

Case No.: UNDT/NBI/2022/039
Judgment No.: UNDT/2023/114
Date: 12 October 2023

Introduction

1. On 14 April 2022, the Applicant filed an application in which he contests: (a) the implied decision to refer allegations of theft, of which he was accused, to Burundian national authorities; (b) the implied decision to waive his immunity in relation to the theft case of which the Applicant was accused; (c) the decision to retain monies paid by the Applicant to the United Nations in relation to a theft which has not been investigated and in relation to which no disciplinary finding was ever made; and (d) the decision not to pay his last month's salary and separation entitlements.

2. On 23 May 2022, the Respondent filed his reply in which he contested the receivability of the application and asserted that should the application be found receivable by the Tribunal, the Applicant's claims have no merit.

3. The Tribunal held oral hearings from 6 to 7 September 2023, and, on 21 September 2023, the parties filed their closing submissions.

Facts

4. The following facts are not disputed by the parties (unless otherwise stated).

5. The Applicant is a former staff member with the now-closed Office of the

of Mission Support (“CMS”).

7. On either Friday, 18 June 2021 or Monday, 21 June 2021, the Applicant received the second set of keys from the Office of the CMS. He did not return the CMS’ keys.

8. In the morning of Tuesday, 22 June 2021, the CMS sought to inquire about the completion of all pending payments to the remaining vendors, but the Applicant was absent from the office that day and unreachable by phone. The CMS asked an OSESG-B security officer to report the Applicant’s absence and requested that the United Nations Department of Safety and Security (“UNDSS”) be informed.

9. In the evening of 22 June 2021, the Applicant called the CMS explaining that he had been occupied all day and could not use his phone to call or text. The CMS went to the Applicant’s house with the office driver, and upon their arrival, the Applicant told them that he had left the keys in the OSESG-B office.

10. The CMS took the Applicant to the office to retrieve the keys. Once in his office, the Applicant collected the set of keys normally kept by the CMS and gave them to the Applicant (gav9)-1y-71(ApplicaT icaT 9gav9)-1y-7(by e)-the told them that h

26. The Departments of Political and Peacebuilding Affairs and Peace Operations
("DPPA")

evaluation should start from that date.

31. The Applicant claims that the OSESG-B *Chef de Bureau's* complaint to Burundian national authorities on behalf of the United Nations flies in the face of the privileges and immunities of the United Nations staff members. As a United Nations staff member, he benefited from functional immunity and that the sole authority to determine whether a particular action comes under such functional immunity lies with the United Nations Secretary-General. He stated that the prescribed procedures were not followed by the CMS who did not refer the theft for proper investigation instead of engaging national Burundian authorities to detain him.

Respondent's submissions

32. The Respondent claims that no rule bars the Organization from requesting host country authorities to investigate crimes committed within their jurisdiction.

33. The Respondent's position is that the referral to Burundian local authorities does not constitute an administrative decision and cannot be challenged directly before the United Nations Dispute Tribunal. The application refers to conduct in relation to the theft incident. Therefore, the portion of the application contesting the implied decision to refer the allegation of theft to Burundian national authorities is not receivable *ratione materiae*.

34. The Respondent maintains that there was no decision to waive the Applicant immunity and that this portion of the Application contesting that decision is not receivable *ratione materiae*. Respondent also claims that the application is time-barred.

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Applicant waited too long to request management evaluation of these decisions.

41. Since the decisions are “implied”, the exact date of the decisions cannot be ascertained. The Appeals Tribunal has instructed that “[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine”. (*Rosana* 2012-UNAT-273, paras. 21-22 and 25). Under this test, “the exercise of determining the date of an implied administrative decision must be conducted by determining when the staff member actually knew or should reasonably have known about the implied decision he or she contests.” (See, e.g., *Survo* 2016-UNAT-644, para. 26; and *Awan* 2015-UNAT-588, paras. 18-19).

42. In this case, the evidence is very clear that the Applicant actually knew about the implied decision to refer the theft allegation to the Burundian national authorities and should reasonably have known about the related implied decision to waive immunity in relation to those allegations on 25 June 2021. On that date, by his own testimony, the Applicant was taken by United Nations security personnel to the Burundian police, placed into local custody, and interrogated by the local police regarding the theft. Clearly, he knew of these (implied) decisions at that time.¹⁴ Thus, the deadline for requesting management evaluation was 23 September 2021.

43. Even if this Tribunal were to toll the time for requesting management evaluation for the period when the Applicant was in custody (because he presumably was unable to file a request during that period), he was released from custody on 15 July 2021. That would mean that his request for management evaluation was due on or before 13 October 2021.

44. However, the record reflects that the management evaluation request was not filed until 2 December 2021 (seven to ten weeks too late). Although the Applicant testified that he filed in early September, there is nothing in the record to support this testimony, and the Tribunal finds that it is not credible.

¹⁴ Although the Applicant claims that he received the criminal complaint from the Prosecutor on 1 November 2021, he did not testify to this, and thus there is no evidence to support the claim.

45. The Applicant's Counsel's letter of 18 October 2021 asking if there was a decision to waive immunity cannot reset the clock. (*Abu Rabei* 2020 UNAT-1060, para. 24; *Qassem* 2021-UNAT-1132 para. 25. A staff member cannot reset the time for management review by asking for a confirmation of an administrative decision communicated to him earlier. *See also, Abu Nqairah* 2018 UNAT-854).

46. Accordingly, the challenge to: (a) the implied decision to refer the theft of which he was accused to national authorities; and (b) the implied decision to waive immunity in relation to the theft case of which he is accused are untimely and shall be to waive Pag91-3(s)

alleged theft is a decision of continuous implementation akin to a decision to place an individual on administrative leave”. (Application, para. 21).

52. The Applicant does not cite any authority for this proposition, but presumably he is referring to *Calvani* UNDT/2009/092 and *Ba* UNDT/2012/025. However, this

57. Since the “continuous implementation” argument does not apply to this case, the claim is not receivable for failure to timely request management evaluation.

The decision to retain monies Applicant paid to the United Nations.

58. Even if the challenge were receivable, the claim would fail on the merits.

59. The Applicant challenges “the decision to retain monies paid by the Applicant to the UN in relation to a theft which has not been investigated and in relation to which no disciplinary finding has ever been made.” The record shows that the Applicant made two payments to the OSESG-Burundi for: BIF10,500,000.00 on 24 June 2021; and BIF15,000,000.00 on 14 July 2021. He challenges the failure to return those sums to him.

60. The jurisprudence is clear that there is a presumption of regularity, pursuant to which it is presumed “that official acts have been regularly performed.” (*See, e.g., Nastase* 2023-UNAT-1367, para. 25; *Rolland* 2011-UNAT-122, para. 26; *De Cruze* UNDT/2011/099, para. 36). If the Administration is able to even minimally show that there was a rational basis for the decision, then the presumption of regularity stands satisfied. (*Nastase* at para 29).

61. The presumption of regularity is a rebuttable one. Thus, once the minimal showing has been made by the Respondent, the burden of proof shifts to the Applicant to show through clear and convincing evidence that the decision was arbitrary or tainted by improper motives. (*Nastase, Rolland, and De Cruze*).

62. Applying that test in this case, the Applicant signed two statements in connection with the payments he made in this case. In the first statement (Annex R/2) he says “I, Adolphe Irambona, accept that I lost the money that were in the safe while I was with all the keys ...[and] I accept to do my best to pay the lost funds ... The funds are for the OSESG-Burundi.” In the second statement (Application, Annex 1), he says “I, Adolphe Irambona, I am handing over then millions and five hundred thousand (10,500,000.00 BIF) to Mr. Kennedy Alai as part of the payment of the lost money from the Impact Funds.”

68. Thus, to meet his burden of proof, the Applicant cannot rely on this faulty claim of “simple logic”, but must present evidence that his statements were, in fact, the result of coercion by the Administration.

69. The Applicant testified at length in the hearing. According to him, on 22 June 2021, he was “kidnapped and spent the entire morning with the kidnappers who took his phone.” The kidnappers asked him about his role at the United Nations and about a

office just like the one where he had worked for several years.¹⁸

73. The Applicant testified that he spoke to UNDSS staff and then to the Head of Office, Mr. Ely Dieng. He said that Mr. Dieng “accused me of being responsible and said that if I did not pay back the money within the next two hours then I would be put in prison.” The Applicant says that he was intimidated and that is why he signed the first statement, (Annex R/2).

74. Much of the Applicant’s testimony is consistent with that of the other witnesses. However, the Applicant’s testimony differs in some key parts and the Tribunal does not find the Applicant’s testimony to be credible on those points.¹⁹ Instead the Tribunal accepts the testimony from Security Officer Kennedy Alai and Charles Tive (Chief Security Adviser for Burundi in UNDSS) that the Applicant volunteered to pay the money in order for the matter not to go any further beyond the office level.

75. First of all, the Applicant’s testimony about being kidnapped to be interrogated about his career plans is simply incredible. He claims that he went to report the kidnapping the day after it happened but that he did not report it because “I was kept waiting” until he was called to return to the Mission offices. Yet he has never reported

¹⁸ Albeit, at the time of this incident, the offices had no electricity because the Mission was being shut down and the power was cut off.

¹⁹ This Tribunal is cognizant of the decision in AAC 2023-UNAT-1370 and has applied it in reaching this judgment. The AAC panel acknowledges that “[w]e have digressed at length in this Judgment to make these remarks (*obiter dicta*) about the UNDT’s practice of fact-finding ...” (AAC at para. 62). However, it does not indicate what parts are *obiter dicta* and what is *ratio decidendi*. This Tribunal has not expressly discussed in this Judgment the various factors that were used in analysing the credibility of each witness since it views that discussion in AAC to be *obiter dicta*. However, to be clear for purposes of appellate review, the Tribunal **did** consider those factors (in AAC para. 47) and other related factors, such as: viii) whether the witness has a motive not to tell the truth; ix) whether the witness has an interest in the outcome of the case; x) whether the witness’ testimony was consistent; xi) whether the witness’ testimony was differed from statements made by the witness on any previous occasion; xii) the

this kidnapping in the two years since, although one would expect a kidnapping victim to report the crime (and he expressed a desire to report it that morning).

76. Second, the Applicant also gave similarly incredible testimony that he was detained overnight at a Burundian military camp unbeknownst to the camp commander. Again, it seems beyond belief that a civilian could be brought under armed guard into a military camp and nobody would ask any questions.

77. Third, the Applicant's claim, about being threatened with imprisonment if he did not pay the money within two hours, is not consistent with the known facts. The statement he gave, supposedly in response to that threat, makes no mention of payment within two hours and says only that he would do his best to pay the money by the following day.

78. Moreover, throughout the period of 23-24 June, the Applicant had access to his phone and made numerous calls to friends and family to round up the funds. There is no evidence that, while making these calls, the Applicant ever complained to anyone that he was being detained against his will or threatened.

79. On the other hand, Mr. Alai testified that "everything that happened was at [the Applicant's] request ... He said, I don't know what happened, but I am going to pay it." Similarly, Mr. Tive testified that the Applicant said "he didn't take the money, but he admitted that he takes responsibility by violating the key protocol ... [He] clearly stated that he was responsible, he couldn't think of nobody else who is, because he violated the key protocol."

80. The testimony of these witnesses seems more plausible and more credible than that of the Applicant.

81. Even if the Applicant's testimony were to be believed, which it is not, that testimony does not support his original claim that the first statement was coerced by his being held against his will for two days. By his own testimony the Applicant spent the night before at his home, came to the office for an hour or so in the morning, left to report "the kidnapping", and returned to the office before the theft was even discovered.

Thereafter, he had only been at the office for a few hours before signing the first statement. These two claims are contradictory.

82. According to his testimony, the Applicant “was in a position of weakness. I was under pressure.” That statement is deemed to be true. It is clear that the Applicant was under pressure and in a position of weakness largely because the evidence pointed to him as the cause of the missing money. Under those circumstances, common sense says that he may have freely chosen to avoid further problems²⁰ by agreeing to pay the money because “I lost the money that were in the safe while I was with all the keys.” Paying the money, without admitting committing the theft, could have seemed the best option under those circumstances.

83. In sum, the credible evidence shows that the theft was discovered on 23 June. When confronted that same day with the fact that he had all the keys when the money disappeared, the Applicant agreed to pay back the money to avoid the case going beyond the office level. Thus, the Tribunal finds that the first statement was not the result of duress from the Administration.

84. The same is true as to the second statement. After signing the first agreement,

choose to withhold entitlements from the staff member on a provisional basis pending completion of the disciplinary process.” (Application, para. 28 citing to ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) paras. 9.5 and 9.6). However, this argument also lacks merit.

90. ST/AI/2017/1, paragraph 9.5 states, *inter alia*, that “[t]he Under-Secretary-General **may** then decide to recover, in part or in full, any financial loss suffered by the Organization pursuant to staff rule 10.1 (b). Staff rule 10.1(b), in turn, says that “the staff member **may** be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member’s conduct.” And ST/AI/2017/1, paragraph 9.6 states “the Under-Secretary-General for Management **may** decide to withhold the estimated financial loss suffered by the Organization from the staff member’s final separation entitlements.” The use of “may” confirms that these provisions are permissive, not mandatory. (*Azar* 2021-UNAT-1104, para. 33). The Applicant cites no authority saying these procedures must be used to recovery money owed to the Organization.

91. Furthermore, ST/AI/155/Rev.2 (Personnel payroll clearance action) provides that “[s]taff members separating from service, in accordance with their contractual obligations to the United Nations are responsible for: (a) Settling all indebtedness to the United Nations.” (*Id.*, sec. 11). The jurisprudence recognizes that the provisions for recovery like those the Applicant references are for when the staff member does not settle their debt. (*Azar* UNDT/2021/125 para. 21. Procedure contemplates “notice given to the separating staff member, in order to enable him/her to take an informed decision whether to offer a kind of surety in exchange for the release of “entitlement documents). Clearly this contemplates settlement of the debt in an informal fashion.

92. In essence, the Applicant’s argument is that when a staff member says, “I am indebted to the United Nations, I want to settle my debt, and here is the money”, the Organization cannot accept the repayment offer but must follow the ST/AI/2017/1 procedures. “Simple logic” tells us that this argument does not make sense.

93. In conclusion, the Tribunal determines that the Applicant has failed to sustain his burden of proving by clear and convincing evidence that the decision not to return the money was irrational, unreasonable, or unfair in any manner.

Conclusion

94. The application is denied.

(Signed)

Judge Sean Wallace

Dated this 12th day of October 2023

Entered in the Register on this 12th day of October 2023

(Signed)

Eric Muli, Officer-in-Charge