



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1178

**Khamis Ali Khamis
(Respondent)**

v.

**Secretary-General of the United Nations
(Appellant)**

JUDGMENT

Before: Judge Graeme Colgan, Presiding
Judge Dimitrios Raikos,
Judge Jean-François Neven

Case Nos.: 2020-1478

Date: 29 October 2021

Registrar: Weicheng Lin

Counsel for Appellant (Secretary-General): Jay Pozenel & Francisca Lagos Pola
Respondent (Mr. Khamis): Self-represented

JUDGE GRAEME COLGAN, PRESIDING.

1. The Secretary-General of the United Nations, (the Appellant), appeals the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) Judgment No. UNDT/2020/147, issued on 18 August 2020. In this impugned Judgment, the UNDT found unlawful the disciplinary sanction of separation from service, with compensation in lieu of notice and without termination indemnity, imposed on Mr. Khamis Ali Khamis (the Respondent) for misconduct. This was largely on the grounds that the facts underlying the alleged misconduct had not been established by clear and convincing evidence. The UNDT granted Mr. Khamis' application contesting the sanction, rescinded the Administration's decision, and awarded him 23 months' net base salary as compensation in lieu of rescission. The case raises sensitive, delicately balanced, but important issues about intimate domestic and sexual relationships between United Nations staff members and local people, not only in Uganda where these events occurred, but potentially also wherever United Nations staff members are posted.

2. For the reasons set out below, we affirm the UNDT's Judgment and dismiss the appeal.

Facts and Procedure

3. We will now only summarise the background events. For a more detailed account of them, reference may be had to the UNDT's more comprehensive account. We will then deal with some pertinent elements of them in more detail.

4. At the time of his alleged misconduct, Mr. Khamis was serving as a Field Officer (Health Information Systems) at the P-3 level in Adjumani, Uganda, for the United Nations High Commissioner for Refugees (UNHCR). He had started work with the Organisation in 2009. His role was the most senior position in a "deep field position" in the rural district of Kitgum and he acted as a team leader in charge of 27 staff members.¹

5. For a period of about 7 months until February 2018, Mr. Khamis lived with and was in a domestic, commercial, and sexual relationship with a local woman whom the UNDT called "JA", as we will also. That relationship was terminated by Mr. Khamis after he believed he had discovered that JA had other sexual partners. Upon being required by Mr. Khamis to leave the

¹ Impugned Judgment, para. 5.

home in which they had been living, JA did so and promptly complained to the local police that Mr. Khamis had ‘defiled’ her, that is he had compelled her to have anal sexual intercourse with him, and that he owed her money. Local police, representatives of the UNHCR and JA met to discuss what was initially assessed as a domestic situation. Mr. Khamis denied the sexual allegations against him but agreed to pay JA sums including for her wages as his housemaid and as he had previously promised her to establish a small shop business. Police then expected JA’s complaint of defilement and rape to be withdrawn. That did not occur.

6. A month later, while the police investigation was ongoing, a Ugandan Member of Parliament (UMP) held a press conference about Mr. Khamis’ alleged activities and the UMP’s statements were carried by a Ugandan news media outlet on the following day. The UMP’s allegations about him were reported and embellished, extending to say that, as a UNHCR staff member, he had harassed and sodomised refugee girls in the town of Kitgum, that he was immune from sanction because of his United Nations status and that the UMP would be calling for locals to “mobilise” if no action was taken against him.

7. Publication of these allegations widened, and they were exaggerated and embellished further in other media, alleging that Mr. Khamis had abused and sexually exploited refugee women, including by engaging in anal sex, which is considered an “unnatural” and criminal offence under Ugandan law.

8. Unsurprisingly, these allegations came to the attention of the UNHCR Inspector General’s Office (IGO) and an investigation into them was started. Over the course of four days in March 2018, ten witnesses, plus the Respondent as the subject of the investigation, were interviewed as part of that investigation. The Respondent was interviewed more than once. During that period also, the Respondent was arrested by the police investigating JA’s original allegation of anal sex. He was released from arrest after four days in custody. Some three months later the Police announced that there was insufficient evidence that Mr. Khamis had engaged in “unnatural offences” and closed JA’s complaint file.

9. That was not the end of the matter for Mr. Khamis, however. In August 2018, UNHCR’s Director of the Division of Human Resources (DHR) alleged formally a number of misconducts against him. These included that he had behaved in a manner that discredited, and had undermined public confidence in, UNHCR; that his romantic relationships with two local women had created a risk for UNHCR; that the multiple media articles tarnished UNHCR’s

reputation by indicating that his conduct compromised the image and interests of UNHCR in Uganda; and that despite the media articles recording allegations not having been substantiated by the Police or the IGO, his relationship with at least one of the women was a key part of the chain of events that led to the articles' publication.

10. Mr. Khamis responded to these allegations, denying any misconduct. The High Commissioner, however, concluded that the allegations had been established on clear and convincing evidence and that they constituted misconduct by him. On 18 December 2018 the Appellant was notified of the decision to separate him from service.

11. At the time of his application before the UNDT he was at the P-3 Step 13 level on a fixed-term appointment.

12. We now address in more detail events pertinent to the issues on the appeal.

UNHCR IGO Investigation:

13. As already noted, on 16 March 2018, the IGO commenced an investigation into these matters. On 21 March 2018, it informed Mr. Khamis (by way of a "Subject Notice of Investigation letter") that it had opened an investigation into the following alleged misconduct, that he:

- (a) Engaged in sexual relations with "Persons of Concern";
- (b) Engaged in sexual activities with other UNHCR staff while being the Head of the FU Lamwo District;
- (c) Had sexual relations with a Ugandan national and engaged in a sexual practice that could be a criminal offense and violation of Ugandan law;
- (d) Breached the UNHCR Code of Conduct; and
- (e) Breached United Nations security rules and regulations for failing to adhere to applicable security directives (residing in non-compliant accommodation).

IGO Investigation Report:

14. After interviewing witnesses and Mr. Khamis as noted previously, on 5 May 2018, the IGO issued its Investigation Report dated 10 May 2018 and approved on 16 May 2018. The Investigation Report provided as background that Mr. Khamis had become aware of the media articles alleging he had been involved in Sexual Exploitation and Abuse (SEA) and that he had sodomised five refugee girls in violation of the Ugandan Penal Code, and so he alerted the UNHCR Representative to these articles on 16 March 2018. The articles alleged he had not been arrested because he was a diplomat and that, in the event no action was taken, locals would mobilise to demonstrate. These allegations appear to have been made in reliance on the UMP's public statements.

15. Further, according to the IGO's Investigation Report, JA, a Ugandan national and the complainant, met Mr. Khamis which she was working as a waitress at a restaurant in an hotel where UNHCR personnel lived. Mr. Khamis asked her to move into his house in Kitgum and perform domestic work for a monthly salary. Mr. Khamis lived at this house during the week and on weekends lived in Gulu where he paid for the rent of a second house and lived with his girlfriend, TA, also a Ugandan national. The Gulu residence was in the name of Ms. TA although Mr. Khamis paid the rent and bills. Mr. Khamis was married and his wife lived outside Uganda. Ms. JA and Ms. TA knew about each other and their relationships with Mr. Khamis.

(a) Interview with JA

16. The IGO's Investigation Report and the Interview Transcript recorded the following. JA was interviewed via an interpreter (she understands and speaks some English) and under oath. The following is what JA told investigators. Her seriously ill mother is dependent on her. She explained that she met Mr. Khamis while working as a waitress at the hotel. He offered to pay her twice her waitressing salary if she worked domestically in his home in Kitgum. On 12 December 2017, she began working there and, otherwise having to commute a significant distance and upon his invitation, moved into one of the rooms. She claimed that on the very first day there Mr. Khamis told her "I love you" and indicated he was willing to help her. She "felt [she] had no other option, so [she] accepted." They had sexual intercourse on that first day. About a week later Mr. Khamis decided they needed to travel to Gulu for shopping and, en route, told her he had another rented house in Gulu and she should see the

house. Upon arrival she met another woman there whom she assumed was a domestic worker. When she asked to leave that night, Mr. Khamis told her he wanted to “show love to both of [them] tonight”. She refused and noted her concern with disease. She said that, in response, Mr. Khamis indicated he would have anal sex with her to avoid disease. She refused and told him it was not permissible in her culture. She then told investigators that Mr. Khamis locked the doors, sealed her mouth and forcibly raped her anally. When he finished he started having sex with the other woman. She took the key and her phone and went to her sister’s house in Gulu. Her sister noted that as their mother was sick and the only way to support them was by working and because Mr. Khamis owed JA outstanding pay, her only option was to return to Mr. Khamis’ other home, finish work, collect her pay and then rethink the situation. Mr. Khamis repeatedly called her and when he picked her up, he convinced her not to tell anyone what happened and to forgive him, saying he would not repeat what had happened. She said that Mr. Khamis went on leave and returned 24 December 2017. Upon his return he would forcibly rape her anally and, when he would leave the house, he would lock the door leaving her there without credit to use her phone. She said that, on 13 February 2018, he came home with another woman and repeatedly anally raped JA through the night while also having sex with the other woman. JA was crying and in the night she ran to her friend’s house. JA then went to the police detective’s house and, in the morning, went to the police station to record a statement. She then indicates that she was having medical problems as a result of the rape and needed ongoing medical treatment. She further indicated that an “administrative officer” whom we will identify as “JO”, Mr. Khamis, and the police discussed her report and Mr. Khamis paid her the outstanding money to settle the matter although she told them that payment of money owed to her was not the issue, but rather mistreatment, sexual abuse and anal sex.

(b) Interview with TA

17. TA is a Ugandan national and Mr. Khamis’ girlfriend living in an apartment in Gulu that Mr. Khamis pays for. She told investigators no sex of any kind occurred on the night of 13 February 2018² and that she did not witness any sex between Mr. Khamis and JA, consensual or otherwise. She said JA never told her she had been raped by Mr. Khamis but did mention that she would expose Mr. Khamis if he ended their relationship. She told the

² We infer that TA was the otherwise unidentified woman with whom Mr. Khamis came home on that date as JA related to the Police.

investigators that JA took a photo wearing a driving instructor's hat and posted it on Facebook. TA was potentially a significant corroborative witness for JA but contradicted JA on almost all pertinent aspects of JA's accounts of sexual assault and other manipulative behaviour during which JA had said TA was present.

(c) Interview with Detective RE

18. The IGO investigator(s) went to Kitgum Police Station to meet with the head of "OCID", Detective RE. Detective RE told IGO the aspects of the report made by JA including among other things that had had non-consensual anal sex with him at least ten times and that she was locked in the house and anally raped. Detective RE was the investigating officer into JA's report. The Detective knew JO, an Admin/Finance officer with UNHCR in Kitgum and called him to come to his office to discuss the issue of possible diplomatic immunity of Mr. Khamis. JO told the Detective that Mr. Khamis had immunity since he was United Nations staff and could not be arrested. Since it was a "family matter" Detective RE, JO, and Mr. Khamis agreed to meet at Mr. Khamis' house. Ms. JA the complainant, her friend, Mr. JO and the CID officer travelled to Mr. Khamis' house in a UNHCR vehicle driven by a UNHCR driver with the Kitgum Field Office. Detective RE further told investigators that at Mr. Khamis' house in the presence of himself, Mr. Khamis, JA, her friend, JO, and the driver, Mr. Khamis indicated that he had lived with JA for two months during weekdays and had paid for JA to receive driving lessons in Gulu. However, he learned that JA was having an affair with her driving instructor and another man from Jinja, so he ended their relationship. He noted he had wanted to open a business for JA with working capital of UGX 1.5 million, as he had done for TA.

19. It was agreed during the meeting that JA would receive UGX 1.4 million (400,000 of which was for two months they were living together and cleaning his house). This money was counted and handed over during the meeting by JO and JA's friend in the presence of the CID officer. Another UGX 150,00 was given to JO to pay the carpenter who was working at the Kitgum shop he had agreed to establish for JA. Mr. Khamis hired a vehicle to pick up JA's personal items from his house. After the meeting, the CID police officer went for lunch together with JA's female friend (who had apparently been present at this meeting as her support person) and the UNHCR driver and the lunch was paid for by JO with Mr. Khamis' money.

20. Detective RE considered the case pending and awaited JA's withdrawal of her complaint but a few days later Detective RE received a phone call from BL, the father of one of JA's friends who informed him that JA was very ill. On 1 March 2018, BL went to the police and JO was called to attend a meeting. Another meeting occurred at the Police Regional District Commander's Office in Kitgum where the CID officer and BL took part.

21. On 2 March 2018, the CID officer re-opened JA's case. The Detective told the IGO that JA had been escorted to the hospital for a forensic medical examination. The Hospital's report did not mention injuries to her anus but focused on her vagina and the result of the examination was inconclusive. Detective RE told the IGO that he was informed that Mr. Khamis received telephoned threats related to the allegations. After discussions with the Resident District Commissioner, the Ugandan Ministry of Foreign Affairs, a UNHCR Representative, and the Chief of Protocol, the Regional CID Officer from Gulu, requested the Police case be transferred from Kitgum to Gulu. The case was thus transferred.

(d) Interviews with Mr. Khamis

22. Mr. Khamis (at that time aged 54 years) was interviewed twice. He denied ever having sexual relations with any refugee or "persons of concern" in Uganda or elsewhere during his tenure with UNHCR. He was not told who constituted the class "persons of concern", but also did not ask. He was certain he never had a relationship with anyone that could have been a refugee. He never met the UMP and said he did not know why she made allegations to the press that he abused refugees. He also denied engaging in sexual activities with any UNHCR staff while Head of the Field Unit in Lamwo.

23. He denied JA's allegations. He told investigators JA (who was then aged about 24 years) was his girlfriend. He told investigators he regularly gave JA money to help her ill mother. Because JA moved in with him and stopped working as a waitress, he offered to pay for the start-up of a shop for her. He consulted a local UNHCR driver, VO, to help him calculate the costs of doing so.³ On 14 February however, he confronted JA about her affair with another man and she admitted to having sexual intercourse with a Ugandan man and he found messages on her phone that indicated she intended to have sex with a local former

³ It appears that VO was not interviewed as part of the IGO investigation.

Member of Parliament who had given her money. He further described the meeting with JA, the police and others at his house.

(e) IGO Investigation Report Conclusions

24. The IGO Investigation Report concluded that Mr. Khamis “[b]ehaved in a manner that ha[d] discredited UNHCR and undermined the public confidence in UNHCR by: Failing to uphold the standards expected of an International Civil Servant by engaging in multiple concurrent sexual relationships with local women which attracted negative attention from the press.” The IGO found no evidence of sexual exploitation and abuse by Mr. Khamis and did not make a determination on the allegation of anal rape as the local police investigation was ongoing. The IGO also determined Mr. Khamis violated security protocols living in two residences that were not fully approved by UNHCR and failed in his management responsibilities to enforce staff compliance with the UNHCR Security Management Policy.

The disciplinary process:

25. On 8 August 2018, Mr. Khamis was temporarily reassigned to Kampala as a Health Information Systems Officer. On 13 August 2018, he received a letter from the DHR, which was dated 17 July 2018, informing him that UNHCR was commencing disciplinary proceedings against him. This letter indicated that the IGO found: 1) his behaviour discredited UNHCR and undermined public confidence in UNHCR; 2) his romantic relationship with two local women created a risk for UNHCR operations; 3) the evidence, including multiple media articles, tarnished UNHCR’s reputation; and 4) even though the articles included allegation that were not substantiated, his relationship with at least one of the women was a key part of the chain of events leading to the publication of the articles.

26. This letter thus informed him that the DHR was instituting disciplinary proceedings on grounds his conduct breached Staff Regulation 1.2(f) requiring him to conduct himself at all times in a manner befitting his status as an international civil servant and in violation of paragraph 42 of the International Civil Service Commission’s Standards of Conduct for International Civil Service requiring him to refrain from any activities that can compromise the image and interests of UNHCR, and in violation of principle 8 of the UNHCR Code of Conduct. The DHR further noted the allegations that he engaged in sexual activities with UNHCR staff and that he engaged in sexual abuse with persons of concern were

not substantiated and he was thus not charged with misconduct in relation to these allegations. While the IGO report confirmed he had breached the UNHCR Security Management Policy, the High Commissioner decided not to pursue this further. Mr. Khamis was invited to respond and produce countervailing evidence and was informed of his right to seek counsel in his defence including from Office of Staff Legal Assistance (OSLA).

27. On 12 October 2018, Mr. Khamis responded to the allegations, denying them. He said that he was being held liable for having a polygamous relationship which was permitted under Ugandan Law and in most African countries and which is not contrary to any United Nations policy. He also argued he was unlawfully being held liable for what others published in the media, the media having reported alleged criminal acts which the IGO and the Ugandan police concluded were unfounded. In addition, he made various other submission including that there were procedural irregularities relating to Privileges and Immunities, that the investigation was improper and that his right to family life was being violated.

Imposition of Disciplinary Sanction (the contested administrative decision):

28. Following a review of the IGO's report and Mr. Khamis' submissions, the High Commissioner concluded that the facts had been established by clear and convincing evidence and constituted misconduct. As a result, the High Commissioner rendered the impugned decision in a "separation letter" dated 17 December 2018. In this letter, the High Commissioner wrote in relevant part:

(...) the High Commissioner concluded that it has been established on the basis of clear and convincing evidence that you failed to conduct yourself in a manner befitting your status as an international civil servant, in breach of Staff Regulation 1.2(f) when you cohabitated and maintained a sexual relationship with a 23-year-old local Ugandan woman, Ms. JA (...)

The High Commissioner considered your response to the allegations of misconduct, in particular your assertion that your relationships did not contravene any UN polices or rules, that your right to private and family life has been violated, as well as alleged disregard for your religion and the African culture where polygamy is an acceptable norm. However, paragraph 42 of the International Civil Service Commission's Standards of Conduct for the International Civil Service makes clear that there are situations in which the behaviour of an international civil servant may reflect on the organization, and that international civil servants must bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties can compromise the image and the interests of the organization.

Contrary to your assertions that your relationship with Ms. [JA] was “solid” and “regular”, the High Commissioner found that the evidence supported a finding that there was a significant power differential in the relationship. While you were UNHCR’s team leader in the area, you brought Ms. [JA] out of her job at the Little Palace Hotel to co-habit with you and provide house help. You gave Ms. [JA], who had little or no financial means, additional sums of money, including money for her mother and promised her further financial support. When you ended the relationship with Ms. [JA], she went to the local police and claimed the sum of money UGX 1,400,000, which you paid, representing two month’s salary of approximately UGX 400,000, and monies that you had promised to pay Ms. [JA] towards starting a business.

The High Commissioner further concluded that it had been established on the basis of clear and convincing evidence that after you ended the relationship with Ms. [JA], she filed a complaint of criminal behaviour against you, which resulted in your arrest by the authorities in Uganda, and that the Ugandan media published numerous articles on the matter which objectively damaged UNHCR’s image and interests. Had you not engaged in the sexual relationship with Ms. [JA] this damage would not have occurred. While the Ugandan police report concluded that there was insufficient evidence to sustain criminal charges, you should reasonably have ensured that your conduct was beyond reproach and could not be used to tarnish UNHCR’s image and interests.

For these reasons, the High Commissioner found that you failed to comply with your basic obligations set out in Staff Regulation 1.2(f), and that your actions amounted to misconduct within the meaning of Staff Rule 10.1 (a) and warrant the imposition of disciplinary measure in accordance with Staff Regulation 10.1(a).

...

Mr. Khamis contested these sanctions imposed upon him before the UNDT.

The UNDT’s Judgment

29. The UNDT directed itself to decide first whether the facts on which the disciplinary measure was based, had been proven by clear and convincing evidence. Second, if so, whether this amounted to misconduct. Third, whether the sanction imposed was proportionate to the breach. And, fourth, whether the Appellant’s due process rights had been respected.

30. The UNDT recorded the following conclusion at para 35 of its Judgment:

The IGO investigation concluded that the Applicant had engaged in multiple concurrent relationships with local women which attracted negative attention from the press. However, the undisputed findings from the investigation were that the Applicant was

engaged in consensual, romantic relationships with JA who lived in Kitgum and TA who lived in Gulu which is approximately a one-and-a-half-hour drive from Kitgum. The Applicant rented houses in both locations and JA and TA were known to each other. The three had an arrangement whereby the Applicant lived with JA during the week in Kitgum and with TA in Gulu on weekends.

31. As to whether Mr. Khamis' relevant proven conduct constituted misconduct, the UNDT considered that the applicable standards of conduct included Mr. Khamis' obligation to conduct himself at all times in a manner befitting his status as an international civil servant and to refrain from conduct that might compromise the image and interests of UNHCR. To these considerations, the UNDT applied a number of written standards including Staff Regulation 1.2(f), paragraph 42 of the International Civil Service Commission's Standards of Conduct for the International Civil Service (ICSC Standards), and Principles 2 and 8 of the UNHCR Code of Conduct, although noting that these had not been referred to in the letter recording the Appellant's dismissal. The UNDT did not accept the Appellant's case based on the premise that if Mr. Khamis had not engaged in the relationship with JA, "*none of the ensuing events would have taken place.*" and that it must have followed logically that the Agency was entitled in law to have dismissed him as it did for having an intimate (including sexual), consensual relationship with a local person.

32. The UNDT concluded that the alleged misconduct had to be assessed in terms of the mission, purpose and principles of the United Nations and the impact that such conduct could have on the Organisation's reputation, credibility and integrity. It said that the negative press attention given to Mr. Khamis following the UMP's public statements (which the IGO found to be unsubstantiated as were similar others which the UMP later disowned), originated from the UMP.

33. It held that neither JA nor TA (the women with whom Mr. Khamis had intimate relationships) was a refugee or a UNHCR beneficiary, classes of person covered by Staff Rule 1.2(e). It rejected the Organisation's submission that the unsubstantiated and scandalous allegations made against Mr. Khamis, without more, meant that he was responsible for reputational damage suffered by it. It differentiated or distinguished cases which appeared to support such an approach on the basis that the staff members in those cases were, unlike Mr. Khamis, guilty of the conduct alleged.

34. The UNDT held that the Organisation had taken significant, perhaps even vital, account of irrelevant considerations: the High Commissioner was said to have admitted that it was influenced by the sensationalised (but ultimately inaccurate) media reports as these had aggravated the concerns of donor nations and an earlier UNHCR corruption scandal in Uganda. The Organisation acted unlawfully by basing its decision on discredited factual allegations and, therefore, irrelevant considerations.⁴

35. Turning to the established facts of Mr. Khamis' relationship with JA, the UNDT concluded that the Organisation had also erred in this regard by assuming that Mr. Khamis' dealings with JA and TA were "transactional", that is commercial sexual relationships in the nature of prostitution, and that they were prohibited relationships because they were "deeply and fundamentally unequal" because he earned more money, and he was significantly older, than JA and TA. The High Commissioner had relied on Staff Regulation 1.2(f) and paragraph 42 of the ISCS Standards. The UNDT found that these considerations were not those with which Staff Regulation 1.2(f) is concerned, and that indeed, applying the lens of them, that Mr. Khamis was a successfully performing staff member.⁵

36. The UNDT concluded, so far as liability was concerned, the Organisation's decision was to be rescinded and:

53. The Tribunal finds that in arriving at its decision the Respondent ignored relevant matters and considered irrelevant matters. The facts have not been established by clear and convincing evidence resulting in an illegal decision.

37. At paragraph 53 of its Judgment, the UNDT noted that the IGO report concluded Mr. Khamis engaged in multiple consensual concurrent relationships with local women. It was uncontested that the negative press attention originated from the UMP's press statement and conference alleging abuse of refugees, which the IGO found were unsubstantiated. Further JA and TA were not refugees and not beneficiaries of the UNHCR assistance within the prohibitions stipulated in staff rule 1.2 (e). The High Commissioner improperly concluded that Mr. Khamis' relationship with JA was inconsistent with standards of conduct because it was "transactional" and a deeply fundamentally unequal relationship because of their financial circumstance and age differences. The High-Commissioner had relied on Staff Rule 1.2(f) and paragraph 42 of the ICSC Standards. Mr. Khamis' relationships did not cause the

⁴ Impugned Judgment, para. 40.

⁵ *Ibid*, para. 36.

unsubstantiated and scandalous allegations raised in the media by the UMP as Mr. Khamis had no control over what the media chose to report. Mr. Khamis had customary relationships with two women. Their status, age, education, or earnings did not make the relationships transactional and only where the woman is underage would it violate United Nations standards. The High-Commissioner failed to establish that the Applicant's polygamous lifestyle was contrary to any human rights instruments or compromised the image and interests of the Organisation. The High Commissioner failed to consider that numerous witnesses referred to TA and JA (separately) and Mr. Khamis as husband and wife. Consequently, the UNDT held that the Administration failed to establish the facts on which the allegations were made.

38. The UNDT found the investigation was flawed, the High-Commissioner failed to consider cultural context, and he ignored exonerating evidence such as the consensual nature of the relationship between Mr. Khamis and JA and gave too much prominence to the sensationalised and unsubstantiated media reports. The UNDT thus rescinded the sanction of severance from service, with alternative in-lieu compensation set at 23 months' net base salary. The UNDT declined to award moral damages to Mr. Khamis for lack of evidence. It said:

At the time of his dismissal on 14 December 2018, the Applicant held a fixed-term appointment, which was due to expire on 31 October 2020. The Respondent may opt to pay compensation in lieu of rescission.

...

The compensation limit is normally two years' net base salary, in accordance with Art. 10.5(a) of the Statute. Only in exceptional circumstances can an enlarged quantum be considered. The Applicant's fixed-term appointment may not have been renewed or may have been terminated for a number of reasons, the compensation awarded under Art. 10.5(a) will therefore be limited to 23 months' net base salary, representing the unfinished period to the end of his contract.

39. The UNDT concluded that Mr. Khamis had not established evidence to support his claim to moral damages, and had not corroborated such evidence as there was, whether expertly or otherwise. It did not allow this claim.

Submissions

Secretary-General's Appeal

40. The UNDT erred in fact and in law in not finding that Mr. Khamis sexually exploited JA in violation of Staff Rule 1.2(e) and ST/SGB/2003/13. The evidence was clear and convincing that Mr. Khamis used his power differential and JA's financial vulnerability for his own sexual gratification. Mr. Khamis an international staff member, was team leader in Kitgum. His monthly net pay as of December 2017 was USD 9,236.46, whereas JA a 23-year-old Ugandan national from Kitgum— a deep field location in a rural area, earned USD 27.47 a month (using UN exchange rate December 2017). She had basic education and spoke little English. Mr. Khamis hired her as domestic help, promised her money for a business and gave her money for her ill mother. The record also indicated he admitted that when she reported to police, he had owed her 2 months' salary and other monies, he apparently had withheld. The UNDT erred in not recognising that he was exploiting her vulnerability stemming from the position of power as an international civil servant in a mission setting, her financial vulnerability depending on him economically and in a subservient position as his domestic worker. While it is true the Ugandan police closed its investigation into rape allegations, the facts supporting sexual exploitation have been established in the record.

41. The UNDT erred in fact by not considering the definition of sexual exploitation established in section 1 of ST/SGB/2003/13 and, thereby, recognising that the Respondent had exploited the unequal relationship between JA and him for his sexual gratification. The UNDT further erred in law in finding this conduct did not constitute misconduct under the United Nations legal framework. UNHCR staff are expected to uphold standards that fully reflect the humanitarian principles of UNHCR, particularly when the staff member is the most senior UNHCR official and team leader in a deep-field location. Engaging in exploitative sexual relationships with members of the local community where the staff member works and where the power dynamic is unequal, is legally prohibited by Staff Regulation 1.2(f) and ST/SGB/2003/13, which were, at the relevant time, applicable to the Respondent under his terms of appointment and/or contract.

42. Further Staff Rule 1.2(e) prohibits staff members from engaging in sexual exploitation which ST/SGB/2003/13 defines as "any 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.”⁶ Paragraph 42 of the Standards of Conduct for International Civil Service approved by General Assembly resolution 67/257 of 12 April 2013 provides that civil servants must “bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organizations [...]”. Principle 8 of the UNHCR Code of Conduct requires staff to refrain from “any involvement in criminal or unethical activities, activities that contravene human rights, or activities that compromise the image and interests of UNHCR”. By having an exploitative sexual relationship with a woman from the local community in which he worked and who was also in a subservient position, Mr. Khamis compromised the image and interests of UNHCR and thus he failed to comply with obligations under Staff Regulation 1.2(f), Staff Rule 1.2(e), the Standards of Conduct for International Civil Service, and the UNHCR Code of Conduct.

43. The UNDT erred in law in finding that Mr. Khamis’ conduct did not constitute misconduct because Ms. JA was not underage, and it did not violate local law. The applicable legal framework is that noted above, and not local law. JA’s not being underage is irrelevant to whether he exploited his unequal power and her financial vulnerability. The UNDT misunderstood the legal framework in its finding that the High Commissioner failed to establish that his polygamous lifestyle was contrary to any human rights’ instrument. This was an erroneous finding. First, Mr. Khamis was not sanctioned for having a polygamous relationship with TA and JA but for having a sexually exploitative relationship with JA. Second, misconduct of an international civil servant need not be in breach of a human rights norm or contravene local law for it to constitute misconduct under the legal framework.

44. The UNDT also erred in fact and law in finding that the High Commissioner disregarded evidence that the relationship was that of ‘husband and wife’. While Ugandan law recognizes customary marriages celebrated according to the rites of an African community, it also provides for rights and obligations of the spouses including upon dissolution of marriage or cohabitation, a spouse’s rights to be assigned the rented premises where the couple lived and the right to receive maintenance from the former spouse. JA did not enjoy any of these protections bestowed to her under local law. As the sanction letter illustrates, the

⁶ ST/SGB/2003/13, Section 1.

High Commissioner assessed all the evidence of the relationship and correctly concluded it was not that of a “husband and wife”.

45. The UNDT erred in law in finding the investigation was flawed. There was no flaw. Rather the UNDT observed that relevant matters were ignored, and irrelevant matters were given weight, but the UNDT did not identify which matters had been ignored and which should have been considered. This finding is unsupported by evidence and is speculative. The UNDT did not actually identify any procedural flaws. The UNDT erroneously held that the High Commissioner improperly relied on sensationalised media reports, concerns by UNHCR donor countries and previous corruption scandal. However, the sanction letter referred only to Ugandan media reports remarking that Mr. Khamis’ conduct caused reputational harm but did not rely on the media reports to establish the conduct occurred. Furthermore, the UNDT erred in finding the High Commissioner failed to consider cultural context around polygamy as the High Commissioner’s decision finding of misconduct was not about polygamy.

46. Finally, the UNDT erred in law in finding that UNHCR failed to protect Mr. Khamis from third party retaliation and blackmail. The Secretary-General’s obligations of safety and security do not extend to protecting staff members against damage to their reputation and do not extend to protecting staff who engage in sexual exploitative relationships with their domestic workers. In claiming the Secretary-General failed to protect Mr. Khamis from blackmail, the UNDT is blaming JA as the victim for having filed a police report alleging rape. While the Ugandan police closed the investigation the evidence was not sufficient to sustain charges, the record does not show that JA’s allegation was false nor provide evidence that Mr. Khamis had not engaged in sexual exploitation in violation of Staff Rule 1.2(e).

47. The UNDT erred in procedure by not holding an oral hearing.

48. The Appellant requests this Tribunal to vacate the impugned Judgment and to uphold the decision to separate the Respondent for misconduct. Alternatively, the Appellant requests the impugned Judgment be vacated, and the case remanded to the UNDT for a fresh determination by a different judge following an oral hearing. This deprived the Secretary-General of the opportunity to test the credibility and reliability of the testimony and submissions made by Mr. Khamis and cross examine him and other witnesses.

Mr. Khamis' Answer

49. Mr. Khamis requests the Appeals Tribunal dismiss the appeal in its entirety. He seeks costs against the Secretary-General. He submits that he did not commit misconduct. The IGO investigation found no evidence of sexual exploitation or abuse of vulnerable persons as JA was neither a refugee nor underage. All evidence supported that it was a consensual relationship between adults. The Secretary-General wrongfully emphasises that JA was his domestic worker, but he ignores the fact that this was a relationship that started months before moving in together. As in all relationships, partners do help each other and thus his financial support of JA to assist her personal needs was in this context. The Respondent's arguments that the age difference, income, and education status and nationality are factors coming into play in determining the appropriateness of their relationship are either not supported by the evidence or are untenable.

50. The UNDT correctly found that the investigation was flawed. There were procedural irregularities around privileges and immunities which lead to his unlawful arrest by the Ugandan police. The IGO met with the MUP and told her that Mr. Khamis had limited immunity if the event occurred outside of work. This response fuelled his arrest. The IGO, however, had no authority to make such an assessment as this power rests with the Secretary-General. Now he has a permanent record of arrest and must explain this on future job applications. During arrest and investigation, he did not receive adequate support from UNHCR, putting his life in danger. The investigation was shallow, interviewed few people and the IGO failed to interview relevant witnesses such as leaders of Kitgum and Lamwo with whom he worked closely.

51. Mr. Khamis further argues consensual sex between adults is not misconduct. The investigators asked him whether his wife was aware of his two girlfriends, which was acting like "moral police". The investigation was biased as the IGO had negative views on polygamy. The evidence points to legality, acceptability, and appropriateness in Uganda. Rather, the separation from service was based on extraneous and discriminatory considerations. The Administration relied upon sensationalised media reports to determine its reputation was harmed, which was subjective and not established by any empirical or circumstantial evidence. The media reports were false, which investigations proved.

52. The UNHCR failed to protect him from third party retaliation and blackmail. He severed his relationship with JA for personal reasons and she retaliated by levying false allegations against him. The Appellant has failed to substantiate that the UNDT erred in reaching its conclusion that there was no misconduct. The UNDT correctly found the facts are not established to warrant misconduct. Thus, the UNDT correctly determined his sanction was not proportionate and was unlawful. Lastly the UNDT did not err in procedure in deciding not to hold an oral hearing. The UNDT has broad discretion. The UNDT was in possession of all pertinent information it needed to render its Judgment.

Considerations

53. We start with an examination of the allegations forming the basis of the Organisation's investigation of Mr. Khamis' conduct. As will be seen, they bear little relation to the investigation's conclusions. First it was alleged that he had "engaged in sexual relations with Persons of Concern." That category of persons was not defined, at least for the Respondent, but we infer it covered vulnerable people for whom UNHCR had special responsibility and including particularly asylum-seekers and refugees. Second, it alleged that he had "engaged in sexual activities with UNHCR staff while being the Head of FU Lamwo". The numbers and identities of the UNHCR staff were not identified. Third, it was alleged that Mr. Khamis "had a sexual relation with a Uganda national and that [he] engaged in a sexual practice which, if proven, could be a criminal offense and a violation of the national laws of Uganda (defilement)." Penultimately, another allegation to be investigated was that "this behaviour" had breached the UNHCR Code of Conduct. No particulars of this breach were alleged. Finally, Mr. Khamis was alleged to have "breached UN security rules and regulations by failing to adhere to applicable security directives (residing in non-compliant accommodation)."

54. Several of the allegations appear to have had little or no substance, even from the outset. For example, the allegation of having engaged in sexual activities with United Nations colleagues appears to have been, at best for the Organisation, an untrue rumour concerning one colleague. The suggestion that he had breached security rules and regulations by moving from a hotel to private rented accommodation, has the appearance of a make-weight unconnected to the allegations of improper conduct about which the Organisation was rightly concerned to investigate. It is of note and concern that when interviewed, no particulars of these bald allegations were put to Mr. Khamis—he was simply asked to comment on the written

allegations and told that his explanations, which in several cases consisted of his own speculation about what was specifically alleged, would be further investigated.

55. While it was appropriate for the UNHCR to be concerned about the public allegations of serious misconduct against Mr. Khamis and to investigate these, more and better particulars should have been obtained so they could be put to him at his interviews. The “Persons of Concern” (and why they were such persons and what considerations applied to them) should have been ascertained and made known to Mr. Khamis, but they were not. Likewise, the allegation of potential criminal conduct (anal intercourse) was not particularised and even the victim of that alleged offending was not identified as she should have been. Even accounting for the difficulties of conducting interviews through a translator with women about their very personal experiences, the transcripts of the interviews of complainants, witnesses and Mr. Khamis illustrate a lack of planning, a degree of haste under pressure and a failure or refusal to disclose information to him that he ought to have had as a matter of natural justice to him.

56. Finally, we have made a detailed examination of the Appellant’s letter of dismissal to Mr. Khamis dated 17 December 2018. That is because this represents a contemporaneous expression of the then applicable reasons behind that decision and from a time free of the potential subconscious influences of litigation. This letter sets out formally the Appellant’s grounds for the sanctions that were then imposed on Mr. Khamis.

57. The conclusions included that there was clear and convincing evidence that he had breached Staff Regulation 1.2(f). That breach was said to have been his co-habitation and maintenance of a sexual relationship with a 23-year-old Ugandan woman (JA) between mid-December 2017 and 14 February 2018. This was said to have been a failure to conduct himself in a manner befitting his status as an international civil servant.

58. The DHR, whose decision it was to separate Mr. Khamis from service, rejected his contentions that his conduct did not contravene UN policies or rules, that his right to family life and privacy had been violated, that the censure violated his religion, and “the African culture where polygamy is an acceptable norm.” The Appellant took the view, relying on paragraph 42 of the ICSC Standards, that the circumstances, including conduct and activities outside the workplace and unrelated to official duties, reflected on the Organisation and its image and interests.

59. The DHR stated that there was a “significant power differential” in Mr. Khamis' relationship with JA. Mr. Khamis was the UNHCR's team leader in the area. He offered JA a significantly better paying job than she had previously held as a hotel waitress, to “cohabit with” him and provide house help. He provided JA, who had little money, with additional funds both for her ill mother and to start a small business of her own. The DHR recorded that when Mr. Khamis ended their relationship, JA complained to the local Police claiming the sum of UGX 1.4m representing 2 months' wages and the funding promised for the start-up business.

60. Also significant in the decision to separate Mr. Khamis from service was JA's complaint against him alleging criminal behaviour, his arrest and the publication in local media of articles which damaged UNHCR's image and interests. The Appellant concluded that this damage would not have occurred had he not been in a sexual relationship with JA. Despite not being prosecuted by the Police, the Appellant concluded that Mr. Khamis should have ensured that his conduct was beyond reproach and beyond its ability to tarnish UNHCR's image and interests.

61. The Appellant concluded that these breaches of Staff Regulation 1.2 amounted to misconduct under Staff Rule 10.1(a) and warranted appropriate disciplinary measures. In assessing this, a mitigating factor was said to be the Respondent's unblemished prior record. An aggravating feature was said to be Mr. Khamis' team leader role with a high visibility and his possibly influential presence in Kitgum which had the potential to expose UNHCR negatively.

62. A “significantly aggravating circumstance” was said to be Mr. Khamis' lack of remorse for his conduct or for the reputational harm suffered by the Organisation. His assertions of his entitlement under international human rights law to undertake his relationship with JA and that the Appellant's stance, were said to have exhibited a lack of respect for cultural diversity and cast serious doubt upon his understanding and sharing of UNHCR values.

63. The decision letter stated that the decision-maker had followed parity principles in determining the sanction and referred to other cases based on what were said to be analogous facts and principles. Mr. Khamis' engagement ended upon his receipt of this letter, and he was paid compensation in lieu of notice of termination, but no termination indemnity.

64. We examine next to the relevant regulatory norms which the Administration applied to Mr. Khamis' relevant conduct. Staff regulation 1.2(f) states:

While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

65. Paragraph 42 of the ICSC Standards states:

The private life of international civil servants is their own concern and organizations should not intrude upon it. There may be situations, however, in which the behaviour of an international civil servant may reflect on the organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organizations. This can also result from the conduct of members of international civil servants' households, and it is the responsibility of international civil servants to make sure that their households are fully aware of this.

66. This paragraph should be read in the context of paragraph 40 of the ICSC Standards which among others requires respect for diversity, as follows:

The world is home to a myriad of different peoples, languages, cultures, customs and traditions. A genuine respect for them all is a fundamental requirement for an international civil servant. Any behaviour that is not acceptable in a particular cultural context must be avoided. However, if a tradition is directly contrary to any human rights instrument adopted by the United Nations system, the international civil servant must be guided by the latter. International civil servants should avoid an ostentatious lifestyle and any display of an inflated sense of personal importance.

67. The foregoing passages illustrate that there is a fine balance to be struck between the individual and personal rights and freedoms enjoyed by United Nations staff members, and the need for them to conduct themselves publicly (both at and outside work) in accordance with the standards and aspirations of the United Nations. It is not possible to prescribe precisely and in advance where that balance will be struck in any particular case: it will always be a matter of fact and degree in the infinitely variable circumstances of each case relating to

the agency, the staff member, the country in which they are engaged, the particular cultural climate and other relevant factors. Some cases will be clear, others so close to that point of balance that they will be hard to decide and attract moral and legal controversy. This case falls towards this latter end of the spectrum of conducts. It had, therefore, to be decided objectively, free of the moral views of the UNDT or appellate judges who have considered it or are to consider it, in short in accordance with the law.

68. Given the largely uncontested relevant facts of what did and did not happen, the starting point for deciding the appeal must be an examination of prohibited and unacceptable conduct by United Nations staff members including those holding positions such as Mr. Khamis did. That is to be found not just in the overarching statements set out above, but primarily in the various rules applicable to him.

69. ST/SGB/2018/1 sets out United Nations Staff Regulations and Rules. Staff Regulation 1.2(e) and (f) require staff to have paramount regard to the interests of the United Nations and to be loyal to its aims, principles and purposes as set out in the Charter. Personal views (including religious convictions) are “inviolable” but must not adversely affect their official duties or the interests of the UN. Staff must conduct themselves at all times in a manner befitting international civil servants and must not engage in any activity that is incompatible with the proper discharge of their duties with the UN. Staff shall avoid any action that may adversely reflect on their status, or the integrity required by that status.

70. Staff Rule 1.2(e) specifies prohibited conducts, such as sexual exploitation and abuse. Among the specified prohibitions are sexual activity with “children” who are defined as being under the age of 18 years so therefore, except as was alleged falsely in publicised allegations against Mr. Khamis, not at issue in this case. Likewise prohibited is the exchange of money, goods, employment or services for sexual favours or other forms of humiliating, degrading or exploitative behaviour. There is a positive duty on United Nations staff members to create and maintain an environment that prevents sexual exploitation and abuse.

71. Staff Rule 10.1 addresses “Misconduct”. This includes failure to comply with obligations under the Charter, the Staff Regulations and the Staff Rules and any other relevant and applicable administrative issuances, or a failure to observe standards of conduct expected of international civil servants. Such failure may (our emphasis) amount to misconduct leading to disciplinary processes and the imposition of disciplinary measures for misconduct.

72. Staff Rule 10.2 sets out the range of disciplinary measures open to the Organisation upon a finding of misconduct. Because of the outcome of this appeal, it is unnecessary to consider this further.

73. ST/AI/2017/1 sets out the process to be followed for investigation and a disciplinary process in relation to unsatisfactory conduct. This essentially involves providing the affected staff member with details in writing of the allegation(s) and of the standards allegedly breached, the provision of a right to respond including by the provision of evidence, notification of the right to legal assistance, and access to the investigation report and supporting documentation.

74. Section 9 of ST/AI/2017/1 requires that the standard of proof of allegations of misconduct shall be by “clear and convincing evidence” if separation or dismissal may result, or by the preponderance of the evidence in other cases. Mr. Khamis’ case required the higher standard of proof of the allegations against him.

75. As will be clear from the foregoing, some activities are expressly and clearly prohibited, for example sexual activity with children. Such conduct, if denied but proven to the requisite standard, will amount to misconduct for which sanctions may be applied. Other proven conducts more generally described (for example conducts bringing the Organisation into disrepute) will need to be assessed in a more nuanced and discretionary way by weighing and balancing the rights and obligations of several stakeholders including the Organisation, the staff member, the community in which the staff member works and lives, and relevant international norms and standards.

76. Mr. Khamis’ case falls into that latter category just described. There is no question whether he was engaged in sexual conduct with children, that is those under the age of 18 years—he was not. Nor were the various other claims made publicly by the UMP and broadcast on various media, established to the evidential clear and compelling standard. Although it was alleged in the news media following the UMP’s comments, that Mr. Khamis had abused and sexually exploited refugee women, there was no evidence (let alone to the clear and convincing standard required), to support this allegation.

77. Less easily determined, however, was whether Mr. Khamis' relevant conduct breached the obligation on him not to engage in the exchange of money, goods, employment or services for sexual favours or other forms of humiliating, degrading or exploitative behaviour. That is because of the coincidence of Mr. Khamis engaging JA as a paid housekeeper, the payment to her of other monies to assist her sick mother and to enable her to establish a small business of her own, with the relatively prompt establishment of their sexual relationship.

78. What did the evidence establish, to the requisite clear and convincing standard, before the UNDT on this issue of what is known as transactional sexual relations? The UNDT did not make its own findings on evidence presented to it. It examined the quality of the Organisation's investigation and whether it was legal, rational, procedurally correct and proportionate. It considered whether the Organisation's investigation ignored relevant considerations or took into account irrelevant ones and whether the Organisation's decision was absurd or perverse. It concluded that the Organisation ignored relevant matters and took into account irrelevant ones. It also held that the facts had not been established by clear and convincing evidence. The UNDT concluded that the Organisation's decision was, accordingly, illegal.

79. Case law on these issues includes clarification of the UNDT's role in cases such as this. It may review whether the Organisation's decision(s) are legal, rational, procedurally correct, and the outcome proportional. The UNDT can determine whether relevant matters were taken into account and irrelevant ones were not. It can consider whether the Organisation's decision was absurd or perverse. Those were all appropriate considerations for the UNDT to examine and it was not necessary in these circumstances for the Tribunal to itself hear and see witnesses before deciding those issues.

80. If it finds failings amounting to errors of law or fact under these criteria, the UNDT may intervene and override the Organisation's decisions. If not, however, the UNDT may not substitute its decision for that of the Organisation including re-exercising the application of a discretion open to the Secretary-General from amongst a range of courses of action open to him: see *Sanwidi* 2010-UNAT-084, para 40. In disciplinary cases such as this, the UNDT is entitled to examine whether the relevant standard of proof has been met in relation to the facts on which the disciplinary outcome was based; whether those established facts amount to misconduct; whether the sanction imposed is proportionate to the misconduct; and whether the staff member's rights to due process were observed: *Nadasan* 2019-UNAT-918 at paras. 38-43.

81. On appeals such as this, the UNAT must usually bear in mind the advantages enjoyed by the UNDT (*Negussie* 2020-UNAT-1033, para. 48) although those may be limited or even non-existent when, as in this case, there was no in-person hearing with oral evidence from witnesses. It follows that we are in as good a position as the UNDT was in determining whether it erred in its conclusions.

82. What relevant conduct relied on by UNHCR was established to the clear and compelling evidential standard, and did this constitute misconduct by Mr. Khamis? The following descriptions (first, second etc.) are not chronologically sequential steps but just identifiers of different behaviours. First, and by agreement with her, he arranged for JA (an adult) to take up a role as a paid housekeeper for him at about double the wage she had previously earned waitressing. Added to this, he gave JA money to establish her own business and to assist her ill mother. Second, he commenced an intimate sexual relationship with JA. Third, he maintained another intimate sexual relationship with TA (also an adult) in another town, usually at weekends and at accommodation paid for by him at the same time as paying money to TA to establish her own business. Third, he arranged that JA and TA would each know of the other and of the relationship of the other with Mr. Khamis. Fourth, when he suspected or discovered that JA had had sexual relations with another man at the same time as she was living with him, he required her to leave their accommodation in Kitgum. Fifth, although denying any sexual impropriety with JA, Mr. Khamis admitted he owed her money and paid this together with fulfilling his promise of finance for her new shop venture. The foregoing were all behaviours of Mr. Khamis for which he was responsible.

83. We now set out relevant events which, although they affect the issues in the case, were not themselves behaviours of Mr. Khamis or other events for which he can reasonably be said to have been responsible. First, after JA had complained to Police of her defilement (anal rape) by Mr. Khamis and this complaint was being investigated, the UMP made public very serious and egregious, but untrue, statements at a press conference about his conduct towards other women and identified him as a UNHCR staff member. These untrue but salacious statements were reiterated, exaggerated and made worse subsequently by a printed or written media outlet. Second, UNHCR became aware of these stories about Mr. Khamis. Concerning a senior member of its staff, but without more, these public statements had the potential to reflect, and may well have indeed reflected, very badly on the Organisation, particularly as they were the

subject of both Police and UNHCR investigations and so were not able to be responded to or refuted publicly, at least not immediately.

84. This publicity about Mr. Khamis did reflect badly on the image and interests of UNHCR. It alleged very serious breaches by Mr. Khamis of fundamental international human rights and of the commission by him of serious criminal offences. It alleged that as a staff member of the UN, Mr. Khamis was immune from any liability for those allegedly despicable acts. UNHCR was properly very concerned about the consequences to it and its staff in Uganda as a consequence of those public statements and allegations about Mr. Khamis.

85. But the point on which the case turns is Mr. Khamis' responsibility or culpability for those consequences to UNHCR. Was his proven conduct (outlined at paragraph 83 above) such that he was blameworthy for those consequences for his employer? The UNDT held he was not. Did it err in that conclusion in a manner which entitles this Appeals Tribunal to intervene and reverse the effect of the UNDT's Judgment?

86. Mr. Khamis' proven conduct did not itself amount to misconduct: he did not engage in transactional sexual relations with local persons, and his sexual relations with JA and TA were more in the nature of domestic, albeit polygamous and 'open', relationships. Although Mr. Khamis did pay money to both women, in the case of JA this was first as a wage for housekeeping, then a subsidy to enable her to establish a small shop business and finally a contribution towards JA's mother's health costs. The payments from Mr. Khamis to TA were for the rent for the house in which TA lived (at times also with the Respondent) and monies advanced to her for a similar small business establishment. It was not established that these were commercial transactions in return for sexual favours. There was not such an imbalance of power between Mr. Khamis, and JA and TA, that these could be termed abusive or manipulative relationships. Neither woman was connected with the United Nations programme in which Mr. Khamis was engaged so could not have been preferentially treated by the exercise of his power over that programme. When the Respondent's relationship with JA ended, he promptly and willingly paid her the monies to which he had earlier committed to pay despite the ongoing Police investigation into the serious allegation of criminal offending made against him by JA.

87. Addressing each of the specific rules about staff conduct and misconduct relied on by the Appellant to establish the misconduct for which Mr. Khamis was sanctioned, we conclude as follows. He did not conduct himself in a manner not befitting his status as an international civil servant and his proven impugned activities were not incompatible with the proper discharge of his duties with the Organisation. His activities (as proven) were not the subject of public pronouncement by him and otherwise did not reflect adversely on his status, integrity, independence or impartiality required by that status: Staff Regulation 1.2(f).

88. Mr. Khamis' relevant proven conduct was his own concern (and that of JA and TA, but not of the Organisation) and did not reflect on it, at least in a way that upset the necessary balance between his private life and the Organisation's reputation. Mr. Khamis conducted his affairs discretely and JA and TA, to the extent that they were members of his households, did likewise. There was thus no breach by Mr. Khamis of para.42 of the ICSC Standards when read and applied in the context of para.40 of the same Standards.

89. Mr. Khamis' beliefs and views, as practiced by him and at issue in this case, did not affect adversely his official duties or the interests of the Organisation. When that latter consideration was affected, it was by the publication of false information by others which was not attributable to anything Mr. Khamis did culpably. So, ST/SGB/2018/1 setting out UN Staff Regulations and Rules and in particular Staff Regulation 1.2(e) and (f) was not breached by him.

90. Nor was Staff Rule 1.2(e) which prohibits defined sexual exploitation and abuse. As set out in our analysis of the conduct for which the Respondent was responsible, he was not guilty of these practices as defined.

91. Finally, and by applying the foregoing conclusions, it cannot be said that Mr. Khamis committed misconduct as that is defined in Staff Rule 10.1 as summarised earlier in this Judgment.

92. The Appellant has not established that the UNDT erred in any respect in its Judgment and his appeal must be and is dismissed.

93. Mr. Khamis has not, however, made out a case for the Appellant to contribute to his costs. He has not established that he has incurred costs in any event. Irrespective of the substantive outcome of this appeal, it was open to the Secretary-General to bring the appeal as he did on genuine grounds relating to important issues relating to his staff members generally. His appeal was not an abuse of the Appeals Tribunal's process. The Respondent's application for costs is refused.

Judgment

94. The appeal is denied and Judgment No. UNDT/2020/147 is hereby upheld.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 4th day of January 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar