emailed inquiries by the Respondent, the Tribunal reminded the Applicant that there were no signed statements for his case and that witness testimony would have to be sworn. Thereafter, on the morning of the oral hearing the Applicant submitted signed statements in French for two of the witnesses, Mr. OS and Mr. DS. Additionally, the Applicant informed the Tribunal that all three of his supporting witnesses were not English speakers. The three witnesses failed to attend the hearing.

21. The Tribunal had to decide whether to adjourn proceedings due to the unavailability of interpretation services for the Applicant's three absent witnesses. It was noted that under the Tribunal's Rules of Procedure at arts. 16.1 and 2 and 17.6, there is an element of discretion to be exercised as to whether to hold oral hearings and if so, which witnesses must be heard. The application of this discretion is guided by UNAT jurisprudence. In *Sanwidi* 2010-UNAT-084 para. 42, the Appeal's Tribunal explained:

> In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision.

22. In *Mbaigolmem* 2018-UNAT-819, the Appeal's Tribunal observed at paras. 26, 27 and 29 that an appeal in disciplinary matters almost always will require an appeal *de novo*, comprising a complete re-hearing and re-determination of the merits of the case. However, at paragraph 28 UNAT explained,

> There will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. **Should the evidence be insufficient in certain respects**, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it. [Emphasis added]

23. After hearing submissions on both sides, the Tribunal determined that in the instant case oral testimony would be taken from the Applicant and the Respondent's sole witness. The information that was on record when the decision was made provides sufficient evidence regarding the roles played by Messrs. OS and DS; as such their oral testimony was not required. Importantly, the Applicant was given an opportunity to have testimony taken from these two witnesses during the OIOS investigations. Unfortunately, attempts made to use the information provided by the Applicant to contact these persons failed.

24. As to the third witness, Mr. DN, his name was not given previously during the Applicant's OIOS interviews. There was information from the Applicant about a *gendarme* who was prosecuting the case and who had discussions with the Applicant after the 2009 Judgment. The information, that Mr. DN was the Prosecutor and that he told the Applicant that he did not pursue the matter in the Ivorian Courts, was not advanced by the Applicant and placed on record during the disciplinary proceedings. Testimony from Mr. DN, who did not file a witness statement before this Tribunal, is deemed inadmissible.

25. The oral hearing proceeded with the sole witness for each party presenting evidence and being cross-examined. The parties filed closing submissions on 5 November 2021.

Issues

26. UNAT Jurisprudence establishes that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review."[1]

27. The subjects of review in disciplinary proceedings are well established as, in general terms, whether the facts are established, and they amount to misconduct,

[1] *Fasanella* 2017-UNAT-765, para. 20.

whether due process was observed and whether the sanction is proportionate[2]. More specifically, in the instant case issues have been identified as follows:

a. Were the facts established by clear and convincing evidence?

i. Firstly, was there proof that the payments accepted by the Applicant in 2007 were in exchange for the Applicant providing false Belgian passports for Ivorian nationals. If so, did the Applicant commit the criminal offence of fraud thereby violating Ivorian Laws? Alternately, was the Applicant's version of lawfully assisting with obtaining genuine visas for travel to Belgium credible or was he discredited by giving varying accounts?

ii. Secondly, regarding the 2 March 2009 Judgment document, does the Applicant's knowledge of it prove there was an indictment, fine or imprisonment which should have been disclosed by answering 'yes' on the PHP form?

b. Do the facts amount to misconduct?

c. Were the Applicant's due process rights observed during the investigation and disciplinary proceedings? In particular, to what extent did the Respondent's delay and/or motivation to retaliate for a complaint made by the Applicant lead to procedural unfairness?

d. Was the sanction proportionate to the gravity of the offence?

Facts

28. According to the Applicant, in 2007 he was informed by a friend about opportunities for Ivorians to migrate to Belgium with residency status and work permits. In his OIOS interview the Applicant said that these arrangements were through

[2] *Molari* 2011-UNAT-164, para. 29.

the Belgian Embassy. In the instant application, he said that the opportunity was to be arranged by a law firm that specialized in Immigration. The law firm was not named.

29. At the oral hearing, the Applicant was cross-examined about this inconsistency as to whether it was the Belgian Embassy or an immigration law firm making the arrangements. He responded that during his OIOS interview he may have forgotten some aspects of the process. These events happened years before the interview, and when being interviewed he had not yet returned to Ivory Coast. He later returned, checked documents, and spoke to people who clarified things. Hence the new information about an immigration law firm that appeared in his application.

30. The Applicant, who then worked at UNOCI, was approached in 2007 by two Ivorian nationals; Mr. TA ["the Complainant"] and Mr. AB whose travel to Europe the Applicant was to facilitate for this project.

31. As participants in the project, Messrs. TA and AB paid the Applicant, respectively 4 million and 4.9 million West African CFA francs. The Applicant collected their photos and birth certificates. In his interview with OIOS, he stated that he would have received a gift of 500,000 West African CFA francs if the project had succeeded. Under cross-examination before this Tribunal, the Applicant admitted that the value of the gift would be around USD853, which was the equivalent of about one month of his salary at that time.

32. The Applicant's case is that he was surprised when instead of Ivorian national passports with Belgian visas, his childhood friend Mr. SO received from his contact Belgian passports for Messrs. TA and AB. The Applicant did not at any time during the OIOS investigation give the name of the contact who his friend liaised with to receive the travel documents. That name has not been disclosed to date.

33. The Applicant stated in his OIOS interview that he saw the receipt of Belgian passports as a problem. In his application, he says he later discovered the immigration law firm was fake. However, although the Applicant realized there was a problem and sought to discourage use of the false passports, Mr. TA insisted on using his for travel.

was included as part of the t

Considerations

Whether the facts are established by clear and convincing evidence?

56. The function of the Tribunal in considering the challenged decision is that of judicial review. In reviewing the Secretary-General's exercis

59. The Respondent had no clear and convincing evidence on which to decide on dismissal of the Applicant for violating Ivorian law in 2007 by accepting payment to produce false passports and committing fraud.

60. The OIOS Report does not include clear and convincing proof, by admissions or otherwise that the Applicant's version of events, that he was arranging for genuine visas for a fee as opposed to selling false passports was not true. On this version, the Applicant was a victim, along with the Complainant, of the fraudulent actions of an unnamed Belgian Embassy contact of his childhood friend Mr. OS.

61. In deciding on whether the alleged disciplinary charge was substantiated, the Respondent was required to make findings based on clear and convincing evidence. It is not clear and convincing from the record how the Applicant and his version of events

to represent the Applicant who had never retained him. The letter was acknowledged but there was no meaningful response.

85. In his 31 January 2020 statement in response to the allegations memorandum, the Applicant said that his counsel's recent searches uncovered numerous irregularities on the face of the record demonstrating that the alleged Court hearings never took place and the alleged sentence was invalid. He said that after completing the authentication research, the next step for counsel would be to apply to have the court declare the judgment a false document. Correspondence proving that authentication efforts were in progress were attached.

86. The Applicant contended in his response to the allegations memorandum that "the Complainant helped by some corrupted *gendarme* and staff of the [Ivorian Court] have produced false documents to set a false Judgment. The Complainant himself disclosed to the OIOS investigator that he had to bribe the Police Staff, *gendarme* and some [Court]

as to the authenticity of the judgment against the Applicant. Instead "what seems clear is that the complainants were able to use the police and court system to exert pressure on the staff member to reimburse them for fees paid to a third party through the staff member."

90. In a management evaluation request filed on 27 April 2020, the Applicant described the documents relied on by the United Nations in the disciplinary proceedings against him as bogus. He contended that it was incumbent on the Organization's investigators to approach the court of jurisdiction to verify the documents.

91. The Applicant filed three motions on 9 July 2020, 29 October 2020, and 3 December 2020 for extensions of time to file this application as he was awaiting a response from the relevant authorities and court regarding authentication of the 2009 judgment.

92. In his substantive application filed in January 2021, the Applicant indicated he was informed of the alleged Court trial long after the March 2009 Judgment was issued. He then went to the prosecuting *gendarme* who informed him the case was closed at the *Gendarmerie* since April 2008 and the alleged March 2009 Court document was invalid and would have no effect. The Applicant reiterated in his substantive application that he was still pursuing authentication of the judgment through the Ivorian Court as no competent and qualified Ivorian Judge would release such a document with numerous irregularities.

93. In an August 2021 application to the Ivorian Court seeking rectification of the Judgment, the Applicant's Attorney set out the irregularities gleaned from her searches. She said the Applicant "believes that everything has been orchestrated to harm his professional status as an international staff of the UN where he is currently undergoing a disciplinary procedure of dismissal."

94. Although the Applicant may have come to believe the Judgment was procedurally improper and invalid there is no evidence on record that he was of that

view before 2019. It is clear from the Applicant's interview that he received the Judgment in 2009 and there is no indication that he doubted its authenticity. As such, even if upon advice from counsel in 2019, the Applicant became aware of glaring irregularities in the Judgment, he was obligated to have disclosed it in his 2013 job application process. This was specifically required in response to the question in the PHP which was part of his job application process in Inspira.

95. There is an element of truth in his answering 'no' to having been indicted, as he was never served with a summons or indictment for the proceedings that led to the trial and his criminal conviction in March 2009. However, the Applicant candidly admitted in his interview that he was served with two prior summonses. These were clearly in a criminal investigation context. This was enough for him to have erred on the side of full disclosure by responding 'yes' to the qud

99. The Applicant's belated attempts to seek to prove that the judgment was not authentic are of no probative value as to whether or not he should have responded 'yes' in 2013. These attempts, which commenced after the investigation in 2019, do not change the fact that the Applicant was aware of the judgment when he responded 'no' in 2013.

100. The Applicant conceded under cross-examination, that the judgment cannot be changed by way of his most recent attempt i.e. the application for rectification made pursuant to Article 185 of the Ivorian Code of Civil Procedure on 31 August 2021. This provision only permits correction of clerical errors that do not undermine the binding nature of the judgment. Based on the Applicant's delay in checking on the judgment, it is impossible to have its suspected lack of authenticity addressed by way of appeal.

101. There could be no doubt in the Applicant's mind when he completed the PHP in 2013 that to answer in the negative to the question about prior indictments and fines would be to withhold required information. Answering 'no' was the wrong judgment call on his part.

102. Even though the Applicant was never called upon to pay the fine, the prudent and transparent course would be to answer 'yes' as he was aware of the judgment whereby, he had been fined. Thereafter, he could have opted to add an explanation. The PHP specifically provides for explanations to be given after such an answer.

103. Accordingly, the Applicant's duty was to answer truthfully 'yes' and then explain that the fine and imprisonment were not executed, based on a prior arrangement whereby he was re-paying the Complainant. He could have further explained that he had been informed by a *gendarme* who was prosecuting the case that the judgment was of no effect and would not be enforced.

104. Failing to answer 'yes' not only falsified the Applicant's job application but tainted the recruitment process. The Respondent's objective of having knowledge to ensure the integrity of potential staff members was undermined.

> 56. Procedural fairness is a highly variable concept and is context specific. The essential question is whether the staff member is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him.

110. It is clear from the procedural background to his disciplinary sanction that the

120. The Tribunal determines that there was nothing