



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KAZAGIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Cristiano Papile, ALS/OHRM

Susan Maddox, ALS/OHRM

Introduction

1. By application emailed to the New York Registry of the Tribunal on 29 October 2015, and forwarded by said Registry to the Geneva Registry by email of 27 November 2015, the Applicant contests the decision:

- a. to dismiss him in accordance with staff rule 10.2(a)(ix); and
- b. to impose on him a fine equivalent to three months net salary, in accordance with staff rule 10.2(a)(v).

2. Upon the Tribunal's request, the application was filed through the Tribunal's eFiling Portal (CCMS), on 25 December 2015, together with, *inter alia*, a request for interim measures.

Facts

3. The Applicant joined the Organization on 1 May 2002, as Programme Management Assistant (G-5) of the United Nations Peacekeeping Mission in Kosovo ("UNMIK").

4. On or about 3 June 2013, the Applicant was arrested by the Kosovo police, on the basis of allegations that he had engaged in various criminal offences under the Criminal Code of Kosovo ("CCK").

5. By letter dated 28 June 2013, the Chief of State Protocol, Republic of Kosovo, requested the Organization to waive the Applicant's immunity. By code cable of the same day, UNMIK transmitted the letter to the then Under-Secretary-General for Field Support, with copies to the then Legal Counsel and to the Under-Secretary-General ("USG") for Peacekeeping Operations.

6. By note dated 2 July 2013, the Assistant Secretary-General for Legal Affairs informed the then USG For Field Support that the Secretary-General had waived the Applicant's immunity from arrest and legal process. The waiver was transmitted to UNMIK on the same day.

7. By letter of the next day, the Special Representative of the Secretary-General informed the Chief of State Protocol, Republic of Kosovo, that the Secretary-General had waived the Applicant's immunity from arrest and legal process.

8. After his arrest, the Applicant was first placed on leave with pay in July 2013 and, thereafter, on administrative/special leave without pay. He remained in detention and his leave without pay was periodically extended until his dismissal.

9. The Applicant was tried before the Basic Court of Mitrovica on ten charges of sexual offences between 15 October 2014 and 11 February 2015. During trial, the Applicant was instructed by the trial judge as follows:

You have the right not to give testimony and you also have the right not to give answers and if you give testimony you shall neither be obliged to incriminate yourself nor to confess guilt.

10. The Applicant testified in his defence on 27 and 28 January 2015; he stated that in or about November 2010, he had sexual intercourse with S.T., who he stated "was 16 years and five months old" at that time. He also testified that he had sexual intercourse with S.N. who was 17 years old at the time.

11. By judgment of the Basic Court of Mitrovica dated 12 February 2015, the Applicant was convicted of various criminal offences, namely:

- a. Sexual abuse of persons under the age of 16 years, contrary to art. 198, para. 1 of the CCK;
- b. Attempted facilitating prostitution, contrary to art. 201, para. 4 in conjunction with para. 1 and art. 20 of the CCK;
- c. Attempted sexual assault, contrary to art. 195, para. 2, subpara. 3, in conjunction with art. 20 of the CCK; and
- d. Rape, contrary to art. 193, para. 1 of the CCK.

12. The Applicant was sentenced to fourteen years of imprisonment. He filed an appeal against the judgment of 12 February 2015, which, to the best of the Tribunal's knowledge at the time of this judgment, is still pending.

13. By memorandum of 15 June 2015, the Assistant Secretary-General for Field Support referred the Applicant's case to the Assistant Secretary-General for Human Resources Management, for appropriate action. The referral was based on the following documents:

- a. A code cable, dated 13 May 2015, from UNMIK to the Department of Peacekeeping Operations;
- b. An English translation of the above judgment of the Basic Court of Mitrovica; and
- c. English translations of two transcripts of the Applicant's testimony dated 27 and 28 January 2015 at the trial resulting in his conviction on 12 February 2015.

14. By memorandum entitled "allegations of misconduct", dated 25 June 2015, and delivered to the Applicant on) July 2015 at the detention centre where he was being held, he was requested to respond to allegations that:

- a. In or about November 2010, [he had] engaged in sexual intercourse with S.T., who was under 18 years of age at the time;
- b. In or about June 2011, [he had] engaged in sexual intercourse with S.N., who was under 18 years of age at the time; and
- c. [he had] violated the national criminal laws of the Republic of Kosovo relating to sexual abuse, rape, attempted sexual assault and attempted facilitation of prostitution.

15. By the memorandum in question, the Applicant was also informed of his right to avail himself of the assistance of counsel.

16. The Applicant filed his comments on the allegations of misconduct on 22 July 2015 claiming, *inter alia*, that the Organization was not in possession of various documents, including his appeal against the judgment of the Basic Court of Mitrovica; that he had not been permitted to present his defence at the trial and that the birth certificate of both S.N. and S.T were falsified and that they were, in fact, over 18 at the time of the first sexual intercourse with him; that the judgment was not final and was under appeal, and that he would be retiring in November 2015.

17. By letter dated 13 October 2015—delivered to the Applicant on 21 October 2015—the Assistant Secretary-General for Human Resources Management informed the Applicant of the decision by the Under-Secretary-General to impose on him the two above-referred disciplinary measures, namely dismissal and a fine in the amount of three months' net salary.

18. By memorandum dated 27 October 2015, the Chief Human Resources Officer, UNMIK, informed the Chief Finance and Budget Officer that the quantum of the fine imposed on the Applicant was equivalent to EUR5,404,68. Euro 4,721,31 of the fine were paid from the Applicant's leave balance upon separation, and the remaining EUR683,37 were subsequently deposited to UNMIK on the Applicant's behalf.

19. By Order No. 119 (GVA/2016) of 10 June 2016, the Tribunal informed the parties of its intention to adjudicate the matter on the papers, and asked them to file comments in this regard, if any, by 17 June 2016. While Counsel for the Respondent agreed to a judgment being issued on the papers, the Applicant did not revert back to the Tribunal.

Parties' submissions

20. The Applicant's principal contentions are:

- a. The decision is based on unacceptable, ineligible facts and evidence, grounded on false statements, documents and testimonies, unfair trial and

many other impermissible acts of authorities (police, prosecutor and judges);

b. The United Nations were not in possession of many documents, including, *inter alia*, the 633-page case file in front of the national court, and his appeal against the judgment of 12 February 2015, dated 7 April 2015;

c. The birth certificates of S.T. and S.N. were falsified; his “knowledge” of their age, as expressed at trial, was based on their falsified birth certificates; her IDs were never presented and S.N. hid it because she gave a wrong birthdate and a falsified birth certificate issued by the Municipal authorities; according to her real birthdate and ID she was over 19 at the time of the first sexual intercourse;

d. The findings of guilt by the Basic Court of Mitrovica against him, in four criminal offences, was unlawful; he argues, *inter alia*, that the judgment was based on inadmissible evidence; that the acts for which he was accused and prosecuted were not criminal offences; the determination of the factual status was erroneous and incomplete; he did not have the opportunity to defend himself; he did file an appeal against that judgment;

e. Local authorities did not respect his immunity and the United Nations did not express any concern on his unlawful arrest; rather, the Secretary-General lifted his immunity; and

f. The two disciplinary measures imposed on him should be annulled.

21. The Respondent’s principal contentions are:

The facts are established by clear and convincing evidence

a. By his own admission at trial, the Applicant had sexual intercourse with S.T. in November 2010, and he stated at trial that she was 16 years and five months at that time; the Applicant also admitted that he had sexual

intercourse with S.N. in June 2011, and stated at trial that according to her birth certificate, she was “17 and one month, almost” at that time;

b. His arguments and attempts to retract the statements he made at trial with respect to the age of S.T. and S.N. for the purpose of the present proceedings are not credible; in the absence of any evidence, the argument that the birth certificates were falsified is purely speculative;

c. The finding that the Applicant had sexual intercourse with two minors is supported by the conclusions of the Basic Court of Mitrovica in its judgment of 12 February 2015, and is, thus, established by clear and convincing evidence;

d. The Organization relied on that judgment, which convicted the Applicant of several offences, namely sexual abuse, rape, attempted sexual assault and attempted facilitation of prostitution under the criminal laws of the Republic of Kosovo; the Applicant was permitted to present his defence at the trial;

e. It is thus further established by clear and convincing evidence that the Applicant violated these criminal laws;

f. While the Applicant stated that he was appealing the judgment of the Basic Court of Mitrovica, there is no requirement within the Staff Regulations and Rules that a disciplinary process be held in abeyance pending the issuance of a final appellate judgment in a matter concerning violation of local laws;

The facts amount to misconduct

g. By engaging in sexual intercourse with two minors, the Applicant violated the Organization’s clear policy against sexual intercourse with persons under the age of 18; by violating the national criminal laws of the Republic of Kosovo, the Applicant further violated staff rule 1.2(b), which requires staff members to “comply with local laws”, and staff regulation 1.2(f);

The disciplinary measures imposed on the Applicant were proportionate

h. In the present case, the Applicant engaged in two areas of misconduct, namely (a) sexual exploitation and abuse and (b) violation of local laws relating to sexual abuse, rape, attempted sexual assault and attempted facilitation of prostitution; the disciplinary measures imposed on him were proportionate to either of these areas of misconduct, taken separately or together; the Organization's legislative framework with respect to matters of sexual misconduct, and the Secretary-General's practice in disciplinary matters show that the strictest sanctions are appropriate; the Tribunal itself has confirmed that dismissal is the appropriate sanction in cases of sexual exploitation and abuse;

i. Staff rule 10.2(a) permits the Secretary-General to impose several disciplinary measures, including dismissal and a fine, if appropriate; in this respect, the Secretary-General has announced in a report to the General Assembly the intention to levy fines on staff members engaging in sexual exploitation and abuse;

j. In the case at hand, there were no mitigating factors that would warrant a lower sanction;

The Applicant's procedural fairness rights were respected

k. By the allegations letter, the Applicant was informed of the allegations against him and provided with the documentary evidence on which the allegations were based; he was informed of his right to seek assistance from counsel; UNMIK offered to facilitate a telephone call between the Applicant and the Office of Staff Legal Assistance, which the Applicant declined. The Applicant was also given the opportunity to and did provide comments on the allegations, which were duly considered. In the sanction letter, the Applicant was notified of the reasons and outcome of his case;

l. The Administration did not mishandle his waiver of immunity; his arguments in this respect are not receivable and without merit;

Compensation

m. The application should be dismissed in its entirety; hence, the issue of compensation does not arise.

Consideration

Procedural matter

22. According to art. 16, para. 2, of the Tribunal's Rules of Procedure, "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary matter".

23. The Tribunal notes that in one of the documents attached to his application, the Applicant indicated that he did not request an oral hearing. Furthermore, according to the case file, although offered to do so, the Applicant did not seek counsel from the Office of Staff Legal Assistance, or is otherwise represented in the present proceedings. Moreover, since the Applicant was sentenced to fourteen years of imprisonment in 2015, which he is currently serving in the detention centre in Mitrovica, Kosovo, he is not available for a hearing. Finally, by Order No. 119 (GVA/2016) the Tribunal invited the parties to provide their views, if any, on a decision being rendered on the papers, by 17 June 2016. The Respondent agreed thereto, while the Applicant did not revert back to the Tribunal to this date.

24. In light of these exceptional circumstances, in which it was not feasible for the Tribunal to hold a hearing where the Applicant would be present or otherwise represented, and having reviewed the case file, the Tribunal decided that the case could and had to be adjudicated on the papers.

Relevant law and jurisprudence

25. Article X of the United Nations Staff Regulations provides in regulation 10.1(a) that "the Secretary-General may impose disciplinary measures on staff members who engage in misconduct".

26. Staff rule 10.1(a) states that:

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

27. Additionally, staff rule 10.1(c) provides that:

The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

28. In addition, staff regulation 1.2(f) provides that staff members:

[S]hall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action ... that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

29. Furthermore, staff rule 1.2 (Basic rights and obligations of staff) states under subsec. (b) 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.

30. Staff regulation 1.1(f) provides 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 Organizations. 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.

31. Staff regulation 10.1(b) provides that “[s]exual exploitation and sexual abuse constitute serious misconduct”.

32. Also, Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) provides in sec. 3 (Prohibition of sexual exploitation and sexual abuse), and more specifically in secs. 3.1 and 3.2(b):

3.1 Sexual exploitation and sexual abuse violate universally recognized international legal norms and standards and have always been unacceptable behaviour and prohibited conduct for United Nations staff. Such conduct is prohibited by the United Nations Staff Regulations and Rules.

3.2 In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules, are promulgated:

(a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal.

(b) Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defence.

33. According to the established jurisprudence of the United Nations Appeals Tribunal ("UNAT"), the role of the Tribunal in reviewing disciplinary cases is to examine (1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations; and (3) whether the disciplinary measure applied was proportionate to the offence (see *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; *Maslamani* 2010-UNAT-028; *Nasrallah* 2013-UNAT-310; *Walden* 2014-UNAT-436; *Diabagate* 2014-UNAT-403). The Tribunal will examine these elements in turn.

34. With respect to the standard of proof applying in disciplinary cases, the Appeals Tribunal held in its Judgment *Molari* 2011-UNAT-164 that:

Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt – it means that the truth of the facts asserted is highly probable.

Whether the facts on which the disciplinary measure was based have been established

35. The Tribunal will examine the grounds for dismissal, in light of the standard set by the jurisprudence and by the above-quoted legal provisions.

Sexual intercourse with two persons under the age of eighteen years

36. The Tribunal notes that in his evidence before the Basic Court of Mitrovica, the Applicant admitted, without any ambiguity, that he had sexual intercourse with S.T. and S.N., respectively in November 2010 and June 2011, when they were under the age of eighteen. When the Applicant gave testimony on 27 and 28 January 2015 in the context of the criminal trial in Kosovo, he was represented by counsel. Prior to giving his testimony, the Applicant had been instructed by the Presiding Judge that he had no obligation to testify and to incriminate himself, in the following terms:

I will instruct you again, that you have the right not to give testimony and you also have the right not to give answers and if you give testimony you shall neither be obliged to incriminate yourself nor to confess guilt. And of course you have the right to defend yourself in person or through the assistance of the defence counsel. Do you understand Mr. [D.] Kazagic?

37. The Applicant stated at trial that he understood that instruction.

38. When asked whether he remembered what age S.N. had when he had the first sexual intercourse with her, in June 2011, the Applicant stated: “[b]ased on her birth certificate which is contained in the case file, at that time she was 17 and one month, almost”.

39. With respect to S.T., the Applicant admitted at trial that he had sexual intercourse with her in November 2010, and that “at that time she was 16 years and five months old”. He also stated that he met S.T. in June 2005, when she was 11 years old, that he gave her a ring for her birthday on 3 July 2009, and that he knew that she was 15 years of age at that time. He thus admitted that he knew S.T. for five years prior to the first sexual intercourse with her, and that he knew her age at the time they first met (11 years). The Tribunal is satisfied that his testimony at trial shows that he had first-hand knowledge of the age of S.T. when he had sexual intercourse with her in November 2010, irrespective of the birth certificate.

40. The Tribunal notes that while under the criminal law of Kosovo, the minimum age of consent for sexual intercourse is sixteen years of age, under the relevant rules of the United Nations it is eighteen. Section 3.2(b) of ST/SGB/2003/13 clarifies in this respect that “[s]exual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally”. While the Applicant had thus no reason to deceive the Basic Court of Mitrovica about the age of S.T. and S.N. at the time of his first sexual intercourse with them—as long as he could assert that they were at least sixteen—he had reason to assert for the purpose of the disciplinary process at the United Nations and the present proceedings that they were in fact over eighteen years old.

41. The Applicant is now arguing that he gave his testimony based on falsified birth certificates and that, in fact, both S.T. and S.N. were over the age of eighteen at the time of his first sexual intercourse with them. He does not, however, provide any evidence in this respect. The Tribunal notes that in the absence of any evidence, the Applicant’s claim, during the disciplinary proceedings and before this Tribunal, that the birth certificates of both S.N. and S.T. were falsified, lacks any foundation. Under the circumstances, the Tribunal considers that by contradicting his prior own admission, the Applicant’s allegation about false birth certificates are made in bad faith and do not need to be further investigated.

42. Further, the Tribunal notes that the Basic Court of Mitrovica found that it was established *beyond a reasonable doubt* that the Applicant had sexual intercourse with S.N. when she was less than 16 years old, that he had sexual intercourse with her more than once and that he knew her age. The Basic Court of Mitrovica also found that it was proven that S.T. was 15 years when the Applicant gave her a ring for her birthday in 2009. In reaching its conclusions, the Court did rely on the Applicant's testimony and on additional evidence, such as the victims' birth certificates, S.N.'s statements to the police and the Prosecutor, as well as S.N.'s testimony and the testimony of other witnesses in Court.¹

43. In addition to the Applicant's own testimony at trial, the conviction by the Basic Court of Mitrovica is relevant for the Tribunal's adjudication of the present application. Para. 40 of the Standards of Conduct for the International Civil Service of the ICSC² provides in this respect that:

Violations of law can range from serious criminal activities to trivial offences, and organizations may be called upon to exercise judgment in the light of the nature and circumstances of individual cases. A conviction by a national court will usually, although not always, be persuasive evidence of the act for which an international civil servant was prosecuted, and acts that are generally recognized as offences by national criminal laws will normally also be violations of the standards of conduct for the international civil service.

44. Clearly, the conviction of the Applicant for serious offences under the CCK, as reflected above, constitutes persuasive evidence for the purpose of the present proceedings. With respect to the Applicant's argument that the judgment of the Basic Court of Mitrovica is not final and that he has appealed it, the Tribunal recalls what the Appeals Tribunal found in *Abu Ghali* 2013-UNAT-366, namely that "[m]isconduct based on underlying criminal acts does not depend upon the staff member being convicted of a crime in a national court." Thus, the Tribunal's conclusions in the present case, reached on the basis of the conviction of the

¹ It seems that S.T. did not testify at trial since she was not reachable, and that her statements to the police and Prosecutor were not admitted by the Court because they did not meet the requirements of the Kosovo Code of Criminal Procedure.

² See Annex II of the Report of the International Civil Service Commission for the year 2001 to the United Nations General Assembly, fifty-sixth session, supplement No. 30 (A/56/30), 9 August 2001, New York.

Applicant by the Basic Court of Mitrovica and his admissions at trial, are without prejudice to the potential outcome of the Applicant's appeal against that judgment in front of the higher national courts.

45. In light of the foregoing, this Tribunal finds that the conviction of the Applicant by the Basic Court of Mitrovica, together with his free admission at trial of having had sexual intercourse with S.T. and S.N. while they were under the age of eighteen is clear and convincing evidence of him having had sexual intercourse with girls under the age of eighteen.

Did the facts amount to misconduct?

46. It is established for the purpose of the present proceedings that the Applicant engaged in sexual intercourse with two persons under the age of eighteen. This clearly constitutes a violation of the Organization's policy under staff regulation 10.1(b) and secs. 3.1 and 3.2(b) of ST/SGB/2003/13, as well as staff regulation 1.2(f). The facts clearly amount to misconduct which is explicitly prohibited by sec. 3.2(b) of ST/SGB/2003/13.

Whether the disciplinary measure was proportionate

47. According to the established case law of the UNAT in disciplinary matters, if misconduct is established, the Secretary-General has a broad discretion to determine the appropriate sanction. It is not for the Tribunal to decide or consider what sanction or punishment would have been fair or—in the Court's view—more appropriate (see *Sanwidi* 2010-UNAT-084, *Cabrera* 2010-UNAT-089).

48. Staff rule 10.2 provides that “disciplinary measures may take one or more of the following forms only ... (v) fine ... (ix) dismissal” (emphasis added), whereas staff rule 10.3(b) requires that any disciplinary measure imposed on a staff member be proportionate to the nature and gravity of his or her misconduct. Sec. 3.2(a) of ST/SGB/2003/13 explicitly provides that “[s]exual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal”. This provision emphasizes how serious acts with a sexual background are generally taken, even if sexual

intercourse with children does not automatically amount to sexual exploitation and/or sexual abuse. In addition, pursuant to sec. 3.2, it is the goal of these provisions to “further protect the most vulnerable populations, especially women and children”.

49. The recent practice of the Secretary-General indicates that dismissal is considered a proportionate sanction in cases of sexual intercourse with (a) minor(s) and violation of the national laws of a member state (see ST/IC/2014/26 and ST/IC/2013/29).

50. In light of the seriousness of the incident, the Applicant’s dismissal, together with a fine, cannot be considered disproportionate. The sexual intercourse with children alone justifies a severe disciplinary measure, regardless of the outcome of the judicial proceedings in front of the national courts of Kosovo with respect to the violation of the CCK. Therefore, the Tribunal does not need to consider whether the Applicant committed additional acts of misconduct.

51. The Tribunal is also satisfied that the Applicant’s procedural rights were respected.

Conclusion

52. In view of the foregoing, the Tribunal DECIDES:

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 20th day of June 2016

Entered in the Register on this 20th day of June 2016

(Signed)

René M. Vargas M., Registrar, Geneva