



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2020/075

Judgment No.: UNDT/2021/152

Date: 9 December 2021

Original: English

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**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

MILLAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicants:**

Sètondji Roland Adjovi, *Etudes Vihodé*

Charles A. Adeogun-Phillips, Charles Anthony LLP

**Counsel for the Respondent:**

Jacob B. van de Velden, AAS/ALD/OHR, UN Secretariat

Romy Batrouni, AAS/ALD/OHR, UN Secretariat

## **Introduction and procedural background**

1. On 12 September 2020, the Applicant filed an application challenging two decisions:
  - a. The 1 July 2020 decision to place him on Administrative Leave Without Pay (“ALWOP”).
  - b. The 30 June 2020 decision to seize his personal smartphone for the purposes of an investigation.
2. On 15 September 2020, he filed an application for suspension of the contested decisions pursuant to art. 10.2 of the UNDT Statute and art. 14.1 of the UNDT Rules of Procedure of the Tribunal.
3. The Respondent filed a reply to the application for suspension of action on 17 September 2020.
4. On 23 September 2020, the Judge then seized of the case issued Order No. 185 (NBI/2020) in which the application was granted in part, in that implementation of the impugned decision was suspended with respect to placing the Applicant on ALWOP. In the remaining part, the application was dismissed.
5. The Respondent filed a reply on the merits of the application on 15 October 2020.
6. The case was assigned to the current Judge on 10 June 2021.
7. The Tribunal heard the case on 2 November 2021 during which oral evidence was received from Mr. Ben Swanson, who was at the time of the contested decision the Director of the Investigations Division of the Office of Internal Oversight Services (“ID/OIOS”).

### **Summary of the relevant facts**

8. On 24 June 2020, ID/OIOS received a report of possible unsatisfactory conduct implicating staff members of UNTSO in Jerusalem. Evidence submitted in support of the report included a video clip (“the clip”). On 25 June 2020, Mr. Swanson, sent an e-mail to UNTSO’s Acting Head of Mission informing him of the report and the clip.<sup>1</sup> The clip showed two male individuals and a female individual driving through a busy street in a clearly-marked United Nations vehicle. The male individual seen in the back seat and the female were allegedly engaging in an act of a sexual nature as the vehicle was driven along a heavily trafficked street. The UNTSO staff members implicated in the report are the Applicant and another staff member.

9. On 30 June 2020, Mr. Swanson sent a memorandum to the Under Secretary-General of the Department for Management Strategy, Policy and Compliance (“USG/DMSPC”) providing preliminary findings from inquiries undertaken by ID/OIOS in connection with the report of possible unsatisfactory conduct concerning the Applicant.<sup>2</sup>

10. On 2 July 2020, the Applicant received notification of the USG/DMSPC’s decision placing him on ALWOP.<sup>3</sup>

11. On 14 July 2020, the Applicant filed a management evaluation request challenging two decisions: (i) the 2 July 2020 ALWOP decision and (ii) the seizure of his personal cell phone by OIOS during a 30 June 2020 interview.<sup>4</sup> On the same date, he also filed an application for suspension of action (“SOA”).

12. On 22 July 2020, the UNDT issued Order No. 138 (NBI/2020) rejecting the SOA application.

13. On 12 September 2020, the Applicant filed an application on the merits

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<sup>1</sup> Reply, annex R/1.

<sup>2</sup> Reply, annex R/3.

<sup>3</sup> Reply, annex R/5; application, annex 2.

<sup>4</sup> Application, annex 22.

contesting the same two decisions (para. 11 above). On the same day, the Applicant filed a motion for interim measures to suspend the contested decisions.

14. On 15 September 2020, the UNDT issued Order No. 185 (NBI/2020) partially granting the Applicant's motion for interim measures and suspended the decision to place the Applicant on ALWOP.

### **Parties' submissions**

#### ***Applicant***

15. The Applicant's case is summarized below:

*a. The decision to place him on ALWOP was punitive and unlawful.*

i. He had not been accused of any sexual abuse and there were no exceptional circumstances to justify the decision.

ii. While the applicable rule requires that administrative leave shall not be punitive, in the present case, it has been used as such. The Administration issued press statements to that effect while the consequences of the measures vis-à-vis the lack of evidence to support the allegations are unbearable for a staff member living in a foreign country who needs his salary to meet his social and family obligations.

iii. The reasons for his placement on ALWOP were untrue. The Administration has no evidence to support the allegation that the unidentified female in the back seat of the car is a sex worker. During the interview, the investigators did not even ask a single question in that regard to the Applicant. The video clearly shows that the Applicant as the occupant of the front passenger's seat did not engage in any conduct at all, except appearing to be sleeping or simply resting. Even if it could be established that a sexual act was taking place in the video, this had absolutely nothing to do with the Applicant. The Applicant cannot be

responsible for the conduct of others, even if those actions were embarrassing or perceived to be damaging to the reputation of the Organization.

iv. One of the Investigators, Mr. David Ronald Rajkumar, should never have taken part in the investigations because not only is Mr. Rajkumar an agent of the Administration and therefore not a staff of an independent body, but he knows the Applicant personally and has a close relationship with him. In addition, it appears from the communication to the USG/DSMPC that Mr. Rajkumar has also given evidence, helping to identify the Applicant. It is absolutely unfair for the Applicant to be investigated by a witness in the same investigation. Moreover, the two investigators lacked professionalism throughout the interview, injecting their own subjective perceptions into evidence while failing to seek critical information.

*b. The seizure of the Applicant's personal mobile phone was unlawful.*

i. There is no rule in support of such seizure. The investigators lied to him when they referred to ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). Such seizure is not supported by ST/SGB/2004/15 (Use of Information and communication technology resources and data) which is limited to equipment owned by the Organization.

ii. The seizure is also unlawful because it was conducted by Mr. Rajkumar who is not an OIOS/ID investigator but an agent of the Administration, while the procedure did not comply with OIOS internal guidance especially para. 7 of OIOS protocol 5b-PROT-042015 for ICT retrievals.

16. The Applicant prays the Tribunal to award him the following cumulative remedies:

- a. Rescission of the 1 July 2020 decision to place him on ALWOP, restore him to active duty immediately and to instruct the Respondent to release the payment of his full salary and entitlements since 1 July 2020.
- b. Alternatively, if the Tribunal considers that the decision to place him on administrative leave was warranted, to rescind the 1 July 2020 decision to place him on ALWOP and to instruct the Respondent to retroactively place him on Administrative Leave with Pay (“ALWP”) effective 1 July 2020.
- c. To grant him an appropriate remedy for the harm suffered, including for the reputational damage resulting from the defamatory press releases containing false statements.
- d. Retraction of the 2 and 3 July 2020 press statements by issuance of a statement which corrects them and respects the presumption of innocence.
- e. An apology from the Secretary-General and the USG/DMSPC acknowledging that his rights have been violated.
- f. Accountability enforced for the misconduct/unsatisfactory conduct by the Spokesman for the Secretary-General, the UNTSO Senior Advisor and a member of the Strategic Communications Section in the United Nations Department of Peace Operations for abuse of authority under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) and violations of staff regulations 1.2(a)-(b) and staff rule 1.2(f) for knowingly issuing the false and defamatory press statements.
- g. The immediate return of his phone and an apology from the USG/OIOS for violating his rights.

- h. To grant him an appropriate remedy for being unlawfully deprived of his personal property which still had not been returned to him after two months.
- i. To instruct the Respondent to immediately destroy any forensic analysis and data extracted from the Applicant's unlawfully seized personal phone.
- j. To instruct that the Respondent be prevented from using/referring to the seizure of the personal phone, any data/analysis or any further facts/witness testimony against him/any third party resulting from the data/analysis ("fruit of the poisonous tree") of his unlawfully seized phone, in any forum. This includes, but is not limited to, any investigation report submitted by OIOS in accordance with sections 6.15-6.16 of ST/AI/2017/1, the disciplinary process in accordance with section 8 of ST/AI/2017/1 or in any future proceedings in front of the United Nations Tribunals beyond the instant case.
- k. A guarantee that OIOS will immediately revise any "internal policy" documents contradicting ST/SGB/2004/15 used by OIOS which falsely state that OIOS has the legal authority to seize any staff personal devices "under the control of the staff member".
- l. The Administration to issue a fully reasoned supported legal position in consultation with the Office of Legal Affairs ("OLA") and the Staff Unions on the use of personal devices and the extent of the authority of the United Nations in its investigations vis-à-vis those personal devices.
- m. Accountability enforced for the misconduct/unsatisfactory conduct of Mr. Swanson and his staff for abuse of authority under ST/SGB/2019/8 and violations of staff regulations 1.2(a)-(b) and staff rule 1.2(f) for instructing the two investigators to lie to the Applicant so as to seize the personal smartphone of the Applicant, as well as not providing the required signed memorandum to the Applicant from Mr. Swanson containing the explanation in writing why the phone was needed at the time of seizure.

*Applicant's submissions on the admissibility of Annex 37 of the application*

17. The Applicant submits that the Respondent's request that annex 37 of the application be deemed inadmissible is a desperate attempt by the Respondent,

...to prevent staff members disadvantaged by illegal/unethical/improper conduct by OIOS during investigations from becoming aware of the OIOS documented procedures and protocols by claiming they are so "highly confidential" that it could cause exceptionally grave damage to the Respondent if the staff member actually found out how the Respondent was supposed to fulfil their duty of care and to respect staff member's rights to "due process" such they then could be able to compare them how they were actually treated and point out the violations, as the Applicant has done in the instant case.

The Applicant further submits that these documents are properly before the Tribunal and their probative value is obvious when challenging the actions taken by OIOS which violated their own procedures and protocols.

***Respondent***

18. The Respondent's case is summarized as follows:

*a. The contested decision was lawful and rational.*

i. The USG/DMSPC's decision to place the Applicant on ALWOP pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 was lawful and rational.

ii. The information before the USG/DMSPC, namely, the information provided in the 30 June 2020 OIOS memorandum, made it more likely than not that the Applicant engaged in unsatisfactory conduct, (misconduct may include assisting in, or contributing to, the commission of misconduct, there is also credible evidence that the Applicant accompanied Mr. Antoine on the trip to Tel Aviv and was aware of and facilitated, Mr. Antoine's possible engagement of a sex worker that if established, would be of such gravity that would warrant



at least separation from service.

iii. As summarized in the ALWOP letter to the Applicant, the ID/OIOS investigation has produced information that the clip, which has been circulated widely, depicts a clearly-marked United Nations vehicle filmed on the evening of 21 May 2020 on HaYarkon Street in Tel Aviv. The clip showed a woman, reported as possibly being a sex worker, in a red dress, sitting astride a male passenger in the back seat, engaged in an act of a sexual nature. The preliminary inquiry conducted by ID/OIOS had found evidence that identifies the Applicant as the passenger seated in the front passenger seat.

iv. It was more likely than not that that the Applicant engaged in unsatisfactory conduct by using a clearly-marked United Nations vehicle while another staff member was in the back seat engaged in an act of a sexual nature with a woman, in a public and visible manner, thereby failing to use the United Nations vehicle only for the official purposes and to exercise reasonable care in the use of the United Nations vehicle. Following his OIOS interview, in a written statement, the Applicant admitted that he was the passenger seated in the front passenger seat captured in the clip. In light of the foregoing, it is now not in dispute that the Applicant was inside the vehicle that was captured in the clip.

v. The Applicant's conduct displayed egregious misconduct exhibiting a lack of respect for the dignity and worth of the human person, by denigrating and objectifying the human person of women. It goes against the core values of the Organization. It also exhibited a serious lapse of integrity and competence on the Applicant's part. Staff members have been placed on ALWOP and subsequently separated or dismissed for serious misuse of United Nations assets, such as using the

United Nations equipment to disseminate pornography, including child pornography.

vi. It is not in dispute that the Applicant's conduct posed a significant harm to the reputation and credibility of the United Nations and of UNTSO. The Applicant serves as a Security Officer at UNTSO operating in a delicate setting of a conflict-affected area. In these circumstances, the Applicant's behaviour is of such gravity that, if established, it would warrant separation or dismissal.

vii. In the past, staff members were separated for serious misuse of, or grave failure to exercise reasonable care in relation to United Nations property or assets and for inappropriate and disruptive behaviour unbecoming of their status as a United Nations staff member, including domestic violence, and/or performing a sexual act in public. Contrary to the Applicant's assertion that the past cases referred to a different set of facts than the present case, an absence of a past case with the same factual pattern does not prohibit a reasonable inference being drawn from cases of partial similarity as to the appropriate level of sanction.

viii. In light of the foregoing considerations, the requirement of "exceptional circumstances" under staff rule 10.4(c) and section 11.4(b) of ST/AI/2017/1 was met in this case.

*b. The Applicant's unsubstantiated and/or irrelevant assertions should be rejected.*

i. Contrary to the Applicant's contentions, whether one of the investigators, Mr. Rajkumar, was Chief of UNTSO Special Investigations Unit ("SIU") is irrelevant to the decision to place the Applicant on ALWOP. OIOS engaged Mr. Rajkumar in conducting the investigation under the remote management of Ms. Margaret Gichanga-

Jensen, OIOS Investigator, in Vienna. The Applicant's assertion that the investigation was biased against him remains unsubstantiated.

ii. Nothing on the record substantiates the Applicant's contention that Mr. Rajkumar and Ms. Gichanga-Jensen "lacked professionalism" or "injected their subjective perceptions" during the investigation.

iii. Whether the Applicant was asked about the occupation of the woman in the clip is not relevant. In his interview, the Applicant did not acknowledge that he was one of the male passengers in the vehicle at that time, which explains why the investigators did not ask him about the woman in the clip.

iv. The Applicant's assertion that Mr. Rajkumar was a witness because he identified the Applicant in the video clip is baseless. There is photograph evidence of the Applicant which identified the male passenger in the front seat of the vehicle as the Applicant. The mere fact that Mr. Rajkumar knew the Applicant before the investigation by virtue of serving in the same mission does not pose a conflict of interest on the part of Mr. Rajkumar.

v. The Applicant's reference to news articles by Inner City Press ("ICP") or other media outlet is not relevant to his placement on ALWOP, which is based on the preliminary investigative findings. ICP is outside the Organization's control. The Organization did not create the publicity in this case. The Organization's press releases in relation to the clip contained no names. The Applicant's accusation that the information published in the media was "leaked from inside the Organization either from UNTSO and/or OIOS" is unfounded.

c. *There is no “administrative decision” by the OIOS to “seize” the Applicant’s phone for the purposes of the investigation.*

i. The Applicant handed over his phone to the investigators voluntarily albeit with some hesitation. On 16 September 2020, OIOS returned the phone to the Applicant and the main claim of the Applicant is now moot.

ii. The Applicant’s claims concerning the admissibility of evidence in an on-going investigation and a possible disciplinary process are not receivable. It is well-established that an applicant may only challenge a “final decision”, that is a decision taken at the conclusion of an administrative process and which has direct legal consequences. Preparatory or preliminary decisions and steps in an administrative process do not constitute administrative decisions.

iii. The Applicant’s submission of his mobile phone to OIOS during his interview is a preliminary/preparatory step that took place in the course of the OIOS investigation. Contrary to the Applicant’s assertions, this does not constitute a final administrative decision for the purposes of art. 2.1(a) of the UNDT Statute.

iv. The investigative steps are preliminary in nature and can only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences, pursuant to Chapter XI of the Staff Rules. According to the UNAT, this accords with another general principle that tribunals should not interfere with matters that fall within the administration’s prerogatives, including its lawful internal processes, and that the administration must be left to conduct these processes in full and to finality.

v. The Applicant's other claims seeking: (a) the revision of OIOS's "internal policy" and the Administration's "legal position" on the use of personal devices; and (b) accountability for OIOS staff do not concern an administrative decision under art. 2.1 of the UNDT Statute.

*d. The Applicant's rights were not infringed and the OIOS investigator's request for submission of the Applicant's phone is lawful.*

i. The Applicant's submission of his mobile phone to the OIOS investigators is in accordance with the Organization's rules and regulations. In accordance with staff rule 1.2(c) and section 6.2 of ST/AI/2017/1, the Applicant has the duty to fully cooperate with all duly authorized investigations and to provide any communications technology equipment under the control of the Organization or under the Applicant's control. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct.

ii. Contrary to the Applicant's contention, section 6.2 of ST/AI/2017/1 is not in conflict with ST/SGB/2004/15. ST/SGB/2004/15 serves different purposes, i.e., defining the proper use of information and communication technology ("ICT") resources and data and ensuring the security/technical integrity of the system.

iii. The Applicant's assertion that his mobile phone was personal is misplaced. The Applicant's mobile phone contained a United Nations-issued Subscriber Identity Module ("SIM") card and was in effect used for official purposes. The Applicant's phone was made operable by means of the United Nations-issued SIM card and was to be used for official purposes. It therefore falls under the definition of an "ICT resource" set forth in section 1(b) of ST/SGB/2004/15.

iv. In that sense, the Applicant's phone was treated as an ICT resource under ST/SGB/2004/15. Pursuant to section 9 of ST/SGB/2004/15, OIOS, in accordance with its mandate, shall have authority to access all ICT resources and data of United Nations staff members. There is no violation of any procedures set out in ST/SGB/2004/15. The OIOS investigators did not forcefully retrieve the Applicant's mobile phone; instead, they explained the basis for their request and sought his voluntary submission.

v. Contrary to the Applicant's assertions, Mr. Rajkumar was acting on behalf of OIOS as one of the investigators assigned to this case and Mr. Rajkumar lawfully received the mobile phone.

*Respondent's request that Annexes 11, 13, 34, 37 and 44 to the application be ruled inadmissible.*

19. The Respondent requests that annexes 11, 13, 34 and 44 to the application be ruled as inadmissible evidence under art. 18 of the Rules of Procedure. The audio clips which appear to be selective presentation of extracts from OIOS interviews are not authenticated and are of little probative value. The Respondent further requests that annex 37, which appears to be OIOS's internal protocol marked as "strictly confidential", and which authenticity is not admitted, be ruled as inadmissible evidence. In view of the foregoing, the Respondent requests that the Tribunal dismiss the application in its entirety and reject all reliefs sought by the Applicant.

20. In view of the foregoing, the Respondent requests that the Tribunal dismiss the application in its entirety and reject all reliefs sought by the Applicant.

## Considerations

### *Admissibility of Annexes 11, 13, 34, 37 and 44 to the application*

21. Article 18.3 of the Rules of Procedure provides that a party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence. That the Applicant chose to obtain the documents outside the Tribunal process must be frowned upon. Because of the method the Applicant used to obtain the documents, their authenticity let alone their probative value cannot be guaranteed. The documents in issued are therefore ruled inadmissible.

22. The application presents two issues:

a. Whether the 1 July 2020 decision to place the Applicant on ALWOP from 1 July 2020 for a period of three months, or until the completion of the investigation and any disciplinary process, whichever is earlier, is lawful, and

b. Whether the 30 June 2020 seizure of the Applicant's personal smartphone for the purposes of an investigation amounts to an administrative decision within the meaning of art. 2.1(a) of the UNDT Statute, and if it is, whether the decision was lawful.

*Whether the 1 July 2020 decision to place the Applicant ALWOP from 1 July 2020 for a period of three months, or until the completion of the investigation and any disciplinary process, whichever is earlier, is lawful.*

23. It is recalled that in *Applicant* Order No. 185 (NBI/2020), issues relating to the placement of the Applicant on ALWOP were considered. The Tribunal found that “the Respondent applied ALWOP in violation of the presumption of innocence and as a punitive measure” and that “not an iota of reason has been given as to why administrative leave with pay or partial pay, such as retaining the cost of living component of the salary, would not suffice to satisfy this purpose”.

24. Guided by established jurisprudence however,<sup>5</sup> the Tribunal respectfully departs from the above views. It is well-established that it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General or the official with delegated authority amongst the various courses of action open to them. Nor is it the role of the Dispute Tribunal to substitute its own view about what decision ought to have been taken. And, as a general principle, the Dispute Tribunal does not lightly interfere with the exercise of managerial discretion.<sup>6</sup>

25. In addition, it is well established that in conducting judicial review of decisions to place an applicant on ALWOP, the Dispute Tribunal reviews whether the decision was lawful and rational, considering the criteria stipulated in the staff rules and ST/AI/2017/1 and the information before the head of entity at the time of the decision. It is not for the Dispute Tribunal to substitute its own view for the head of entity's decision, but to evaluate whether that decision was irrational or arbitrary.<sup>7</sup>

26. In this case, the Applicant assailed what he referred to as the Respondent's "unsustainable reliance on "Exceptional Circumstances" described in Staff Rule 10.4(c) (ii) and section 11.4(b) of ST/AI/2017/1", and drew the Tribunal's attention to the reasoning at para. 22 of *Okwakol* Order No. 127 (NBI/2020), where it was expounded thus,

...the decision... does not provide any fact-based justification for the application of ALWOP. It is observed, in this connection, that using ALWOP is not a matter of vast administrative discretion, as the Respondent wants, because it concerns fundamental contractual rights of the staff member. Regarding the invoked legal basis, ST/AI/2017/1, leaving aside the question whether an administrative issuance might validly restrict the scope of staff rule 10.4(c), as ST/AI/2017/1 purports, it is specifically worth noting that the Applicant is not investigated for having engaged in sexual exploitation and sexual abuse... The Tribunal understands that details relevant for these considerations may be known to the Respondent and may make up probable cause. This, by itself, however, would not substantiate the ALWOP. The only reason invoked

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<sup>5</sup> *Sanwidi* 2010-UNAT-084, para. 40. See also *Belkhabbaz* 2018-UNAT-873, para. 66.

<sup>6</sup> *Jafari* 2019-UNAT-927, para. 30.

<sup>7</sup> *Gisage* 2019-UNAT-973, paras. 37-40.



to justify it, is ‘reputation of the Organization,’ which, however, is not supplied with any specifics. Using the Organization’s reputation as an abstract good could justify ALWOP in every case of misconduct. Moreover, the investigation has been going on since at minimum December 2019, incriminating material against the Applicant consists in a recording in the possession of the Respondent and no case was made for the need to preserve evidence. Lastly, even assuming that removing the Applicant from active service was necessary, for which there is no substantiation, no justification was given why ALWOP was preferred over an administrative leave with partial pay or with full pay.

27. As the first and last lines of the above excerpt suggest, the Order in *Okwakol* was addressing the issue of whether the decision-maker properly exercised his discretion when he placed the applicant on ALWOP (i.e., whether the decision to apply ALWOP out of the available options was proper in the circumstances of that case). Since it is not the Tribunal’s role to consider the correctness of the choice made by the decision maker, the views expressed in *Okwakol* are not relevant to this discussion.

28. In a bid to demonstrate that the decision to place him on ALWOP is unlawful, the Applicant advanced the following arguments:

- a. that the decision was disproportionate, punitive and violates the presumption of innocence;
- b. the reliance by the Respondent on “exceptional circumstances” described in staff rule 10.4(c)(ii) and section 11.4(b) of ST/AI/2017/1 is misplaced, since there has been no consideration or actual definition of what constitutes “exceptional circumstances” in the decision provided to him;
- c. the backlash from a public outcry amid strong pressure resulting from salacious press coverage cannot be considered as “exceptional circumstances” because it is based on misinformation, misconception, biases and eventual revenues through advertisement;
- d. his alleged actions, i.e., the allegation that his “unsatisfactory conduct of failing to observe the standards of conduct expected of an international civil

servant is of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2(a)(viii) or (ix)”, do not warrant ALWOP;

e. the reasons provided for placing him on ALWOP were false;

f. the interviews were not conducted independently by OIOS as required for misconduct cases in Category 1 defined in section 1.3.1 of the OIOS Investigations Manual since one of the investigators (Mr. Rajkumar) is not an OIOS/ID staff member or OIOS investigator, and was therefore not “operationally independent”;

g. Mr. Rajkumar was also a witness who identified the Applicant for purposes of providing evidence relied upon by the Administration in placing him on ALWOP;

h. throughout the interview recording, it was clear through their voice tones and attitudes that the investigators became more and more hostile towards the Applicant due to their inability to establish their pre-conceived position that the Applicant was guilty of the allegations; and

i. the investigators have failed in the present case to conduct an impartial interview and instead have injected their opinions and subjective perception into the evidence, therefore negatively affecting that evidence.

The Tribunal will here below proceed to assess the credibility of each of the above complaints.

- a. *Whether the decision was disproportionate, punitive and violates the presumption of innocence.*

29. UNAT (in *Gisage*) recognizes that by its very nature ALWOP poses difficulties to the subject and may infringe upon the presumption of innocence but clarifies that even then, ALWOP remains an administrative measure and not a disciplinary measure. UNAT is also alive to the possibility that an ALWOP decision may be unlawful but

recognises the existence of adequate safeguards for ensuring legality and proportionality for staff members subjected to ALWOP decisions.

30. The Applicant's assertion that the impugned decision is disproportionate, punitive and violates the presumption of innocence is premised on arguments that the Respondent only acted under pressure to be seen to be doing something in response to the widespread dissemination of the clip and the continued salacious articles by ICP. This, it is argued, is evidenced by the rapid 2/3 July 2020 press releases to "purportedly show the UN being tough and to throw a juicy bone to the press corps drooling at their kneecaps for the next salacious instalment on this case".

31. The above assertions which are clearly speculative do not amount to evidence that the decision is disproportionate and punitive. The undisputed facts are that the Applicant was being investigated for allegations that on 21 May 2020, he was a passenger in a clearly-marked United Nations vehicle in which acts of a sexual nature took place as it circulated in a heavily-trafficked area of Tel-Aviv. It is on record that the ALWOP decision was based on the criteria set out in section 11.4(b) of ST/AI/2017/1. In the Tribunal's view, based on the nature of the allegations (being a passenger in a clearly-marked United Nations vehicle in which acts of a sexual nature publicly took place) and its gravity (a combination of its nature and reputational effect to the Organization), it cannot be said that the impugned decision was disproportionate. Further, based on established legal principles (*Gisage*) it cannot be said that the decision was punitive and that it violated the presumption of innocence.

*b. Whether the reliance by the Respondent on "exceptional circumstances" described in staff rule 10.4(c) (ii) and section 11.4(b) of ST/AI/2017/1 is misplaced, since there has been no consideration or actual definition of what constitutes "exceptional circumstances" in the ALWOP decision provided to the Applicant.*

32. This complaint, which seems to be premised on the wording of the decision notification letter must fail. There is no legal requirement that the ALWOP notification

decision should explicitly indicate that consideration was taken about what constitutes “exceptional circumstances”, or about the actual definition of “exceptional circumstances”.

33. Suffice it to say that the ALWOP notification to the Applicant indicates that the Applicant was placed on ALWOP under staff rule 10.4 of ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations) and section 11.4(b) of ST/AI/2017/1. Clearly, the ALWOP decision was based on the existence of exceptional circumstances as provided under section 11.4(b) of ST/AI/2017/1, and not on the existence of probable cause that the Applicant had engaged in sexual exploitation and sexual abuse. This renders the heavy reliance on the findings in *Muteeganda* 2018-UNAT-869 and *Gisage*, as the Respondent does, a bit problematic.

34. Staff rule 10.4 of ST/SGB/2018/1 provides in the relevant part as follows:

[...]

(c) Administrative leave shall be with full pay except:

(i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, or

(ii) when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

35. Section 11.4 of ST/AI/2017/1 provides in the relevant part as follows:

A staff member may be placed on administrative leave without pay by an authorized official when at least one of the following conditions is met:

(a) There are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay;

(b) There are exceptional circumstances that warrant the placement of the staff member on administrative leave without pay because the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix), and there is information before the authorized official about the

unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

36. In this regard, the Tribunal must determine:
- a. whether exceptional circumstances existed that warranted the placement of the Applicant on ALWOP;
  - b. whether the unsatisfactory conduct was of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2(a)(viii) or (ix); and
  - c. whether there was information before the authorized official about the unsatisfactory conduct that made it more likely than not (preponderance of the evidence) that the Applicant engaged in the unsatisfactory conduct.

*Whether exceptional circumstances existed that warranted the placement of the Applicant on administrative leave without pay.*

37. Under section 11.4(b) of ST/AI/2017/1 for the requirement of “exceptional circumstances” to be met, there must be: (i) information about the unsatisfactory conduct that makes it more likely than not (preponderance of evidence) that the staff member engaged in the unsatisfactory conduct; and (ii) evidence that the unsatisfactory conduct is of such gravity that it would, if established, warrant termination of employment relationship, namely, separation or dismissal (section 11.4(b) of ST/AI/2017/1).

38. To satisfy the requirement for information about the unsatisfactory conduct, the Respondent sought to rely on evidence including a video clip showing that the Applicant was one of the two male individuals who, with a female individual drove through a busy street in a clearly-marked United Nations vehicle. Further evidence was that the Applicant was in the front seat while the second male individual was in the back seat with the female individual sitting astride him. The Respondent contends that

the male individual who was in the back seat and the female individual were engaging in an act of a sexual nature as the vehicle drove along a heavily trafficked street. Other than the exact nature of the act between the male individual and the female individual and the issue of whether the Applicant was aware of what was taking place in the back seat, the rest of the above evidence is common cause.

39. Other evidence was that at the material time the ‘carlogger’ device fitted to the vehicle was being operated by the Applicant<sup>8</sup> although he was not driving the vehicle. In the Tribunal’s view, the above evidence (even when the contested aspects of the Respondents case are excluded) supports the conclusion that it was more likely than not (preponderance of the evidence that the Applicant has engaged in unsatisfactory conduct of using a clearly-marked United Nations vehicle while a male individual engaged in an act of a sexual nature with a woman in the back seat, in a public and visible manner, thereby failing to use the United Nations vehicle only for the official purposes and to exercise reasonable care in the use of the United Nations vehicle. This amounts to information about the unsatisfactory conduct that makes it more likely than not (preponderance of evidence) that the Applicant engaged in unsatisfactory conduct.

40. To satisfy the requirement for proof that the unsatisfactory conduct is of such gravity that it would, if established, warrant termination of employment relationship, namely, separation or dismissal (section 11.4(b) of ST/AI/2017/1), the Respondent sought to rely on the nature of the allegation and on Mr. Swanson’s testimony about the adverse reputational impact which the clip had on the Organization, including causing tensions between the United Nations and Israel, the Host Member State. Mr. Swanson was clear that the Applicant’s conduct posed a significant harm to the reputation and credibility of the United Nations and of UNTSO in particular within its mission area. Further, that the Applicant serves as Security Officer at UNTSO operating in a delicate setting of a conflict-affected area.

41. Based on the above evidence, the Respondent asserts that the Applicant’s

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<sup>8</sup> Reply, annex R/9, Car log data for UNTSO 205.

behavior if proved would amount to a breach of the trust placed in him by UNTSO and would warrant separation or dismissal in line with the Secretary-General's past practice.<sup>9</sup>

42. Since the occurrence of unsatisfactory conduct is evidenced by a video clip which had been circulated widely, depicting the Applicant travelling in a clearly-marked United Nations vehicle, UNTSO 205 on HaYarkon Street in Tel Aviv, showing a woman, reported as possibly being a sex worker, in a red dress, sitting astride a male individual, engaged in an act of a sexual nature, the Tribunal finds that the information which was before the authorised official made it more likely than not (preponderance of evidence) that the Applicant engaged in the unsatisfactory conduct. The Tribunal further finds that the above evidence points to the existence of exceptional circumstances within the meaning of section 11.4 of ST/AI/2017/1, and therefore that the decision to place the Applicant on ALWOP was lawful and rational.

43. The Applicant's argument that the backlash from a public outcry amid strong pressure resulting from salacious press coverage cannot be considered as "exceptional circumstances" because it is based on misinformation, misconception, biases and eventual revenues through advertisement is only speculative and must fail. There is no evidence that that was the basis for the impugned decision.

44. The complaint that the Applicant was not accused of sexual abuse but for being the occupant of the front passenger seat of a United Nations vehicle where someone else may have engaged in conduct which may meet the criteria cited by the Administration (which is not established) ignores the fact that by law (section 3.6 of ST/AI/2017/1), misconduct may include assisting in, or contributing to, the commission of misconduct. In this regard, it should be emphasized that paragraph 1 of the ALWOP notification indicates that the Applicant was investigated over allegations that he was a passenger in a clearly-marked United Nations vehicle in which acts of a

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<sup>9</sup> See compendium of disciplinary measures, reference numbers 290, 291 of 2016, 345 of 2017 and 417 of 2018.

sexual nature took place as it circulated in a heavily-trafficked area of Tel-Aviv. There can be no doubt that the nature of the allegation warranted the ALWOP.

45. The Applicant's assertion that the reasons provided for placing him on ALWOP were false, and that he was not in the back seat and that there is no evidence that he was aware of what was happening there is not for the Tribunal to determine in the context of this application. The role of the Tribunal is to determine, as per the applicable rules and UNAT jurisprudence, whether the decision to place the Applicant on ALWOP was lawful and rational.

46. The complaint that the interviews were not conducted independently by OIOS as required for misconduct cases in Category 1 defined in section 1.3.1 of the OIOS Investigations Manual since one of the investigators is not an OIOS/ID staff member or OIOS investigator, and was therefore not "operationally independent" fails. First of all, there is no evidence that Mr. Rajkumar did not act independently. Secondly, Mr. Swanson's evidence that OIOS engaged Mr. Rajkumar in conducting the investigation under the remote management of Ms. Gichanga-Jensen, OIOS Investigator, in Vienna<sup>10</sup> was not controverted. The Tribunal accepted Mr. Swanson's evidence as credible.

47. The complaint that Mr. Rajkumar was conflicted since he doubled as an investigator and a witness who identified the Applicant for purposes of providing the evidence relied upon by the Administration in placing him on ALWOP fails as well. The only basis for this complaint is the assertion that Mr. Rajkumar who had worked with the Applicant before identified him during the investigation. Given that there was photographic evidence which identified the Applicant as the male passenger in the rear seat of the vehicle,<sup>11</sup> the mere fact that Mr. Rajkumar knew the Applicant before the investigation by virtue of serving in the same mission does not pose a conflict of interest on his part. Secondly, in his testimony, Mr. Swanson positively testified about Mr. Rajkumar's integrity, noting that had Mr. Rajkumar had a conflict of interest that

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<sup>10</sup> Reply, annex R/1 - Referral e-mail from Mr. Swanson to Mr. Doyle, 25 June 2020, para. 5.

<sup>11</sup> Reply, annex R/7.



meant anything, he would have declared it. The Tribunal accepts that evidence and rejects the assertion that Mr. Rajkumar was conflicted.

48. Upon reviewing the audio recordings,<sup>12</sup> the Tribunal agrees with the Respondent that the Applicant's contentions that throughout the interview recording, it was clear through their voice tones and attitudes that the investigators became more and more hostile towards him due to their inability to establish their pre-conceived position that he was guilty of the allegations, and that, the investigators failed to conduct an impartial interview and instead injected their opinions and subjective perception into the evidence, therefore negatively affecting that evidence, remain speculative and unsubstantiated. Nothing on the record substantiates the contention that the investigators "lacked professionalism" or "injected their subjective perceptions" during the investigation.

49. The complaint that the Applicant was never asked about the occupation of the woman in the clip is baseless since it is on record that at that time of the interview, the Applicant did not acknowledge that he was the male passenger in the vehicle. He could therefore not have been asked about her.

50. About the complaint relating to publicity of the case, the Tribunal accepts the Respondent's explanation that the Organization did not create the publicity, being that the ICP is outside the Organization's control. And, the Applicant's reference to news articles by ICP or other media outlet is not relevant to his placement on ALWOP, which was based on the preliminary investigative findings. The Tribunal notes that while the assertion that the Organization's press releases in relation to the clip contained no names was not controverted, the Applicant's assertion that the information published in the media was "leaked from inside the Organization either from UNTSO and/or OIOS" was not backed by evidence. Based on this, this complaint must fail.

51. All factors considered, the Tribunal finds that the 1 July 2020 decision to place the Applicant on ALWOP from 1 July 2020 for a period of three months, or until the

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<sup>12</sup> Reply, annex R/13 - Audio-recorded interview with the Applicant, 30 June 2020.

completion of the investigation and any disciplinary process, whichever was earlier is lawful.

*Whether the 30 June 2020 seizure of the Applicant's personal smartphone for the purposes of an investigation amounts to an administrative decision within the meaning of art. 2.1(a) of the UNDT Statute and if it is, whether the decision was lawful.*

#### *Receivability*

52. The Respondent maintains that there is no “administrative decision” by the OIOS to “seize” the Applicant’s phone for the purposes of the investigation. Further that the OIOS investigators did not take the phone forcefully from the Applicant, but instead explained to him the basis of such request. After recording his objection, the Applicant submitted his phone to the investigators.

53. It is maintained that since the phone was returned to the Applicant on 16 September 2020, his main claim is now moot. The Applicant on the other hand asserts that the unlawful action of seizing his personal phone over his continued objections was not a “submission” as the Respondent would represent. A similar issue was addressed in *Applicant* Order No. 172 (NBI/2020) at para. 52 in the following terms;

...the Tribunal is not convinced whether the case involved an administrative decision at all. The record shows that the Applicant handed over his phone to the investigators voluntarily albeit with some hesitance, after they asserted that they had authority to request it because of the Organization’s SIM card. The pertinent communication was vague, no legal basis and/or sanction were invoked. Altogether, both sides of the table appear to have acted without a clear or common concept of authorizations and obligations involved, which is not surprising, given that the issue has been largely unexplored. If anything, there might have been a decision refusing to return the phone, after the Applicant withdrew his consent, as evidenced by the Respondent’s reply in Case No. UNDT/NBI/2020/053. However, the main claim has been rendered moot by the Respondent’s returning the asset.

54. It is noted that the Applicant maintains that the investigators lied to him when they referred to ST/AI/2017/1 yet such seizure is not supported by ST/SGB/2004/15

which is limited to equipment owned by the Organization. There is no evidence, however, that the investigators lied to the Applicant. The mere fact that the position of the law they advanced differs from what the Applicant perceives it to be isn't evidence of deceit. In Order No. 172 (NBI/2020) where a similar issue was addressed, the Tribunal held the view that “[a]ltogether, both sides of the table appear to have acted without a clear or common concept of authorizations and obligations involved, which is not surprising, given that the issue has been largely unexplored”.<sup>13</sup>

55. The parties' arguments are similar to those which were considered in Order No. 172 (NBI/2020). The Tribunal is persuaded that the Tribunal's reasoning in Order No. 172 (NBI/2020) aptly addresses the receivability issue this case, and therefore adopts that reasoning without modification.

56. In the result, the application fails with regard to each of the two decisions, and with it, the claim for cumulative remedies.

### **Decision**

57. The application is dismissed in its entirety.

*(Signed)*

Judge Margaret Tibulya

Dated this 9<sup>th</sup> day of December 2021

Entered in the Register on this 9<sup>th</sup> day of December 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>13</sup> Paragraph 51.