordination, OHRM advised Mr. Kamunyi that the SLWFP would be converted to suspension with pay with immediate effect due to the nature and gravity of the allegations against him.

56. Mr. Kamunyi remained on this status until 16 July 2008 when the OIC/OHRM sent him a letter which advised that, "...your suspension will come to an end with effect from the receipt of this letter". The letter also set out in detail the reasons for having placed him on special leave on 29 May 2006. It said that it was done pending the conclusion of an investigation conducted by ID/OIOS into the plot to kill the Executive Director of UN-HABITAT, his involvement in the theft of the hand gun and insubordination for failing to hand over his hand gun to Mr. Marshall.

57. I note that these were different reasons from the one given on 29 May 2006. Then the special leave was imposed because of the 26 May 2006 meeting. The plot to kill and the theft of the hand gun was not referred to by Mr. Marshall in that meeting.

### **Applicant's submissions**

58. It is the Applicant's case that the decision to place him on special leave indefinitely was done without authority, was an abuse of process and a wasteful management of the Respondent's resources.<sup>3</sup> As such it was incapable of ratification by the then ASG/OHRM.

59. It was also submitted that the extension of the SLWFP pending conclusion of the investigation into various allegations against the Applicant conducted by the Kenyan authorities and the investigation by ID/OIOS was equally without authority and a breach of staff rule 105.2 of the United Nations Staff Regulations and Rules and that the prolonged period of special leave was akin to an indefinite and veiled disciplinary sanction.

60. The Applicant further submitted that the decision to suspend him on 4 February 2008 was unlawful and that its further extension on 29 April 2008 for an additional three months or until the disciplinary action was completed was also unlawful for want of authority under the United Nations Staff Regulations and Rules and therefore null and void.

### **Respondent's submissions**

61. The Respondent submitted that Mr. Elmi's decision was lawful, the issues surrounding the matters which were being investigated were serious and there was no indication as to the length of time it would take to finalize the investigations. To

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<sup>3</sup> UN Administrative Tribunal Judgment No. 1411, *Cherif* (2008).



ensure that the Applicant was not prejudiced while the investigations were going on, a decision was made to place him on special leave with full pay.

62. The Respondent's case is that pursuant to staff rule 10.4, Mr. Elmi's decision was not based on any extraneous or impermissible considerations and was consistent with his delegated authority as Chief, UNON/HRMS to ensure the maintenance of the status quo during the pendency of an investigation and did not constitute a disciplinary or punitive measure as special leave with full pay created no adverse presumption against the Applicant and he suffered no financial loss.

### **Conclusions on Issue 2**

63. The policy behind staff rule 105.2 is that where a staff member has reason to request special leave they may do so for the reasons specified. Whether the request is granted is a matter for the Secretary-General. Placement on special leave on full or partial pay is only to be granted in exceptional circumstances. The reasons for granting such special leave are set out in the rule. They include advanced study and research, extended illness and child care.

64. The rule also confers a general power on the Secretary-General to grant special leave in exceptional cases. The rule does not specify what the scope of that power is however this can be ascertained from the specific context of the words which precede it and the wider context of this and other Staff Rules and Regulations.

65. The specific context may be ascertained from the specific criteria which precede the general power.<sup>4</sup> The ambit of the discretionary power conferred on the Secretary-General which follows the criteria is informed by these criteria. In this case they specify the grounds on which staff members can apply to the Secretary-General

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<sup>4</sup> Eiusdem generis is a canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. Black's Law Dictionary, 8<sup>th</sup> ed.

for leave other than annual and home leave. These grounds do not include or refer to disciplinary measures.

66. The wider context is the location of the rule about special leave in the Staff Rules. It is found in Chapter V of the rules which deals with Annual and Special leave, not disciplinary measures and procedures. Later parts of staff rule 105.2 focus on family leave, military service in the armed forces of a State of which the staff member is a national, and for pension purposes. In none of these circumstances is special leave imposed unilaterally on a staff member.

67. Finally, the phrase “the interest of the Organization” is a constraint on the discretion of the Secretary-General to grant special leave. Such interests include the financial interests of the Organisation. In *Lauritzen*, UNDT/2010/172, it was held that it is not in the interests of the Organization to keep a staff member on SLWFP for an extended period without assignment of work.

68. I conclude that the words “exceptional cases” relate to situations referred to earlier in the clause such as where the staff member is undertaking research that will benefit the United Nations, or where a valuable staff member is unable to perform his or her duties by reason of illness or child care obligations. It is not a catch-all which extends to Chapter X disciplinary measures. That Chapter has its own provisions for suspension.<sup>5</sup>

69. The placement of Mr. Kamunyi on SLWFP was made pending an investigation into grave allegations. It was in effect a suspension during investigation and disciplinary proceedings as contemplated by staff rule 110.2. However, no disciplinary proceeding had been initiated against him. The invocation of the discretion under staff rule 105.2 for this purpose was a breach of the Staff Rules.

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<sup>5</sup> This interpretation is in accord with previous decisions of the former United Nations Administrative Tribunal. See Judgment No. 925, *Kamoun* (1999) and Judgment No. 1492 *Anonymous* (2009).

70. In any event it is for the Secretary-General to prescribe the period of special leave.<sup>6</sup> Mr. Elmi did not have that power. The rule contemplates a finite time for such leave. In this case, the continuation of the special leave for over one and half years pending the decision to lay misconduct charges against Mr. Kamunyi amounted to gross delay.

71. There are good reasons for the restriction of the delegation of the power to place staff members on special leave with full pay for the limitation of the period of the leave. These reasons are highlighted by the events in this case. This was a matter of great importance both to the Organization and to Mr. Kamunyi. It required an objective overview of all the facts before such an important decision was made. Mr. Elmi was understandably concerned by Mr. Marshall's description of the meeting and influenced by talk around the compound. His reliance on these to make a unilateral decision may have been well meaning but in the end was unwise and unlawful.

72. On the other hand, the suspension of Mr. Kamunyi once the charges of misconduct were made was lawful as it met all the preconditions required by staff rule 110.2.

### **Issue 3.**

73. Did UNON follow the procedures set out in the relevant United Nations regulations and rules and administrative issuances with respect to the handling of the request for waiver and the arrest and detention of the Applicant by the Kenya Police?

### **The Law**

74. Article 105(2) of the Charter of the United Nations ("the Charter") provides that officials of the Organization shall enjoy such privileges and immunities as are

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<sup>6</sup> See *D'Hooge* UNDT/2010/044.

necessary for the independent exercise of their functions in connection with the Organization.

75. Article V, Section 20 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (“the 1946 Convention”) provides that privileges and immunities are granted to officials in the interests of the United Nations and that the Secretary-General shall have the right and duty to waive the immunity of any official in any case where, in his opinion, immunity would impede the course of justice and can be waived without prejudice to the interests of the Organization.

76. The fundamental importance of the responsibilities of the Secretary-General to safeguard the interests of the Organisation was referred to in an advisory opinion of the International Court of Justice dated 29 April 1999<sup>7</sup>:

“[...] it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings. That finding, and its documentary expression, creates a presumption of immunity which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.”

77. Article V, Section 21 of the 1946 Convention provides that the United Nations shall cooperate at all times with appropriate authorities of Members for the proper administration of justice, the observance of police regulations and to prevent abuse in connection with privileges and immunities.

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<sup>7</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62*

78. General Assembly resolution 76(1) provides that the categories of officials to which the provisions of Articles V and VII of the 1946 Convention apply should include “all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates”.

79. Staff regulation 1.1(f) states that:

“The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, the staff member shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.”

80. The Staff Rules also materially provide at 101.2 (c) that:

“Staff members must comply with local laws and honour their private legal obligations, including but not limited to, the obligation to honour orders of competent courts.”

81. ST/SGB/198 relating to the security, safety and independence of the international civil service provides that in cases of arrest or detention the Secretary-General will use such means as are available to him to ensure respect for the privileges and immunities of international officials.

82. ST/AI/299 deals with the reporting of arrest or detention of staff members and others. It is essential that United Nations Headquarters be informed of incidents such as arrests of staff members immediately after they take place and a detailed procedure is prescribed to ensure that United Nations Headquarters has all the relevant information. A designated official is to immediately contact the Foreign Ministry of the Government concerned and request specified information which is to be

transmitted to United Nations Headquarters. The matter is to be taken up with the Secretary-General and the Office of Legal Affairs (“OLA”).

83. These rules and regulations and administrative issuances are silent as to the procedures to be taken by the Organization when, prior to interview or arrest, it is asked by a host country to waive the privileges and immunities of a staff member for a particular purpose. To better understand the processes adopted by the United Nations for dealing with such an important matter, the Tribunal called Mr. Chris Mensah, Senior Legal Adviser of UNON at the time of the arrest, to give expert evidence<sup>8</sup> about United Nations procedures concerning the waiver of immunity. The following findings are made in the light of his and other relevant evidence.

- a) Delegation. In UNON the Executive Director of the United Nations Environment Programme (“UNEP”) is designated to undertake the special responsibilities for the security and protection of the Organization’s personnel and staff,
- b) The Request for waiver. A letter of request should come from the Ministry of Foreign Affairs of the host country. Only the signatures of the Head of State, the Prime Minister and the Minister of Foreign Affairs are recognised for this purpose. In Kenya, since the police force is an arm of the Government and therefore deemed to be in the Office of the President, it has been the practice to receive requests from the police on letterhead from the Office of the President provided that that person signs on behalf of the President and not in their own capacity.
- c) Receipt of the request. The letter should be addressed to the head of the United Nations at the duty station. In the case of Nairobi this is the Director-General of UNON. It may be copied to the Senior Legal Adviser. If the letter is sent to a

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<sup>8</sup> Pursuant to Article 17(1) of the Rules of Procedure of the United Nations Dispute Tribunal, the Tribunal “may examine witnesses and experts called by either party and may call any other witnesses or experts it deems necessary”.

staff member that person has a responsibility immediately to contact the senior legal adviser who will discuss it with the head of the office.

- d) Processing the request. An inquiry is undertaken at the duty station to ascertain the background to the request. This information is then transmitted to OLA at United Nations Headquarters, which is designated by the Secretary-General to act in such matters.<sup>9</sup> This may be accompanied by a recommendation from the duty station.
- e) Waiver of immunity. It is exclusively for the Secretary-General to determine the distinction between acts performed in an official or private capacity for the purpose of assessing a request from a host country to waive the privileges and immunities of an official of the United Nations. However, the decision is made on behalf of the Secretary-General by the Under-Secretary-General for Legal Affairs (“the Legal Counsel”) at United Nations Headquarters. This decision is sent to the Director-General and the Senior Legal Adviser at the duty station. If the waiver is granted it will usually have conditions attached such as the specific purpose of the waiver, the duration of the interview or detention and the place of the interrogation.
- f) Where an arrest is made without a waiver or the knowledge of the Secretary-General, United Nations Headquarters is immediately informed so a protest can be raised and, as Mr. Mensah put it, to ensure that the staff member’s rights are guarded.

84. The United Nations Field Security Handbook<sup>10</sup> prescribes the procedure to be followed by security personnel in matters of arrest and detention of United Nations staff members. In summary it requires a Designated Official immediately to report the incident by the fastest means of communication available (such as email, cable, facsimile, radio, or telephone) to the Under-Secretary-General for Safety and Security giving all details of the staff member and the circumstances.

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<sup>9</sup> ST/SGB/2008/13 on the Organization of the Office of Legal Affairs.

<sup>10</sup> See paragraphs 6.17 to 6.26.

85. The Designated Official at the duty station where the arrest or detention has taken place shall also immediately contact the Foreign Ministry of the government concerned seeking relevant information including the authority under which the arrest was made and access to the arrested person.

86. Where a case of arrest or detention of staff members of the United Nations or the organizations constitutes a clear violation of the privileges and immunities of the staff member concerned, and where, at the same time, the employing organization has not been able to fulfill its obligations toward the staff member, then heads of organizations with programmes in the country may be requested by the Secretary-General of the United Nations to suspend all operations, other than those of a purely humanitarian nature, and to cancel future missions until the situation is resolved.

### **Additional facts on Issue 3**

87. When Mr. Marshall received news of the death threat in New York, he ordered his deputy, Mr. Bruce, to conduct an inventory of the Armoury. On 20 May it had been reported to Mr. Bruce that the firearms in the Armoury tallied with the register. No arms were missing. On 22 May another inventory was taken by the UNON Armourer. He reported that one weapon was missing

88. When he returned to Nairobi Mr. Marshall began making enquiries. By then he was aware that on 22 May 2006 a UN firearm had been missing from the Armoury. After his briefing by the Kenya Diplomatic Police Unit, who believed Mr. Kamunyi was a suspect, he arranged to interview Mr. Kamunyi on 26 May 2006 but he did not question him about the missing UN firearm.

89. On 27 May 2006 Mr. Marshall reported in an e-mail to Mr. Mohammad Bani Faris, Director, Division of Headquarters Security and Safety Services, DSS, that:



“The investigation is now reaching a critical point and will indeed involve the Kenyan Authorities who will be requesting that immunities of some staff members be lifted for further inquiries. With the substantial information received this far, I am recommending that this waiver be granted”.

90. Mr. Marshall told the Tribunal that he recommended waiver so that the Kenya Police could conduct their investigations unhindered.

91. On 29 May 2006, Mr. Bruce formally reported to the Kenya Police that a UN firearm was missing and on the same day Mr. Frederick K. Situma, Officer Commanding (“O/C”), Diplomatic Police Unit, wrote to Mr. Marshall. As Mr. Kamunyi was now a principal suspect in the theft of the weapon, Mr. Situma requested that all rights and immunities that he may normally enjoy due to his employment as a UNON security officer, be waived, to permit the government of Kenya, represented by the Kenya Police, to interview Mr. Kamunyi. He added:

“Your cooperation in obtaining authority to have Mr. Kamunyi’s rights and immunities waived for the purpose of this investigation is greatly appreciated.”

92. On 29 May 2006, Mr. Marshall sent an e-mail to Ms. Tibaijuka and copied it to Chris Mensah, Bani Faris, Diana Russler (the then OIC/DSS) and others. He informed Ms. Tibaijuka of the waiver request from O/C Situma and attached a copy of the letter. He stated that he believed the request was warranted and should be granted.

93. Ms. Russler asked for advice from the then Assistant Secretary-General of Legal Affairs about the proper way to handle the request including whether it needed to be resubmitted through the Foreign Ministry of Kenya. She wanted this information before a response was provided to the competent Kenyan authorities. Ms. Russler also wrote to the then Under-Secretary-General, Office of Internal Oversight Services, asking for an OIOS investigation to be conducted.

94. Ms. Tibaijuka responded the same day to Mr. Marshall, with a copy to Chris Mensah and others. She wrote “I am by this memo requesting Sasha and Chris [Mensah] to provide me with a written brief on the following 3 issues: (1) SLWFP; (2) procedures for suspension with pay; and (3) the procedures for waiving the immunity of a s/m of the UN. Do we have to refer this issue to OLA or the SG?”

95. There is no evidence that either Ms. Russler or Ms. Tibaijuka received the advice they sought and no formal response was sent to Mr. Marshall authorising him to take any steps in relation to the waiver request.

96. On 9 June 2006, Mr. Marshall and Mr. Jasper went to the Police Station at the request of the Commissioner of Police who wished to discuss several issues including the ongoing investigation into the missing UN firearm.

97. Mr. Marshall wrote a note for the file after the meeting and expanded on it in oral evidence. According to him the Commissioner told him the Police did not think that Mr. Kamunyi’s story about 16 May 2006 was credible and they were going to arrest and detain him. The police had investigated the issue of immunities and considered that as Mr. Kamunyi was a Kenyan citizen and a former police officer, immunity did not apply.

98. Mr. Marshall told the Tribunal that the Police Commissioner became very stern and told him what he was going to do. The Deputy Commissioner gave him a copy of the Vienna Convention. A number of other unrelated matters were also discussed. This meeting ended at 11.15 am.

99. Meanwhile at 11:00 am the same morning Mr. Kamunyi was called to the Gigiri Police Station. He was asked to bring his private firearm and licence. He arrived half an hour later at approximately 11.30. He said he was told by O/C Situma that he had instructions from Mr. Marshall and the Commissioner of Police to seize his firearm and arrest and detain him. Mr. Kamunyi insisted that the matter be recorded in the occurrence book before he succumbed to the arrest and detention. He

said the occurrence book recorded that he was detained pending an investigation into the theft of a UN weapon from a UN Armoury.

100. Later on 9 June 2006, Mr. Mensah received a call from the Director-General of UNON who told him that Mr. Kamunyi had been arrested and asked him to visit him. Mr. Mensah, accompanied by Mr. Bruce, saw Mr. Kamunyi in the police cells in the early evening. He checked that he was not being tortured and that he had access to counsel. He said Mr. Kamunyi was very agitated and that he believed that Mr. Mensah was part of a plot to have him arrested.

101. Mr. Kamunyi was released on 12 June 2006. When he asked the police why he had been held he was told that the United Nations was acting as the complainant in the issue of the theft of the weapon from the Armoury. He said he was told that Mr. Marshall had told the Commissioner that he needed to be arrested and interrogated. In his evidence to the Tribunal, Mr. Marshall denied this. He said he had no role at all in the incarceration as the Police Commissioner takes no instructions from him.

102. Mr. Mensah wrote to New York asking for permission to write to the Government of Kenya to express concern at the arrest. There is no evidence of a reply to that letter or any protest being raised with the Kenya Government.

103. On 5 December 2006, Police Officer Kimaiyo wrote to Mr. Marshall on behalf of the Commissioner of Police. He outlined the investigation into the loss of the UNON Glock pistol and the death threat and then stated:

“..Mr. Frederick Situma ACP O/C Diplomatic Police wrote to you requesting to be allowed to arrest the said Mr. Wahome to assist with the investigations. Mr. Situma received a go ahead and he indeed cause [*sic*] Anthony Wahome to be arrested and interrogated [...]”

104. He went on:

“We therefore do not have anything tangible to incriminate against your staff Mr. Anthony Wahome Kamunyi. You are therefore requested to handle his case administratively”.

105. In April 2007, UNON received another request from the Diplomatic Police Unit requesting to interview seven UNON staff members, including Mr. Marshall and Mr. Kamunyi, about the loss of the firearm and the death threat and to revisit the UNON Armoury to interview other concerned individuals. This request was passed on to Mr. Mensah and after referral to UNHQ a waiver was granted on a strictly voluntary basis and without prejudice to the privileges and immunities of the United Nations and its staff.

#### **Applicant’s submissions**

106. The Applicant submitted that the responsibility for the arrest and detention lay primarily with Mr. Marshall as evidenced by the exchange of correspondence between the head of the Kenya Diplomatic Police Unit and Mr. Marshall and between the Commissioner of Police and Mr. Marshall. He alleged that Mr. Marshall took it on himself to exercise powers he did not have, was ignorant of the proper processes and did not act to safeguard his privileges and immunities.

#### **Respondent’s submissions**

107. The Respondent’s principal submission on this issue was that the arrest and detention of Mr. Kamunyi was a unilateral and independent action by the Kenya Police acting under the authority of the Police Act. Pursuant to Article 2 (7) of the United Nations Charter, the UN may not intervene in matters that are within the domestic jurisdiction of a member state.

108. Next the Respondent submitted that neither Mr. Marshall nor any other officer of the United Nations acceded to the request for waiver. The Respondent relied on the evidence of Mr. Mensah, who expressed his legal opinion to the Tribunal that no proper request for the lifting of immunity had been made in this case because to do so would have required sending a formal communication to the Legal Counsel in the Office of Legal Affairs in New York Headquarters.

109. Thirdly, the Respondent submitted that in spite of Mr. Marshall's recommendation that the waiver should be lifted there is no evidence that he orchestrated or instructed the Police to carry out the interrogation or detention.

110. Finally, the Respondent questioned whether Mr. Kamunyi enjoyed immunity from arrest for the matters the Police was investigating. Under section 20 [*sic*] of the United Nations Field Security Handbook, privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individual themselves. It was submitted that the incident along Thika Road was not reported to the United Nations by Mr. Kamunyi nor did it happen in the course of discharge of his duties.

### **Conclusions on Issue 3**

111. Although Mr. Kamunyi was locally recruited he was not paid an hourly rate and therefore was covered by Articles V and VII of the Convention.

112. Although Mr. Marshall had referred O/C Situma's 29 May 2006 request for the waiver of Mr. Kamunyi's immunity to both the Director-General and Mr. Mensah at UNON and to UNHQ there was no official response and Mr. Kamunyi was arrested without an official waiver or protest.

113. There are two possible explanations for the arrest occurring in the absence of a properly authorized waiver. The first is that Mr. Marshall expressly or impliedly

gave a purported waiver when he met with the Commissioner of Police on 9 June 2006. This is consistent with the letter written by the Deputy Commissioner of Police on December 2006. The second explanation, given by Mr. Marshall to the Tribunal, is that the Commissioner acted unilaterally on the basis that the Police believed that no waiver was required. This latter seems unlikely given that the Police had expressly sought a waiver before they took action and there is no evidence that Mr. Marshall made any protest or raised any objection to the arrest which he knew was imminent. At the most, from his account to the Tribunal he told the Commissioner that Mr. Kamunyi enjoyed some immunity.

114. I find that Mr. Marshall said enough to the Commissioner to give him the impression that waiver had been granted and that Mr. Kamunyi could be arrested.

115. In spite of Mr. Marshall's denial, I conclude that he was more involved in the detention and arrest of Mr. Kamunyi by the Kenya police than he has been prepared to admit for the following reasons:

- a. The correspondence from the Kenya Police points strongly to his involvement.
- b. He knew before the request for waiver was made that it was coming. This can only have been as a result of his discussions with the Police after Mr. Kamunyi refused to hand over his personal firearm to him.
- c. The Police thanked him for his cooperation at the time and in December 2006 recorded that their request for waiver had been granted. As Mr. Marshall was the only United Nations official with whom the Police were dealing with at the time it is highly probable that if the Police believed a waiver had been agreed it was because of what Mr. Marshall had said or agreed to.

116. At the very least, and taking the most benign view of Mr. Marshall's actions, the arrest went ahead with his fore-knowledge and without any protest by him. It is no coincidence that the request for waiver and the arrest followed Mr. Kamunyi's

refusal to surrender his private firearm to Mr. Marshall. It is no coincidence that Mr. Kamunyi was called to the Police station on 9 June 2006 while Mr. Marshall was still in the Police Station. Mr. Marshall's file note made on 9 June does not mention that he raised any protest.

117. On the other hand it is clear that although Mr. Marshall had advised the appropriate authorities of the requests for waiver, he had not received the advice or support to have been expected from those charged with making the complex legal and diplomatic decisions such as whether immunity applied in this situation and what conditions should attach if the waiver were granted.

118. Whatever the circumstances, however, it is clear that the procedures in the relevant United Nations rules and administrative issuances with respect to the handling of the alleged arrest and confinement of the Applicant by the Kenya Police were not followed.

- a. The request for waiver came from the Commissioner of Police and the Diplomatic Police. That letter was under the letterhead of the Office of the President but was not written on behalf of the President. It was signed in the name of the head of the Diplomatic Police Unit.
- b. The letter was not referred to the Kenya Ministry of Foreign Affairs by the persons responsible at UNON or at UNHQ as required by the United Nations procedure described by Mr. Mensah.
- c. The communications were incorrectly addressed by the Kenya Police to Mr. Marshall but he correctly referred the request for waiver to the appropriate authorities within the United Nations. No formal decision was made at United Nations Headquarters about an official response. There is no evidence that important matters were considered, such as whether the alleged actions of Mr. Kamunyi were of a nature that would be covered by immunity, whether it should be granted and if so what if any conditions should be attached to the waiver.

119. Once Mr. Kamunyi had been arrested an appropriate visit was made to him. However, the United Nations made no formal protest or communication to the Kenya Ministry of Foreign Affairs over the arrest.

**Issue 4.**

120. Was the reprimand of the Applicant concerning his refusal to hand over a loaded firearm to his supervisor unlawful in terms of the Staff Rules and done without due process or proper factual basis. Did the applicant's actions amount to insubordination?

**The Law**

121. The Tribunal's task is to examine and assess the processes undertaken by the Respondent to investigate the allegation of insubordination; whether the Respondent had a reasonable and proper basis to find that the Applicant was insubordinate following a fair and lawful process; and whether the response was proportionate.

122. Insubordination is the willful failure to obey a lawful order or instruction of a supervisor.

123. Former staff rule 101.2(b) provides that "[s]taff members shall follow the directions and instructions properly issued by the Secretary-General and their supervisors" and it is an offence under the standard operating procedure of the Security and Safety Service for any member of the Service to not carry out a lawful and reasonable instruction given by a supervisor.

124. Insubordination in the legal sense requires more than proof of a refusal of an instruction given by a superior. The rule requires that the instruction is both lawful and reasonable.



125. The Standards of conduct for the international civil service, quoted in ST/SGB/2002/13 on the Status, basic rights and duties of United Nations staff members, provides the following guidance/explanation on following directions from managers:

“International civil servants have to follow the instructions they receive in connection with their official functions and if they have doubts as to whether an instruction is consistent with the Charter or any other constitutional instrument, decisions of the governing bodies or administrative rules and regulations, they should first consult their supervisors. If they cannot agree, the international civil servant may ask for written instructions. These may be challenged through the proper institutional mechanisms, but any challenge should not delay carrying out the instruction. International civil servants may also record their views in official files. They should not follow verbal or written instructions that are manifestly inconsistent with their official functions or that threaten their safety or that of others.”

126. ST/AI/309/Rev. 2 on the Authority of United Nations Security Officers provides that:

“1. United Nations security officers function as agents of the Secretary-General to preserve order and to protect persons and property within the Headquarters area. All persons on the premises are expected to comply with the directions that may be issued by the security officers in the performance of their functions. Security officers, and all staff members, are expected to exercise their functions with courtesy and in conformity with established rules and regulations, including applicable local law.

2. Security officers are authorized to search persons, vehicles, handbags, briefcases or packages and to seize property if they have reason to believe that any person is carrying an unauthorized weapon [...].

3. Refusal to comply with directions issued by the security officers within their authority may result in removal from or denial of access to the premises and shall be reported by the Chief, Security and Safety Service, to the Assistant Secretary-General, Office of Conference and Support Services, for appropriate action.”

127. The United Nations Field Security Handbook<sup>11</sup>, which became effective in January 2006, provides, in relevant part, that:

“1.2 Compliance with the policies outlined in this Handbook is mandatory; failure to comply with these policies and procedures could seriously endanger the lives of staff members and has implications for the liability of the organizations concerned.

6.27 The policy of the Organization with regard to the possession and carrying of firearms is that no United Nations staff member (including security officers) are authorized to carry firearms unless they are cleared by DSS’ Division of Headquarters Security and Safety Service (DHSS) and authorized by the Secretary-General.

6.28 Private use of firearms by United Nations staff members shall be in accordance with the laws of the host country. However, privately owned firearms shall not be carried in United Nations aircraft, vehicles or into United Nations offices or during the conduct of official business. In those countries that authorize private citizens to carry firearms, and it is standard procedure for citizens to commute to and from work with private firearms, it is standard procedure for citizens to commute to and from work with private firearms, the Designated Official may authorize agencies to construct appropriately

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<sup>11</sup> The Handbook is a comprehensive policy document that has been agreed to by the organizations of the United Nations system at the Ad Hoc Inter-Agency Meeting on Security Matters (has now been replaced by the Inter Agency Security Management Network).

guarded and secured weapons lockers where private weapons will be secured during working hours.”

128. In spite of these references in the Field Security Handbook, at the relevant time there was no policy concerning storage of private firearms in the Armoury at UNON although, as noted by the OIOS report of 8 April 2008, a Firearms Control register was maintained for individual security officers who carried personal fire arms.

129. Former staff rule 110.3(b)(i) states that the issuing of a reprimand is not a disciplinary matter. However, a reprimand stays on the staff member’s Official Status File along with any comments he/she may have had on the case.

#### **Additional facts on Issue 4**

130. The OIOS investigation report concerning Mr. Kamunyi was not released until 12 November 2007. It stated that notwithstanding the opinion of a linguistic expert who had concluded that Mr. Kamunyi was the author of the threatening e-mail, the investigators took the view that this evidence was insufficient to make a conclusive finding against him. In addition it stated that although it was possible that he was involved in the theft of the firearm from the Armoury it noted that as the procedures were rarely followed by security staff in the Armoury and the records were not properly maintained, it was virtually impossible to connect Mr. Kamunyi or any other individual staff member to the removal of a particular weapon.

131. However, ID/OIOS also took up 2 issues against Mr. Kamunyi which had not been part of the original complaint against him. First, on the basis of a search of Mr. Kamunyi’s e-mails, it found that Mr. Kamunyi had stored his personal firearm in his car. As this was contrary to the Firearms Act of Kenya and was in violation of staff regulation 1.2(b) it was not behaviour of the highest standards of integrity. Second it

decided that he had committed an act of insubordination in refusing to hand over his private firearm to Mr. Marshall when requested on 26 May 2006.

132. These recommendations were referred to the ASG/OHRM on 12 December 2007 for action. Charges were laid within 2 months of that but it was not until 16 July 2008 that Mr. Kamunyi was told that his case would not be pursued as a disciplinary matter but he would be reprimanded for his refusal to hand over the firearm - a failure to comply with a “duly authorized instruction issued by his supervisor.”

133. The circumstances of the 26 May 2006 meeting are these. When Mr. Marshall called Mr. Kamunyi to the meeting on 26 May 2006 he had two serious matters to investigate: the theft of the firearm from the UNON Armoury and the death threat. These were grave allegations and the consequences of such allegations are very serious. For these reasons they demanded an investigation of the highest quality and rigor in order to protect the safety and security of United Nations personnel and the due process rights of the person facing the allegations.

134. Mr. Kamunyi was not informed what he was being interviewed about either before or during the meeting. Neither was he interviewed about the two serious matters that Mr. Marshall was concerned about.

135. Before Mr. Kamunyi arrived, Mr. Marshall had been told that he was wearing his private firearm. The recording and transcript of the interview shows that all Mr. Marshall’s questions concerned this. He immediately asked him to make the firearm safe and give it to him. Mr. Kamunyi asked for the reason and explained that he normally left it at the Armoury. Mr. Marshall asked him to comply. Mr. Kamunyi said it was not United Nations property and then began to explain that according to the Kenya Firearms Act he could only give it to a licensing officer or other authorized persons. Mr. Marshall then asked who authorized him to wear it on his uniform when it was not part of the uniform and again asked him to comply. When Mr. Kamunyi said he was not going to comply he was asked to record a statement, which he did.

136. In the course of this exchange Mr. Kamunyi accused Mr. Marshall of intimidating him, told him he did not have the courtesy to explain what was happening and that he was not listening to him. Mr. Marshall said it was not a discussion or a debate. He wanted compliance with his instruction.

137. Mr. Marshall later described Mr. Kamunyi's behaviour in response to his request to hand over his personal firearm as belligerent and aggressive. He told the Tribunal that Mr. Kamunyi appeared agitated and hostile. He denied any knowledge of the UNON Armourer allowing private firearms to be stored at the Armoury.

138. In the course of the investigation into the death threat and theft of firearm matters against Mr. Kamunyi, the OIOS considered the circumstances of the 26 May meeting and recommended that Mr. Kamunyi should be charged with insubordination.

139. Mr. Kamunyi was advised for the first time that the refusal to comply with Mr. Marshall's instruction to hand over the firearm was regarded as insubordination two years later in a letter dated 24 January 2008 from OHRM. It said that such conduct did not meet the standards of behaviour expected of an international civil servant and was very serious. The letter advised that he was charged with insubordination and asked for his comments on this.

140. Mr. Kamunyi responded to that letter. On 12 July 2008, OHRM wrote to him advising that based on his comments the insubordination charge would not proceed as a disciplinary matter however as it was a particularly serious matter it had been decided to issue him with a reprimand.

### **Applicant's submissions**

141. The Applicant submitted that the decision to reprimand and transfer him was made without due process and was arbitrary and prejudicial. In addition it was based

on wrong facts, other extraneous conclusions, factors and findings because no rules had been formulated by UNON about the use of private firearms.

142. The Applicant also submitted that it was contradictory to decide not to pursue an alleged act of insubordination as a disciplinary matter and then proceed to reprimand the Applicant on the same facts contrary to the Uniform Guidelines for Investigation Para 2 Part E posted on the OIOS website; that the basis of the reprimand (the act of insubordination) does not fall within his obligations under the Charter of the United Nations, the Staff Regulations and Rules or other Administrative issuances as a standard of conduct expected of an international civil servant.

143. The Applicant submitted that the letter of reprimand constitutes adverse material within the meaning of Paragraph 2 of ST/AI/292 of 15 July 1982. He alleges that the decision to reprimand him was prejudicial and he stands to suffer irreparable blemish to his records as it has been placed in his official status records.

### **Respondent's submissions**

144. It is the Respondent's case that the Applicant was in breach of security regulations in bringing his personal firearm into the UNON Complex and carrying it around as it was not part of the equipment issued by the United Nations. In discharge of his duties Mr. Marshall was entitled to ask for the surrender of a weapon which was brought into his area of jurisdiction without prior authorization. The refusal to comply with the security order issued by Mr. Marshall was an act of insubordination.

145. Mr. Marshall had the overall responsibility of maintaining security within the UNON Complex and under Section 8 of the Headquarters Agreement between the United Nations and the Government of Kenya, UNEP has the power to make regulations operative within the Headquarters seat for the purpose of establishing conditions in all respects necessary for the full execution of its functions. Under the said section of the Headquarter Agreement no law of the Republic of Kenya, which is

inconsistent with a regulation of UNEP authorized by section 8 of the Headquarter Agreement, shall to the extent of such inconsistency, be applicable within the Headquarter seat.

146. By reason of the foregoing, and staff rule 10.4, the Respondent submitted that Appellant's conduct amounted to insubordination and the Office of the Human Resources Management was entitled to issue a reprimand to Applicant, which is an administrative, non-disciplinary measure.

#### **Conclusion on Issue 4.**

147. The following conclusions are made taking into account the acknowledged seriousness of the matters that UNON was facing at the time.

148. The first question is whether the Respondent had a reasonable and proper basis to find that Mr. Kamunyi had been insubordinate.

149. Mr. Marshall's opinion that Mr. Kamunyi was belligerent and aggressive is not supported by the tape recording which was played to the Tribunal during the hearing or with what I find to be the true and unedited verbatim transcript of this recording. At the most, for a very short time during the encounter both men raised their voices and were firm in their respective positions.

150. Mr. Kamunyi's refusal was not unconditional. He wanted to know why he was being asked to surrender the firearm and on what authority. The latter question was an important one. Mr. Kamunyi is a former Inspector of the Kenya Police, a firearms expert and a competitive shooter. He also adhered strictly to the firearm licensing laws. He wanted to be satisfied that this was a lawful instruction. It is clear from the transcript that Mr. Marshall said nothing to allay his fears. He put Mr. Kamunyi in the position of either refusing to comply with an instruction or, as Mr. Kamunyi saw it, acting in breach of the Firearms Act.

151. Mr. Kamunyi was a careful and responsible gun owner with a good knowledge of his duties and responsibilities in relation to his personal firearm licence. This was known to Mr. Marshall. Mr. Kamunyi was conscious of the dangers of disarming a firearm inside a closed room. He aired those concerns but was not answered except for the unequivocal order to comply.

152. In his statement made directly after the meeting at Mr. Marshall's request, Mr. Kamunyi fully explained his reasons for refusing. These were: his understanding of Kenya Firearms legislation; his concerns about the safety of unloading in the presence of others; and his belief that there were no restrictions on United Nations staff members carrying weapons into the UNON complex.

153. Whatever the rights and wrongs of these beliefs, I am satisfied that Mr. Kamunyi honestly believed that these were correct. Mr. Marshall had issued a standard operating procedure on 19 October 2005 concerning the carrying of firearms within UNON which stated that firearms were permitted on the UNON premises only in accordance with the SOP and that only United Nations security officers were authorized and permitted to carry firearms. It made no distinction between private and official firearms. Mr. Kamunyi had received authorisation to store his firearm at the UNON Armoury from the UNON Armourer

154. Mr. Marshall did nothing to reassure Mr. Kamunyi of the lawfulness of his request at the time. The law, as subsequently revealed, is a complex mix of domestic and United Nations legislation. The Respondent was unable to point to any lawful authority for Mr. Marshall to demand the handing over of the firearm to him personally other than the general maintenance of security at UNON.

155. The Respondent's allegation that he posed a security threat that needed urgent action is undermined by Mr. Kamunyi's ready willingness to sit for over an hour to give a rational explanation for his actions once given the opportunity.



156. Mr. Elmi told the Tribunal that he had not received any memo from Mr. Marshall that Mr. Kamunyi was a security threat or a threat to the people at UNON. He received only a verbal report that there had been a breach of the peace.

157. It is of concern that behind Mr. Marshall's actions both on that date and subsequently, was an uncritical acceptance of a Kenya Police theory that the UN firearm had been missing from the UN Armoury on 16 May 2006 and therefore likely to have been discarded by Mr. Kamunyi on that date. Before the 26 May 2006 interview Mr. Marshall's deputy officer, Mr. Bruce, had told him that there were no firearms missing up until at least 22 May 2006. On this basis it was impossible for the firearm to have been disposed of before then. When asked by the Tribunal to explain his reasons for believing a firearm had been stolen by 16 May Mr. Marshall said it was because the 19 May death threat letter said a weapon was missing.

158. What the letter actually said was: *"The plot involves exiting of a weapon, bullet [sic] proof vest and ammunition from the security and using them against you"*. This is not sufficient evidence from which a person could reasonably infer that a firearm had actually been taken on that date. Mr. Marshall had the proof from his officers based on more than one inventory that the weapon was not missing on 16 May 2006. In those circumstances his reliance on the letter as evidence that Mr. Kamunyi must have taken it was neither rational nor fair.

159. It is also of concern that although Mr. Kamunyi had been depositing his private firearm almost daily at the Armoury as evidenced by a record kept there and signed by the receiving officer, the Chief of Security, Mr. Marshall, said he knew nothing about the practice and even denied it occurred.

160. The OIOS enquiry into the lack of controls at the UNON Armoury was very critical of the firearms control at UNON at that time. It identified many weaknesses in the system, responsibility for which lay with the person in charge, the Chief of

Security, Mr. Marshall. It is apparent that the case against Mr. Kamunyi arose from and to a degree was sustained by these weaknesses.

161. In summary, I conclude that the basis for the suspicions about Mr. Kamunyi's involvement in the disappearance of the UN firearm was very weak and Mr. Marshall's order for Mr. Kamunyi to hand over his private firearm had dubious legal foundation. It was also unreasonable. Mr. Marshall repeatedly issued a single unexplained order and refused to budge from that position or provide a rational explanation for the order when repeatedly asked. While it is clear that Mr. Marshall was affronted by his refusal at the meeting, there is no evidence that Mr. Kamunyi posed a threat to security.

162. As the order was probably unlawful and was certainly unreasonable in all the circumstances Mr. Kamunyi's refusal does not amount to insubordination. The decision to reprimand Mr. Kamunyi was based on a finding that he had been insubordinate. This finding was incorrect on the facts and in law. The decision to reprimand was therefore not appropriate.

163. I do not accept that Mr. Kamunyi was denied due process in relation to the charge of insubordination. Certainly the charges were laid long after the event and give the impression of being an afterthought when the other substantive charges could not be sustained, but in spite of this Mr. Kamunyi was fairly and properly advised of the charge and was given an opportunity to respond. That response resulted in the disciplinary charge being dropped. There was no breach of due process.

#### **Issue 5.**

164. Was the transfer of the Applicant from his position of Security Officer with UNON Safety and Security Service (UNON/SSS) to UNON Conference Services vitiated by lack of due process and in violation of the Staff Rules; and was this justified on the facts? Was proper procedure followed in relation to this?

## **The Law**

165. Staff regulation 1.2(c) provides that:

“Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.”

### **Additional facts on Issue 5**

166. In August 2008, after the investigations about Mr. Kamunyi and the associated investigation into the Security Service at UNON had ended, a meeting took place in New York between the Department of Security, the Director-General of UNON and OHRM. It was decided that there was not sufficient evidence revealed in the OIOS report to proceed with the charges against him and it was in the best interests of Mr. Kamunyi for his suspension to be lifted and for his return to work.

167. However, it was also decided that he should not return to the Department of Security and another post would be found for him. Mr. Mensah was involved in this decision. He facilitated Mr. Kamunyi's reassignment at UNON. He said that DSS was very uncomfortable with him returning to work there and so an alternative position was found for him with Conference Services. Mr. Kamunyi was not consulted about this but advised of his new position once it had been decided

168. The position at Conference Services was at the same level as his previous position at Security. Mr. Kamunyi accepted that he had received the same payments and other entitlements as before but felt prejudiced because he had been removed

from his field of expertise and the career progression he had expected. He has continued to work in that capacity since that time.

### **Applicant's submissions**

169. It is the Applicant's case that his transfer from UNON/SSS to Conference Services is vitiated by lack of due process. He submitted that the transfer was informed by matters that he was not aware of. He had not heard of these matters prior to the decision, which is a *sine qua non* under ST/AI/371, and in violation of staff rule 110.4 and ST/AI/371.

170. The Applicant submitted that the transfer was prejudicial to him as it caused him to suffer prejudice and irreparable blemish to his record. He alleges that the transfer has caused him loss by way of deprivation of office, promotion, opportunities, privileges and a legitimate expectation as a Security Officer at UNON.

### **Respondent's submissions**

171. The Respondent submitted that the Applicant's testimony shows that he agreed to be transferred to Conference Services;

172. It also submitted by the Respondent that pursuant to staff rule 1.2(c) [*sic*], the Secretary-General is vested with the discretionary authority to assign and transfer staff as he sees fit in the interest of the Organization. Accordingly, the Applicant as a staff member of the United Nations is required to comply with his transfer or reassignment to a different office.<sup>12</sup> And while employed by the United Nations, staff members have no entitlement to any particular position within the Organization.

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<sup>12</sup> *Hepworth* UNDT/2009/003.

### **Conclusion on Issue 5**

173. The evidence at the hearing was that Mr. Kamunyi was not consulted on the transfer. He was presented with the decision which he complied with and subsequently protested. While it would have been fairer if he had been consulted and given the rationale for the decision before it was finalised, the transfer was a lawful exercise of the discretion of the Secretary-General. Given the history of the events that took place between Mr. Kamunyi and his former manager it is unrealistic to expect that Mr. Kamunyi could have resumed his previous employment as if nothing had happened. It was prudent management to avoid the almost inevitable conflict that would have occurred. Although that has meant a complete change in Mr. Kamunyi's career that change was not because of an unlawful administrative decision.

### **Summary of findings**

174. The Applicant was unlawfully suspended from his position of Security Officer from May 2006 to January 2008 and unlawfully banned from UNON premises from 26 May 2006 to March 2007. I accept the Applicants' submission that this amounted to an indefinite and veiled disciplinary sanction.

175. The placement of the Applicant on special leave with full pay for an inordinate period of time on 29 May 2006 and 14 July 2006 was unlawful.

176. The procedures set out in the relevant United Nations rules and administrative issuances with respect to the handling of the request for waiver of his immunity and the arrest and confinement of the Applicant by the Kenya Police were not followed correctly.

177. The behaviour of the Applicant at the 26 May 2006 meeting fell short of insubordination and the consequence of a reprimand was therefore unsubstantiated and unjustified.

178. The transfer of the Applicant to another area of work on his return was a lawful exercise of the Secretary- General's discretion.

## **Issue 6. Remedies**

### **Respondent's submissions**

179. It is the Respondent's case that although during the pendency of the investigations by the Kenya Police and OIOS the Applicant was not at work, he was on full pay and has presented no evidence demonstrating he suffered damages or loss of any of his entitlements under the terms of his appointment or as a staff member of the United Nations.

180. As the party seeking to recover compensation and moral damages for losses he suffered, the burden is on the Applicant to identify the wrongful acts of the United Nations that proximately caused the loss or damage and, where possible, to and quantify the resulting damages.

181. The Applicant has presented no evidence establishing that the Respondent's actions in this matter were wrongful or that they proximately caused him any damages or other losses.

182. The Applicant's arrest and incarceration was an act of the Kenya Police for which the Respondent does not bear any responsibility.

### **Applicant's submissions**

183. The Applicant alleges that the moral damage he has suffered arising from the stress caused by the breaches warrants compensation. This damage was caused by the allegations of a plot against Ms. Anna Tibaijuka and the allegations of theft of a handgun from the UNON Armoury.

184. He also submitted that he suffered stress, uncertainty and moral damage and is entitled to damages for lost promotion opportunities, including employment, education and social benefits as a consequence of the long period of time on leave with pay and the transfer to Conference Services. He says he suffered pressure, stress and anguish, which had serious consequences not only for his professional life, which became virtually non-existent, but also for his personal life.

185. He seeks compensation for the moral damage caused by the allegations of insubordination.

186. The Applicant seeks the following remedies:

- a. Declarations that the decisions to suspend and to place him on special leave were null and void;
- b. A declaration that the actions of his UNON superiors was in violation of Article 105 of the United Nations Charter and motivated by malice and ill-will;
- c. A recommendation that disciplinary action be taken against named individuals who he alleges have violated his rights;
- d. An order expunging all adverse material from his official status file lodged as a consequence of events in this case;
- e. An order of damages for mental anguish and suffering, lost opportunities for promotion; and
- f. Legal costs of US\$ 45,575.

## **The Law**

187. Pursuant to Article 10 of its Statute the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10(5)(b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

188. The Tribunal may only make an award of costs where a party has abused the process of the Tribunal.

## **Conclusion on remedies**

189. The three unlawful administrative decisions taken by the Respondent against the Applicant were the unlawful suspension, the placement on SLWFP for one year and 8 months and the reprimand for insubordination. Each of these decisions is rescinded. Reference to them should be removed from the Applicant's official status file. As these decisions do not concern appointment, promotion or termination no amount of alternative compensation is required to be set.

190. The remedy of rescission is not appropriate where the unlawfulness relates to procedural failures such as those which occurred in the handling of the request for waiver. However, the Applicant is entitled to compensation under Article 10(5) (b) for the negative effects of both the breaches and the failures of procedure.

191. The Applicant was paid during the period of investigation and suffered no loss of salary but the negative consequences of the breaches on him go beyond mere monetary loss. These consequences include loss of self-esteem, isolation from professional life for over a year and damage to his reputation. The unlawful



suspension and removal without authority from access to his work place caused him embarrassment and frustration.

192. In addition to these are the effects of the arrest by the Kenya Police. The Respondent's submission that ultimate responsibility for arrest lies with the police is accepted but this does not relieve the Respondent from responsibility for the harm, both mental and physical which was caused to Mr. Kamunyi by its failure to follow the correct process for the request for waiver.

193. There is a real chance that had the waiver request been correctly processed by the United Nations the arrest may either not have occurred or would have been subject to conditions which would have mitigated its effect. He suffered some physical effects of being held in custody. He is left with a permanent record of arrest even though he has not faced any criminal charges. He will be faced with explaining the fact of his arrest in future applications for promotion or employment. As a former senior Police Officer who has built his career in security this is a serious and lasting impact. For these reasons I find that this is an exceptional case which justifies the payment of more than two years' net base salary.

194. In relation to costs it is acknowledged that this case has had an unfortunately long and difficult history including interruptions by the changes to the UN internal justice system. It has taken a long time for it to come before the Tribunal however there is no evidence that either party was responsible for this delay or that there was any abuse of the Tribunal's process. There are no circumstances to justify the award of costs.

195. It is clear that the actions of several UN officials were unlawful, careless or negligent. It is for the Secretary-General to take any disciplinary or other steps in the light of the findings in this judgment and in the interests of the maintenance of the Rule of Law in the UN.

**The Tribunal orders:**

196. The rescission of the unlawful decisions to suspend the Applicant, to place him on SLWFP for one year and 8 months and to reprimand him for insubordination. All references to these decisions are to be removed from the Applicant's UN personnel record.

197. The Respondent is to pay the Applicant compensation pursuant to Article 10(5) (b) of two years six months of his current net base salary.

198. The Applicant is entitled to the payment of interest on this award of compensation from the date this judgment is executable, namely 45 days after the date of the judgment. Interest on the judgment sum is payable from then at the US Prime Rate until payment is made. If the Respondent fails to pay this sum within 60 days from the date the Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate from that date until payment.

198. There is no order for legal costs.



Judge Coral Shaw

Dated this 16 day of December 2010

Entered in the Register on this 16 day of December 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi