UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1431

Doreen Nimusiima
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Leslie F. Forbang, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2023-1781
Date of Decision:	22 March 2024
Date of Publication:	6 May 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Amanda Stoltz
Counsel for Respondent:	Pearl Maria Bekunda & Charles Kevin Nsubuga

JUDGE LESLIE F. FORBANG, PRESIDING.

1. The Secretary-General has lodged an appeal of Judgment No. UNDT/2022/127 (impugned Judgment)[1] in which the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) granted the application of Ms. Doreen Nimusiima, a former staff member of the United Nations High Commissioner for Refugees (UNHCR).

2. Before the UNDT, Ms. Nimusiima challenged the disciplinary decision of separation from service on the grounds of resettlement fraud. In the impugned Judgment, the UNDT held that the Administration had failed to prove by clear and convincing evidence that she committed misconduct and consequently rescinded the disciplinary decision.

3. Upon review, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) dismisses the Secretary-General's appeal and affirms the impugned Judgment.

Facts and Procedure

4. Ms. Nimusiima initially joined UNHCR in 2008 as a Data Entry Clerk, but as of 2014, was a Senior Community Services Assistant (G-5) in the Nakivale Refugee Camp in Uganda. On 1 January 2017, she was appointed as Assistant Protection Officer in Kyaka Refugee Camp.[2]

5. On 30 July 2020, the Inspector General's Office (IGO) of UNHCR received a complaint from JM (Complainant), stating that he was a refugee from the Democratic Republic of the Congo (DRC or the Congo) in the Nakivale Refugee Camp, and that he had been convinced by UNHCR agents to pay USD 5,000 in return for resettling him in a third country. He alleged that these UNHCR agents made him go back to the Congo to sell his family's land to obtain this sum. He further stated that after giving them the money, they sent him a pre-screening form which had a different story than his original one. He claimed that he asked for his money back, but then they started threatening him, so he went to Rwanda.[3]

6. On 22 August 2020, the Complainant responded to IGO inquiries about these UNHCR agents, and he stated that the two individuals who took his money were AM (a former UNHCR

[1] *Nimusiima v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/127 (1 December 2022).
[2] *Ibid.*, para. 6.
[3] Trial Bundle, pp. 120-121. Please note that the parties agreed to a package of relevant documents for the UNDT hearing that is referred to as the "Trial Bundle".

Resettlement Assistant) and Ms. Nimusiima. He stated that he first met AM on 25 January 2017 to discuss an agreement whereby she could arrange for resettlement for him in a third country, possibly Canada.[4] Subsequently, he met both women on 28 January 2017 in Kampala at a building near Java Coffee, where he gave them the cash. The Complainant stated that his uncle had sold the family land and houses in Goma to get this sum.[5]

7. The IGO advised the Complainant that AM was no longer employed by UNHCR and asked the Complainant to explain more about Ms. Nimusiima's role.[6] The Complainant responded that he paid them when they were together, and that the pre-screening form that he received was prepared by Ms. Nimusiima before it was ultimately shared with him.[7]

8. As was later revealed in the investigation, on 1 February 2017, AM had sent an e-mail to Ms. Nimusiima with a Microsoft Word document labeled "Txxx" (Txxx document) containing the refugee claim of the Complainant's half-sister (AT). The cover e-mail stated only: "FYA". The refugee claim was approximately one page long and contained, among other text, the following six lines: [8]

> They told father to rape me he refused and told them he would rather die than sleeping with her daughter. One of the rebel cut off my father's private parts and he was trying to insert them in my private parts using a stick I passed out because of the pain I don't know what happened next I woke up in the hospital with my brothers , nieces and my young sister . We stayed in the hospital for 6months our home was burn my father died and my elder sister as well.

9. On 8 February 2017, Ms. Nimusiima responded to AM with a pre-screening assessment (PSA) form attached. In the cover message she said: "Please find attached a sample of the screening sheet we use here. Hope it's helpful. Just edit it for your use. Cheers!" Ms. Nimusiima signed off with her title and her telephone number.[9]

[4] Trial Bundle, p. 114.
[5] *Ibid.*, p. 115.
[6] *Ibid.*, p. 116. AM was separated from UNHCR for misconduct, specifically, changing the birth dates of six Congolese refugees to enhance their chances of resettlement. *See ibid.*, p. 565.
[7] Trial Bundle, p. 113.
[8] *Ibid.*, pp. 249-250.
[9] *Ibid.*, p. 252.

10. The PSA form prepared by Ms. Nimusiima contained a similar refugee story for the Complainant's half-sister, but better written, except for the lines quoted above that were identical, including the grammatical and typographical errors.[10]

11. AM forwarded the e-mail and PSA form to the Complainant. The Complainant subsequently sent it to the IGO. When the Complainant sent the e-mail chain to the IGO, the cover message from Ms. Nimusiima to AM had been deleted.[11]

12. The Complainant also gave the IGO a document he stated was given to him by AM on or about 14 or 16 June 2018, which was an unsigned letter, with the UNHCR logo, addressed to Complainant's half-sister that her resettlement application had been submitted to Canada.[12] This letter was fraudulent.

13. The Complainant also sent the IGO some screenshots of WhatsApp messages that he claimed that he had with AM, in which he threatened that he would report AM to the IGO if she did not refund his money.[13]

14. The IGO opened an investigation into Ms. Nimusiima on 22 September 2020. An IGO Investigations Specialist interviewed the Complainant, a UNHCR Resettlement Officer (later called as a "Resettlement Expert" at the UNDT hearing), and Ms. Nimusiima.

15. On 5 May 2021, the Director of the Department of Human Resources (DHR) informed Ms. Nimusiima that based on the completed Investigations Report the available evidence supported that, acting in concert with AM, she:

> a) Received money from a refugee, [the Complainant], in January 2017 in exchange for assistance with his resettlement case; and
> b) Fabricated a refugee story for [the Complainant's] family and created a fraudulent pre-screening form, which [she] then shared by email with Ms. [AM], and Ms. [AM] forwarded to [the Complainant].[14]

16. In her interview with the IGO, Ms. Nimusiima denied these allegations. She maintained that AM contacted her about a refugee from Nakivale (Complainant's half-sister) who said that she

[10] *Ibid.*, p. 254.
[11] *Ibid.*, p. 476.
[12] *Ibid.*, p. 497.
[13] *Ibid.*, p. 542.
[14] *Ibid.*, p. 568.

had previously been interviewed by Ms. Nimusiima. Ms. Nimusiima asked for AM to share the details of this woman's claim, and AM sent the Txxx document to her. Subsequently, Ms. Nimusiima said that she checked her records and found that she had interviewed this woman but had not done any follow-up. So, she shared her interview notes that she had put in a PSA form about the Complainant's half-sister and sent it back to AM for her further use.[15]

17. In her responses to DHR, Ms. Nimusiima asserted that the IGO had flouted due process by failing to interview key persons, including AM (her alleged accomplice), the Complainant's half-sister (who was the subject of the Txxx document and the PSA form), the Complainant's uncle (who supposedly arranged for the sale of family land in the Congo), and another individual who was purportedly present at the meeting where the bribe was paid by the Complainant to AM and Ms. Nimusiima.[16]

18. Ms. Nimusiima pointed out that there was no evidence that a Café Java or Java Coffee existed in the Nakulabye area, where they supposedly met the Complainant for the exchange of money.[17]

19. Ms. Nimusiima asserted that the Complainant's story that he sold the family land in the Congo and received the cash from it, all within 3 days, was not credible and there was no paper proof of this transaction.[18]

20. Ms. Nimusiima countered that the Complainant constructed a story to include her because he had an e-mail from her to AM which contained her name and e-mail address.

21. In a second response to DHR, Ms. Nimusiima questioned the identity and refugee status of the Complainant. She provided results of a Google search which disclosed an article about the Complainant being a Rwandese national who was earning a living as a comedian mimicking the President of Rwanda.[19]

[15] *Ibid.*, pp. 51-55.
[16] *Ibid.*, p. 67.
[17] *Ibid.*, p. 70.
[18] *Ibid.*, p. 71.
[19] *Ibid.*, p. 91.

22. Following this response, the IGO interviewed the Complainant again. Ms. Nimusiima responded to the results of this second interview, highlighting what she considered inconsistencies between the first and second interviews of the Complainant.[20]

23. On 1 November 2021, DHR advised Ms. Nimusiima that the High Commissioner had concluded that it "has been established on clear and convincing evidence that, acting in concert with [AM], [she] received money from [the Complainant] in exchange for assistance with resettlement, that [she] fabricated a refugee claim for [the Complainant's] family, and that [she] created and shared a fraudulent pre-screening assessment form, which was then sent to [the Complainant]."[21]

24. DHR rejected as not credible Ms. Nimusiima's explanation of her e-mail exchanges with AM concerning the Txxx document and the PSA form. DHR noted that AM, being a junior Resettlement Assistant, did not have a "cogent reason" to be communicating with Ms. Nimusiima about the refugee, the Complainant's half-sister.

25. DHR noted that if Ms. Nimusiima had indeed interviewed the Complainant's half-sister in Nakivale, then given the harrowing account of murder and sexual assault she provided, it was not credible that Ms. Nimusiima never followed up on it and failed to create any paper or electronic records of this interview.

26. DHR rejected Ms. Nimusiima's claim that in the PSA form she was merely sharing her interview notes about the Complainant's half-sister with AM for work purposes. Upon review of the two documents, the DHR assessed that they clearly showed that Ms. Nimusiima was not sharing her own interview notes, but rather was sharing a revised version of the original text of the Txxx document in the PSA form. DHR pointed to some of the identical spelling, grammar and punctuation mistakes in the two documents as proof that Ms. Nimusiima had revised AM's draft into the PSA form and forgotten to correct or delete certain parts.[22]

27. DHR also pointed out that the PSA form shared by Ms. Nimusiima had two different accounts of when the father of the Complainant and his half-sister had died. In the second paragraph, it stated that their father was killed in 2010 by armed assailants, and in the third

[20] *Ibid.*, p. 79.
[21] *Ibid.*, p. 86.
[22] *Ibid.*, p. 88.

paragraph it stated that their father was mutilated during a 2012 attack and died after that. DHR stated this was conclusive evidence that the PSA form was at least partially fabricated.

28. DHR concluded that by "receiving money from [the Complainant] in exchange for assistance with resettlement, fabricating a refugee claim for [the Complainant's] family, and creating and sharing a fraudulent pre-screening assessment form, [Ms. Nimusiima] engaged in corruption and fraud" as defined in the UNHCR Strategic Framework for the Prevention of Fraud and Corruption.

29. The Strategic Framework defines "Corruption" and "Fraud" as follows:

> Corruption – The offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party. Corruption may take the form of an undisclosed conflict of interest, unauthorized acceptance of honours, gifts or remuneration, bribery (including kickbacks), illegal gratuities or economic extortion.
>
> Fraud – Any act or omission, including misrepresentation or concealment of a material fact, that knowingly or intentionally misleads, or attempts to mislead, a party to obtain a benefit, whether directly or indirectly, whether for oneself or for a third party. Fraud could involve misappropriation of cash (such as fraudulent claims/disbursements) or other assets (such as fraudulent shipments, falsifying inventory records), or fraudulent statements (purposefully misreporting or omitting information).

30. In considering the sanction to impose, the High Commissioner identified as an aggravating factor that the misconduct went to the heart of UNHCR's mission to find solutions for refugees, whereas Ms. Nimusiima's long and satisfactory service was a mitigating circumstance. The High Commissioner also took into account the parity principle and noted that the disciplinary measure of separation from service was invariably imposed on staff members who engaged in corruption or fraud.[23]

31. Effective 1 November 2021, the High Commissioner imposed the disciplinary measure of separation from service on Ms. Nimusiima.[24]

32. On 24 January 2022, Ms. Nimusiima filed an application with the UNDT challenging this sanction.

[23] *Ibid.*, p. 566.
[24] Impugned Judgment, para. 12.

Impugned Judgment

33. The UNDT held a four-day hearing in this case in which it received testimony from Ms. Nimusiima, the Complainant, the Investigations Specialist, the Resettlement Expert, a former Supervisor of Ms. Nimusiima, and AM. Having regard to its role in the legal framework to "ascertain whether the facts on which the sanction is based have been established", the UNDT reviewed the key findings underlying Ms. Nimusiima's dismissal.

34. First, the Dispute Tribunal observed that the main documentary evidence relied upon for establishing that Ms. Nimusiima acted in concert with AM was: (1) the 1 February 2017 e-mail from AM to Ms. Nimusiima with the Txxx document containing the refugee claim of the Complainant's half-sister, and (2) the 8 February 2017 e-mail from Ms. Nimusiima to AM with the PSA form attached, including details of the claim of the Complainant's half-sister.

35. The UNDT found that the contents of these documents and this exchange were "equivocal" and that this evidence was "purely circumstantial".[25] The UNDT also concluded that it was not proven that AM had sent the fraudulent resettlement letter to the Complainant, or that the WhatsApp exchanges between AM and the Complainant about the USD 5,000 payment were genuine.

36. The UNDT observed that the only eyewitness testimony about Ms. Nimusiima receiving a USD 5,000 bribe came from the Complainant; however, the UNDT found that the Complainant's testimony was "completely without credibility".[26] The UNDT acknowledged that Ms. Nimusiima had unearthed information that contradicted the Complainant's claim to being a refugee and his identity, and stated that his untruthfulness about these matters should have led the Secretary-General to conclude that the Complainant's account of his meeting with Ms. Nimusiima was "a total fabrication".[27]

37. The UNDT rejected the Secretary-General's argument that the Complainant had no motive to lie. The UNDT offered, for example, that the Complainant may have been angry about the failure of Ms. Nimusiima to follow-up on his half-sister's case. Or, he may have been seeking retribution

[25] *Ibid.*, para. 48.
[26] *Ibid.*, para. 51.
[27] *Ibid.*

against AM, and added Ms. Nimusiima to his complaint when he saw her name on the e-mail forwarding the PSA form.

38. The UNDT concluded that Ms. Nimusiima's explanation was "at least more credible" than that of the Complainant. Ms. Nimusiima maintained that AM contacted her about a female refugee whom she had previously interviewed in the Nakivale Refugee Camp, and so she responded to AM with her record of her interview in the PSA form. The UNDT noted that there was no UNHCR policy prohibiting the sharing of information about refugees between colleagues. Ms. Nimusiima's version of events was corroborated by AM at the hearing. The UNDT also rejected the Secretary-General's argument that AM could not be believed because AM had previously been separated from UNHCR for misconduct.[28]

39. Second, the UNDT concluded that the evidence that Ms. Nimusiima received money from the Complainant was "exceptionally weak" as it was based solely on his testimony, which lacked credibility.[29] The UNDT faulted the Investigations Specialist for failing to exhaust all avenues to speak with the other witnesses who were supposedly present at the meeting where the Complainant allegedly gave the bribe to AM and Ms. Nimusiima. The UNDT also found that the evidence to support that the Complainant sold real estate in the Congo to pay the USD 5,000 bribe was not clear and convincing. The UNDT rejected the belated theory and research submitted by the Secretary-General after the hearing that was intended to establish that paperless tribal land transactions in the Congo were normal.[30]

40. Third, the UNDT found it incredible that if indeed the Complainant had paid a bribe to Ms. Nimusiima that he never attempted to contact her for a refund or to complain that he had not received the promised resettlement assistance.[31] The Complainant had Ms. Nimusiima's e-mail address and telephone number from when he received the PSA form.

41. Fourth, the UNDT observed that the dismissal letter refers to a fabricated refugee claim; however, the only way to establish that the refugee claim was indeed fabricated would have been through testimony of the Complainant's half-sister. The UNDT noted that the only "embellishment" that the Complainant had testified to was the addition of his mother being raped

[28] *Ibid.*, paras. 62-63, and 65.
[29] *Ibid.*, para. 69.
[30] *Ibid.*, para. 72.
[31] *Ibid.*, paras. 73-74.

in front of him and his siblings. The UNDT pointed out that this was already in the Txxx document sent by AM to Ms. Nimusiima, so this was not embellished by Ms. Nimusiima.[32]

42. The UNDT conceded that it was "strange" that there were six lines with distinctive grammatical or typographical errors in the Txxx document that appeared in the same manner in the PSA form, which the Secretary-General argues demonstrated that Ms. Nimusiima copied these lines from the Txxx document from AM into the PSA form but forgot to correct the errors. The UNDT suggested that Ms. Nimusiima may have slipped in this missing information in an effort to "cover her tracks", because Ms. Nimusiima had failed to follow up with this refugee. The UNDT also observed that the Resettlement Expert appeared to accept that Ms. Nimusiima had indeed interviewed the Complainant's half-sister in the past but failed to follow up on it.[33]

43. The UNDT also observed that Ms. Nimusiima indicating "normal priority" on the PSA form was "not consistent with the actions of a person trying to embellish a refugee story to make it more likely to result in resettlement".[34]

44. Fifth, the UNDT found that there was no evidence in the record to show that Ms. Nimusiima knew that AM would share the PSA form with the Complainant. The UNDT was also unconvinced by the evidence of the Resettlement Expert that was intended to show that it was not credible that Ms. Nimusiima would have failed to follow-up on such a harrowing refugee story.[35]

45. For the foregoing reasons, the UNDT held that the Administration failed to prove by clear and convincing evidence the basis for the misconduct that led to Ms. Nimusiima's dismissal.[36]

46. The UNDT examined each of the due process violations alleged by Ms. Nimusiima, and found that in all the circumstances, due process was observed.[37] However, the Dispute Tribunal noted that the failure of the Investigation Specialist to interview appropriate witnesses adversely affected the Secretary-General's ability to meet the standard of proof required.[38]

[32] *Ibid.*, para. 81.
[33] *Ibid.*, para. 79.
[34] *Ibid.*, para. 80.
[35] *Ibid.*, para. 86.
[36] *Ibid.*, para. 88.
[37] *Ibid.*, para. 95.
[38] *Ibid.*

47. As a remedy, the UNDT rescinded the sanction of dismissal, and set compensation in lieu of rescission at the equivalent of two years' net base salary. The UNDT also ordered the removal of the sanction letter and all references to it from Ms. Nimusiima's Official Status File.[39]

48. The Secretary-General filed an appeal of the impugned Judgment on 30 January 2023, which Ms. Nimusiima answered on 3 April 2023.

Submissions

The Secretary-General's Appeal

49. The Secretary-General submits that the Administration had established that it was "highly probable" that Ms. Nimusiima had engaged in corruption by receiving money from the Complainant in exchange for resettlement assistance and engaged in resettlement fraud by fabricating a claim for his family.

50. The Secretary-General relies on three pieces of evidence: (i) the e-mail exchanges between AM and Ms. Nimusiima about the Complainant's half-sister's refugee claim; (ii) the fact that AM had previously engaged in similar conduct; and (iii) the testimony of the Complainant and available evidence that supported his testimony.

51. The Secretary-General submits that the UNDT made numerous findings of fact that were entirely unsupported, repeatedly erred in law, committed errors of procedure, and exceeded its jurisdiction, all resulting in a manifestly unreasonable decision.

52. The Secretary-General submits that the UNDT erred in law and fact in its assessment of the e-mail exchange between AM and Ms. Nimusiima regarding the refugee claim of the Complainant's half-sister.

53. The Secretary-General contends that Ms. Nimusiima's explanation about the e-mail exchange was inconsistent with her own role and AM's role in the resettlement process. The Secretary-General argues that the evidence from the Resettlement Expert was that the PSA form is used by those in the "protection" role (like Ms. Nimusiima) but is never used by resettlement assistants like AM. Ms. Nimusiima therefore had no legitimate reason to send a PSA form to AM.

[39] *Ibid.*, paras. 97-99.

54. The Secretary-General further argues that the PSA form demonstrates that Ms. Nimusiima was not, in fact, sharing her own earlier interview notes with the Complainant's half-sister, but rather she had revised the Txxx document sent by AM and included those contents in the PSA form.

55. The Secretary-General submits that the UNDT exceeded its jurisdiction by offering its own explanation for why an identical six-line portion of the Txxx document appeared in the PSA form. The Secretary-General submits that the UNDT erred by speculating that Ms. Nimusiima had added this into the PSA form to cover her tracks, when Ms. Nimusiima had testified that she had *not* made any additions to the PSA form. The Secretary-General submits that pursuant to UNAT jurisprudence, the UNDT is not supposed to be an advocate for the staff member.[40]

56. The Secretary-General submits that the UNDT's reasoning was based on its erroneous assumption that Ms. Nimusiima had interviewed the Complainant's half-sister in 2016 in Nakivale (as she said), but there was no evidence supporting this. The Secretary-General points out that there is no physical file about the Complainant's half-sister and the PSA form did not have her biodata.

57. The Secretary-General submits that the UNDT failed to draw adverse inferences from obvious inconsistencies in the refugee story in the PSA form, such as the father's death on two different dates. The Secretary-General refutes the UNDT's explanation that perhaps this was what the Complainant's half-sister said in her interview, by pointing out that the PSA form is not used to record interviews.

58. The Secretary-General submits that the UNDT erred in finding that Ms. Nimusiima's explanations were corroborated by AM. The Secretary-General submits that AM's testimony was "riddled with inconsistencies" and contradicted her own witness statement. He also points out that AM was not truthful about her own separation from service with UNHCR.

59. The Secretary-General submits that the UNDT was "improperly selective" in relying on the testimony of AM and Ms. Nimusiima but disregarding the testimony of the Complainant and the Resettlement Expert.

[40] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 44.

60. The Secretary-General concludes that the February 2017 e-mail exchanges were highly irregular in view of UNHCR's standard procedures, and the PSA form incontrovertibly contained information copied and pasted from the Txxx document. This evidence was corroborated by the Complainant's account. The Secretary-General thus submits that this "sufficiently establishes" that Ms. Nimusiima committed fraud by fabricating a refugee claim and creating and sharing a fraudulent PSA form. He argues that the UNDT erred in reaching a different conclusion.

61. The Secretary-General submits that the UNDT erred in its assessment of the Complainant's testimony and the evidence that corroborated his testimony.

62. The Secretary-General argues that the UNDT failed to assess the Complainant's testimony in light of the totality of the evidence, and thereby failed to conduct a proper judicial review.

63. The Secretary-General submits that the UNDT erred by dismissing the corroborating evidence, including: (i) the fraudulent letter on UNHCR letterhead that informed the Complainant's half-sister that her resettlement application had been submitted to Canada; (ii) e-mails from the Complainant to AM requesting a return of the money he paid her; (iii) screenshots of WhatsApp exchanges between the Complainant and AM about returning the money he paid her. The Secretary-General states that the UNDT erred by simply accepting the testimony of AM who denied knowledge of these communications and improperly suggested that the Administration should have proved that the WhatsApp messages were "genuine".

64. The Secretary-General maintains that there were no material inconsistencies in the Complainant's testimony and that while there might be "serious doubts" about the Complainant's nationality or his refugee claim, these were not "proven to be untrue". The Administration considered that the Complainant's candid admissions were consistent with his account of being willing to pay a bribe in exchange for fast-tracking the resettlement process. The Secretary-General submits that the UNDT's conjectures about possible motives for why the Complainant may have made up his account were not supported by the evidence.

65. The Secretary-General concludes that the UNDT erred by overstating the significance of the inconsistencies in the Complainant's testimony and his prior untruthfulness and improperly rejected the probative value of corroborating evidence. The UNDT's conclusion that his testimony was completely without credibility was in error and should be reversed by the UNAT.

66. Even if the UNAT were to consider that the Complainant's testimony about the meeting where money was exchanged with Ms. Nimusiima was insufficient, the Secretary-General states that the evidence that Ms. Nimusiima created a fraudulent PSA form is clearly established and in and of itself was sufficient to warrant the sanction of dismissal.

67. The Secretary-General requests that the UNAT vacate the impugned Judgment and uphold the disciplinary decision to dismiss Ms. Nimusiima from service for fraud and corruption.

Ms. Nimusiima's Answer

68. Ms. Nimusiima submits that the Dispute Tribunal was correct to find that the facts upon which the sanction of dismissal were based were not proven to the clear and convincing evidence standard.

69. Ms. Nimusiima argues that it was within the UNDT's power to consider alternative inferences that could be made from Ms. Nimusiima sending the PSA form to AM in February 2017. There was nothing in that e-mail to show that Ms. Nimusiima was acting in concert with AM to commit fraud or corruption. This e-mail is purely circumstantial and should have little or no weight to prove the case against her.

70. Ms. Nimusiima submits that the UNDT was correct in its finding that the Secretary-General should have called as a witness someone other than the Resettlement Expert, because this Expert did not know about the duties of protection officers like Ms. Nimusiima, and the Expert also admitted to holding a grudge against Ms. Nimusiima in connection with an entirely different incident. The Investigations Specialist should have interviewed a protection officer to ascertain whether there was anything improper with Ms. Nimusiima sharing a PSA form with a colleague.

71. Ms. Nimusiima submits that the UNDT was correct to find that the IGO neglected to interview key witnesses and accordingly the Administration could not meet its standard of proof.

72. Ms. Nimusiima submits that the UNDT rightly found that the testimony of the Complainant lacked credibility and was filled with inconsistencies.

73. Ms. Nimusiima submits that the Administration did not produce clear and convincing evidence before the UNDT to show that she received or solicited money from the Complainant in

order to assist him in resettlement. She further points out that she has never worked in resettlement and could not have promised to assist him. The Investigations Specialist was in Uganda for three weeks for his investigation but never attempted to verify the Java Café where the meeting supposedly took place, and in fact it does not exist.

74. Ms. Nimusiima submits that the Complainant was not able to convincingly explain the source of the USD 5,000 that he supposedly gave to AM and Ms. Nimusiima. The UNDT was correct to find that it was unlikely that the Complainant could sell his property in war-torn Congo in two days. The IGO also failed to interview people who would have had knowledge of this sale, including the Complainant's uncle.

75. Ms. Nimusiima submits that the IGO erred in not making a greater effort to interview the Complainant's half-sister. Ms. Nimusiima argues that if the Complainant's story was true, why wouldn't his half-sister help him to get a remedy from UNHCR.

76. Ms. Nimusiima refutes the Secretary-General's assertions that the Complainant was credible. She notes that the Complainant admitted to forging identity documents and that an article in a newspaper shows that he was from Rwanda, not a refugee from the Congo.

77. Ms. Nimusiima submits that the e-mail that AM forwarded to the Complainant was not the same as the e-mail sent by Ms. Nimusiima, as brought out before the UNDT. Moreover, when the Complainant forwarded this e-mail to the IGO he deleted certain documentary evidence, from which one should draw an adverse inference about the Complainant.

78. Ms. Nimusiima submits that the letter of dismissal failed to show that Ms. Nimusiima had any knowledge of AM's suspicious activities. There was also no evidence that Ms. Nimusiima was involved or knew about the fraudulent resettlement letter produced by the Complainant. Ms. Nimusiima was also not a part of the WhatsApp exchanges between the Complainant and AM, if they were even genuine.

79. Ms. Nimusiima submits that the UNDT was correct to note the contradiction in the dismissal letter's reliance on the Complainant's information, but also acknowledging that the Complainant lacked credibility.

80. Ms. Nimusiima submits that for all of these reasons the clear and convincing evidence standard was not met, as the UNDT rightly found, and accordingly, she requests that the Appeals

Tribunal affirm the impugned Judgment and the award of two years' compensation in lieu of reinstatement.

Considerations

81. Before us is an appeal by the Secretary-General of the United Nations against the decision of the Dispute Tribunal in Judgment No. UNDT/2022/127 (impugned Judgment) which rescinded the disciplinary decision of separation from service imposed on Ms. Doreen Nimusiima (a former UNHCR staff member) on the grounds that the Administration had failed to prove by clear and convincing evidence that she committed misconduct in the form of resettlement fraud and/or corruption.

82. The Secretary-General submits that the UNDT made numerous findings of fact that were entirely unsupported, repeatedly erred in law, committed errors of procedure, and exceeded its jurisdiction, all resulting in a manifestly unreasonable decision. The Secretary-General urges this Tribunal to vacate the impugned Judgment and uphold the disciplinary decision to dismiss Ms. Nimusiima from service for fraud and corruption.

83. Ms. Nimusiima contends that the Dispute Tribunal was correct to find that the facts upon which the sanction of dismissal were based were not proven to the clear and convincing evidence standard. Accordingly, she requests that we affirm the impugned Judgment and the award of two years' compensation in lieu of reinstatement.

84. From the foregoing, the main issues for determination in this appeal are whether the UNDT erred in law, fact or exceeded its jurisdiction when it found that the Administration had not established clear and convincing proof that Ms. Nimusiima committed misconduct.

85. This appeal raises detailed and intensely factual issues that have necessitated close scrutiny of multiple investigation documents, the transcripts of evidence given before the UNDT, and the documentary exhibits. We are, nevertheless, very mindful that some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence has been heard,[41] as in the case of the testimonies of

[41] *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 81.

Ms. Nimusiima, the Complainant, the Investigations Specialist, the Resettlement Expert, a former Supervisor of Ms. Nimusiima, and AM.

86. Our jurisprudence reiterates that the Dispute Tribunal is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties and this Tribunal would not lightly interfere with the broad discretion of the UNDT in the management of its cases.[42] In a case such as this where there is a conflict of evidence between witnesses, and especially where documents tend to throw doubt upon one or more of the contested eyewitness accounts' of events, the UNDT is usually in the best position to assess the relevant probabilities.

87. Accordingly, our task on appeal is not to ourselves re-decide the case that was before the UNDT. This is so because we cannot enjoy the same advantages experienced by the first-instance judge, for example seeing and hearing the witnesses give their accounts of the events. Rather, our task is to determine whether the UNDT did not apply the correct tests and whether the Dispute Tribunal could reasonably have reached the decisions it did about what happened.[43]

88. The test to be applied by the UNDT in the judicial review of disciplinary cases under Article 2(1)(*b*) of the UNDT Statute is well-established. It requires consideration of the evidence adduced and the procedures utilized during the course of the investigation by the Administration.[44] The four-part test that the Dispute Tribunal must undertake when evaluating the legality of a disciplinary sanction includes: (i) whether the facts on which the sanction is based have been established; (ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules; (iii) whether the sanction is proportionate to the offence, and (iv) whether the staff member's due process rights were respected during the investigation and disciplinary process.[45]

[42] *James v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-680, para. 19; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-294, para. 20; *Khambatta v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-252, para. 15; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23.
[43] *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, paras. 48-49.
[44] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.
[45] *Mihai-Tudor Stefan v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1375, para. 63.

89. Therefore, to determine whether the Dispute Tribunal erred in law, fact or exceeded its jurisdiction when it found that the Administration had not established clear and convincing proof that Ms. Nimusiima committed misconduct, we are bound to explore whether the UNDT adhered to the test for evaluating the legality of disciplinary sanctions as variously confirmed by the Appeals Tribunal in a series of cases.[46] And to this we shall now turn.

Whether the facts on which the sanction is based have been established

90. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.[47]

91. Before we review the evidence, we find it useful to set out the relevant regulatory framework regarding misconduct. Staff Regulation 10.1 provides that "[t]he Secretary-General may impose disciplinary measures on staff members who engage in misconduct".[48] Staff Rule 10.1 further provides that: "[f]ailure by a staff member to comply with his or her obligations under the Charter of the United Nations, Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct".[49]

92. In addition, Staff Regulation 1.2(b) provides that "[s]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status".[50]

93. Specific to the allegations herein, misconduct involving corruption and fraud is defined in the UNHCR Strategic Framework for the Prevention of Fraud and Corruption as:

[46] *Mubashara Iram v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1340, para. 47; *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-532, paras. 17 and 19-21; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 43.
[47] *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 40; *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403, para. 35.
[48] Secretary-General's bulletin ST/SGB/2018/1/Rev.2 (Staff Regulations and Staff Rules of the United Nations).
[49] *Ibid.*
[50] *Ibid.*

> Corruption – The offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party. Corruption may take the form of an undisclosed conflict of interest, unauthorized acceptance of honours, gifts or remuneration, bribery (including kickbacks), illegal gratuities or economic extortion.
>
> Fraud – Any act or omission, including misrepresentation or concealment of a material fact, that knowingly or intentionally misleads, or attempts to mislead, a party to obtain a benefit, whether directly or indirectly, whether for oneself or for a third party. Fraud could involve misappropriation of cash (such as fraudulent claims/disbursements) or other assets (such as fraudulent shipments, falsifying inventory records), or fraudulent statements (purposefully misreporting or omitting information).

94. Based on this regulatory framework the DHR found that Ms. Nimusiima's actions qualified as misconduct and imposed the disciplinary measure of separation from service. We now consider whether there was sufficient evidence to support that determination.

95. The consistent jurisprudence of the Appeals Tribunal has held that "when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable."[51]

96. We recall that in *Negussie*, we held that:[52]

> Clear and convincing evidence of misconduct, including as here, serious misconduct, imports two high evidential standards. The first ("clear") is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard ("convincing") requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events or may be of evidential inferences that can be properly drawn from other direct evidence.

97. The e-mail exchanges between AM and Ms. Nimusiima appear to be the main proof offered to establish Ms. Nimusiima's culpability, as they are the only documentary evidence that link Ms. Nimusiima to the other exchanges between AM and the Complainant about the alleged bribe and the fraudulent resettlement letter. The Secretary-General submits that the UNDT erred in its

[51] *Samuel Bwalya v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1376, para. 59; *Mobanga v. Secretary-General of the United Nations*, 2017-UNAT-741, para. 24; *Abu Ghali v. United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-366, para. 33.
[52] *Negussie* Judgment, *op. cit.*, para. 45.

assessment of the e-mail exchange between AM and Ms. Nimusiima regarding the refugee claim of the Complainant's half-sister.

98. The Secretary-General relies amongst others on the e-mail exchanges between AM and Ms. Nimusiima about the Complainant's half-sister's refugee claim to contend that the Administration had established that it was "highly probable" that Ms. Nimusiima had engaged in corruption by receiving money from the Complainant in exchange for resettlement assistance and engaged in resettlement fraud by fabricating a claim for his family.

99. The UNDT in the impugned Judgment *inter alia* found that the e-mail exchanges of 1 and 8 February 2017 and the documents attached thereto showed that Ms. Nimusiima acted in concert with AM, but concluded that the contents of these documents and exchanges were "equivocal" (unclear/vague), "purely circumstantial"[53] and did not prove with high probability that AM had sent the fraudulent resettlement letter to the Complainant, or that the WhatsApp exchanges between AM and the Complainant about the 5,000 USD payment were genuine.

100. Consequently, two basic questions emerge for our appreciation at this stage, to wit: what degree of reliance can be placed on the 1 and 8 February 2017 e-mail exchanges between Ms. Nimusiima and AM? And do the e-mail exchanges constitute "clear and convincing evidence" of Ms. Nimusiima's misconduct, either for fraud or corruption?

101. The 1 February 2017 e-mail sent by AM to Ms. Nimusiima did not carry any information on the precise action to be taken on the attachment contained in the email. In addition, the corresponding reply by Ms. Nimusiima on 8 February 2017 simply contained an attachment of a PSA form with a message which read: "Please find attached a sample of the screening sheet we use here. Hope it's helpful. Just edit it for your use. Cheers!"[54]

102. The foregoing e-mails and the contents of the documents exchanged between AM and Ms. Nimusiima confirm that they were communicating, but they do not constitute clear and convincing evidence that they were doing so for the purpose alleged by the Secretary-General, or any other improper purpose. The UNDT was correct in stating in its impugned Judgement that the content of the e-mails and the documents were equivocal in the sense that inferences other than of illegal action by Ms. Nimusiima could be drawn from their contents, including the

[53] Impugned Judgment, para. 48.
[54] Trial Bundle, p. 252.

explanations provided by Ms. Nimusiima and AM. This evidence does not amount to clear proof that Ms. Nimusiima acted in concert with AM either to fabricate a resettlement claim or to solicit a bribe from the Complainant.

103. With regard to receipt of a bribe, the Dispute Tribunal observed that the sole evidence to prove that Ms. Nimusiima had received USD 5,000 from the Complainant emanated from the eyewitness testimony of the Complainant himself. However, the learned UNDT Judge, who had the best view of the Complainant's demeanor and the coherence of his story with the surrounding facts, found that the Complainant's testimony was "completely without credibility."[55] We have often stated that the UNDT is in a unique position to make such an assessment and that such findings are due particular deference on appeal.[56] We see no reason to depart from our prior precedent in this case, given the many discrepancies in the Complainant's account, and even the Administration's admission that the Complainant was not truthful about certain aspects of his biography.[57]

104. In evaluating whether this eyewitness testimony and the e-mail exchanges could demonstrate corruption, we remind ourselves again of the high evidential standard that must be met for fraud, given the stakes for the staff member. In *Asghar*, we held that: [58]

> [a] finding of fraud against a staff member of the Organization is a serious matter. Such finding would have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, the UNDT generally should reach a finding of fraud only on the basis of sufficient, cogent, relevant, and admissible evidence permitting appropriate factual inferences and legal conclusions that each element of fraud (the making of a misrepresentation, the intent to deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence. In other words the commission of the fraud must be shown by evidence to have been highly probable.

105. In the matter at hand, the evidence before the UNDT and this Tribunal, which was principally an e-mail exchange and testimony from a Complainant of questionable credibility, was not sufficient, cogent and relevant evidence, so as to prove the elements of fraud (misrepresentation, the intent to deceive or prejudice) as to Ms. Nimusiima.

[55] Impugned Judgment, para. 51.
[56] *AAE v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1332, para. 126.
[57] Secretary-General's appeal brief, para. 30.
[58] *Asghar v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-982, para. 35.

106. Accordingly, we do not find that the facts proffered in support of the charge of corruption have been established with a high degree of probability, and therefore agree with the Dispute Tribunal that the Administration has failed to prove by clear and convincing evidence that Ms. Nimusiima committed the serious misconduct alleged.

107. Having established that the Administration has failed to prove by clear and convincing evidence that Ms. Nimusiima committed misconduct, there is no need for the Appeals Tribunal to consider the remaining factors of the test on whether the disciplinary sanction imposed was fair and reasonable. We conclude that the Dispute Tribunal did not commit an error of law or fact in rescinding the contested decision.

Whether the UNDT exceeded its jurisdiction

108. Pursuant to Article 2(1) of the Appeals Tribunal Statute, the role of the Appeals Tribunal is to determine if the Dispute Tribunal has made errors of fact, law or procedure or exceeded or failed to exercise its jurisdiction or competence.

109. In the instant matter, the Secretary-General submits that the UNDT exceeded its jurisdiction by offering its own explanations for why an identical six-line portion of the Txxx document appeared in the PSA form and the inconsistencies in the refugee story in the PSA form, such as the Complainant's father's death on two different dates.

110. We do not agree that the UNDT is confined to determining "facts" and, by formulating and adopting in its judgment an alternative explanation of a document, it exceeded its statutory jurisdiction. The facts at issue were the contents of e-mails. The Secretary-General's case included inviting UNDT to draw inferences from these e-mails that were probative of the Administration's theory of the case and were inculpatory of Ms. Nimusiima. The fact that it was necessary for the Secretary-General to invite the UNDT to draw inferences from them confirms that the e-mails themselves were equivocal. They may have meant what the Secretary-General argued for, but they might have been interpreted as being neutral or even exculpatory of the staff member. In these circumstances, the UNDT was entitled, indeed probably obliged to, consider carefully whether to draw the inference it was invited to by the Secretary-General or to draw another inference as it did, informed by other relevant evidential considerations. That was not acting in excess of its jurisdiction but rather exercising a normal judicial function.

111. We recognize that the UNDT is best placed to make factual findings and that by our consistent jurisprudence the Dispute Tribunal has a broad discretion in determining the weight to attach to the evidence before it.[59] We held in *Abbassi*[60] and more recently in *Al Othman*, that "in order to overturn a finding by the Dispute Tribunal, the Appeals Tribunal must be satisfied that the finding of fact is not supported by the evidence or that it is unreasonable".[61]

112. By reason of the foregoing, we are satisfied that the Dispute Tribunal's findings of fact were supported by the evidence and were reasonable. Therefore, the decision of the Dispute Tribunal is upheld.

Judgment

113. The Secretary-General's appeal is dismissed and Judgment No. UNDT/2022/127 is affirmed.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2024 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Forbang, Presiding	Judge Colgan	Judge Sandhu

Judgment published and entered into the Register on this 6th day of May 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar

[59] *Kacan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-582, para. 25; *Mahfouz v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-414, para. 15; *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 33.
[60] *Abassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 26.
[61] *Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-972, para. 70.