Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

WASSERSTROM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Mary Dorman

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, the former Head of the Office for the Coordination of Oversight of Publicly Owned Enterprises ("(O)POEs") in the United Nations Interim Administration Mission in Kosovo ("UNMIK"), complained to the Ethics Office that he had been retaliated against for whistleblowing pursuant to ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) dated 19 December 2005.

2. He alleged that UNMIK senior officials retaliated against him because he reported misconduct to, and cooperated with, the United Nations Office of Internal Oversight Services ("OIOS"). The acts of alleged retaliation against him were the closure of his office, ending his assignment with UNMIK and commencing an unauthorized and unwarranted investigation against him in the course of which he was treated in a manner that was appalling and in breach of his rights to due process.

3. After finding that there was a *prima facie* case of retaliation, the Ethics Office submitted the case to the Investigations Division, OIOS, ("ID/OIOS") for further investigation in accordance with ST/SGB/2005/21. On receipt of their investigation report, which found that the Applicant had not been retaliated against, the Ethics Office dismissed the Applicant's complaint. The Applicant's claim is against this decision of the Ethics Office.

4. The primary question to be addressed is whether the Ethics Office was in error in accepting the findings and recommendations in the ID/OIOS investigation report without raising such questions, or causing such further enquiries to be made, as would any reasonable decision-making body properly directing itself in accordance with the applicable legal principles.

Facts

The Applicant's case before the Ethics Office

5. In a letter dated 3 June 2007, the Applicant lodged his complaint with Mr. Robert Benson, former Director of the Ethics Office. He provided necessary background information as well as a comprehensive account describing the events which he claimed gave him the necessary protection, as a whistleblower, against retaliation, or, as it is referred to in some national jurisdictions, victimization. The Tribunal considers it best to present the Applicant's case in his own words with the appropriate emphases as they appear in the original:

> Origins and Mandate of the Office for Coordination of Oversight of Publicly-owned Enterprises. Office of [the Special Representative of the Secretary-General ("SRSG")]. UNMIK
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> … Following the release of external audit reports on the POEs in July 2003 which revealed serious gaps in UNMIK oversight of these enterprises, in August 2003 a meeting was held in Vienna with the then Acting SRSG, Mr. Charles Brayshaw, and senior staff of UN/OIOS and the European Commission's Office for the Fight Against Fraud ["OLAF"] to determine a way forward on the subject. A plan of action to address the deficiencies identified in the audit reports was presented and adopted. One of the actions was to establish an office within the Office of the SRSG to coordinate among the various UNMIK bodies with direct oversight responsibility for the POEs, to see that improvements were carried out. OPOE was thus established for that purpose in October 2003, with me as its Head.
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> … POEs as a group come under the control of the Kosovo Trust Agency ["KTA"]. KTA is under the control of UNMIK's Pillar IV, the "EU Pillar," which is responsible for Economic Reconstruction and Development. Pillar IV in turn reports to the SRSG. Oversight of the POEs is thus the responsibility of KTA and, above KTA, Pillar IV.
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> … It is important to note that OPOE was never to exercise direct oversight of the POEs. The Legal Advisor, Mr. Alexander Borg-

Olivier, and the Head of Pillar IV at the time, Mr. Nikolaus Lambsdorff, were clear that line or executive responsibilities were not to be part of OPOE's mandate. OPOE deliberately has no separate legal basis; it has no legal, regulatory, enforcement or executive authority of its own. It is not established by Regulation or Administrative Direction. It cannot "direct" or "instruct;" it can only "urge" and "ask." It has only the power of persuasion.

… Over the years from 2003, OPOE has been involved in supporting management reform, improvements to the regulatory environment in Kosovo, and in supporting investigations of various kinds. Incorporation of the POEs into Joint Stock Companies was one such initiative, an effort largely completed by late 2005. After incorporation, OPOE has been observing Board meetings of the new companies, to monitor these new Boards as they exercise oversight over the POEs, providing opinions on issues of concern, directly or through the OPOE chain of command. Because of the limits of [reference is made to "the QPQ", but the Tribunal is unaware of the meaning of this abbreviation] mandate these opinions have no legal force and are in no way binding, though they can be influential.

Evolution of the Current Issue

… In September 2006, I met with my supervisor, Mr. Steven Schook, [Principal Deputy Special Representative of the Secretary-General ("PDSRSG")], to discuss the work of OPOE for the coming year. In that conversation, he asked me to pick one priority for OPOE to work on until the close of UNMIK. I chose improving corporate governance at the POE Board level. He agreed, and asked me to provide him with a background paper on that subject, so he could better understand the work of OPOE. He also mentioned that there were those who did not like OPOE because of its perceived power, and that I should "keep my ear to the ground." On 10 October 2006, I sent Mr. Schook the paper by email … .

… Ten days later, I became aware that one of the Kosovo Government Ministers, Mr. Ethem [Ç]eku, Minister for Energy and Mining, had presented the SRSG with a paper in which he asked to be allowed to take over the Board of the Kosovo electricity utility, KEK. This went directly against the independence of the POEs, and opened

the door to political interference in decision making. It was contrary to the paper I had presented to Mr. Schook only days earlier.

… On 6 November 2006, I wrote to Mr. Schook raising these concerns, and asking for his and the SRSG's intervention, copying the latter, to ensure that Mr. [Ç]eku was not allowed summarily to take over the KEK Board. …

… Sometime in mid November, I was called to see Mr. Schook. In regard to my approach to corporate governance, to which Mr. S[c]hook had agreed in September, he said, "I don't buy any of this bullshit … Politicians everywhere control these things." I disagreed - politicians everywhere do not control publicly owned enterprises and when enterprises do succumb to political control it is seen as an aberration to be corrected, not imitated. I, however, did understand from this meeting that I would find no support from PDSRSG Schook on what we previously had agreed would be my Office's priority until the end of the Mission.

… I should point out that during this period, from end September, one of my two Professional staff left, and although I was told I could replace him, it never materialized. In December, my other international staff member was also cut as of end January, which left me with only one local staff member. I took this as a sign that I was being deliberately weakened and isolated.

… Seeing that my superiors were unsupportive on this matter, I then turned my attention to the Ahtissari Settlement Agreement, to try to get language in the Agreement that would protect the gains we had made with the POEs to remain independent and free of political interference. Working with others over the period December 2006/January 2007, it appeared that the Settlement Agreement would contain language requiring good corporate governance by "relevant Kosovo authorities."

… On approximately 1 February 2007, I was called to see Mr. Schook. He was angry. He said, "I hear from Pillar IV and people I trust you've been badmouthing me." I denied doing so. He said, "I don't know what you do all day. Tell me, what do you do all day?" When I started to reply, he cut me off. He then said, "I think your office should be closed." I replied that I had been unhappy with his lack of support on the issues that I believe are crucial to the future of

Kosovo. He concluded that conversation with, "Sorry your issues are not front burner for me."

… Now with no international staff, and with this attitude of my supervisors, it was clear from that moment that I was operating in a very hostile work environment.

… I also began to hear worrying rumours about corruption in connection with the proposed new power plant and mine, known as Kosovo C, over time a multibillion euro project. The Steering Committee for that project is chaired by the Minister of Energy and Mining Eth[e]m [Ç]eku, and Mr. Schook is a member of the Committee. The rumours concerned the payment of what was called a "facilitation fee" in the hundreds of millions of euros to a local partner should that bidder win the tender. Part of that payoff was rumoured to be going to Minister [Ç]eku and to Mr. Schook, among others. I began to wonder about the connection between the takeover of the KEK Board by Minister [Ç]eku, which seemed to be inevitable, supported by PDSRSG S[c]hook, as well as SRSG R[ü]cker, and about the Kosovo C project. I brought these concerns to the attention of a number of individuals, including OIOS.

… While only a formal investigation can determine if PDSRSG Steven Schook and SRSG Joachim R[ü]cker are guilty of fraud, conspiracy and accepting bribes in the form of "kick-backs", the perception of corruption clearly exits for both Schook and R[ü]cker.

… I should note that the World Bank expressed concerns in January, March, and April in separate letters to the Minister along similar lines. They objected to his push for "early action for a negotiated settlement with a single bidder," and tried to walk away from the project in April. They were convinced to remain engaged by a number of stakeholders, including Mr. Schook.

… In March 2007, as I had hoped, the Ahtissari Settlement Agreement made clear, that the POEs should be "independent," governed by "international principles of corporate governance and liberalization." This was a victory of sorts. At the same time, however, the Government had nominated 16 individuals to serve on POE board, 14 of whom were blatantly either not qualified or not independent (i.e., "engaged in political activity" and one was on a terrorist watch-list) and in violation of laws, the KTA Code of Corporate Governance and the proposed Settlement Agreement. The KEK Board would be

composed of seven individuals, four of whom were from Government, including Minister Ceku of Energy and Mining and an ex-Minister. If this were to happen KEK would then be under government control – completely.

… Nominees had to be approved by the KTA Board. I was told that the Head of Pillar IV, who chairs the KTA Board, had informed the KTA Board that SRSG R[ü]cker himself had asked that the KEK Board be approved as presented (regardless of their being in violation of laws, the KTA Code of Corporate Governance, and the Settlement Agreement).

… But that was only the beginning – the Government was drafting legislation which would put the POEs squarely under government control, again in violation of international principles as in the Settlement Agreement. I wrote a strong memo on this subject on 29 March 2007 …. The reply I got from Andreas Wittkowsky, Deputy Head of Pillar IV was that my comments were sent to the wrong address.

… I wrote on 13 April to The Legal Advisor … about the seeming illegality of the proposed new composition of the KEK Board, in which Government would hold four seats, and three by others, giving Government effective control. I got a reply on 3 May from The Legal Advisor disagreeing with me, but providing no reasoning … .

… I reported on the above two memos to OIOS in New York as part of what I saw as a worrying pattern of behavior within UNMIK: to ignore not only the spirit of the law, but also its letter, and also on UNMIK top leadership choosing to ignore principles of corporate governance to favor certain outcomes or individuals. These have contributed to an ongoing OIOS investigation, which I think is a very serious one.

… At the same time as my outspokenness in favor of international principles of good corporate governance was going unheeded, it was clear that my personal situation was precarious. From conversations with Mr. Schook beginning in November 2006, definitely in February 2007, from the reports of anger I received at my memo of late March 2007 (from Pillar IV, from Government, which also received them) and the one of mid April 2007, I knew to anticipate that my days were numbered.

… In early May 2007, I became aware of a document prepared by UNMIK's Office for Strategy Coordination in April 2007, which [was] called the "Transition Planning and Implementation Report" … in which my Office, OPOE, was shown with the notation, "Decision taken to close down OPOE from June 30 [2007]." … I was never consulted on this action, nor was I given a copy of the document. (It was leaked to me.) OPOE is the only office under the SRSG's umbrella to be closed at 30 June 2007. On 7 May 2007, I was sent my "Completion of UNMIK Assignment" letter … .

… Such was the desire to close OPOE for getting in the way that even the single local staff member in the Office was terminated, despite normal practice of redeploying such staff elsewhere in the Mission. This took place despite the fact that he is one of very few Kosovars, and probably unique among UNMIK staff to hold a Master's degree in Criminal Justice from a [United States] university, a fact known to UNMIK Personnel.

… In addition, OIOS has sent in an End-of-Mandate Audit, very extensive, with which I have cooperating extensively, indicating areas for the Audit team's exploration. I have no doubt UNMIK's senior staff are convinced I am somehow driving it.

… When I learned of my non-extension, I agreed to work with the Managing Directors of PTK [Post and Telecommunications of Kosovo] and Pristina International Airport, to work with them directly in corporate governance, development and accountability. We signed a contract on 24 May 2007, which I disclosed formally to UNMIK on 30 May 2007. …

… The SRSG was furious. He told me he would consult with UNMIK's Legal Advisor "to arrange for my earlier departure." He is also making every effort to force the cancellation of my new contract.

… On 29 May, the SRSG initiated an investigation into misconduct in connection with my new job, an investigation which is both administrative and criminal in nature. As of 31 May 2007, he has arranged for OHRM to relieve me of my responsibilities and place me on Special Leave With Full Pay during the investigatory period … This has all been accelerated because my contract ends on 30 June. I am very concerned that they will punish me with trumped up charges. As of to day, they are stopping my UN email account, reclaiming my computer, and are taking back my UN vehicle.

> … Furthermore, last Friday evening, as I was driving out of Kosovo en route to Greece, I was held at the Kosovo border by the UNMIK Border Police without a warrant (they took my passport). The restriction of my freedom of movement clearly constitutes an illegal arrest. The Financial Investigation Unit took me back to Pristina on orders of a judge, where my house and car were searched without my seeing a Warrant, although I asked for one. They said they had been given one "orally." They also said my immunity had been waived, though I saw no evidence of that. They confiscated a number of items. This is at least harassment, and possibly illegal. Every action of the Financial Investigation Unit in this instance was probably not legal.
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> … I spoke out against abuses. I am cooperating with OIOS under very difficult circumstances. Shutting OPOE, then pursuing me with investigations and other measures, is clear retaliation against a staff member who disagreed outspokenly with policies and practices by top individuals in UNMIK that run counter to UNMIK's own laws, regulations, Codes, the Settlement Agreement, and international principles of corporate governance. I blew the whistle within UNMIK and to OIOS, and now I am suffering daily consequences which could be dire.

6. By letter dated 29 July 2007, the Ethics Office provided its review of the Applicant's complaint and found that there was a *prima facie* case of retaliation against him. They expressed their findings as follows:

> … The question for the Ethics Office is whether there is a prima facie case that the decisions and actions taken by UNMIK vis-à-vis [the Applicant] constitute retaliation. Following its preliminary review of the matter, the Ethics Office finds that the actions taken by UNMIK against [the Applicant] were disproportionate to the alleged wrongdoing and are linked to his cooperation with OIOS. Thus, the protected activity was a contributing factor to the retaliatory actions.
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> … The Ethics Office therefore finds a prima facie case of retaliation as per Section 5 of ST/SGB/2005/21.

7. In accordance with the prescribed procedures, the Ethics Office submitted the case to ID/OIOS to be investigated. By a memorandum dated 29 July 2008, ID/OIOS forwarded its investigation report dated 8 April 2008 ("the Investigation Report"), together with a number of annexes summarising the interviews conducted with various individuals as well as some written documentation ("the Annexes"), to Mr. Benson. In the Investigation Report (totalling 22 pages), ID/OIOS concluded that (emphasis added):

> … [T]he closure of OPOE and the non-extension of [the Applicant's] contract with UNMIK was made prior to [the Applicant's] cooperation with OIOS and therefore cannot be considered as retaliation.
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> … [T]he initiation of the preliminary investigation into [the Applicant's] possible conflict of interest was duly authorized and warranted. *The investigative steps taken during this investigation were all within the jurisdiction and under supervision of the international prosecutor and the pre-trial judge*. ID/OIOS found no evidence that Messrs. Rücker, Schook and Borg Olivier interfered in or otherwise influenced the decisions taken by the international prosecutor and the pre-trial judge in this case.

8. However, ID/OIOS also found that (emphasis added):

> … Some of the actions (i.e. seizure [of the Applicant's] national passport at the Kosovo border with the aim to restrict his movement, searches of this private vehicle and residence, placement of a poster with his photograph at the entrances of UNMIK [headquarters] to prevent his entry as well as visibly sealing off his office for an extensive period of time) *appeared to be excessive* considering the administrative nature of his reported possible conflict of interests. *However, ID/OIOS found no evidence that these activities would have been retaliatory within the meaning of [ST/SGB/2005/21]*.

9. By letter dated 21 April 2008 to the Applicant, Mr. Benson summarised the main findings of the Investigation Report and concluded, on behalf of the Ethics Office, that:

> As a consequence of OIOS' detailed and thorough investigation of this matter, which entailed interviews with UNMIK staff, review of telephone and email records during the relevant time periods, OIOS' … conclusion is that the alleged retaliatory acts[,] although having found to be disproportionate in relation to the conflict of interest issue, are in no way linked to the protected activities. There, therefore, cannot be a finding of retaliation in this case

10. In response to Mr. Benson's letter dated 21 April 2008 the Applicant identified,by letter dated 21 may 2008, a number of what he considered to be mistakes in the Investigation Report and in Mr. Benson's letter. He requested the Ethics Office to continue its investigation of his allegations of retaliation in light of "the misstatements of facts" and noted that:

> Your memorandum confirms "excesses"; "investigative failures"; "confusions" and acts against me that are "disproportionate" in relation to the charges against me on the part of UNMIK Department of Justice, its Financial Investigations Unit, Office of Legal Affairs, Division of Administration and Security Service. Each of these offices report to the SRSG. It is incomprehensible that the calculated serial reprisals against me are the result of anything but a plan of retaliation.

11. On 21 May 2008, the Applicant also requested administrative review of Mr. Benson's decision of 21 April 2008 to dismiss his compliant.

12. By letter dated 3 June 2008, Ms. Susan John, then Ethics Officer, replied to the Applicant's 21 May 2008 letter to Mr. Benson stating that ST/SGB/2005/21 does not "envisage any further action by the Ethics Office or by any other office on a case after the outcome of the investigation has been communicated to the complainant in a case where retaliation has not been established".

Subsequent procedural history

13. There followed a number of procedural matters both before and after the case was transferred, on 1 July 2009, to the Dispute Tribunal. It is not necessary to traverse those matters which relate to an issue of receivability and important questions of disclosure of relevant documents which were the subject of several Orders by His Honour, Judge Adams, who had conduct of this case before his term of office ended. Counsel for the Applicant indicated that the manner in which the Respondent conducted these proceedings will be the subject of an application for costs after the determination on the substantive merits of this case. This matter will be dealt with if and when it arises.

14. Judge Adams' tenure with the Dispute Tribunal ended on 30 June 2010 and on 3 August the case was assigned to Her Honour, Judge Kaman, whose tenure ended on 30 June 2011.

15. On 25 August 2011, the case was assigned to the present judge. Case management discussions were held and various Orders were made in preparation for a hearing on the merits.

16. On 12 and 14 October 2011, a hearing was held on issues of liability alone. The Tribunal heard evidence from the Applicant as well as from Ms. John, and Mr. Benson. The parties produced 11 bundles of documents. By consent, the Tribunal ordered the parties to produce their final written submissions and gave them leave to comment on each others submissions. The parties were reminded that their submissions were to be confined to liability alone on the question whether the Ethics Office's decision that there was no retaliation was fundamentally flawed on the grounds of procedural and/or substantive error.

17. On 18 October 2011, the Respondent filed and served a request to call Mr. Vladimr Dzuro, OIOS Investigator, as a witness. By email of 18 October 2011, the Applicant filed and served his objection to reopening the hearing.

18. By Order No. 239 dated 19 October 2011, the Tribunal set out a revised timetable for the parties to file and serve their closing submissions.

19. By Order No. 245 (NY/2011) dated 20 October 2011 regarding the Respondent's request to call Mr. Dzuro as a further witness, the Tribunal ordered the Respondent to file and serve a submission setting out why he had not been called before and to explain the relevance and probative value of his evidence to the substantive claim and the issues in the case. By email of the same date, the Respondent withdrew the request to call him.

20. By email of 20 October 2011, the Respondent requested the Tribunal to release the audio recordings of the Applicant's witness testimony. By email of 20 October 2011, the Applicant agreed to the Respondent's request and additionally requested the audio recordings of the evidence of Ms. John and Mr. Benson.

21. By email of 24 October 2011, the Respondent requested leave to produce a further document in evidence, which detailed "the policy of the United Nations Development Programme ("UNDP") in regard to the rights and obligations of staff returning form secondment to UNDP". By Order No. 254 (NY/2011) dated 27 October 2011, the Tribunal noted that this document had no relevance to determining the issue of liability although it may be relevant to compensation, and therefore deferred the consideration of the Respondent's request.

22. By Order No. 250 (NY/2011) dated 24 October 2011, the Tribunal released the audio recordings of the witness' testimonies to the parties under the conditions

that they were to be treated in strict confidence and not be shared with third parties and that they only be used in connection with preparing their closing submission.

The applicable law

23. In summary, the essential elements of ST/SGB/2005/21, which provides protection against retaliation, include the following:

a. At the relevant time, the staff member must entertain a belief, based on reasonable grounds, that there is an actual or potential breach of the Organization's regulations and rules;

b. The staff member must report such actual or anticipated breach through the established mechanisms which, as in this case, include OIOS and the Ethics Office;

c. The report should not consist merely of the dissemination of unsubstantiated rumours and must be made in good faith;

d. At the time that the report is made, it must have been based on a reasonable belief, formed on reasonable grounds, even if it is subsequently proven to have been mistaken;

e. The making of such reports is regarded as protected activity;

f. If a staff member has engaged in a protected activity, it is strictly prohibited to retaliate against that individual by any direct or indirect detrimental action recommended, threatened or taken against her/him;

g. If the staff member has been exposed to such detrimental action, s/he may make a complaint to the Ethics Office;

h. The Ethics Office is required to conduct a preliminary investigation to determine if:

i. the complainant engaged in a protected activity; and

ii. there is a *prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation;

i. If the Ethics Office finds that there is a *prima facie* case, it is to refer the matter to OIOS for an investigation;

j. If there is a finding by the Ethics Office that the staff member has engaged in a protected activity and some detrimental action has been enacted against her/him, the Administration must prove by clear and convincing evidence that it would have taken the same detrimental action against any staff member absent the protected activity;

k. After considering OIOS's investigation report, the Ethics Office is to make a recommendation to the head of department or office concerned and the Under-Secretary General for Management for appropriate action to be taken or whether to dismiss the complaint.

l. The Ethics Office is to make this recommendation based on its independent review of the complaint. The Ethics Office does not act as a mere rubber stamp endorsing the report and recommendation of OIOS.

The Applicant's submissions

24. The Applicant identifies the protected activities that he engaged in as follows:

a. Prioritizing the issue of good corporate governance, including requesting senior UNMIK officials to intervene to prevent a political takeover of the KEK's Board by the then Minister for Energy and Mining of Kosovo and seeking senior UNMIK officials' support to oppose proposed legislation that would compromise good governance;

b. Reporting his increasing concerns over corporate governance issues to OIOS; and

c. Reporting to OIOS a possible kickback scheme concerning a proposed new power plant and mine in Kosovo, involving high-level local politicians and senior UNMIK officials;

25. The Applicant contends that the following actions amounted to retaliatory activities and a breach of his rights to due process:

a. The OPOE was closed and his contract with UNMIK was not renewed;

b. The investigations into his alleged offence of signing an employment contract to work for the Managing Directors of PTK and Pristina International Airport were matters of an administrative nature, and did not justify his treatment as a potential criminal;

c. He was stopped at the border in his car, coming from Greece;

d. His passport was taken away;

e. He was escorted back to his apartment under armed escort;

f. His car and his home were searched without a proper warrant;

g. His United Nations ground pass was taken away;

h. His office at the United Nations was cordoned off with crime scene tape;

i. Wanted posters with his name were put up at different places at the UNMIK facilities;

j. He was not advised of his right to representation.

Respondent's submissions

26. The Respondent's contentions may be summarised as follows:

a. The decision of the Ethics Office that there could be no finding of retaliation against the Applicant was correct and it acted in accordance with its procedures and mandate. The direct evidence elicited by OIOS demonstrated that there is no basis for the Applicant's allegations. The Ethics Office is not empowered to conduct investigations, and that there was no reason to doubt the Investigation Report;

b. The Investigation Report was complete, comprehensive and unequivocal in finding that the Applicant was *not subjected to* retaliatory treatment in that:

i. The decision to close the OPOE was effectively made on 13 October 2006 when the SRSG directed that the rationale set out in a restructuring report concerning UNMIK prepared in March 2005, the so-called "Harston Report", be applied in the budget submission for 2007-2008. The Applicant misrepresented an entry into a matrix that was prepared in May and June 2006 as a decision not to close his office and that it superceded a recommendation from the Harston Report, when this entry was in reality merely a talking point inserted by the Applicant himself;

ii. The SRSG's decision to initiate an investigation into the Applicant's new employment contract to work for the Managing Directors of PTK and Pristina International Airport was appropriate in that it was reasonable to suspect criminality in circumstances where an official procures a highly lucrative contract from a company over which he exercised oversight responsibility;

iii. The Applicant was stopped and searched because he had acted suspiciously, removing boxes and an image of his hard-drive, and driving to the border;

c. The senior management of UNMIK was not involved in the conduct of the investigation, including securing his office with crime tape, displaying posters with his photo and excluding him from the UNMIK premises, which were conducted by other United Nations units, namely the Financial Investigations Unit, the Director of Administration of UNMIK and OHRM, respectively;

d. The reports made by the Applicant to OIOS are not properly covered by protection against retaliation because:

i. Any such report was submitted in the course of his normal duties to monitor the activities of KTA and to advise the PDSRSG;

ii. He was transmitting unsubstantiated rumours and could not possibly have believed them to have been true. The Respondent asserts that the Applicant claimed that he was "at war" with his superiors. Accordingly, it is one of the arguments being put forward by the Respondent that he was not acting in good faith in transmitting such rumours;

e. The decision to close OPOE and to dispense with the Applicant's services predates the commission of any acts deemed to have secured for him a protected status as a whistleblower;

f. The search and seizure procedures following his detention at the border check point and his subsequent treatment were not directed by UNMIK, but by the office of the Chief Prosecutor, and therefore could not be retaliatory.

Consideration

The judicial review of the decision of the Ethics Office

27. This case has specifically been pleaded as a failure on the part of the Ethics Office to find not only that the Applicant had carried out a protected act, but that he was subject to retaliation for having done so. It is important to bear in mind that in carrying out a judicial review of the administrative decision taken by the Ethics Office, it is not the function of the Tribunal to carry out its own investigation for the purpose of determining whether or not there was in fact retaliation. In the circumstances of this case, the Tribunal may legitimately express its view as to whether or not there had been retaliation, but it is not required to do so.

28. The issue for consideration is whether the Ethics Office committed an error in their function of reviewing the Investigation Report to determine whether, pursuant to ST/SGB/2005/21, the Administration had by clear and convincing evidence established that it would have taken the same alleged retaliatory action absent the protected activity (see sec. 2.2). Moreover, the Tribunal is to assess whether there was material in the Investigation Report, including the Annexes, that pointed to certain significant contradictions, which needed to be resolved in order to answer the principal question as to whether the burden of proof on the Administration was discharged following the Ethics Officer's preliminary finding of *prima facie* retaliation.

The Ethics Office's role under ST/SGB/2005/21

29. Pursuant to sec. 5.7 of ST/SGB/2005/21, once the Ethics Office has received the investigation report, it will inform the complainant, in writing, of the outcome of

the investigation and make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management.

30. The evidence given by Mr. Benson and Ms. John clearly indicated that it was part of their duty not simply to rubberstamp the Investigation Report and recommendation by OIOS, but to carry out an independent review of the Report. In answer to the specific question put by the Tribunal, as to whether it was open to the Ethics Office, at this stage of the review, to require of OIOS that they should address any inconsistencies or whether further enquiries should be made, Mr. Benson answered in the affirmative.

31. In his evidence before the tribunal, Mr. Benson admitted that, when reaching his conclusion, he had only read the Investigation Report and not the Annexes. He explained that he did not consider the Annexes because, based on the findings of the Investigation Report, he found no reason to do so. In response to a question from the Tribunal he stated that, had he found the Investigation Report inadequate, he would have returned the matter to ID/OIOS for further investigations. His evidence was confirmed by the testimony of Ms. John.

32. It is necessary for the Tribunal to consider whether or not any reasonable reviewer properly directing her/himself to the questions of fact and law would have seen it as part of their duty to examine the Annexes and/or requested ID/OIOS to make further enquires. In particular, did the Ethics Office fail to carry out a proper review of the complaint as required under ST/SGB/2005/21? Did they simply adopt the conclusions of the Investigation Report and its recommendations without properly assessing it, and without considering the Annexes to see whether they were consistent with the Report and recommendations?

Key documents in the case

33. The key documents in this case are the following:

a. The Applicant's complaint dated 3 June 2007 to Mr. Benson;

b. The Ethics Office's letter dated 29 July 2007 expressing a finding of *prima facie* retaliation and making a formal referral to ID/OIOS for investigation.

c. The Investigation Report and recommendations dated 8 April 2008 together with the Annexes, including the recording of the evidence obtained from each of the witnesses interviewed by OIOS;

d. The letter dated 21 April 2008 from Mr. Benson, the Director of the Ethics Office to the Applicant;

e. The letter dated 21 May 2008 from the Applicant to Mr. Benson; and

f. The letter dated 3 June 2008 from Ms. Johns to the Applicant.

The Applicant's reporting of potential misconduct—the protected activities

34. ST/SGB/2005/21, sec. 2.1(a) requires any report of potential misconduct to be made in good faith. Neither OIOS nor the Ethics Office questioned the Applicant's good faith. The Tribunal finds, after examining all the documents, and having heard and seen the Applicant give evidence, that, at all material times, he acted in good faith, even if it could be said that he was or may have been mistaken. He had reasonable grounds to entertain a suspicion of possible misconduct or

mismanagement, or even more benignly a process of flawed decision-making, which fell short of the standards or requirements which UNMIK was mandated to maintain.

35. The Respondent contends that the Applicant was at "war" with his superiors. Given the evidence, this argument is not soundly based. In fact, it was the Respondent's Counsel, taking issue with the Applicant's reference to his "latest salvo" in one of his communications to Ms. Ahlenius, put the following question to him, "Were you conducting a war against your superiors, Mr. Wasserstrom?" to which his reply was, "I have felt deeply embattled because I was raising issues that I knew they didn't want to hear". This exchange is inconsistent with the adverse construction by the Respondent that the Applicant claimed that he was at war with his managers. Furthermore, at no time did either the Ethics Office or OIOS question the Applicant's good faith or the basis upon which he formed the belief that there were either actual or potential breaches of the regulations and rules. The Tribunal rejects the Respondent's contention.

36. The Respondent further submits that since the Applicant's reports were made during the course of his regular duties (his role was to monitor the activities of KTA and advise the PDSRSG) these reports do not constitute protected acts. For example, it was put to the Applicant that a memorandum dated 10 October 2006 from the Applicant to Mr. Schook was nothing more than "a benign performance of his duties". This argument does not find favour with the Tribunal and there does not appear to be any support for this legal contention in ST/SGB/2005/21. On the contrary, maladministration or the reasonable belief that it may have occurred is usually identified by a staff member in the course of their carrying out their normal day–to–day functions. To exclude such circumstances from protected status will effectively render nugatory the underlying purpose of the policy underpinning protection to whistleblowers enshrined in ST/SGB/2005/21.

The Ethics Office's review of the Investigation Report

The legal test applied in the Investigation Report when finding that the Administration had not retaliated against the Applicant

37. Where a staff member has, in good faith, made a report of possible misconduct (a protected activity), sec. 2.2. of ST/SGB/2005/21 provides that the burden of proof "shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity". However, in the Investigation Report, ID/OIOS merely stated that it found (emphasis added): "*no evidence* that these activities would have been retaliatory within the meaning of [ST/SGB/2005/21]".

38. The Tribunal finds that the Administration had not properly established that retaliation had not occurred and, before dismissing the Applicant's complaint, the Ethics Office should have ensured that clear and convincing evidence actually existed. The Ethics Office could have done so in two ways: either by examining the Annexes or by sending the Investigation Report back to ID/OIOS for further investigation and/or clarification. However, the Ethics Office did neither. Given the finding, by the Ethics Office, of *prima facie* retaliation, it was for the Respondent to rebut this by providing clear and convincing evidence, that it would have taken the same action, absent the protected activity. The Ethics Office merely adopted the Investigation Report and recommendations of ID/OIOS and appears to have abrogated its responsibility to address the correct legal test.

39. The Tribunal finds that the Ethics Office's uncritical acceptance of the Investigation Report constitutes an error of law and procedure within the meaning and intention of ST/SGB/2005/21.

Factual inconsistencies in the Annexes

40. It is necessary to address the response made by the Ethics Office that there was no indication in the Investigation Report, based on its factual findings, to suggest that there was a need for further enquiry or examination by OIOS.

41. The Tribunal took the opportunity of studying the Annexes and found that, in a number of material respects, the witnesses' responses called for either further enquiry or a proper explanation from the Administration. Alternatively, faced with certain discrepancies, it could not reasonably be argued that the Administration discharged its burden of proof by clear and convincing evidence. Such a requirement cannot be satisfied by evidence which appears to conflict in material respects. For instance, the Tribunal discovered the following matters which emerge from an examination of the individual reports of the OIOS interviews with various individuals:

a. There was a fundamental conflict of evidence between Judge Peralta, Chief International Judge, and Mr. Borg Olivier. In particular, Judge Peralta denied issuing a search warrant saying that he did not do so and would not have done so in the circumstances;

b. Several witnesses testified to the fact that investigations into conflicts of interest were administrative by the nature and not criminal;

c. One witness described the searches of the Applicant's car and apartment as being quite Draconian. Similar sentiments were expressed by other witnesses;

d. There was a consistent pattern in the evidence of several witnesses that the circumstances in which the Applicant found himself did not warrant the kind of treatment to which he was subjected to, in particular, they felt that the manner of his treatment was wholly unjustified for what was in essence an administrative issue and not a criminal matter;

e. Mr. Borg Olivier reported to the Office of the Chief Criminal Prosecutor what he considered as suspicious behavior on the part of the applicant removing boxes from his office and placing them in his car. The very act of making such a report is indicative of the fact that he considered it an appropriate matter for the prosecuting authorities.In the circumstances he would have known that, as a senior staff member, the Applicant was entitled to immunity from prosecution absent a waiver of immunity by the Secretary-General. It is clear that Mr. Borg Olivier made no effort to consider the Applicant's rights to due process. This question seems to have escaped the attention of the Ethics Office. A reasonable decision-making authority would have identified Mr. Borg Olivier's conduct as a legitimate matter for further enquiry.

42. In light of the factual inconsistencies in the Investigation Report and the Annexes, the Ethics Office should have instituted further enquiries which were material to the question that they had to determine.

The investigation of the Applicant

43. It would also have been appropriate for the Ethics Office to have questioned ID/OIOS' finding in the Investigation Report that the "[t]he investigative steps taken during this investigation were all within the jurisdiction and under supervision of the

international prosecutor and the pre-trial judge". It is not clear to the Tribunal from where the international prosecutor and the pre-trial judge should have derived such authority and on what basis they could have considered that it was appropriate to treat the Applicant as if he had somehow been deprived of his fundamental rights to due process.

44. The Security Council resolution that established UNMIK (S/RES/1244 (1999)) provides that the international civil presence, of which the international prosecutor and the pre-trial judge were components, were to maintain "civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo" and to protect and promote human rights (see para. 11 (i) and (j)). However, the Security Council resolution did not authorise the international civil presence to investigate United Nations staff members for alleged criminal activities. Even if so, the Applicant, as a high-ranking official, would appear to have enjoyed, at least some, immunity in Kosovo. Accordingly, before the international prosecutor and the pre-trial judge could have taken any investigative steps against the Applicant, the Secretary-General would have needed to waive this immunity. Neither the international prosecutor nor the pre-trial judge appeared to have jurisdiction to investigate any work-related misconduct by United Nations staff members. Given the administrative nature of such investigation, this would seem to have been the role of OIOS. However, the Investigation Report fails to mention any of these circumstances. Had the Ethics Office conducted a proper review of the Investigation Report, it is inconceivable that they would have accepted the finding of OIOS in this respect.

45. Given the limited mandate of the international prosecutor and the pre-trial judge in relation to the suspected administrative breaches of the Applicant, the Tribunal finds that the Ethics Office should, in the first place, have questioned their

authority to initiate an investigation of the Applicant and to ascertain, at the very least, how or why and for what reason the international prosecutor could have acted with such callous disregard of the Applicant's right to due process.

The excessive nature of the actions taken against the Applicant

46. The Investigation Report made a critical comment about the way in which the Applicant was treated, but nevertheless concluded that such treatment was not retaliatory. This begs the question as to how or for what reason could a staff member with an otherwise impeccable record of service with the Organization have been subjected to wholly unacceptable treatment in breach of his right to due process. There would appear to have been a fundamental failure on the part of the Ethics Office to ask the simple question as to why the Applicant was treated in such a way.

47. The Respondent contends that there could have been no link between the protected activities and the alleged retaliatory acts, since the international prosecutor and the pre-trial judge were independent of UNMIK senior management. If follows from the Security Council resolution establishing UNMIK (S/RES/1244 (1999)), para. 6, that the SRSG were to control "the implementation of the international civil presence" which, amongst its functions, included those of the international prosecutor and the pre-trial judge, as already mentioned above. In Regulation No. 2000/6 of the SRSG dated 15 February 2000 (UNMIK/REG/2000/6), the SRSG stipulated that he "may appoint and remove from office international judges and international prosecutors" under certain criteria (sec. 1.1). As the SRSG clearly maintained some supervisory responsibilities, it cannot be concluded, as submitted by the Respondent, that the international prosecutor and the pre-trial judge were entirely independent of the UNMIK senior management.

48. The Tribunal finds that the Ethics Office should have taken note of the fact that, as the principal agency promoting the observance of human rights norms and practices and respect for the rule of law, the United Nations could not,and would not, have countenanced or condoned such humiliating and degrading treatment of a member of its own staff. Accordingly, faced with the clear finding of detrimental treatment being meted out to the Applicant and having regard to its finding of *prima facie* retaliation, the Ethics Office should have pursued further enquiries to ascertain the reasons for such treatment. Without having done so, their finding that the treatment was not retaliatory is fundamentally flawed.

Conclusion

49. Given the burden of proof on the Administration to establish by "clear and convincing evidence" that there was no retaliation pursuant to sec. 2.2 of ST/SGB/2005/21, and given some of the unresolved questions arising from the Investigation Report and the Annexes, any reasonable reviewer would have examined the Annexes and/or would have sent the Investigation Report back to ID/OIOS for further investigations and/or clarification. The Ethics Office failed to do so, and the Respondent is consequently liable for its failures and/or omissions.

50. The Applicant's complaint is upheld.

51. The parties are invited to settle the issue of remedy failing which the Tribunal will hold a hearing on a date to be fixed, in October 2012, to determine the appropriate remedy to be afforded to the Applicant and to hear any other application that may be made, as indicated at the hearing on the merits. In this event, the parties are to inform the Tribunal on or before 1 August 2012 whether they intend calling any witnesses and producing any documents and, if so, identifying them and providing an estimate of the length of the hearing.

(*Signed*)

Judge Goolam Meeran

Dated this 21st day of June 2012

Entered in the Register on this 21st day of June 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York