

# **UNDT/2014/092, Birya**

## **UNAT Held or UNDT Pronouncements**

The Tribunal found that: 1) The DG failed in her legal obligation to review and promptly appoint an investigation panel into the Applicant's complaint of prohibited conduct and that the delay was unlawful and resulted in serious consequences for the Applicant. 2) The instigation by DSS UNON of the detention and charging of the Applicant by the Kenya Police without a waiver of immunity by the Secretary-General was unlawful. 3) DSS UNON acted covertly without the knowledge of the Director-General or the United Nations Headquarters in its dealings with the Kenya Police on 21 August. This prevented the United Nations from meeting its lawful obligations to the Applicant and to the Organization before the Kenya Police detained the Applicant. 4) The Director-General and ASG/OHRM acted in breach of ST/AI/299 by failing to obtain all relevant facts about the detention of the Applicant from the Kenyan Foreign Ministry. 5) The delay in setting up the fact-finding panel caused the Applicant stress and anxiety. The Applicant was awarded the sum of USD3000 as compensation. 6) The Applicant was also awarded USD3000 for the procedural failure by UNON to comply with the procedures relating to the arrest and detention of staff members.

Obligations of the UN where a staff member is facing arrest or detention by the host country police - The UNON DSS officers approached the Kenya Police on the basis of an uncompleted internal investigation into the Applicant's behaviour and persuaded them to charge the Applicant with criminal offences. This was in breach of the Secretary-General's obligations under the Charter and the Secretary-General's procedures set out in A/63/331 including the requirements for a waiver of the Applicant's functional immunity. Further, there was no written request to the permanent mission of the host state for information about the allegations and the United Nations Headquarters was not advised of the circumstances until the warrant of arrest was issued some days later.

Accountability referral: The Tribunal was concerned that in the present case, DSS UNON had again acted with impunity and disregarded the United Nation's

obligations under the General Convention as well as with the relevant resolutions of the General Assembly and the Secretary-General's position on the implementation of these. These acts adversely affected the Applicant and do no credit to the United Nations. The Tribunal therefore formally referred these breaches to the Secretary-General, pursuant to art. 10.8 of its Statute, for action to be taken in making DSS UNON accountable and to ensure that there are no future breaches of a similar nature.

## Decision Contested or Judgment/Order Appealed

The Applicant challenged the decision by United Nations Office at Nairobi (UNON) management to use the Kenyan police in resolving prohibited conduct (ST/SGB/2008/5). The Applicant has also alleged that: the seven-month delay in constituting a fact finding panel by the Director-General (DG), UNON, into his complaint of prohibited conduct did not meet the threshold of promptness stipulated in section 5.14 of ST/SGB/2008/5; the DG breached the duty to take prompt and concrete action into his complaint; the DG was neither fair nor impartial in handling his complaint; and the DG was misinformed about a falsified police bond dated 30 August 2013.

## Legal Principle(s)

N/A

## Outcome

Judgment entered for Applicant in full or in part

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Birya

## Entity

UNON

## Case Number(s)

UNDT/NBI/2014/10

## Tribunal

UNDT

## Registry

Nairobi

## Date of Judgement

2 Jul 2014

## Duty Judge

Judge Shaw

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Due process

Delay

Privileges and immunities

Waiver of immunity

Referral for accountability

# Applicable Law

## Administrative Instructions

- ST/AI/299

## Agreements, conventions, treaties (etc.)

- Agreement on Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the Secretary General of the United Nations on 19 April 1946

## GA Resolutions

- A/RES/65/247

## Other UN issuances (guidelines, policies etc.)

- A/63/331

## Secretary-General's bulletins

- ST/SGB/198
- ST/SGB/2008/5
- ST/SGB/2009/3

## Staff Regulations

- Regulation 1.1(f)

## Staff Rules

- Rule 101.2(c)

## UN Charter

### UNDT RoP

- Article 17.5
- Article 18.1
- Article 18.5
- Article 19

## UNDT Statute

UNRWA DT Statute

- Article 10.8

## Related Judgments and Orders

2012-UNAT-194