



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/GVA/2016/043

Judgment No.: UNDT/2017/025

Date: 10 April 2017  
English

Original: French

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**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BENAMAR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Richard Sédillot

**Counsel for Respondent:**

Alexandre Tavadian, UNHCR

## **Introduction**

1. By application filed on 27 June 2016, the Applicant contests the disciplinary measures imposed in accordance with staff regulations 10.1 (a) and 1.2 (b) and staff rules 1.2 (b) and (c) and 1.5 (a), consisting of a written censure, a loss of three steps in grade, and deferment, for a period of three years, of eligibility for consideration for promotion.
2. The Respondent filed his reply on 27 July 2016.

## **Facts**

3. The Applicant joined the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in October 2005 as a General Service staff member at the G-5 level. On 1 November 2007, he was appointed to the post of Finance Officer at the P-3 level in the Democratic Republic of the Congo. He was assigned to the post of Senior Administration/Finance Officer in Burkina Faso in September 2012. He was then reassigned to the same post at the same level in Jordan in February 2014. He is currently serving in Turkey.
4. On 3 January 2013, the child S.M. Benamar was born of the Applicant’s union with Ms. J.W.G., his former partner.
5. On 20 October 2013, a car with armed men arrived at the place of residence of the Applicant, who was not home at the time. The armed men entered the house and left with the child S.M. Benamar and Ms. J.W.G., despite protests from the Applicant who, having been notified by his guards, had arrived at his house 15 to 20 minutes after the car had arrived.
6. On 21 October 2013, the UNHCR representative office in Burkina Faso sent a note verbale to the Ministry of Foreign Affairs of Burkina Faso referring to the incident of 20 October 2013 and noting that it was critical that the Applicant promptly receive news of his son and have access to him. The child and mother returned to the Applicant’s residence on 24 October 2013.

7. On 30 October 2013, the Applicant's lawyer filed a motion before the *Tribunal de Grande Instance of Ouagadougou* to determine custody of the child.

8. On 29 November 2013, the Applicant filed a complaint against X with the Public Prosecutor of Burkina Faso at the *Tribunal de Grande Instance of Ouagadougou* for trespassing, abduction and complicity in the abduction and forcible confinement of his child and the child's mother. On 10 January 2014, the *Tribunal de Grande Instance of Ouagadougou* issued an order entrusting custody of the child S.M. Benamar to his mother and granting the Applicant visitation rights. The Applicant's lawyer appealed that order before the Court of Appeal on 22 January 2014.

9. On 29 January 2014, the Applicant requested, on the UNHCR travel authorization form (PT8), for his son, S.M. Benamar, to travel with him to Jordan. He subsequently travelled to Jordan with his son without obtaining prior authorization from the child's mother.

10. On 10 February 2014, the Applicant's former partner filed a complaint against him with the Inspector General's Office of UNHCR for sexual exploitation, kidnapping and forcible confinement, physical and psychological violence, use of privileges and immunities, and refusal to comply with local laws. Part of the complaint was also directed against the Resident Representative of UNHCR in Burkina Faso, another UNHCR staff member in Burkina Faso and a driver.

11. On 11 April 2014, the Inspector General's Office of UNHCR ("IGO") received another written complaint from the Applicant's former partner addressed to the High Commissioner, in which she alleged that the Applicant had abducted their son, S.M. Benamar. IGO then opened an investigation into the allegations and, having noted that the complaint was not patently frivolous, assigned an investigator to the case.

12. On 13 March 2015, the Applicant's Counsel filed with the Public Prosecutor at the *Tribunal de Grande Instance of Paris* a complaint, dated 5 May 2014, against the child's mother for abduction of a minor and extortion; against Mr.

Dieudonné Kazumba (supposedly a consul of the Democratic Republic of the Congo), for abduction of a minor in an organized gang and usurpation of title; and against X, for abduction of a minor in an organized gang and trespassing.

13. In an e-mail dated 6 June 2014, an IGO investigator informed the Applicant that he was the subject of an investigation and summoned him for an interview. In the e-mail, the investigator also informed the Applicant that “the allegations against [him] [were] related to [his] purported failure to comply with the provisions of the order of 10 January 2014 of the *Tribunal de Grande Instance of Ouagadougou* in Burkina Faso regarding custody of [his] son, [S.M.] Benamar”.

14. The Applicant responded to the e-mail the following day, informing the IGO investigator that the case would be litigated before the Court of Appeal of Ouagadougou on 16 July 2014 and requesting a response to the complaints that he had filed. He also provided the e-mail address of his lawyer.

15. An initial telephone interview was conducted with the Applicant on 30 June 2014, at the start of which the Applicant was officially informed that he was the subject of the investigation. During the interview, the investigators asked the Applicant to provide them with the documentation relating to the appeal filed against the order of 10 January 2014, as well as any other documents that would corroborate that the Applicant had custody of his son S.M. Benamar at the time that he had brought the child to Jordan and at the time of the interview.

16. By decision No. 94 of 20 August 2014, the Court of Appeal of Ouagadougou confirmed that custody of the child S.M. Benamar had been entrusted to the mother, awarding maintenance to the mother and granting the Applicant visitation rights. The child’s mother sent a certified copy of this decision by e-mail to the Inspector General of UNHCR on 3 September 2014, requesting him to ensure that the Applicant complied with the courts’ decisions.

17. On 17 October 2014, the Applicant filed an appeal on points of law before the Court of Cassation of Burkina Faso against the decision of the Court of Appeal.

18. In an e-mail of 27 October 2014, the IGO investigator asked the Applicant to confirm, before 1 December 2014, that he was complying with the terms of decision No. 94 of the Court of Appeal, particularly with regard to the handover of the child to his former partner. She also informed him that a “failure to confirm ... [could] constitute professional misconduct”.

19. A second telephone interview was conducted by the IGO investigator with the Applicant on 15 December 2014, during which the Applicant stated that “all remedies [had not] been exhausted and [were] far from having been exhausted,” and that his appeal to the Court of Cassation was still pending. The investigators asked him to provide them with proof, before 7 January 2015, that (1) the decision of the Court of Appeal was not enforceable and (2) the Applicant had filed an appeal to the Court of Cassation. They reiterated that request by e-mails of 30 December 2014 and 12 January 2015, granting the Applicant an extension until 13 January 2015.

20. The Applicant replied by e-mail on 13 January 2015, indicating, *inter alia*, that the decision of the Court of Appeal would be subject to an appeal before the Court of Cassation, that it was not enforceable beyond the borders of Burkina Faso, and that, if necessary, he would refer the matter to the competent international authorities. He also noted that the best interests of his son were at stake and that, after the aggression and forcible confinement that his son had been subjected to, it was inconceivable that he should again be placed in contact with his aggressors.

21. On 11 February 2015, the Applicant was temporarily reassigned to the UNHCR representative office in Hungary, effective 1 April 2015. On his travel authorization application, signed on 22 February 2015, he listed himself and his son, S.M. Benamar. He also listed his son on the dependency allowance application form, signed on 15 February 2015. The Applicant travelled from Amman to Budapest on 1 April 2015 and the Organization paid his son’s travel expenses.

22. By an e-mail of 25 February 2015, the IGO investigator replied to the Applicant’s message of 13 January 2015, requesting him to send a copy of the

appeal on points of law before 5 March 2015 and informing him that, after that deadline, IGO would consider the order of the Court of Appeal as final.

23. In an e-mail of 5 March 2015, the Applicant sent a certificate of 2 March 2015, signed by his Counsel, affirming that an appeal on points of law had been filed before the Supreme Court of Burkina Faso against the decision of the Court of Appeal of Ouagadougou.

24. The investigator acknowledged receipt of the certificate in an e-mail of the same date, while emphasizing that he had requested a copy of the statement in support of the appeal on points of law, and giving the Applicant until 10 March 2015 to send it to him.

25. In an e-mail of 10 March 2015, the Applicant informed the investigator that his lawyer, who was on mission at the time, had contacted his colleague in Burkina Faso, who had prepared the appeal, requesting him to obtain a copy of the statement.

26. In an e-mail of 17 April 2015, the IGO investigator sent the Applicant the preliminary findings of the investigation, inviting him to submit comments prior to 3 May 2015, a deadline that was subsequently extended to 8 May 2015. The applicant submitted his comments by an e-mail of 8 May 2015.

27. The mother of the child S.M. Benamar contacted the Inspector General of UNHCR again by an e-mail of 16 May 2015 to request that follow-up action be taken on the court decisions regarding custody of her son.

28. In a letter of 15 July 2015, the Director of the Division of Human Resources Management, UNHCR, informed the Applicant of the allegations of misconduct against him. Specifically, he was charged with:

- a. “[F]ailing to promptly notify the Secretary-General, in writing, of any changes affecting [his] status under the Staff Regulations or Staff Rules (staff rule 1.5)”;

b. “[F]ailing to fulfil [his] duty to comply with and perform [his] private legal obligations in accordance with the order issued by the *Tribunal de Grande Instance of Ouagadougou* on 10 January 2014 and the decision of the First Civil Chamber of the Court of Appeal of Ouagadougou on 20 August 2014 (staff regulation 1.1 (f) and staff rule 1.2 (b))”; and

c. “[K]nowingly failing to cooperate with an investigation by the Inspector General’s Office (staff regulation 1.2 (r))”.

29. The Applicant was invited to respond to these allegations in writing and was informed of his right to seek the assistance of counsel, in accordance with administrative instruction ST/AI/371/Amend.1.

30. The Applicant responded to the allegations on 10 August 2015.

31. In a letter of 11 April 2016 entitled “Disciplinary measures”, the Director of the Division of Human Resources Management, UNHCR, informed the Applicant of the decision of the High Commissioner to impose three disciplinary measures on him, namely: a written censure, the loss of three steps in grade, and deferment, for a period of three years, of eligibility for consideration for promotion, pursuant to staff rule 10.2 (i), (ii) and (vi). She included a copy of the written censure, dated 1 April 2016, and informed the Applicant that it would be placed in his personnel file.

32. In the written censure, the High Commissioner refers to the three disciplinary measures and notes:

You are currently failing to comply with your private obligations, as you have not obeyed the rulings of the courts of Burkina Faso. Consequently, you are required to report every six months on measures taken to fulfil your private legal obligations. The Division of Human Resources Management will expect your first report [on] 1 September 2016. If you refuse to submit a report every six months or if you refuse to comply with the court orders, I will initiate a new disciplinary process that could lead to more severe disciplinary measures.

33. On 27 June 2016, the Applicant filed an application with the United Nations Dispute Tribunal contesting the disciplinary measures imposed on him by the High Commissioner of UNHCR.

34. On 27 July 2016, the Respondent submitted his reply and, on 29 July 2016, the Applicant filed additional written claims.

35. On 27 September 2016, the Tribunal held a directions hearing and, on 28 November 2016, a hearing on the merits was held.

36. On 1 December 2016, the Tribunal issued Order No. 229 (GVA/2016) inviting the parties to submit arguments on four issues raised during the hearing on the merits, which they did on 28 February 2017.

### **Parties' contentions**

37. The Applicant's contentions are:

a. The disciplinary process was unlawful; in particular, the Applicant had no opportunity to examine or cross-examine any witnesses; no exculpatory evidence produced by him was considered;

b. The principles contained in article 6, paragraph 3 (d), of the European Convention on Human Rights, which guides international courts, as well as article 10 of the Universal Declaration of Human Rights and article 14, paragraph 3 (e), of the International Covenant on Civil and Political Rights, were violated;

c. The drafters of the investigation report were partial, as they did not hear the witnesses who could have shed light on the behaviour of the mother, whose involvement in his son's abduction justified the Applicant's decision to keep the child with him;

d. Although he indicated on several occasions during the investigation that he wished only to respond through his Counsel, this request was not taken into account by the investigators; his right to seek the assistance of

counsel at all stages of the process and his right to a fair trial were violated; he requests the Tribunal to declare the process null and void;

e. In view of the danger to which his son had been exposed and the fact that the child had been a victim of abduction, the Applicant had to ensure the child's protection and keep him with him, despite his obligation under staff rule 1.2 (b) to honour the orders of competent courts; he could not reasonably be expected to hand over the child to the mother when she had participated in his abduction after breaking into his house at night, accompanied by armed men and a so-called consul, without an order from a competent authority;

f. The impartiality of the courts of Burkina Faso is questionable, as the Applicant filed a number of complaints regarding the intrusion and abduction with the Public Prosecutor of Burkina Faso, which were never investigated;

g. Similarly, the High Commissioner did not conduct a thorough investigation of the events that the Applicant, as a staff member, had been subjected to; the Organization did not assist him in making arrangements for his son's safety; the High Commissioner has a duty to ensure that the immunities and privileges of officials are respected and to guarantee the protection of their physical and moral integrity and that of their dependants;

h. Although the Organization took into account a number of mitigating circumstances, if the context of the case is taken into consideration, the disciplinary measures imposed on the Applicant are clearly disproportionate;

i. The decision provides for additional disciplinary measures in the event that the Applicant does not submit a report every six months or refuses to comply with the orders of the courts of Burkina Faso; such a decision, which anticipates the initiation of a new disciplinary process for acts identical to those already subject to sanctions, constitutes a violation of the *non bis in idem* principle;

j. The Applicant requests, first, that the contested decision be declared null and void on account of procedural irregularity, that his rights be restored retroactively, and that he be reinstated to a Senior Officer post; and

k. In addition, he requests that the Tribunal find the disciplinary measures imposed on him to be disproportionate and reduce them to a more proportionate level.

38. The Respondent's contentions are:

- a. The role of the Tribunal is to examine, first, whether the appropriate standard of proof was applied in establishing the alleged facts; second, whether the established facts amount to misconduct; and, lastly, whether the disciplinary measures imposed are proportionate to the nature and gravity of the misconduct;
- b. In cases entailing separation from service, the alleged facts must be established according to the "clear and convincing" standard of proof, whereas if the sanction imposed is not separation from service, as in the present case, the required standard of proof is lower. In such cases, the alleged facts must be proven on the basis of a preponderance of evidence or a balance of probabilities;
- c. The Applicant does not dispute that he relocated his son from his usual place of residence, Burkina Faso, without having full custody of him and without the prior consent of the child's mother; nor does he dispute that the courts of Burkina Faso granted full custody to the child's mother and that the orders issued by those courts have been enforceable since 20 August 2014; these facts are also corroborated by evidence;
- d. The Applicant also does not dispute that he never transmitted to the investigators the statement in support of his appeal on points of law; lastly, he does not deny that he failed in his obligation to

inform the Division of Human Resources Management that he did not have legal custody of his son;

- e. His refusal to comply with the orders of the courts of Burkina Faso is incompatible with the obligation of staff members established under staff rule 1.2 (b); similarly, his refusal to transmit a copy of the statement in support of his appeal on points of law constitutes a violation of staff rule 1.2 (c);
- f. His failure to inform the Division of Human Resources Management that he did not have legal custody of his son constitutes a violation of staff rule 1.5 (a), which caused the Respondent financial losses;
- g. The established facts thus amount to misconduct under staff rule 10.1 (a);
- h. It was the Applicant who filed a motion instituting proceedings with the courts of Burkina Faso in order to obtain full custody of his son. The courts, after hearing both parents, explicitly took the child's best interests into consideration and found that the mother would be a better caretaker for the child; they therefore did not automatically or systematically grant custody of the child to the mother, as the Applicant alleges;
- i. In taking the contested decision, the High Commissioner acknowledged and took into account as a mitigating circumstance in determining disciplinary sanctions the fact that the child's mother "had either organized or participated in the temporary abduction of [his] child from [his] home"; however, he correctly concluded that this did not absolve the Applicant of all responsibility because, in relocating the child without being authorized to do so, the Applicant had attempted to take justice into his own hands in what amounts to international child abduction;

- j. In determining disciplinary sanctions, the High Commissioner enjoys broad discretionary power; he took into account one aggravating circumstance and four mitigating circumstances; he also took into consideration past practice in disciplinary matters and the gravity of the misconduct;
- k. The measures imposed were proportionate and the Applicant did not specify which measures would have been more appropriate or which mitigating circumstances the High Commissioner might have failed to take into account;
- l. In the context of a disciplinary process at the United Nations, the Applicant has no right to examine or cross-examine anyone; that right may only be exercised before the United Nations Dispute Tribunal;
- m. Moreover, the report of the Resident Representative of UNHCR in Burkina Faso was duly taken into consideration and was included with the IGO investigation report; the High Commissioner never questioned the truthfulness or accuracy of the claim that the Applicant's former partner had organized the abduction of the child from his home on 20 October 2013; this amounts to a mitigating circumstance and was considered as such, although it does not absolve the Applicant of responsibility;
- n. A staff member does not have the right to legal assistance until the investigation has been completed and the disciplinary process begun, i.e., from the time of receipt of the letter informing him or her of the allegations of misconduct against him or her; in this case, the letter detailing the charges duly informed the Applicant that he was entitled to counsel; and
- o. The application has to be dismissed.

## Judgment

39. At the time the contested decision was taken, the applicable texts on disciplinary sanctions were staff regulation 10.1 (a) (contained in ST/SGB/2016/1<sup>1</sup>), according to which the Secretary-General “may impose disciplinary measures on staff members who engage in misconduct”, and staff rules 10.1 to 10.3, which provide as follows:

### **Rule 10.1 Misconduct**

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and 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.

(b) Where the staff member’s failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such 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 his or her actions, if such actions are determined to be wilful, reckless or grossly negligent.

(c) 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.

### **Rule 10.2 Disciplinary measures**

(a) Disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;

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<sup>1</sup> Superseded by ST/SGB/2017/1.

- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

...

**Rule 10.3**  
**Due process in the disciplinary process**

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

40. In the light of these provisions, the Tribunal will examine two categories of arguments submitted by the Applicant: the lawfulness of the disciplinary process and the proportionality of the disciplinary measures imposed on him by the Organization.

41. With regard to the lawfulness of the process, the Applicant claims that:

- a. The process is null and void because he was unable to examine his own witnesses during it;
- b. The investigation report is partial;

c. His right to be assisted by a lawyer during the disciplinary process was not respected;

d. The *non bis in idem* principle was violated because UNHCR threatened to impose new disciplinary measures if he continued not to comply with the orders of the courts of Burkina Faso awarding custody of his son to the child's mother.

42. The Applicant also claims that the disciplinary measures are disproportionate to the gravity of the misconduct because he was acting in his son's best interests.

43. Following the hearing on the merits, by Order No. 229 (GVA/2016) of 1 December 2016, the Tribunal requested both parties to respond to three questions that, in its view, are important for determining the outcome of this case:

a. Does the need to take into account the child's best interests constitute a limit on the Organization's disciplinary power in the context of the concrete facts of the process instituted in respect of the Applicant?

b. Does consideration of the child's best interests influence the assessment of the proportionality of the disciplinary sanctions and does it constitute cause for absolving the staff member from disciplinary responsibility?

c. Did the Applicant have a duty to cooperate with the investigator during the preliminary investigation stage when such cooperation could have resulted in the imposition of disciplinary measures on him?

44. Notwithstanding the scope of the questions addressed to the parties, it should be recalled that the Tribunal's Statute grants it limited power in disciplinary matters.

45. The jurisprudence of the United Nations Appeals Tribunal has consistently held that, in the case of an application contesting disciplinary sanctions, the

Tribunal must determine the following (*Masri* 2010-UNAT-098, *Shahatit* 2012-UNAT-195, *Portillo Moya* 2015-UNAT-523):

- a. Was the appropriate standard of proof applied in establishing the alleged facts?;
- b. Do the established facts amount to misconduct?; and
- c. Is the disciplinary measure proportionate to the gravity of the misconduct?

46. The Tribunal must also consider whether due process was followed.

*Establishment of the facts constituting the basis of the disciplinary measures*

47. It is therefore necessary to examine whether the facts held against the Applicant were established.

48. According to the jurisprudence of the United Nations Appeals Tribunal, unless the disciplinary sanction entails separation from service, a preponderance of evidence or balance of probabilities is considered sufficient to prove the alleged facts (see *Molari* 2011-UNAT-164). Given that the sanctions against the Applicant do not entail separation from service, this is the standard of proof applicable to the present case.

49. The Applicant does not dispute that he relocated his son from his place and country of residence without having legal custody of him and without the prior consent of the child's mother. Nor does he dispute that the Court of Appeal of Ouagadougou definitively upheld the decision of the *Tribunal de Grande Instance of Ouagadougou* to grant custody of the child to the mother. At the hearing before this Tribunal, Counsel for the Applicant also noted that he and his client did not dispute that this order had become enforceable on 20 August 2014, although he had submitted a statement introducing an appeal on points of law.

50. According to article 538 of the Code of Civil Procedure of Burkina Faso, "filing an appeal of a ruling within the authorized time frame shall suspend its enforcement, unless it is accompanied by an order making it immediately

enforceable or has been erroneously designated as a final ruling.” However, in contrast to a typical appeal, an appeal on points of law is an extraordinary remedy that does not suspend the enforcement of a ruling. In the present case, the Applicant—even though he submitted an appeal on points of law—thus failed to comply with a final and enforceable court decision granting custody of his son to the child’s mother.

51. The Applicant maintains that the Administration was aware of the fact that custody of the child had been awarded to the mother, which was, moreover, the subject of the IGO investigation.

52. The Tribunal notes that it was not the Applicant who informed the Organization of the change in his status and of the court decision of 10 January 2014 to award custody of his son to the child’s mother. On the contrary, even though his lawyer had appealed that decision before the Court of Appeal of Ouagadougou, the Applicant requested, on 29 January 2014, for his son to travel with him to Jordan at the expense of UNHCR. It was his duty to inform the Division of Human Resources Management of the ongoing proceedings at that time and thereafter. The Organization first became aware of the dispute through the child’s mother, when she filed a complaint to IGO in this regard on 11 April 2014. The Tribunal finds that the facts relating to this allegation are also satisfactorily established.

53. Lastly, the Applicant does not deny that, during the investigation, he did not provide the investigators with a copy of the statement that his Counsel had filed before the Court of Cassation in support of his appeal. He provided a copy only in the context of the proceedings before this Tribunal. The facts underlying the allegation that the Applicant failed to cooperate with the investigation are thus also established.

*Do the established facts amount to misconduct?*

54. Staff rule 1.2 (b) stipulates 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.” In refusing to comply with the

final and enforceable decision of the Court of Appeal of Burkina Faso, the Applicant failed to fulfil his obligation under staff rule 1.2 (b).

55. Furthermore, according to staff rule 1.2 (c): “Staff members have the duty to [...] cooperate with duly authorized audits and investigations.” The Tribunal considers that, even though the Applicant provided a copy of the statement in support of his appeal on points of law in the context of the proceedings before this Tribunal, he had failed to provide a copy to the investigators during the investigation, despite several requests from them in an effort to complete the investigation. This constitutes a violation of staff rule 1.2 (c).

56. Lastly, staff rule 1.5 (a) stipulates that:

Staff members shall be responsible for supplying the Secretary-General with relevant information, as required, both during the application process and on subsequent employment, for the purpose of determining their status under the Staff Regulations and Staff Rules as well as for the purpose of completing administrative arrangements in connection with their employment. Staff members shall be held personally accountable for the accuracy and completeness of the information they provide.

57. The Tribunal considers that the Applicant’s failure to inform the Division of Human Resources Management that he did not have legal custody of his son, even as he travelled with him to his new duty station (on official travel), constitutes a violation of staff rule 1.5 (a).

58. While in his reply to the application the Respondent suggests that the Applicant’s abduction of his son constitutes professional misconduct under the terms of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the Tribunal notes that this was not one of the charges levelled against him during the investigation and the disciplinary process. Indeed, this is a point that the Respondent raised for the first time in his reply and is therefore outside the scope of the contested decision.

59. Consequently, the Tribunal will not address this matter as it has not been officially submitted for its consideration.

*Due Process*

60. The Applicant questions, on the one hand, the lawfulness of the process, citing, *inter alia*, a failure to comply with the standards of the European Convention on Human Rights and, on the other, the proportionality of the disciplinary measures to the acts committed, in the light of his son's best interests.

Application of internal rules

61. In analysing the lawfulness of the disciplinary process, the Tribunal must refer to the specific legal framework of the United Nations disciplinary process while also considering, as suggested by the Applicant, the application of article 6.3 (d) of the European Convention on Human Rights, article 10 of the Universal Declaration of Human Rights, and article 14.3 of the International Covenant on Civil and Political Rights.

62. It should be recalled that the United Nations internal justice system is a *sui generis corpus juris* consisting of a set of specific rules with its own hierarchy and targeting a specific group of employees: international civil servants.

63. International civil servants have a specific legal status, are subject to the authority of the Secretary-General and must respect the Charter of the United Nations, the principles and aims of the Organization, as well as all internal United Nations rules and regulations.

64. Moreover, the United Nations is an international organization, not a State. As such, it does not have the status of a contracting party to the European Convention on Human Rights and, consequently, that Convention does not apply to relations between the United Nations and its employees, who are international civil servants (see Administrative Tribunal of the International Labour Organization Judgment No. 2662 (2007), para. 12).

65. Aside from the fact that the United Nations is not a contracting party to the European Convention on Human Rights, it should also be taken into account that this case concerns disciplinary proceedings, not criminal proceedings, and that, even among States parties to the European Convention on Human Rights, a

consensus has not been reached on the extension of the scope of the Convention to disciplinary proceedings within national civil services:

Despite the gradual expansion of the “civil sphere” of the disputes referred to in article 6, considerable uncertainty remained in defining the scope of the protection provided under this provision in relation to jobs in the civil service.<sup>2</sup>

66. Furthermore, Professor G. Sperduti wrote: “It follows that disciplinary proceedings, being proceedings commenced by a charge of breach of rules of professional conduct, are in no way subject to the requirements of Art. 6”.<sup>3</sup>

67. In the case of *Engel and others v. The Netherlands*, the European Court of Human Rights held that article 6 is applicable to administrative proceedings (including disciplinary proceedings) if the proceedings are criminal in nature from the substantive standpoint. According to the European Court of Human Rights, decisions should take into account the classification of the proceedings in the domestic court, the “criminal” nature of the offence and the severity of the penalties.

68. The *Engel* case expanded the scope of the safeguards provided under article 6 of the European Convention on Human Rights in the case of disciplinary proceedings which are equivalent to criminal proceedings and where the penalties established are as severe (such as for violations of European competition law).

69. For the above reasons, article 6 of the European Convention on Human Rights does not apply to this case, which is governed by the internal rules of the United Nations.

#### Internal rules

70. The United Nations has established its own disciplinary system which provides employees, at different stages of the process, with due process rights,

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<sup>2</sup> Paul Tavernier, “Faut-il réviser l'article 6 de la Convention européenne des droits de l'homme?”, in *Mélanges en hommage à Louis Edmond Pettiti*, (Bruylant, Brussels, 1998), pp. 707-720.

<sup>3</sup> Giuseppe Sperduti, *Disciplinary proceedings and judicial review in the light of article 6 of the European Convention on Human Rights*, HeinOnline, 5 Italian YB Int'l L., 115, 116 (1980-1981).

including the right to be informed of the substance of charges, the right to respond and the right to seek the assistance of a lawyer, as well as the adversarial principle.

71. Over the years, the jurisprudence of both this Tribunal and the United Nations Appeals Tribunal has established the standard for due process in the context of disciplinary proceedings in accordance with the internal rules of the United Nations. The United Nations Appeals Tribunal has clarified that disciplinary cases are administrative, not criminal, and that, therefore, criminal law procedure does not apply to disciplinary cases (*Jahnsen Lecca* 2014-UNAT-408).

72. It follows that, while the United Nations Appeals Tribunal has recognized the application of the Universal Declaration of Human Rights by this Tribunal (see *Tabari* 2010-UNAT-030, *Chen* 2011-UNAT-107) neither article 10 of that Declaration nor article 14.3 of the International Covenant on Civil and Political Rights has been violated in the present case. Indeed, those articles are applicable only in the case of judicial proceedings in a criminal context, which is not the case in the present case. The Tribunal is satisfied that the Applicant's rights during the investigation and disciplinary proceedings, which are administrative in nature and do not come under criminal law, were fully respected, as will be explained below.

73. Internal jurisprudence has confirmed that certain rights exist only at the disciplinary proceedings stage. Thus, in *Powell* 2013-UNAT-295, the United Nations Appeals Tribunal ruled that:

24. During the preliminary investigation stage, only limited due process rights apply. In the present case, the UNDT was correct in finding that there was no breach of Mr Powell's due process rights at the preliminary investigation stage in that, by 21 December 2004, Mr. Powell had been apprised of the allegations against him and had been given the opportunity to respond.

74. Similarly, the right to seek the assistance of counsel applies only from the moment that the disciplinary process is initiated, i.e., from the point at which the charge letter is sent to the staff member concerned (*Akello* 2013-UNAT-336):

36. While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the Applicant's case, our jurisprudence remains that the due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary stage, only limited due process rights apply.

...

38. We thus find that the UNDT erred in law in concluding that there was a right to be apprised of the assistance of counsel during the investigation stage. The Secretary-General's appeal on this ground is allowed.

75. In addition to the articles and provisions of the Staff Regulations and Staff Rules cited above, administrative instruction ST/AI/371 of 2 August 1991, which was in force at that time and for which there is no official translation in French, establishes the procedure to be followed in implementing the above-mentioned provisions:

2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation. Staff rule 10.1 provides 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 which may amount to misconduct and may lead to the institution of the disciplinary process and the imposition of disciplinary measures for misconduct."

...

3. If the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses and any other document or record relevant to the alleged misconduct.

...

5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether administrative leave is warranted. Administrative leave under staff rule 10.4 is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant administrative leave without pay, in both cases without prejudice to the staff member's rights.

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from Headquarters, shall:

(a) Inform the staff member in writing of the allegations and his or her right to respond;

(b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;

(c) Notify the staff member of his or her right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense, and offer information on how to obtain such assistance.

...

7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter. If more time is required, it shall be granted upon the staff member's written request for an extension, giving cogent reasons why he or she is unable to comply with the deadline. If no response is submitted within the time-limit, the matter shall nevertheless proceed.

8. The entire dossier is then submitted to the Assistant Secretary-General, Office of Human Resources Management.

9. On the basis of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, shall proceed as follows:

(a) Decides that the case should be closed, and the staff member should be immediately notified that the charges have been dropped and that no further action will be taken. This is without prejudice, where appropriate, to the measures indicated in staff rule 110.3 (b) (i) and II); or

(b) Should the facts appear to indicate that misconduct has occurred, refer the matter to a Joint Disciplinary Committee for advice; or

(c) Should the evidence clearly indicate that misconduct has occurred, and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the staff member be summarily dismissed. The decision will be taken by or on behalf of the Secretary-General.

76. In addition to administrative instruction ST/AI/371, administrative instruction IOM/09/FOM/10/2012 on the role, functions and *modus operandi* of the Inspector General's Office of UNHCR sets out the stages in the investigation process within UNHCR.

77. However, it emerges from the provisions of administrative instruction ST/AI/371 cited above that the disciplinary process begins only when, in accordance with paragraph 6 of that instruction, the Administration informs the staff member in writing of the allegations and of his or right to respond. Moreover, the preliminary investigation carried out at the start of the disciplinary proceedings is not conducted with both parties being heard, and the staff member has the right to seek the assistance of counsel only after a letter notifying him or her of the allegations of misconduct has been sent. Lastly, the right to call and cross-examine witnesses does not apply during any stage of the administrative proceedings; that right applies only before the United Nations Dispute Tribunal.

78. In order to determine whether the process complied with the above rules, the Tribunal shall recall the steps followed in the present case. Following a complaint filed by Ms. J. G. W., on 15 April 2015, the Inspector General's Office initiated an investigation into the Applicant to determine the truthfulness of the allegations. The Applicant was informed by an e-mail of 6 June 2014 that he was the subject of an investigation. During the investigation, the Applicant was called to interview twice: once on 30 June 2014 and once on 15 December 2014.

79. On 6 and 23 March 2015, the Inspector General's Office sent the Applicant an electronic copy of the records of his two interviews so that he could confirm that they accurately reflected the content of the interviews. On 17 April 2015, the

Inspector General's Office sent the Applicant a preliminary investigation report, giving him a time limit to respond. On 8 May 2015, the Applicant responded and, on 22 May 2015, the Inspector General's Office issued its final report and forwarded it to the Director of the Division of Human Resources Management, UNHCR.

80. On 15 July 2015, a letter was sent to the Applicant informing him of the allegations of misconduct. The letter also informed the Applicant of his right to seek the assistance of a counsel of his choice and invited him to respond to the allegations made against him within two weeks. He submitted his comments on 13 August 2015.

81. On 11 April 2016, the High Commissioner imposed three disciplinary measures on the Applicant: a written censure, the loss of three steps in grade, and deferment, for a period of three years, of eligibility for consideration for promotion, in accordance with staff rule 10.2 (a) (i), (ii) and (vi).

82. The Applicant was therefore notified that he was the subject of an investigation and was informed of the allegations made against him. He was interviewed several times by the investigators and was asked to confirm the accuracy of the records of those interviews. The letter sent to the Applicant informing him of the allegations also informed him that he could seek the assistance of counsel and invited him to respond. Thus, he had several opportunities to respond to the allegations and put forward his arguments and evidence. Lastly, he was informed of his right to submit an application to the United Nations Dispute Tribunal challenging the disciplinary measures imposed on him.

83. It should be recalled that full due process rights (such as, for example, the right to question witnesses) apply only in the judicial phase, i.e., before the United Nations Dispute Tribunal. Any challenge to the procedure followed before the Dispute Tribunal must be made in the form of an appeal and may not be the subject of the present judgment.

84. Having analysed all the documents and evidence produced in this case, the Tribunal concludes that, throughout the administrative proceedings—including both the (preliminary) investigation and the disciplinary process—and in the context of the applicable regulatory framework, the Applicant's rights to due process were respected and none of the actions taken by the Organization during the process were unlawful.

*Proportionality of disciplinary measures*

85. It remains for the Tribunal to determine whether the penalties imposed were proportionate to the misconduct. In that regard, the Tribunal recalls the judgment of the United Nations Appeals Tribunal in the case *Aqel* 2010-UNAT-040, of which there is no official translation in French:

35. Having established misconduct and the seriousness of the incident, the Appeals Tribunal cannot review the level of sanction imposed. Such a decision, which falls within the remit of the Commissioner-General, can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness, which has not been established.

86. It follows from the above-mentioned case, which has been confirmed by other judgments (see *Sanwidi* 2010-UNAT-084 and *Shahatit* 2012-UNAT-195, among others), that the judge's supervision of the proportionality of a sanction is limited and it may overturn a sanction only if it is clearly disproportionate.

87. It is therefore necessary to analyse the proportionality of the disciplinary measures imposed on the Applicant and assess any impact of the child's best interests on the disciplinary powers of the Organization.

88. The Applicant argues that the measures imposed (written censure, loss of three steps in grade, and deferment, for a period of three years, of eligibility for consideration for promotion) were excessive, especially in the light of his past professional performance and disciplinary history (which had always been exemplary and with good evaluations) and in the context of the events that led him to take his child.

89. The disciplinary measures imposed were justified from both the legal point of view and on the basis of the facts. Indeed, the Tribunal is of the view that, in taking the contested decision, the Organization took into account more mitigating circumstances than aggravating circumstances, as shown below.

In order to determine the appropriate disciplinary measure, I have taken into account the mitigating and aggravating circumstances. I have also considered the previous practice of the Secretary-General and the High Commissioner.

In the present case, the only aggravating circumstance that I have held against you was your persistent refusal to comply with the orders of the courts of Burkina Faso. With regard to mitigating circumstances, I have identified four. First, your performance evaluations have always been very positive. Second, you have been employed by UNHCR for several years with no history of disciplinary measures. Third, your child is currently supported entirely by you. Lastly, the mother of your child either organized or participated in the temporary abduction of your child from your home on 20 October 2013.

90. The Tribunal must nonetheless consider whether the child's best interests were taken into account in determining the disciplinary measures imposed on the Applicant.

91. With regard to the application of the principle of the best interests of the child, it should be noted that this principle can be considered a norm of *jus cogens*. This principle is established in the Convention on the Rights of the Child, which was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990 in accordance with article 49 of the Charter of the United Nations. The Convention addresses States and not international organizations. However, the Tribunal considers that norms of *jus cogens* apply to international organizations because they have their own supralegal status that is consistent with the values of the United Nations.

92. Indeed, the preamble to the Convention establishes a link between the text of the Convention and the internal values of the Organization:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

93. However, the disciplinary powers of the United Nations and of this Tribunal are limited when it comes to determining the best interests of the child. The Organization and the Tribunal have no jurisdiction over cases involving families and minors and, therefore, they have no power to decide on the merit of a ruling concerning custody of the child. That remains a matter exclusively for the national courts.

94. It is necessary, however, to consider whether, in this case, the best interests of the child constitutes a mitigating circumstance and whether it has been sufficiently taken into account as such. Given that the Organization took into account the fact that the child's mother either arranged or participated in the child's temporary abduction on 20 October 2013, the Tribunal is satisfied that the child's best interests were duly taken into account by the Organization as a mitigating circumstance.

#### Grounds for exoneration

95. The Tribunal must, however, determine whether, beyond that mitigating circumstance, the best interests of the child could absolve the Applicant from all responsibility for the misconduct.

96. The Applicant maintains that, if he had handed his son over to the mother, he would have placed the child in imminent danger. The Tribunal could envisage that, in extreme cases, it would be justified for a staff member, as a parent, not to hand his child over to the child's legal guardian despite a final enforceable ruling by a national court. This could be the case where there is clear evidence that the legal guardian is putting the child in real, imminent and grave danger (such as selling him online to paedophile networks). In that case, it would be conceivable that the Organization, which enjoys immunity from jurisdiction, would use its discretionary power and decide not to punish a staff member who had failed to comply with a final enforceable ruling of a national court. Similarly, if in such a case the Tribunal were to receive an application challenging a disciplinary measure, it could find in favour of the staff member who was disciplined for failure to comply with a court decision.

97. The Tribunal must therefore determine whether the best interests of the Applicant's child constitutes grounds for exoneration in this case. This does not seem to be so: firstly, it should be recalled that it was the Applicant who referred the matter to the courts of Burkina Faso and who appeared before the court of first instance. He was also heard, as was the child's mother, by the courts of Burkina Faso.

98. The Tribunal further notes that, in their decisions, the two courts of Burkina Faso expressly took into account the best interests of the Applicant's child and found that it was in the child's best interests to award custody to the mother. In reaching that conclusion, the courts of Burkina Faso demonstrated sound and comprehensive legal reasoning.

99. The Applicant's justification for failing to comply with the court decisions was that his child would be in danger if left with his mother, mainly because she had participated in the child's abduction on 20 October 2013 with the assistance of a so-called consul. However, that event was already taken into account by the courts of Burkina Faso in their considerations, and also by the Organization as a mitigating factor. There are no new elements indicating extreme and grave circumstances as described in the example above which could enable the Tribunal

to conclude that the staff member had no choice but to keep the child with him in order to protect his integrity, physical or otherwise. On the contrary, the Tribunal is of the view that taking his child outside of Burkina Faso without the mother's consent as the child's legal guardian also prevented the child from seeing his mother, which could be regarded as contrary to the child's best interests. It follows that there are no grounds for exoneration in this case.

100. After analysing the content of the decision of 11 April 2016, the Tribunal notes that the High Commissioner took into account the personal circumstances and the background of the situation regarding the custody and kidnapping of the child on 20 October 2013 and, therefore, the best interests of the child. The Tribunal is satisfied that the disciplinary measures imposed on the Applicant are proportionate to his misconduct and that the Organization took due account of both the aggravating and mitigating circumstances that were relevant in order to determine the appropriate measures.

*Non bis in idem*

101. The Applicant also maintains that the fact that the contested decision includes new disciplinary measures if he fails to submit a report every six months or refuses to comply with the decisions of the courts of Burkina Faso constitutes a violation of the principle of *non bis in idem*.

102. The Tribunal notes that this rule is a principle of criminal proceedings, which applies only in the event of a new prosecution and punishment which is initiated and implemented following a final and enforceable decision against the same person in relation with the same facts (see *Horciag v. Romania*, ECHR Decision No. 70982/01, 2005). If this principle can be applied in disciplinary matters, provisions to that effect are established at the national level (see, for example, article 1332-5 of the French Labour Code).

103. Moreover, in the present case, the Tribunal is of the opinion that the mere fact of *envisaging, possibly and in the future*, additional disciplinary measures if the Applicant continues to violate the orders of the courts of Burkina Faso does

not constitute a violation of the principle of *non bis in idem* by virtue of the decision of 11 April 2016.

**Decision**

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

The application is rejected in its entirety.

*(Signed)*

Judge Teresa Bravo

Dated this 10<sup>th</sup> day of April 2017

Entered in the Register on this 10<sup>th</sup> day of April 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva