



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

KAVOSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Wangeci Wahome Akedi

Counsel for Respondent:

Rebeca Britnell, UNHCR

Francisco Navarro, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application contesting the decision to impose on him the disciplinary measure of dismissal.
2. For the reasons stated below, the Tribunal finds that the contested decision is lawful and rejects the application.

Facts

3. The Applicant joined UNHCR on 2 January 2013 as a Field Assistant at the G-4 level in the UNHCR Sub-Office in Shiraz, Iran. On 1 June 2015, he was promoted to Protection Associate at the G-6 level and, on 1 April 2017, to Assistant Protection Officer (National Officer A level). Between 1 October 2018 and 1 January 2020, the Applicant was Acting Head of Sub-Office in Shiraz.
4. On 11 October 2020, the Inspector General’s Office (“IGO”), UNHCR, received a report of possible sexual harassment implicating the Applicant. Then, on 18 January 2021, IGO received allegations that the Applicant might have engaged in Sexual Exploitations and Abuse (“SEA”) against a refugee (“the Complainant”).
5. On 25 January 2021, IGO opened an investigation into the allegations. During the investigation, IGO interviewed witnesses and gathered relevant evidence.
6. On 16 February 2021, the Applicant was notified that he was the subject of an investigation and informed of his rights and obligations.
7. On 17 February 2021, the Applicant was placed on Administrative Leave Without Pay (“ALWOP”) until the completion of the investigation and any disciplinary process.
8. On 6 April 2021, IGO sent to the Applicant an updated subject notice of investigation concerning two additional allegations of misconduct.
9. On 8 April 2021, the Applicant was interviewed by IGO investigators.

10. On 29 April 2021, IGO shared with the Applicant the draft investigation findings of its report and gave him an opportunity to comment, which he did on 13 May 2021.
11. On 27 May 2021, IGO concluded the investigation and transmitted the investigation report and its annexes to the Director of the Division of Human Resources (“DHR”), UNHCR.
12. On 9 August 2021, the Applicant requested management evaluation of the decision to place him on ALWOP.
13. On 3 September 2021, the Applicant’s administrative leave was changed to partial pay effective 1 August 2021.
14. On 7 October 2021, the Applicant filed an application with the Tribunal challenging the decision to place him on administrative leave.
15. On 20 December 2021, the Director, DHR, UNHCR, notified the Applicant of the allegations of misconduct and informed him of his rights to respond to the allegations and be assisted by counsel.
16. On 15 February 2022, the Applicant submitted his response to the allegations.
17. By Judgment *Kavosh* UNDT/2022/032 of 30 March 2022, the Tribunal rejected the Applicant’s application against the decision to place him on administrative leave.
18. By letter dated 11 May 2022 (“Sanction Letter”), the Applicant was informed of the decision to dismiss him from service pursuant to staff rule 10.2(a)(ix).
19. On 8 August 2022, the Applicant filed the present application.

Procedural history

20. On 14 September 2022, the Respondent filed his reply.

21. On 19 April 2023, the Applicant filed a motion for interim measures that was rejected by Order No. 42 (GVA/2023) of 28 April 2023.

22. On 7 September 2023, the Applicant filed a rejoinder pursuant to Order No. 108 (GVA/2023).

23. On 13 September 2023, a case management discussion (“CMD”) took place with the participation of the Applicant, his Counsel and Counsel for the Respondent.

24. By Order No. 123 (GVA/2023) of 19 September 2023, the Tribunal instructed the parties to file further information on several issues discussed during the CMD.

25. On 28 September 2023, the Respondent, *inter alia*, submitted *ex parte* information concerning the Complainant.

26. On 28 September 2023, Counsel for the Applicant filed a submission together with a large number of documents.

27. On 6 October 2023, the Respondent informed the Tribunal that the Complainant would be available to testify should the Tribunal decide to hold a hearing, and that her testimony would be given in Persian (Farsi).

28. By Order No. 137 (GVA/2023) of 9 October 2023, the Tribunal decided to strike from the record the Applicant’s 28 September 2023 submission. It also ordered the Applicant to refile his submission by 16 October 2023 following guidelines that the Tribunal provided in said Order. The Respondent was ordered to file his comments on the Applicant’s submission by 23 October 2023. Both parties filed their respective submission by the given deadlines.

29. By Order No. 162 (GVA/2023) of 24 November 2023, the Tribunal decided, *inter alia*, to hold a hearing, *in camera*, in the present case. It also summoned seven witnesses to give testimony during the hearing and informed the parties that interpretation from Farsi to English and vice versa would only be provided for the Complainant’s testimony. However, due to an administrative issue in securing interpretation, the Complainant later agreed to testify in English.

30. On 11 December 2023, the Respondent filed a motion to submit additional evidence.

31. On 12 December 2023, the Applicant informed the Tribunal, *inter alia*, that he had not been able to confirm the attendance of Ms. I.K. as a witness and requested, in the alternative, to be allowed to call Dr. S.A.K. as a witness.

32. On 21 December 2023, the Tribunal informed the parties that the hearing would take place on 23 and 24 January 2024.

33. By Order No. 1 (GVA/2024) of 2 January 2024, the Tribunal, *inter alia*, granted the Respondent's motion of 11 December 2023 and denied the Applicant's motion of 12 December 2023. It also recalled that the hearing would be held *in camera* and determined a tentative schedule for the hearing.

34. On 23 and 24 January 2024, the hearing in the present case was held. Six witnesses, namely the Applicant, the Complainant, Mr. D.M. (Protection Assistant Officer), Mr. J.M. (former UNHCR Resettlement Expert), Ms. E.C.R. (Chief of the Refugee Status Determination Section in the Division of International Protection, UNHCR), and Ms. E.R. (Senior Investigation Specialist, IGO), provided testimony under oath before the Tribunal.

35. During the hearing, several issues arose. The Tribunal dealt with them by Order No. 12 (GVA/2024) of 5 February 2024, where it, *inter alia*, gave the Applicant until 12 February 2024 to file his motion on anonymity, if any, and ordered the parties to file their closing submission by 19 February 2024.

36. On 19 February 2024, the Applicant filed his closing submission including a motion for anonymity. The same day, the Respondent filed his closing submission, a motion for leave to file an objection to the Applicant's late filing of his motion for anonymity, and a request to strike it out of the record. He also opposed the Applicant's motion to exceed the page limit in his closing submission.

Consideration

Preliminary issues

37. The Tribunal notes that the Applicant only filed his motion for anonymity on 19 February 2024 disregarding the deadline of 12 February 2024 that the Tribunal set in its Order No. 12 (GVA/2024). He did so without having sought and obtained an extension of the given deadline or even indicating the reasons for his late submission. Under these circumstances, the Tribunal decides to strike the Applicant's motion from the record.

38. The Tribunal further observes that the Applicant did not comply with the Tribunal's instructions in its Order No. 12 (GVA/2024) concerning the page limit of his closing submission. Nor did he request leave to exceed such page limit. However, considering that the Respondent has filed his closing submission and that the Applicant may benefit from this fact if he is to resubmit his submission, the Tribunal decides to exceptionally accept the Applicant's closing submission as such.

39. Nevertheless, since the Applicant's Counsel disregarded the Tribunal's instructions on several occasions thus causing unnecessary delays and additional work for the Tribunal and the opposing party, the Tribunal considers it necessary to strongly call her attention. The Tribunal recalls that under art. 8.2 of the Code of Conduct for Legal Representatives and Litigants in Person, legal representatives "shall be diligent in complying with the statutes, rules of procedure, practice directions and orders, rulings or directions that may be issued by the Tribunals" and that failure to do so may amount to an abuse of proceedings warranting an award of costs under art. 10.6 of the Tribunal's Statute.

Scope and standard of judicial review

40. In the present case, the Applicant was dismissed from service as a result of a disciplinary process against him.

41. According to art. 9.4 of the Tribunal’s Statute, in hearing an application challenging an administrative decision imposing a disciplinary measure, the Dispute Tribunal shall pass judgment on the application “by conducting a judicial review”. In so doing, the Dispute Tribunal “shall consider the record assembled by the Secretary-General and may admit other evidence” to assess:

- a. Whether the facts on which the disciplinary measure was based have been established by evidence and up to the required standard of proof;
- b. Whether the established facts legally amount to misconduct;
- c. Whether the Applicant’s due process rights were observed; and
- d. Whether the disciplinary measure imposed was proportionate to the offence.

42. The Tribunal will address below these issues in turn.

Whether the facts on which the disciplinary measure was based have been established by evidence and up to the required standard of proof

43. The disciplinary measure in the case at hand is dismissal. It is well-settled law that when the disciplinary measure results in separation from service the alleged misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164, para. 30; *Ibrahim* 2017-UNAT-776, para. 34).

44. Clear and convincing evidence requires more than a preponderance of evidence but less than proof beyond a reasonable doubt (see, *Molari*, para. 30). To meet this standard, “[t]here must be a very solid support for the finding; significantly more evidence supports the finding and there is limited information suggesting the contrary” (see *Applicant* 2022-UNAT-1187, para. 64). “Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence” (see *Negussie* 2020-UNAT-1033, para. 45).

45. Moreover, in determining whether the standard of proof has been met, the Tribunal is “not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General”. Thus, it will “only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based” (see *Nadasan* 2019-UNAT-918, para. 40).

46. In the present case, the facts on which the disciplinary measure was based as per the Sanction Letter are as follows:

The Applicant

- i. Sexually exploited [the Complainant], a ... refugee, by engaging in a romantic and sexual relationship with her between late 2017 or early 2018 and November 2020. Underlying the relationship were [his] promises that [he] would marry [the Complainant], take her with [him], and look after her as [he] advanced in [his] career, on which [the Complainant] relied;
- ii. Engaged in sexual harassment of multiple male and female colleagues by sharing a sexually explicit document, the “Sex Bible”, over WhatsApp on 29 October 2018, while [he was] Acting Head of the UNHCR Shiraz Sub-Office, Iran;
- iii. Breached UNHCR rules on the use of IT equipment by receiving and storing sexually explicit material on [his] official UNHCR-issued mobile phone; and
- iv. Failed to fully cooperate with the investigation by deleting 989 files from [his] UNHCR laptop before surrendering it as evidence for the investigation on 17 February 2021 as well by being untruthful in [his] responses to the IGO’s questions and selective on [his] submission of evidence.

47. The Applicant submits that the Respondent has failed to establish clear and convincing evidence to support the case against his alleged misconduct. The Applicant denies each of the charges against him.

48. The Respondent claims that all the allegations have been established by clear and convincing evidence.

49. The Tribunal will proceed to consider each of the allegations and the relevant evidence on record below.

The alleged sexual exploitation

50. In his submissions before the Tribunal, the Applicant claimed that the allegations against him were false, and that the Complainant's evidence was riddled with discrepancies.

The Complainant's status

51. The Applicant alleges that the Complainant did not have the status of a refugee. He claims that at the time of the alleged facts, she held a passport from her country of origin and a valid visa in Iran. In support of his argument, he states that the Complainant did not have an "Amayesh card", which, according to him, was issued to refugees by the Iranian Government.

52. The Respondent claims that the Complainant was a refugee and a person of concern to UNHCR.

53. On this issue, the Tribunal clarifies that it is not its role to determine whether the Complainant qualifies as a refugee. Such a determination falls within the authority of UNHCR based on the refugee criteria that stem from its Statute and related norms and standards. The role of the Tribunal is only to establish whether UNHCR considered the Complainant as a refugee and whether the Applicant was aware of it.

54. An extract from the "ProGres" system, i.e., the UNHCR database of registered persons of concern, shows that the Complainant registered with UNHCR on 8 May 2017 and has been recognized as a refugee since then. The evidence also shows that the Complainant was granted a DAFI (Albert Einstein German Academic Refugee Initiative) scholarship, which is only available to refugees, and that she was resettled as a refugee under the auspices of UNHCR in December 2021.

55. During the hearing, Ms. E.C.R., Chief of the Refugee Status Determination Section at UNHCR, confirmed that the Complainant has the status of a refugee for UNHCR. She testified that UNHCR has the authority to determine who is a person of concern and who qualifies as a refugee. She explained that UNHCR is not bound by the determination made by any national authority and that there are more refugees recognized by UNHCR in Iran than those holders of “Amayesh cards”. She also testified that having a passport has no impact on the refugee status of a person, particularly where the agent of persecution is not the state as in the Complainant’s case. Ms. E.C.R. specifically mentioned that not having an “Amayesh card” or having a national passport did not make a difference to the Complainant’s refugee status at UNHCR.

56. Based on the above-mentioned evidence, the Tribunal concludes that the Complainant has indeed the status of refugee for UNHCR.

57. The evidence on record also demonstrates that the Applicant was aware of the Complainant’s status. This is evident by an email that the Applicant sent to other UNHCR colleagues on 2 March 2020 containing a list of refugee leaders in which the Complainant was listed as a “Refugee Volunteer (former DAFI scholar)”. This is further supported by a WhatsApp conversation between the Applicant and the Complainant on 21 March 2020, whereby he advised her to apply for asylum in France. Under such circumstances, it is reasonable to infer that the Applicant knew that the Complainant was a refugee.

The romantic or sexual relationship

58. The Applicant denies that a romantic or sexual relationship existed between him and the Complainant. It is the Applicant’s case that they were only friends and had a “formal relationship”. He claims that the Complainant contacted him to extort money from him and entrapped him by offering him her masseuse services.

59. During the hearing, the Complainant provided, under oath, a detailed and coherent account of her relationship with the Applicant, and she described how the relationship evolved and how it broke down. Her testimony is consistent with the IGO record of her interview dated 15 February 2021.

60. The Complainant testified that she met the Applicant, a then-staff member of UNHCR and a well-known person in the refugee community, in the summer of 2017 at an event organized by UNHCR with students. She explained that the Applicant sought out her Instagram account and later contacted her via WhatsApp.

61. The Complainant described how he approached her, gained her trust, and established a relationship with her. She stated that she did not have any previous romantic or sexual experience and that she comes from an Islamic background in which women are expected to refrain from sex before marriage.

62. The Complainant testified that the Applicant invited her to his apartment to celebrate her birthday and that she agreed as she trusted him. Once there, the Applicant hugged her and told her that she “could rely on him for the rest of [her] life” and that he had “chosen [her] as his wife”.

63. The Complainant then provided a detailed account of how the Applicant convinced her to have sex despite her religious objections. She indicated that he first persuaded her to have anal sex. Then, he persuaded her to have vaginal sex on Valentine’s Day (14 February 2018).

64. When questioned about how the Applicant convinced her, the Complainant explained that the Applicant told her that he wanted to find out if she was a virgin before marrying her because he had had a bad experience in the past. According to the Complainant, the Applicant also mentioned that he had studied Islamic law and that he knew that vaginal sex was permissible if they read marriage verses to each other, and that they could obtain their families’ consent for an official marriage later.

65. From that moment on, the Complainant testified that they continued seeing each other and having sex around three times per week at his apartment and that they were an ordinary couple. The Applicant would talk about his plans for the future including their marriage and his expectation to be appointed to a higher-level position in Tehran or abroad and mention that he would take her with him as his wife wherever he would go. He would also talk about the Office and his colleagues.

66. The Complainant testified that at some point she noticed that the Applicant had other sexual partners and was less interested in her. Still, she desperately tried to “save” their relationship.

67. The Complainant further testified that in November 2021, during an encounter at the Applicant’s apartment, she told the Applicant that she had a “suitor” and that she expected him to fulfil his promise and marry her. However, she was in shock when the Applicant advised her to marry her “suitor”. She explained to him that since she had lost her virginity to him, she could not marry anyone else. The Applicant, however, pretended not to understand the situation and denied their relationship. They then had a discussion and ended up having sex.

68. The Complainant testified that it was at this point that she decided to record the Applicant on her mobile to demonstrate their intimate relationship. This video, recorded on 21 November 2020, is part of the evidence on record and was played during the hearing.

69. The video recorded on 21 November 2020 shows the Complainant’s face, then the Applicant appears naked holding a light sheet while touching his private parts. The video continues to show the Applicant’s apartment as well as the Applicant walking around naked but covered with a light sheet. After that, the Applicant is seen getting dressed in the bedroom, where he puts on underwear.

70. The Complainant further testified that the Applicant wanted to engage in “group sex” and that she was so desperate to keep him interested in her that she pretended to agree and planned a ruse with a friend who played along. The encounter was planned for 27 November 2020.

71. The Complainant’s testimony is corroborated by messages exchanged on 23 November 2020 where the Complainant texted the Applicant: “Is the [three] person meeting ok for Friday? You fix the time”, and the Applicant responded “Great! Is after 3 p.m. in the afternoon ok?”.

72. According to the Complainant's interview record with IGO, which accuracy she confirmed before the Tribunal, on 27 November 2020, when the Applicant realized that there would be no "group sex", he got angry and asked her to be "like a slave". He then tied her hands and blindfolded her. Letting aside the graphic details, her testimony is that, during their sexual encounter, she felt so bad that she "screamed", that the Applicant did not pay attention to that, and that he continued having intercourse in a "very harsh way" to the point that he put his hand on her mouth to stop her from screaming. The Complainant indicated that she felt humiliated and that upon arriving home, she considered committing suicide.

73. It was at the end of this intercourse, that the Complainant recorded the second video, which is also part of the evidence on record and was played during the hearing.

74. The video recorded on 27 November 2020 shows the Applicant lying on a sofa naked from the waist down and looking into his mobile phone. The video further shows the naked legs of a woman, presumably the Complainant, who is sitting across from him. The video continues to show the Applicant and the Complainant chatting while he is looking at his smartphone and touching his private parts.

75. According to the Complainant's testimony, she met again with the Applicant at his apartment on 17 January 2021. She recalled that when she asked him about their relationship, he denied its existence. The Complainant then revealed to him that she had recorded videos proving their relationship and that she would disclose them to the Bureau for Aliens and Foreign Immigrant Affairs of the Government of Iran ("BAFIA"). She further testified that he tried to dissuade her from doing so by offering to pay a dowry as compensation and to help her resettle in France. The Complainant explained that she was not interested in compensation and left the apartment.

76. The Complainant stated that the Applicant asked her by message to return to his apartment in the afternoon, which she did. According to her testimony, during this conversation, the Applicant was naming her after her family name as he usually did when he was upset, and started to increase the amount of money that he offered in the morning. The Complainant left and, the same evening, the Applicant sent her a voice message containing a record of their conversation that afternoon, which was supposed to show that she was blackmailing him for money.

77. Text messages exchanged on 17 January 2021, which are part of the evidence on record, corroborate the Complainant's testimony. Those messages read in their relevant part as follows:

Message from the Applicant:

Thanks

(A forwarded voice message)

If I have to, I will send these too.

[Are] you ok with that? You want to make me miserable, and I also know ways to make one miserable too.

First, I will send these to ... so that he knows who is blackmailing here.

I did research and talked to our lawyer. When you blackmail someone, no court will vote in your favour; the voice conversation reveals everything.

And if BAFIA also [comes] to know about this, they will not hesitate to cancel your families' refugee card/permit. Because threatening and blackmailing is a crime in all countries laws and this voice message will reveal many things for my organization too.

Message from the Complainant:

You are shameless and dishonourable.

You have reached the limit of insolence.

You are accusing me of blackmailing you??!?

I was your fiancé for [three and a half] years and now you are saying we are just friends.

I looked into your eyes and was embarrassed knowing that you [are] rejecting me and not accepting. How can I look into your eyes and remind you of what you said.

...

Is mentioning the dowry, my rights, and that you have taken my virginity called blackmailing now!!! Our relationship which was absolutely like a marriage is now a friendship!! Ha!!!

...

I have rejected all my suitors because of you!

Now I cannot get married because I'm no longer a virgin...

...

May God does not forgive you...

I also will not forgive, and be sure that I will fight for my rights and will stand to show your real face so that humans like you would not be able to commit these mistakes under the flag of the United Nations and [defame] the UN. How would I know I'm the last refugee victim of these acts[?]

Though I was among the educated and wiser ones from a good family but still I was deceived by you, let alone others.

I don't want anything, I didn't want anything from the beginning I just wanted to prove [to] myself that all you said was a lie!!! But then I was surprised to see you are very shameless, not only you deny but also accuse me of blackmailing.

Oh my goodness!

Whom I was considering as my man all these times!!!

How could I rely on your promises!!!

You are a charlatan and lustful person

I want to show your real face to the world

You are threatening me...

Message from the Applicant:

It seems that I'm very absent minded ... I had a wife and I was not even aware ... hopefully your parents are aware? Because temporary

marriages without consent of parents is void. So I'll come with this message to kiss your father's hand ...

At least give me your home address so that I can come...

78. The Complainant explained that she contacted BAFIA to report the Applicant's actions but did not get any help. She then decided to complain to UNHCR.

79. The Applicant submits that the Complainant's testimony is false. He denies that he was involved in a romantic or sexual relationship with the Complainant. It is the Applicant's case that they were only friends and had a "formal relationship". He claims that the Complainant entrapped him by offering him her masseuse services and later blackmailed him as part of a conspiracy by UNHCR and BAFIA officials against him.

80. The Tribunal is not persuaded by the Applicant's arguments for the following reasons.

81. First, the Complainant's testimony was sound and consistent throughout the disciplinary process and the hearing before the Tribunal. She provided important details of her relationship with the Applicant and appeared honest and emotional when she testified. Her testimony was corroborated by the evidence on record, namely contemporary videos and text messages. The videos recorded on 21 November 2020 and 27 November 2020, described in paras. 69 and 74 above, in which the Applicant is shown naked, touching his private parts, and carefree in the Complainant's presence support a finding that a sexual relationship existed.

82. Second, the text messages between the Applicant and the Complainant, also show, that they had a romantic relationship. On 17 January 2021, after the Applicant accused the Complainant of blackmailing him, she replied, *inter alia*, "I was your fiancé for [three and a half] years and now you are saying we are just friends" and "[now] I cannot get married because I'm no longer a virgin" (see para. 77 above). Although the Applicant replied sarcastically, the totality of the evidence on record shows that they had an intimate relationship beyond a mere friendship.

83. While the Applicant testified that the Complainant suggested a “friends with benefits” relationship, the evidence does not support his contention. The evidence provided by the Complainant shows that the Applicant deleted two messages in which he said “I love several people. Something that you don’t like”, which corroborates the Complainant’s version that they were in a relationship, that he had other sexual partners and that the Complainant was upset about it.

84. Third, there is no evidence on record to show that the Complainant worked as a masseuse as the Applicant claims. The Complainant testified that after finishing her studies she worked as a skin care therapist but denied ever working as a masseuse. She explained that her proposal to massage the Applicant was part of their relationship, which contrasts with the Applicant’s claim that she insisted on giving him a massage so he could not refuse and was forced to remove his trousers.

85. In any event, had the Applicant only received a massage, as he claims, it would be reasonable for him to get dressed as soon as the massage is over. The videos rather show him at ease naked or partially naked from the waist down and touching his private parts in the presence of the Complainant. The Tribunal thus considers that the Complainant’s version of events is more credible than the Applicant’s far-fetched version.

86. Fourth, the Applicant claims that the Complainant blackmailed him as part of a conspiracy by UNHCR officials against him. However, there is no evidence on record to support his argument. The Complainant testified that she was not interested in any financial compensation or “mehrieh”, which is normally given to a woman to support herself when her marriage is over. She explained that she intended to put pressure on the Applicant so he would fulfil his promise to marry her.

87. According to the transcript of the voice recording of 17 January 2021, the Applicant offered the Complainant help with her “university application” if she did not report him to UNHCR and he stayed in the Organization, which he called a “win-win situation”. He also threatened the Complainant with filing a case before a local court against her and having their respective families involved. The

conversation also shows a discussion about the amount of money that the Applicant could offer the Complainant.

88. However, it is the Tribunal's view that the Applicant had no reason to make any offer to the Complainant if they were only friends and had nothing to hide. The mere fact that the Applicant tried to negotiate financial compensation as a way out of the situation is inconsistent with his denial of an intimate relationship with the Complainant.

89. It is also reasonable to infer that by recording their conversation in the afternoon of 17 January 2021 and sending the voice recording to the Complainant, the Applicant tried to intimidate her.

90. Concerning the alleged conspiracy, the Tribunal notes that while tensions may have arisen among colleagues following the Applicant's promotion as Acting Head of Sub-Office in Shiraz, this does not prove that the Complainant conspired with BAFIA or UNHCR officials to get him fired. There is no evidence on record to support the Applicant's contention in this respect.

91. Fifth, the Applicant argues that on 14 February 2018, when the Complainant claimed that they had sexual intercourse for the first time, he invited his friend out for dinner. The Tribunal finds that the Applicant's contention is irrelevant as the Complainant explained that they only met at his place during the day, normally in the afternoons. She clarified that as a woman from an Islamic background living with her family in Iran, she was not allowed to be out of home at night.

92. Sixth, the Applicant submits that the Complainant claimed to not be aware of the Applicant's door number despite allegedly visiting him two or three times a week. The Complainant testified that every time she came to visit the Applicant, he was already waiting for her at the door, so she did not need to ring the doorbell and did not notice the door number. The Complainant was, however, able to provide the Applicant's address correctly and describe his apartment to IGO investigators. The Applicant's argument is thus rejected.

93. The Appeals Tribunal held in *Haidar* 2021-UNAT-1076, para. 43, that “it is typical in disputes concerning sexual harassment that the alleged conduct takes place in private, without direct evidence other than from the complainant and that the evidentiary questions in such cases centre on the credibility of the complainant’s testimony”.

94. In *AAE* 2023-UNAT-1332, para. 104, the Appeals Tribunal further held that sexual assault cases “are typically difficult to adjudicate” as “Judges must make findings of fact often with two conflicting versions of events and with contradictory testimonial evidence”. In such cases and “in order to come to a reasoned conclusion on the disputed facts, judges must satisfy themselves on the credibility and reliability of the persons concerned and provide cogent reasons for those findings”.

95. The Tribunal finds that in the present case, the Complainant, who testified before the Tribunal under oath, gave a coherent, detailed, and reliable account of the events, and that her testimony was consistent with her initial interview record with IGO investigators. There was no inconsistency that could have undermined her credibility and reliability.

96. Her testimony is further corroborated by additional evidence in the form of several text messages and two explicit videos that were part of the investigation record and were examined during the hearing. In contrast, the Applicant’s evidence lacks credibility. Ms. E.R., IGO Senior Investigation Specialist, testified that the Applicant changed his version of the events several times during the investigation and his account of events, as indicated above, is either inconsistent with other evidence on record or immaterial.

97. Consequently, the Tribunal finds that it has been established by clear and convincing evidence that the Applicant sexually exploited the Complainant, a refugee, by engaging in a romantic and sexual relationship with her between late 2017 or early 2018 and November 2020.

The alleged sexual harassment

98. The Applicant was sanctioned for sharing a sexually explicit document, the “Sex Bible, the complete guide to sexual love” (“Sex Bible”), over WhatsApp on 29 October 2018, with his colleagues while he was Acting Head of the UNHCR Sub-Office in Shiraz.

99. It is not disputed that the “Sex Bible”, which is part of the evidence, is a book of sexually explicit content, which is obvious from its title and cover page. It consists of 258 pages of images and text of sexual content and nudity.

100. It is also undisputed that the Protection Unit in the Shiraz Sub-Office kept a WhatsApp group to communicate about work and that the members of this group were UNHCR officials. The group included the Applicant, who used an official UNHCR number and his personal number in his dual-SIM-card UNHCR-issued phone. He sent the “Sex Bible” from his personal number.

101. At the time of the alleged incident, the Applicant was Acting Head of the UNHCR Sub-Office in Shiraz and, in that capacity, he supervised all staff members in the Sub-Office in Shiraz.

102. The Applicant does not dispute that he sent the “Sex Bible” to his colleagues on 29 October 2018 via the WhatsApp group at 9.49 p.m. or 9.50 p.m.

103. Screenshots of the WhatsApp group, which are part of the evidence on record and were examined during the hearing, reveal that Ms. S.F. replied at 9.53 p.m. stating that she could not believe it. The Applicant answered back at 9.53 p.m. and 9.54 p.m. that the book had been sent by Mr. J.M. and that he had just forwarded it. The Applicant added at 9.55 p.m. that “since it [had] educational value”, it was “ok”. He also indicated that he was unable to send a screenshot of Mr. J.M. sending him the book because there were legal repercussions.

104. Some minutes later, at 10.01 p.m., the Applicant sent the “Sex Bible” to Ms. M.H. indicating “really the book is useful” and asking whether she had seen it to which she replied with a smiley face emoji indicating “it is better if I keep quiet”.

105. The Applicant initially suggested that he was not unaware of the content of the “Sex Bible”. However, his messages indicating that the book “[had] educational value” and that it “[was] useful” show the contrary.

106. The Applicant submits that he sent the book in error and upon realizing it, he immediately deleted it. However, the evidence on record shows that by the time the Applicant deleted the message, the offense had already occurred. Ms. S.F. had seen the document and reacted shocked saying that she could not believe it. Ms. M.H. was equally surprised.

107. The Applicant claims that the complaint lodged by Ms. M.H. did not fall within the definition of “sexual harassment” because after receiving the “Sex Bible” in her mobile, he responded with a smiley face emoji which, in his view, demonstrates that the message was welcome.

108. The Applicant also questions the sincerity of the complaint as it was filed two years after the incident, whereas normally an aggrieved person would have filed a complaint soon after it. The Applicant seems to suggest that there was a hidden motive for it.

109. The Tribunal is not persuaded by the Applicant’s contentions.

110. First, the interview record of Ms. M.H. with IGO investigators shows that, when questioned about her reaction, she explained that she was shocked when she received the “Sex Bible” in the group and that, considering the UNHCR Code of Conduct, it was “wrong”. She also testified that she was surprised that the Applicant shared it separately with her, that she did not like it and found it inappropriate.

111. Second, the complaint was filed by Mr. J.M. as noted by Ms. E.R., IGO Senior Investigation Specialist, during her testimony. In fact, Mr. J.M. was obliged to report the incident as rightly noted by the Respondent.

112. Concerning the Applicant’s contention that Mr. J.M. had sent the “Sex Bible” and that he just forwarded it, the Tribunal recalls that Mr. J.M. testified that he did not send the “Sex Bible” to the Applicant but that it was the Applicant who first

showed him the book and suggested that he share it with the WhatsApp group, which he declined to do. The Applicant's assertion is, therefore, unfounded.

113. In any event, the Applicant's contention is immaterial as the evidence clearly shows that it was the Applicant who shared the "Sex Bible" with the WhatsApp group. Likewise, even if the Applicant seems to suggest that there was a hidden motive for reporting the incident, the Tribunal finds that the motive has no bearing on the Applicant's actions.

114. Accordingly, the Tribunal finds that it has been established by clear and convincing evidence that the Applicant shared a sexually explicit book, the "Sex Bible" with his colleagues, over WhatsApp on 29 October 2018, while he was Acting Head of the UNHCR Shiraz Sub-Office.

The alleged breach of UNHCR rules on the use of IT equipment

115. The Applicant was also sanctioned for breaching UNHCR rules on the use of IT equipment by receiving and storing sexually explicit material in his official UNHCR-issued mobile phone.

116. The evidence shows that during the forensic analysis of the Applicant's official UNHCR mobile phone, IGO retrieved nine pictures showing the Applicant nude or semi-nude. Of the nine pictures, three of them are pornographic in nature showing the Applicant's private parts.

117. The Applicant submits that this occurred because of a synchronization issue between his official mobile number and his personal phone number. He testified that some documents that were in his personal phone number were inadvertently transferred to his official phone and that the explicit photos found on his mobile were never forwarded to anyone.

118. In this respect, Ms. E.R., Senior Investigation Specialist, IGO, testified that the Applicant's contention about the synchronizing issue was not realistic. The Applicant admitted during cross-examination that he sent the three explicit photos of his private parts from his private number to his official UNHCR number and phone.

119. In light of the above, the Tribunal finds that it has been established by clear and convincing evidence that the Applicant received and stored sexually explicit material in his official UNHCR-issued mobile phone.

The alleged failure to fully cooperate with the investigation

120. The Applicant was sanctioned for failure to fully cooperate with the investigation by deleting 989 files from his UNHCR laptop before surrendering it as evidence for the investigation on 17 February 2021, as well as by being untruthful in his responses to questions from IGO and selective in his submission of evidence.

121. The Applicant submits that he did not have ample time to understand the proceedings and applicable rules as well as to seek independent legal advice. He argues that he deleted documents in his laptop that he thought were not relevant to the investigation and was not aware that the same was prohibited by the rules. He also claims that he was prejudiced because he could not understand legal jargon in English, his second language.

122. The Tribunal is not persuaded by the Applicant's contentions.

123. First, the evidence shows that he is a law graduate and is proficient in English as demonstrated by his professional work experience, which includes being a translator and interpreter. Furthermore, the Tribunal notes that the IGO notice of investigation dated 16 February 2021 specified, *inter alia*, that he "must not withhold, destroy or tamper with evidence" and that he acknowledged receipt of this notice and confirmed that "[he had] read and understood its contents". Therefore, his argument that he did not understand what "evidence" meant in the context of the investigation is without merit.

124. Second, according to the investigation report, IGO conducted a forensic analysis of the laptop and found that the Applicant deleted a total of 989 files from the laptop between receiving the subject notification on 16 February 2021 and handing over his UNHCR owned ICT equipment on 17 February 2021. Indeed, as noted by IGO, if these files were unrelated to the investigation the Applicant had no interest in deleting them from the laptop.

125. Third, the evidence shows that the Applicant hampered the investigation by changing his version of the alleged facts after being confronted with the evidence. Ms. E.R., IGO Senior Investigation Specialist, provided testimony in this respect. For example, while the Applicant initially stated that he had received one message from the Complainant, after being shown the first video recording, he stated that he had received three messages.

126. The Applicant also provided misleading evidence to IGO. For example, while he stated that the Complainant had sent him messages asking him to be “friends with benefits”, the evidence provided by the Complainant showed that the Applicant had deleted two messages in which he said “I love several people. Something that you don’t like”, which was against his interest as they corroborated the Complainant’s version that they were in a relationship.

127. Accordingly, the Tribunal finds that it has been established by clear and convincing evidence that the Applicant failed to fully cooperate with the investigation by deleting 989 files from his UNHCR laptop before surrendering it as evidence for the investigation, as well as by being untruthful in his responses to questions from IGO and selective in his submission of evidence.

Whether the established facts legally amount to misconduct

128. Regarding whether the established facts legally amount to misconduct, the Tribunal recalls that staff rule 10.1(a) 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 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.

129. In the Sanction Letter, the High Commissioner concluded that the Applicant’s actions constituted misconduct in violation of the UN Staff Regulations and Rules and other administrative issuances that will be indicated below.

The sexual exploitation

130. Staff regulation 1.2(b) provides as follows:

Basic rights and obligations of staff

General

...

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

131. Staff rule 1.2(e) reads:

Specific instances of prohibited conduct

(e) Sexual exploitation and abuse is prohibited ... The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.

132. Section 1 of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) defines sexual exploitation as (emphasis added):

[A]ny actual or attempted abuse of a *position of vulnerability, differential power, or trust, for sexual purposes*, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term “sexual abuse” means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

133. Principle 7 of the UNHCR Code of Conduct provides that as a staff member of UNHCR, one is committed to (emphasis in italics added):

7. Prevent, oppose and combat all exploitation and abuse of refugees and other persons of concerns.

I undertake *not to abuse the power and influence that I have by virtue of my position* over the lives and well-being of refugees and other persons of concerns.

I will never request any service or favour from refugees or other persons of concern in return for protection or assistance. I will never engage in any exploitative relationships – sexual, emotional, financial or employment-related – with refugees or other persons of concern.

Should I find myself in such a situation with a beneficiary that I consider non-exploitative and consensual, I will report this to my supervisor for appropriate guidance in the knowledge that this matter will be treated with due discretion.

134. It has been established by clear and convincing evidence that the Applicant sexually exploited the Complainant, a refugee, by engaging in a romantic and sexual relationship with her between late 2017 or early 2018 and November 2020.

135. The Tribunal notes that the Complainant, a refugee in Iran from an Islamic background, was in a vulnerable position and put herself in great danger by reporting the Applicant. She testified that her family could have killed her, had they found out that she had lost her virginity outside of marriage.

136. In contrast, the Applicant, a then staff member of UNHCR, was in a position of trust and power not only in the refugee community in Shiraz but also vis-à-vis the Organization and BAFIA, with which he had a close professional relationship. He had an academic degree on Islamic law and was in his home country.

137. Therefore, the Tribunal finds that the Applicant abused his UNHCR position of trust with respect to the Complainant to engage in a sexual relationship with her. The Complainant testified that she had never been in a relationship before and that she trusted the Applicant because he was a UNHCR staff member, “a person who is supposed to stand for refugees’ rights”, and that she believed that he could not harm her.

138. Likewise, the Tribunal also finds that the Applicant abused the Complainant’s trust, her position of vulnerability, and the power differential by pretending that he would marry her and take her with him when he was appointed somewhere else. The evidence shows that he convinced her to have sexual relations by giving her reassurances of a marriage in the future based on his knowledge of Islamic law as detailed in para. 64 above.

139. Should the Applicant's intentions of marriage with the Complainant have been genuine, he should have reported the situation to his supervisor for appropriate guidance as per principle 7 of the UNHCR Code of Conduct. Nonetheless, this never occurred.

140. The evidence also reveals that the Applicant engaged in humiliating sexual behaviour against the Complainant knowing that she could not marry anybody else as she had lost her virginity to him and was so desperate that she would "do anything to persuade him to get married" and "save [the] relationship". Her testimony that she "had no power in that relationship" substantiates her vulnerable situation and explains why she felt compelled to engage in sexual practices that made her feel humiliated, such as the encounter of 27 November 2020 referred to in para. 72 above.

141. The Tribunal also finds that the Applicant abused his power differential with the Complainant by threatening her not to disclose their relationship to BAFIA and UNHCR. The Tribunal notes that during their conversation on 17 January 2021, the Applicant threatened the Complainant that there would be an investigation, the court would review the case and that their families would be involved. The Applicant then explicitly texted her that "if BAFIA also come to know about this, they will not hesitate to cancel your family's refugee card" (see text message exchange at para. 77 above), which would have negatively impacted the Complainant's reputation and her family's wellbeing.

142. This abuse of power differential with the Complainant is also clear by the Applicant's proposal to help her with her "application" so she could relocate to France. This is what the Applicant called a "win-win situation" if the Applicant did not report him and he remained employed with UNHCR.

143. Based on the foregoing, the Tribunal finds that the High Commissioner correctly determined that the Applicant's conduct amounted to sexual exploitation as defined in section 1 of ST/SGB/2003/13 and constituted a breach of his basic obligations under ST/SGB/2003/13, staff regulation 1.2(b) and staff rule 1.2(e) as well as principle 7 of the UNHCR Code of Conduct.

144. The Tribunal, therefore, concludes that the established facts in connection with the allegation of sexual exploitation legally amount to misconduct.

The sexual harassment

145. Staff regulation 1.2 provides in its relevant part that (emphasis added):

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

(b) *Staff members shall uphold the highest standards of efficiency, competence and integrity.* The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

146. Staff rule 1.2(f) reads:

Specific instances of prohibited conduct

...

(f) Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

147. UNHCR/HCP/2014/4, the “Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority” of UNHCR, defines sexual harassment in para. 5.3 as (emphasis added):

[Any] unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that *might reasonably be expected or be perceived to cause offence or humiliation to another.* Sexual harassment is particularly serious when it *interferes with work*, is made a condition of employment or *creates an intimidating, hostile or offensive environment.* Sexual harassment may be unintentional and may occur outside the workplace and/or outside working hours. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

148. Secs. 4.2 and 4.3 of UNHCR/HCP/2014/4 provide, *inter alia*, that (emphasis in italics added):

4.2 Duties of UNHCR Personnel

UNHCR Personnel, including Staff Members and Affiliate Workforce, are expected to:

- a) *maintain a harmonious working environment* for other colleagues by behaving in a manner which is free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment or abuse of authority;
- b) not to condone discrimination, harassment, sexual harassment and abuse of authority;

...

4.3 Additional Duties of Managers and Supervisors

Managers and supervisors are also expected to:

- a) *act as role models by upholding the highest standards of conduct* in order to achieve an environment free from discrimination, harassment, sexual harassment and abuse of authority, in which hurtful and destructive behaviour have no place;
- b) facilitate, inspire and help to create a harmonious working environment free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment and abuse of authority;
- c) ensure that incidents of discrimination, harassment, sexual harassment or abuse of authority are promptly addressed in a fair and impartial manner, regardless of the contractual status. Failure on the part of managers and supervisors to fulfil their obligations under this policy may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and may lead to administrative or disciplinary action.

149. It has been established by clear and convincing evidence that the Applicant shared a sexually explicit book, the “Sex Bible” with his colleagues over WhatsApp on 29 October 2018, while he was Acting Head of the UNHCR Shiraz Sub-Office.

150. On this issue, the Tribunal recalls the following:

- a. First, it is not disputed that the “Sex Bible” is a book of sexually explicit content;
- b. Second, the evidence shows that Ms. S.F. and Ms. M.H. were shocked when they received the “Sex Bible” in the WhatsApp group and considered the Applicant’s action inappropriate. This is also evident from the testimony of Mr. J.M.; and
- c. Third, the Applicant’s suggestion that Ms. M.H. welcomed his message containing the “Sex Bible” is unsubstantiated as indicated in para. 110 above.

151. Therefore, it is reasonable to conclude that the Applicant’s actions caused offense to his colleagues and were particularly grave considering that the Applicant shared “the Sex Bible” with supervisees in a professional environment, while he was Acting Head of the UNHCR Shiraz Sub-Office.

152. In doing so, the Applicant did not conduct himself in a manner befitting his status as an international civil servant, and failed to act as a role model by upholding the highest standards of conduct and creating a harmonious working environment. UNHCR/HCP/2014/4 specifically prohibits sexual harassment.

153. The Tribunal therefore finds that the High Commissioner correctly determined that the Applicant’s conduct amounted to sexual harassment as defined in para. 5.3 of UNHCR/HCP/2014/4 and constituted a breach of his obligations under staff regulation 1.2(a), (b), and staff rule 1.2(f) as well as secs. 4.2 and 4.3 of UNHCR/HCP/2014/4.

154. Accordingly, the Tribunal concludes that the established facts in connection with the allegation of sexual harassment legally amount to misconduct.

The breach of UNHCR rules on the use of IT equipment

155. Secs. 7 and 10.1 of UNHCR/AI/2019/13, the Administrative Instruction on End User Computing of UNHCR, provide in their relevant parts that (emphasis in italics added):

7. Prohibited Use of UNHCR End-User Devices and Services

UNHCR owned End-User Devices and services *must not be used for any activity that is inconsistent with the mission of the organization, misrepresents UNHCR, is in contravention of Staff Regulations, violates any UNHCR policies, or would be considered unlawful by local/national laws.*

UNHCR owned End-User Devices and services must not be used for:

...

- *Viewing, creating, downloading, hosting, or transmitting pornographic, offensive, or obscene material (i.e. information, images, video clips, audio recordings, etc.)*

...

10. Responsibilities

10.1. End-Users

All End-Users must:

- Comply with all UNHCR policy, administrative instruction, and other guidance documents as they apply to End-User Devices;
- *Ensure the safekeeping, care, and appropriate use of the end-user device and accessories assigned to them.*

156. It has been established by clear and convincing evidence that the Applicant received and stored sexually explicit material in his official UNHCR-issued mobile phone.

157. On this issue, the Tribunal recalls that three of the pictures that IGO retrieved as a result of the forensic analysis of the Applicant's UNHCR mobile phone are pornographic in nature showing his private parts as indicated in para. 116 above.

158. Therefore, the Tribunal finds that the High Commissioner correctly determined that the Applicant engaged in prohibited use of his UNHCR-issued mobile phone as provided by section 7 of UNHCR/AI/2019/13, which specifically prohibits “viewing, creating, downloading, hosting, or transmitting pornographic, offensive, or obscene material”. He also breached his obligations under secs. 7 and 10.1 of said Administrative Instruction to ensure the appropriate use of the device assigned to him.

159. Therefore, the Tribunal concludes that the established facts in connection with the allegation of breach of UNHCR rules on the use of IT equipment legally amount to misconduct.

The failure to fully cooperate with the investigation

160. Staff Rule 1.2(c) states (emphasis in italics added):

Basic rights and obligations of staff

General

...

(c) Staff members have the duty to report any breach of the organization’s regulations and rules to the officials who are responsible for taking appropriate action. *Staff members shall cooperate with duly authorized audits and investigations.* Staff members shall not be retaliated against for complying with these duties.

161. Paras. 26 and 28 of UNHCR/AI/2019/15 (Administrative Instruction on Conducting Investigations in UNHCR) provide that (emphasis added):

26. UNHCR personnel, including affiliate workforce, *have a duty to cooperate fully and in good faith with all duly authorized investigations by UNHCR and by other UN entities.* When requested by the IGO, they must provide the IGO access to any records, documents, and information and communications technology (ICT) systems, applications and services used to access, or containing, data or other information controlled or owned by UNHCR. Private property shall not be searched or seized without the consent of the concerned party.

...

28. Investigation participants, including the subject and witnesses, *must not interfere with an investigation by withholding, destroying or tampering with evidence, or by influencing, coaching, intimidating or retaliating against anyone associated with an investigation.* They must respect the confidential nature of an investigation. A breach of these obligations may amount to misconduct and may result in an investigation and the institution of disciplinary proceedings.

162. It has been established by clear and convincing evidence that the Applicant failed to fully cooperate with the investigation by deleting 989 files from his UNHCR laptop before surrendering it as evidence for the investigation, as well as by being untruthful in his responses to the questions from IGO and selective in his submission of evidence.

163. As held by the Appeals Tribunal in *AAE*, para. 140, “there is a positive obligation in the regulatory framework on a staff member to cooperate with an investigation”. It is clear from the record, as indicated in paras. 120 to 127 above, that the Applicant failed in his duty in this respect.

164. Consequently, the Tribunal finds the High Commissioner properly determined that the Applicant failed to fully cooperate with the investigation and breached his obligations under staff rule 1.2(c) and paras. 26 and 28 of UNHCR/AI/2019/15. Hence, the Tribunal concludes that the established facts in connection with the allegation of failure to fully cooperate with the investigation legally amount to misconduct.

Whether the Applicant’s due process rights were observed

165. Administrative instructions UNHCR/AI/2019/15 and UNHCR/AI/2018/18 (Misconduct and the Disciplinary Process) set out the due process requirements during the investigation and the disciplinary process.

166. According to the Appeals Tribunal’s jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated (*Akello* 2013-UNAT-336), whereas at the preliminary investigation stage only limited due process rights apply (*Powell* 2013-UNAT-295).

167. After having carefully reviewed the case record, including the investigation stage and the disciplinary process, the Tribunal is satisfied that the Applicant's due process rights were fully respected throughout both phases.

168. During the investigation, the Tribunal notes that IGO Investigators informed the Applicant about the allegations against him prior to his interview. The interview was recorded, and its transcript was shared with the Applicant for his comments and signature. He was given an opportunity to respond to the allegations and provide any documentation and/or names of witnesses in support of his version of events, which he did. The draft investigation report was also shared with the Applicant for his comments, which were taken into account in the final version of the report insofar as they were relevant.

169. During the disciplinary process, the Tribunal notes that the Applicant was informed of the charges against him and of his right to be assisted by Counsel. He was also given the opportunity to provide his comments on the allegations of misconduct, which were considered in the Sanction Letter.

170. Nevertheless, the Applicant claims that the investigation was tainted by procedural flaws that compromised his due process rights and are indicative of bias against him, namely that:

- a. His line of questioning was improper as IGO Investigators "went ahead to make findings/conclusions while the investigation process had not been completed";
- b. IGO investigators failed by "cherry-picking the evidence" and refusing to interview the persons listed by the Applicant as his witnesses;
- c. IGO investigators refused to request CCTV footage near the Complainant's house, which would "confirm" that "the Complainant was a willing and consenting adult in their relationship";

- d. IGO investigators failed to meet the “standard of objectivity” when they interviewed Ms. F.T. with whom the Complainant had accused the Applicant of being in an intimate relationship;
- e. The Respondent failed in his duty of care towards the Applicant when he contracted COVID-19; and
- f. IGO investigators failed to investigate the existence of a conspiracy against him.

171. In this respect, the Tribunal wishes to point out that not every violation of an applicant’s rights would render the disciplinary sanction unlawful. It is well-settled case law that “only substantial procedural irregularities will render a disciplinary measure unlawful” (see *Sall* 2018-UNAT-889, para. 33; see also *Abu Osba* 2020-UNAT-1061, para. 66; *Muindi* 2017-UNAT-782, para. 48). The Appeals Tribunal added in *Sall*, at para. 33, that:

Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault.

172. The onus is on an applicant to provide proof of the lack of due process and how it negatively impacted the outcome of the investigation and/or the disciplinary process (see, e.g., *Pappachan* UNDT/2019/118 Corr.1, para. 78).

173. Bearing in mind the above jurisprudence, the Tribunal will in turn review the Applicant’s alleged procedural irregularities occurred during the investigation process.

174. First, the Applicant did not substantiate his argument that the line of questioning of IGO investigators was improper or that they made conclusions while the investigation process was still ongoing. In fact, the evidence shows that the Applicant was given every opportunity during the investigation to respond to the allegations and provide evidence in support of his version of events. The Applicant’s contention is, therefore, rejected.

175. Second, in relation to the Applicant's contention that IGO investigators failed by "cherry-picking the evidence" and refusing to interview the persons listed by the Applicant as witnesses, the Tribunal finds that his contention is unsupported.

176. The Tribunal recalls that an investigator has a certain margin of discretion, based on a critical assessment of the evidence produced, to decide what is relevant or not for the purpose of the investigation (*Beda* UNDT-2021-057 para. 98).

177. Ms. E.R., IGO Senior Investigation Specialist, testified that they did not interview some of the witnesses proposed by the Applicant because they did not consider that their testimony was relevant as the issues on which the Applicant proposed them to testify were not subject of the investigation. The reasoning for not interviewing each of the witnesses proposed by the Applicant is properly addressed and documented in the methodology section of the investigation report. The Applicant's submission is, therefore, rejected.

178. Third, regarding the testimony of Ms. F.T., IGO investigators considered that her testimony was irrelevant for the investigation. Indeed, whether she engaged in an intimate or friendly relationship with the Applicant was unrelated to the purpose of the investigation.

179. Forth, in relation to the refusal to request CCTV footage near the Complainant's house, the Tribunal notes that it is not disputed that the Complainant visited the Applicant's apartment. Therefore, CCTV footage near the Applicant's house was not relevant.

180. Fifth, concerning the Applicant's argument that the Respondent failed in his duty of care towards the Applicant during the investigation when he contracted COVID-19 and was on ALWOP, the Tribunal finds that the Applicant failed to substantiate his argument.

181. Sixth, the Tribunal is not persuaded by the Applicant's submission that IGO investigators failed to investigate the existence of a conspiracy against him. As documented in the investigation report, the alleged conspiracy lacks credibility in light of the available evidence. Indeed, the possibility that the Complainant (who

put herself in great danger by reporting the Applicant), Mr. J.M., Ms. M.H. and BAFIA (with which the Applicant was on the best of terms) conspired against the Applicant is far-fetched and unfounded.

182. Accordingly, the Tribunal finds that the Applicant failed to substantiate his claim that his due process rights were violated.

Whether the disciplinary measure imposed was proportionate to the offence

183. The jurisprudence of the Appeals Tribunal provides that “the Administration has a broad discretion when it comes to the choice of a disciplinary sanction” (see *Iram* 2023-UNAT-1340, para. 86), and the Tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity (see *Appellant* 2022-UNAT-1216, para. 45; *Iram*, para. 86).

184. Furthermore, “due deference must be shown to the Secretary-General’s decision on sanction because [art.] 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard” (see *Beda* 2022-UNAT-1260, para. 57).

185. Staff rule 10.3(b) provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. In this regard, in *Rajan* 2017-UNAT-781, para. 48, the Appeals Tribunal held that

[t]he most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

186. In the case at hand, the High Commissioner imposed on the Applicant the disciplinary measure of dismissal from service pursuant to staff rule 10.2(a)(ix).

187. In the Sanction Letter, imposing the contested disciplinary measure on the Applicant, the High Commissioner indicated that in his assessment of the proportionality of the disciplinary measure, he considered mitigating and aggravating circumstances of the case as well as his and the Secretary-General's prior practice in disciplinary matters.

188. As a mitigating circumstance, the High Commissioner considered that the Applicant had served UNHCR for eight years.

189. As aggravating circumstances, the High Commissioner considered that:

- a. The Applicant's misconduct concerning sexual exploitation goes to the heart of the protection mandate of UNHCR and its mission to find solutions for refugees;
- b. The Applicant held the position of Assistant Protection Officer, which carries a heightened necessity of integrity in dealing with refugees; and
- c. The sexual harassment was particularly serious on account of the Applicant's position as manager, which carries a specific obligation to act as a role model.

190. The Sanction Letter also shows that the High Commissioner took into account the parity principle and compared the Applicant's case to other similar cases in which staff members were previously involved. In this respect, the Sanction Letter provides that:

The Secretary-General and the High Commissioner have invariably imposed the disciplinary measure of dismissal or separation from service on all 19 staff members who were found to have engaged in sexual abuse and exploitation in the last eight years. Similarly, since 2017 the High Commissioner has imposed the measure of dismissal or separation from service on all 13 staff members who committed sexual harassment.

191. To challenge the proportionality of the sanction, the Applicant basically submits that the sanction is excessive on the assumption that the allegations against him do not constitute misconduct. However, since the four allegations against the

Applicant have been established by clear and convincing evidence and constitute misconduct, the Applicant's contention is unfounded.

192. The Appeals Tribunal held in *Rajan*, at para. 47, that the question to be answered in the final analysis of proportionality is whether a staff member's conduct has led to the employment relationship—based on mutual trust and confidence—being seriously damaged so as to render its continuation intolerable.

193. The Tribunal recalls that the Applicant's misconduct is based on four serious allegations that have been established by clear and convincing evidence, namely, sexual exploitation of a refugee, sexual harassment of his supervisees, improper use of his UNHCR mobile phone to receive and store pornographic material, and failure to cooperate with the investigation. Under such circumstances, the Tribunal is satisfied that the Applicant's conduct has led to the employment relationship being seriously damaged so as to render its continuation intolerable.

194. Accordingly, the Tribunal finds that the disciplinary measure applied in the present case was proportionate to the grave offences committed.

195. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant and rejects his request for remedies.

Conclusion

196. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Sun Xiangzhuang

Dated this 17th day of April 2024

Entered in the Register on this 17th day of April 2024

(Signed)

René M. Vargas M., Registrar, Geneva