



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/056

Judgment No.: UNDT/2010/175

Date: 8 October 2010

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BEKELE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Adolph Bishanga OSLA-affiliated volunteer

Counsel for respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Employment History

1. At one stage in his career, the applicant was a police officer in the Ethiopian police force. In the late 1980s, he ran into difficulties following orders he had received to investigate a criminal case. His termination from the police force became the subject of some newspaper articles. During his cross examination by counsel for the respondent, it emerged that those difficulties were mentioned in a Human Rights Report.

2. On 3 December 2001, the applicant joined the United Nations as a Security Officer within the Security and Safety Service (SSS) at the United Nations Economic Commission for Africa (UNECA), Addis Ababa, Ethiopia. The applicant was appointed at the G-2 level on a short-term contract which was renewed several times before it expired on 31 December 2008 when he was separated from service.

Background and Facts

3. On Saturday, 15 April 2006, the applicant was arrested by Ethiopian Police. He was released on bail following a court order on Monday, 17 April 2006. On 25 May 2006, the charges against him were dropped after the Prosecutor determined that there was insufficient evidence for the case to proceed.

4. After his return to duty following his arrest, the applicant was reassigned to several squads in the SSS as follows: 1 January to 31 May 2006, to the Conference/CCTV; 1 June to 30 November 2006 to the “C squad”; and 1 December 2006 to 27 August 2007 to the “D squad”.

5. On 15 August 2007, the applicant addressed an email to the Secretary-General asking him to consider his security problem and to provide him employment protection. In his email, the applicant stated that he had been arbitrarily arrested and detained at a police station in April 2006, dehumanized and suffered physical, emotional and psychological punishment. He stated that he had well-founded fears that he would continue to be persecuted by the local authorities and that he believed that UNECA was

not in a position to protect him. Given his security concerns, he requested to be relocated to a duty station outside Ethiopia.

6. The Administration replied to the applicant's email on 28 September 2007 stating that UNECA had taken the necessary measures to assist him following his arrest and had acted according to the Staff Regulations and Staff Rules. Consequently, his request for relocation to another duty station was denied.

7. By a letter dated 8 October 2007, the applicant informed the Administration as follows:

“...given the gross human right[s] violation[s] in Ethiopia and the experience I have gone through, I am compelled to abandon my whole family and fle[e] to a land I have never been, struggling for survival.”

8. By email dated 1 November 2007, the Administration informed the applicant that his rights as a staff member had not been infringed by UNECA and that “the propriety of [his] arrest and [his] treatment by local authorities” were matters “beyond the purview of the Organization’s internal justice system.”

Administrative Decision and JAB Review

9. On 14 November 2007, the Chief, Human Resources Services, UNECA (“Chief/HRS”), wrote to the applicant querying his unauthorized absence as of 27 August 2007 and directed him to explain his continued absence from work in writing by 30 November 2007. The applicant was also informed that such an absence could otherwise be considered as abandonment of post under ST/AI/400 – *Abandonment of Post* (as amended by ST/AI/2005/5). On the same date, the Chief/HRS informed the Chief of the UNECA Finance Section to withhold the applicant’s salaries and allowances until further notice.

10. The applicant responded by email on 28 November 2007 stating that he had fled the country due to a “well founded fear of security”. On 18 December 2007, the applicant submitted a Statement of Appeal to the Joint Appeals Board (JAB) challenging the

Administration's refusal to relocate him to another duty station. The respondent filed a Reply on 14 February 2008. On 17 March 2008, the applicant submitted Observations on the respondent's Reply. On 30 April 2008, the respondent submitted Comments on the applicant's Observations.

11. A JAB Panel convened on 21 January 2009 to consider the appeal. The Panel completed its deliberations and adopted its report at that meeting. The Panel unanimously found that the respondent violated the terms of the applicant's appointment "by failing to inquire into the matter to see whether reassignment was at all necessary," recommended that such an inquiry be undertaken and that the respondent make a "good faith attempt to reassign" the applicant if his fears were found to be substantiated.

12. On 26 March 2009, the applicant was informed of the Secretary-General's decision to take no further action in respect of his complaint. The Secretary-General disagreed with the findings and recommendation of the JAB. The applicant was also informed that in accordance with staff rule 111.2(p), he could appeal the decision to the now defunct United Nations Administrative Tribunal.

13. On 9 October 2009, the applicant filed an Application for extension of time to file his Application which was granted by the Tribunal. The applicant filed the present Application on 12 October 2009. The respondent's Reply was filed on 25 November 2009. The Tribunal heard the matter on 19 and 24 May 2010, following which the Parties filed their closing submissions on 25 May 2010.

14. At the hearing, the Tribunal heard the testimonies of a total of six witnesses. The applicant and three others testified orally in support of his case. The three witnesses for the applicant were Mr. Getachew Abebe, Mr. Tesfaye Teka and Mr. Tadele Demissie. One Ms. Tegist Sebsebe the wife of the applicant had language difficulties and could not give oral testimony but tendered a witness statement which was admitted in evidence with the consent of the respondent's counsel. She was not cross-examined. Two witnesses testified for the respondent namely, Mr.

Robert Fairall who was the Officer-In-Charge (OIC) of UNECA Security department at the period material to this case and Mr. Zeleke Ourgie who was head of the UNECA Security investigation team.

Applicant's Case

15. The applicant frames his case as follows:

a. On 15 April 2006, he was arrested, detained and severely beaten by the Ethiopian People's Revolutionary Democratic Front (EPRDF) police on false charges of sexual assault, which charges were later dropped for want of evidence. In the police detention cells, his interrogators repeatedly mentioned that they knew he was a UN Security Officer when beating him.

b. UNECA did not respond to a call for assistance by the applicant's wife on the night of his arrest. It did not respond either to a similar call made by Mr. Abebe on 16 April 2006 the day after the arrest. The applicant was only visited by a UNECA official on Monday, 17 April 2006.

c. A report of his arrest and physical abuse was sent to UNDSS one year after the incident although it was the duty of UNECA to inquire into the merits of the allegations made against the applicant and to advise whether he should be afforded legal representation.

d. His duties as a UNECA Security Officer made him a target of EPRDF Security Agents' harassment as he enforced arms rules by restricting the admission of armed EPRDF officials into the UNECA compound which angered them. The applicant submits that his request for a clear, written order on the subject from his superiors went unheeded.

e. The way he was treated by the EPRDF police who fabricated charges of sexual assault against him, his detention and physical abuse he suffered, the neglect

of his plight by UNECA and their treatment of him upon his release, founded a fear of persecution and insecurity which ultimately caused him to flee Ethiopia.

f. UNECA initiated abandonment of post procedures without investigating his reasons for fleeing his home country contrary to staff regulation 8.1 (a).

g. The procedures applicable for assistance of staff members who have been arrested or detained were not complied with in his case and he therefore did not receive the assistance from the Organization to which he was entitled.

h. Some UNECA Security Officers, upon his release from police detention, misused their power by subjecting him to psychological abuse through demotion and assigning him to different duties contrary to staff regulation 1.2.

i. It would have been reasonable for the respondent to relocate him given his fear and given that these fears were linked to his performance of official functions in UNECA.

16. The applicant requests the Tribunal to order:

a. The retroactive payment of his salary;

b. Compensation for injuries suffered during the course of his service to UNECA; and

c. An inquiry to be conducted to determine: if reasons exist for him to fear for his safety in performing his functions in Addis Ababa; the circumstances surrounding his arrest and his subsequent demotion; that he be informed of the outcome of the inquiry; and that the respondent make a good faith effort to relocate the applicant if the applicant's fears are found to be substantiated; and

d. Failing such an investigation, the applicant should be awarded two years' salary as compensation.

Respondent's Case

17. The applicant was arrested following allegations of rape by his house maid.

18. The respondent claims that the safety and security control room logbook shows that UNECA first became aware of the applicant's detention at 5.00 p.m. on 16 April 2006 and that an Officer was dispatched to the police station that evening but was denied access to the applicant and told to return the next day. A UNECA Security Officer attended the police station the next day. The Officer met with the applicant, who told him that the reason for his detention was that "he had quarreled with his house maid". Upon returning from the police station, the Officer sent an email to the Officer-in-Charge of UNECA SSS citing the applicant's explanation for his detention. It is the respondent's case that this contemporaneous record is consistent with the Officer's testimony to the Tribunal.

19. The applicant was only detained once, on which occasion the Administration gained access to the applicant and monitored the situation as it was obliged to.

20. When the Ethiopian Prosecutor looked into the allegations and found that they were not substantiated, the applicant was cleared of all charges. The respondent claims that the relevant issue is why the applicant was detained and not whether or not he was subsequently convicted of any crime under Ethiopian law.

21. Another aspect of the applicant's case is the matter of his detention and physical abuse. The applicant brought this to the attention of the Captain of the Police Station, in the presence of the Security Officer, and to the attention of the Court when he appeared before it. Whether and how the issues pertaining to his detention and his treatment in custody are raised with the authorities is a matter for the applicant alone. At no time did the applicant ask UNECA to assist him in this regard, nor was there anything the former could properly have done under the circumstances.

22. The Officer dispatched to visit and assist the applicant while he was in custody was the former Head of Crime Investigation in the Addis Ababa police department and

he counseled the applicant as to the appropriate course of action and told the applicant that he should take up any issues he had with the Ethiopian authorities.

23. All staff members must observe and respect the national laws of the country they are in and submit to its legal process. There is no special status conferred on staff members in the conduct of their private affairs. Privileges and immunities are conferred to staff members in the interests of the Organization and only attach to United Nations personnel when they are performing official functions in accordance with former staff regulation 1.1(f).

24. A staff member's immunity from legal process is strictly functional. It is linked to their status and functions as officials of the Organization. Under the Convention on the Privileges and Immunities of the United Nations, it is for the Secretary-General, not the staff member concerned, to determine whether words or acts were spoken, written or performed in an official capacity and whether they fall within the scope of the staff member's immunity. Notwithstanding their immunity, United Nations staff members have an obligation to cooperate with the competent national authorities and to respect city, state and federal laws and regulations.

25. The applicant was alleged to have committed a serious criminal offence under Ethiopian criminal law. These allegations had nothing whatsoever to do with the Organization so there was nothing that the Organization should have done other than respond promptly and monitor the situation.

26. The respondent was informed of the applicant's detention on 17 April 2006, contrary to the applicant's claim. There is no evidence to support the applicant's submission that the incident was only reported to UNDSS one year later.

27. The respondent notes that there is a typographical error in paragraph 3 (b) of the administrative review letter sent to the applicant on 28 September 2007, referring to the applicant's detention in April "2007" instead of the correct date of "2006".

28. The applicant has not produced sufficient evidence to support the allegation that his assignment to various duties constituted harassment and that he was placed in danger as a result of applying the policy of disarmament to Ethiopian authorities.

29. The Administration's actions following the applicant's arrest in April 2006 by local authorities were appropriate. The applicant has failed to set out any basis in his Application for the allegation that his security was jeopardised or that he had a right to be relocated from one duty station to another. If the applicant wished to obtain a position with the Organization at a different duty station, he was not precluded from applying for the same.

30. For these reasons, the respondent requests that the application be dismissed.

Considerations

Did UNECA adequately assist the applicant and fulfill its obligation to report the incident to the UN Headquarters?

31. In 1982, the Secretary-General issued ST/SGB/198 - *Security, Safety and Independence of the International Civil Service*. The purpose of the Bulletin was to outline measures in relation to the protection of the safety, security and independence of staff as members of the international civil service and to reaffirm his commitment on the same. The immediate reporting of incidents such as that in the present case was among the measures approved by the Secretary-General. ST/SGB/198 was therefore issued with an Administrative Instruction setting out the relevant reporting procedures.¹ The Administrative Instruction was promulgated with the three annexes setting out the rights of the Organization where a staff member is arrested or detained, the applicable legal principles and listing the designated officials in charge of security matters for the various duty stations.

¹ ST/AI/299 - *Reporting of Arrest or Detention of Staff Members, other Agents of the United Nations and Members of their Families*.

32. Section 3 of ST/AI/299 obliges the designated official for security matters to immediately report the arrest or detention of any United Nations staff member - whether internationally recruited or locally recruited – to the Assistant Secretary-General for General Services in New York by the fastest possible means of communication available. The Executive Secretary of UNECA is the designated official for Ethiopia.

33. Sections 4 and 5 apprise the designated official of his functions in respect of the Ministry of Foreign Affairs in the host country and Headquarters respectively. In respect of the latter, the designated official is provided with a non-exhaustive list of particulars which the Report must include. It is pertinent that both sections are mandatorily required of the designated official.

34. Section 2 of Annex 1 to ST/AI/299 affords the Organization the right to visit, converse with, obtain information, arrange legal counsel for its staff and appear in legal proceedings to defend the interests of the United Nations. I am of the firm view that the word “right” as it is used in the said provision actually goes beyond a right, which may or may not be exercised and in fact imports an obligation.

35. It is important to note that the list in Section 2 of the Annex is of the *minimum initial steps required* of the Organization to safeguard its interests and that of its staff. While the question of access to its staff members is a right of the Organization vis-à-vis the host country, it is equally a responsibility of the Organization vis-à-vis the staff member. In other words, the Organization has an obligation to the said staff or agent and itself, to inquire as to the reasons for the detention and the charge, assist with legal representation and appear in legal proceedings to defend any of its interests affected by the arrest or detention.

36. The annexes must of course be read together with the Administrative Instruction that it is attached to, in that they contain provisions with the dual-purpose of safeguarding the interests of the United Nations and discharging the Organization’s obligations to staff.

37. Whether the Organization, represented in this instance by the security authorities of UNECA, fulfilled its obligations to the applicant and to itself as provided for in its

regulations and rules is among the issues fundamental to this Application. It would appear that these obligations were not fulfilled.

The Evidence

38. The applicant described the manner in which he was arrested when he testified to the Tribunal. He told the Tribunal that at about 2.00 p.m. on Saturday, 15 April 2006, he was with his family at home when a group of armed policemen arrived at his residence. They beat him, forced him into their car and took him to the Police Station. There, they handcuffed him to a bench and the beating continued amidst taunts such as “we know who you are, you are a UN security officer, and we will show you.”

39. It is the evidence of the applicant’s first witness, Mr. Abebe, that he was informed of the applicant’s arrest and detention by the applicant’s wife at about midnight on the day of his arrest. The next morning, together with the wife of the applicant, he visited the applicant in custody. He got the telephone number for UNECA security from the applicant and, with the applicant’s wife, called UNECA to report the applicant’s arrest that very morning.

40. In her witness statement, the applicant’s wife stated that she first reported the incident to UNECA Security on the day of the arrest. It is also on record that both she and Mr. Abebe were told after each report to UNECA Security that the report was being considered. The applicant maintains that in fact UNECA did nothing until 17 April 2006, and that even after his release nothing was done by the Organization to assist him.

41. Two witnesses testified for the respondent. The OIC of UNECA SSS at the time, Mr. Robert Fairall, testified first and was unequivocal throughout his testimony both on what he considered to be the appropriate practice under such circumstances and on the way in which the arrest of the instant applicant was dealt with. According to the witness: the UN is under no obligation to provide investigative or legal assistance to a local staff member; the Organization played no role whatsoever in having the applicant released from custody; and he did not know if anyone on his staff had access to or had spoken with the applicant while he was in custody.

42. The respondent's second witness was Mr. Ourgie, the Security Officer and Head of the UNECA SSS investigation team who visited the applicant on behalf of UNECA while he was in Police custody. The Officer testified that he went to the Police Station to see and assist the applicant, as is usually done for any staff member. The witness told the Tribunal that when he went to the police station to see the applicant, he waited in the office of the Chief Inspector. The applicant was brought in and complained that he was beaten. He then took off his clothes to reveal the injuries and bruises he had sustained. The witness said that both he and the Chief Inspector were shocked at what they saw and advised the applicant to show his injured body to the Court when making his bail application.

43. It is on record that the witness sent the OIC two emails on 17 April 2006. The first contained a brief report of the arrest and detention of the applicant and of his visit to the police station. The email made no mention of the applicant's complaints, the bruises shown to the witness nor of the advice he claims to have given the applicant. The second email reported the applicant's release.

Findings

Assistance to the Applicant

44. What is clear from the testimony of three witnesses and the applicant, is that the first visit by a UNECA official was on 17 April 2006, which was also the day the applicant was released on bail. I am not surprised by this. The OIC's testimony on the role of the UN vis-à-vis a locally recruited staff member in such matters, read together with the testimony of the applicant's witnesses on the reception of their reports to UNECA Security, paint a vivid picture of both disinterest and neglect on the part of UNECA.

45. The Security Officer's claim that his response to the report of the applicant's arrest was immediate is simply not borne out by the facts. The Officer's email to the OIC, coupled with the latter's candid testimony that his office was only required to monitor the situation (which his Officer did and reported back on), do not indicate anything that can

be described as support or assistance of a staff member as envisaged by sections 2 and 3 of ST/AI/299.

46. The provisions of section 2 (a)-(e) must not be read disjunctively. The Organization cannot be expected to provide any assistance or appear in proceedings, without first having visited the concerned staff member and being apprised of the facts of the situation.

47. It must be noted that the said applicable procedures are not in place merely to protect staff members and agents of the Organization who are arrested and detained by local authorities, but also to protect the Organization's interests which include its integrity, values and standards.

48. It is not in the Organization's interests that its standards are compromised in any way and for its staff or agents, to be treated below such standards by the authorities of a host country which clearly subscribes to and is bound by United Nations standards. For a host country to blatantly disregard its obligations by submitting UN staff, be they national or international, to degrading treatment, is a situation that this Organization must not be confronted with.

49. Staff Regulation 1.2(c) provides, inter alia, that the Secretary-General should ensure, "having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them." In *Mwangi*², the former UN Administrative Tribunal emphasized the importance it attached to the Organization's obligations under staff regulation 1.2(c) as follows:

"Furthermore, even were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being."

The Tribunal reiterates this importance in the present case.

² UN Administrative Tribunal Judgment No. 1125, (2003).

Reporting to UN Headquarters

50. The respondent maintains that the incident of the applicant's arrest was reported to the appropriate authorities in New York at the time. The OIC of UNECA Security told the Tribunal that he could not recall the form in which the report was made and that it could have been made either by email or by phone.

51. The respondent tendered the Security Officer's email of 17 April 2006 to the OIC, as evidence of compliance with the reporting requirement. It is not evidence of compliance with Section 5 of ST/AI/299. The respondent's submission on the sufficiency of the email as evidence is both surprising and specious.³ The email shows only that the Security Officer reported the arrest to the OIC after his visit to the police station. The email from the Security Officer is perhaps more remarkable for what it omitted to say than what it did say.

52. Given the seriousness of the issue, I find it inconceivable that a report might have been made, even by telephone, for which no record was kept or found. As demonstrated by the testimony of the respondent's witnesses, even a phone call reporting the applicant's arrest and detention to UNECA Security was entered in an official log book which was tendered before this Tribunal.

Reporting to the relevant Ethiopian Authorities

53. Despite the abusive treatment occasioned to the applicant, the Secretary-General made no representations to the Ethiopian Government through the appropriate channels. In actual fact, to illustrate the disregard of the applicable Staff Regulations and Staff Rules, the respondent presented oral evidence that the applicant was advised by the UNECA Security Officer to file his complaints with the Addis Ababa Police Commission.

³ The respondent argued that "the applicant did not raise any issue in relation to *adequacy* of the information conveyed to headquarters and whether or not it complied with this paragraph of the Administrative Instruction" (emphasis added).

54. The Tribunal is appalled by the contempt and disregard shown by UNECA towards the applicant. How did the respondent expect the applicant to file a complaint to the very police force that he was accusing of cruelty and inhuman treatment, treatment that the respondent in the person of the same Security Officer, had seen evidence of and expressed shock at?

55. No doubt, it cannot be easy or straightforward to determine that a staff member or an agent of the Organization has been arrested by the authorities of a host country for acts within the scope of their employment. While the Secretary-General has the power to waive the immunity of a staff member or agent to arrest and prosecution where he determines that these do not arise from official engagement, it is exclusively within his province to determine whether an act was official or indeed whether the arrest was actually based on an official act. The Secretary-General is required to make an assessment about the particular case in order to arrive at such a determination as provided in section 3 of annex 1 to ST/AI/299 referred to above. No such assessment was made in this case.

56. The respondent in his submissions states that the allegations against the applicant “had nothing whatsoever to do with the Organization” but does not provide any evidence to show how such a determination was made or, to express it differently, how the applicant’s immunity was waived. The Tribunal would have expected to see correspondence exchanges with the United Nations’ Legal Counsel to evidence how such a crucial matter as the immunity of the applicant was considered by the respondent⁴. The Tribunal therefore finds that in the present case, the respondent failed to comply with the required procedures under ST/AI/299.

57. In its Advisory Opinion of 29 April 1999, the International Court of Justice, in reference to the United Nations Organization, lent its counsel on the matter of staff immunity and reminded the Secretary-General that he bears primary responsibility for safeguarding the interests of the Organization, so that:

⁴ See for example in former United Nations Administrative Tribunal Judgment No. 579, *Tarjourman* (1992).

“[...] it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings. That finding, and its documentary expression, creates a presumption of immunity which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.”

58. It is the applicant’s case that the police authorities in Ethiopia arrested and brutalized him on a trumped-up charge of rape of his house maid. His claim is that his arrest and the inhuman treatment which followed it when he was in custody for three days, were as a result of his insistence that senior Ethiopian military officials abide by the UN armament regulations while visiting the UNECA premises.

59. The stance taken by UNECA Security in respect of the applicant’s arrest and continued detention naturally resulted in the Organization not acting to determine whether the applicant’s arrest truly resulted from an official act and whether the exercise of his immunity and privileges were called for.⁵

60. Clearly, the Head of department was absolutely wrong in his understanding of the role of the Organization. His ignorance of the applicable rules led him to the unfounded decision that the applicant had no immunities or privileges.

Conclusions

61. I find that UNECA failed to comply with the requirements of ST/AI/299. The UNECA administration clearly did not react to the report of the applicant’s arrest with any sense of urgency. UNECA’s response to the applicant’s plight was dilatory at best. Contrary to the requirements of sections 2-3 of Annex 1 to ST/AI/299, the UNECA administration failed to assist the applicant in arranging legal counsel for his bail

⁵ Mr. Fairall told the Tribunal: “quite frankly, in the case of Mr. Bekele he is an Ethiopian citizen, he is subject to Ethiopian law. He doesn’t have protection from local law, and in this case there was an allegation made by another Ethiopian national citizen, a female, against him. As far as the UN is concerned, it has no right to become involved in the investigation. All we can do is stay in contact with the local Police.”

application and possible defence and failed to appear in the legal proceedings for the applicant's bail to defend any United Nations' interest that may have been affected by the applicant's arrest and detention. The testimony of the OIC on the role of the UN in respect of "local staff" in such situations, and his candor in saying as much, is unfortunate for the staggering lack of care that it showed.

The inadequacy of the response to the applicant's plight by his head of department in the light of the United Nations core values and competencies.

62. The United Nations Organization is one like no other. It is the foremost international Organization commanding the membership of one hundred and ninety-two countries out of a total of one hundred and ninety-four in the world. It is an Organization that sets standards for member countries and regional and sub-regional bodies. The Organization's Secretariat also sets standards for itself involving high performance of its staff and managerial excellence.

63. In *ST/SGB/1999/15-Organizational Competencies for the Future*, the Organization's core values and competencies are listed. Section 6.2(b) of *ST/AI/2002/3-Staff Selection System* (superseded by *ST/AI/2010/3*) on staff selection referred to the said competencies which are further explained in the handbook titled "*United Nations Competencies for the Future*".

64. There is evidence on both sides that the applicant's arrest and detention was reported to UNECA Security. There is also evidence that an Officer, who was also the head of the investigation team in the security department in UNECA, attended the Police Station and visited the applicant. Mr. Ourgie, on the same day, sent a report of the matter to the OIC by email. Apart from a vague claim by the said OIC that he must have reported the matter to New York and that he did not recall the form his report took, nothing more was done on the part of the OIC.

65. It is not in dispute that the OIC did not so much as invite or personally interview the applicant, who at all times material to this application worked under him in the security department, with a view to having first hand information of what had happened.

This attitude of receiving a report about a staff member's ordeal and ignoring both the report and the staff member who is available for the asking is totally unprofessional and does not show mastery of the subject-matter. In other words, it strikes at the Organization's core value of Professionalism.

66. As a staff member of the UN, the core competency of communication is sadly not reflected in the OIC's lack of interest. Managers in the Organization are also expected to exhibit leadership, build trust and exercise good judgment. None of these competencies can be gleaned from the response of this head of department who told the Tribunal that, "I would have no idea why I would have to contact the foreign ministry when there was no foreign national involved in the incident." It is unfortunate that while Mr. Fairall sat on a pedestal, unable to communicate within his own department, neither the interests of the applicant nor those of the Organization were protected on this occasion as envisaged by the UN Charter, ST/AI/299 or ST/SGB/198.

67. I find that the response of the OIC, UNECA Security was utterly inadequate in the circumstances.

68. The weight of the evidence before me, and the candid testimony of the Officer-in-Charge of the Security Services Section of UNECA, obliges me to make the following comment. The OIC very clearly saw a distinction between what was required of the Organization in respect of its national and internationally recruited staff. There is little doubt in my mind that the OIC saw the latter as a class above, and distinct, from the former. It is both unacceptable and appalling that a Senior Official such as the OIC of UNECA Security could be completely ignorant of the applicable procedures in a matter as serious as the security and safety of staff members of the United Nations.

69. I note with grave concern that even in the face of one of his staff being arrested, no effort appears to have been made to educate himself as to the relevant rules and procedures in place for precisely these situations. Obscure situations sometimes arise and present managers and supervisors with challenges not previously countenanced and for which there is neither guidance nor legislation. This was not one of those situations. The

dereliction of duty in the circumstances of the present case is, in my judgment, a consequence of managerial incompetence and sheer prejudice.

Did the administration act in a manner consistent with its international declarations, covenants and conventions on the protection of human rights?

70. The prohibition against cruel, inhuman and degrading treatment is found in most national constitutions. All national and international instruments that prohibit inhuman treatment recognize its absolute, non-derogable character. This non-derogability has also consistently been reiterated by various national and international Courts and Tribunals.

71. Under Article 11 of the Universal Declaration of Human Rights (UDHR), everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which they have had all the guarantees necessary for their defence. The right to be presumed innocent is an inalienable human right enshrined in Ethiopia's Constitution. Ethiopia is bound by its own constitution and by the African Charter of Human and Peoples' Rights, which it ratified in 1998. Article 19 (Rights of Persons Under Arrest) and Article 20 (Rights of the Accused) of the Ethiopian Constitution prohibit forced confessions and require presumption of innocence until proven guilty.

72. Considering that the United Nations is the leading light and promulgator of international conventions and covenants on human rights abuses including all forms of cruel and inhuman treatment, the respondent fell dismally short of his own standards. Mr. Ourgie testified that he was shocked when he saw the injuries inflicted on the applicant during his arrest and detention. Strangely, he did not consider the applicant's mistreatment to be important enough to be included in his email to the Officer-in-Charge. In addition, it was evident from answers elicited in the applicant's cross-examination that the respondent was aware that the applicant's exit from the Ethiopian Police force in the 1980s had been the subject of a Human Rights Report. In any event, effective communication on the part of the OIC of UNECA Security at the time would have put things in perspective.

73. As stated already in this judgment, despite the inhuman and degrading treatment meted out to the applicant and the Ethiopian Authorities' total disregard for whether or not the applicant enjoyed privileges and immunities as a United Nations staff member, the Secretary-General did not make any representations to the Ethiopian Government through the appropriate channels. The Tribunal finds that the respondent failed to act in a manner consistent with its international declarations, conventions and covenants and with other relevant international legal instruments on the protection of human rights.

Did the applicant abandon his post in UNECA? Was his request for relocation to another post outside Ethiopia a reasonable one? Was the Organization obliged to relocate him?

74. It is part of the applicant's case that as a result of human rights violations and the experience he had gone through, he was compelled to abandon his family and flee from Ethiopia due to a "well founded fear of security". In his communications to the Administration on 15 August 2007, 8 October 2007 and 28 November 2007, he spoke of his security problems and fears for his security but provided scant details and only referred back to his arrest, detention and inhuman treatment. In its report, the JAB found,

"the fact that [the applicant] had risked his livelihood to move away to a place without salary or benefits was an obvious sign that at the very least [he] believes in good faith that there was indeed something to flee from."

I am inclined to agree with the JAB and I find that the applicant had a genuine belief that he was not safe in Ethiopia.

75. Section 4 of ST/AI/400 defines abandonment of post as:

“[...] a separation initiated by the staff member other than by way of resignation. It is considered a unilateral repudiation of the contract of employment and not a termination initiated by the Secretary-General as defined in article IX of the Staff Regulations and in staff rule 109.1(b) [currently staff regulation 9.3]. The intent to separate may be presumed from the circumstances, in particular from the failure of the staff member to report for duty.”

76. Sections 9 to 12 of ST/AI/400 describe the procedure that must be complied with before a staff member is separated from the Organization on the ground of abandonment of post. Contrary to the requirements of these sections:

- a. The UNECA Administration withheld the applicant’s salary and allowances even before receiving the applicant’s explanation for his absence (see paragraph 9 above);
- b. The UNECA administration did not submit a presentation to the Assistant Secretary-General for Human Resources Management recommending separation for abandonment of post; and
- c. In what amounts to a constructive separation on the grounds of abandonment of post, the applicant was separated from service at the expiry of his fixed-term appointment on 31 December 2008 while waiting for the JAB to deliberate on his appeal which he had filed on 18 December 2007.

77. ST/AI/400 must be read in a manner consonant with the principles in the Staff Regulations, particularly Staff Regulation 1.2(c), which requires the Secretary-General to ensure that “all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.”

78. Notwithstanding the scant details provided in the applicant’s explanations of his unauthorized absence, the evidence before the Tribunal shows that the applicant was separated without adherence to the stipulated procedure against the background of his previous plea for assistance from the Organization and his subsequent explanation for his absence. For his part, and in my judgment, the applicant acted in accordance with section 11 of ST/AI/400 which required him to inform his supervisors of his absence and its

cause. The Tribunal considers that the applicant's separation from the employment of the Organization constructively amounted to a separation on the grounds of abandonment of post and that this was unlawful.

79. The Tribunal finds that the Organization did not fulfill its obligations under staff regulation 1.2(c) in that it failed to investigate the applicant's concerns about his safety when he requested to be relocated to another duty station. Had the respondent taken the applicant's complaint seriously and enquired into the veracity of his claims, he would have at least become aware of the harassment and humiliation that the applicant and his family were being subjected to consonant with the testimony of the applicant's wife. Unfortunately, the Administration was only to become aware of the latter information during the hearing because the applicant was not detailed in his communications to the Administration.

80. The applicant's testimony is lent credence by that of his wife who described the anxieties and insecurities that led her husband to flee the country. In her witness statement, the Tribunal admitted and is dated 27 April 2010, the applicant's wife stated that one year after her husband's arrest and detention, on 20 April 2007, three armed EPRDF agents came and searched the family residence without a court warrant. The applicant was not at home at the time. She stated that she and her children were terrorized and their household goods thrown about. She stated that even after the applicant fled the country, the EPRDF agents continued to visit their residence and continued to follow her. For these reasons, she decided to move to another rental house in a different location.

81. Much as it would be humanitarian to do so, there are no Staff Regulations or Staff Rules that place an obligation on the Organization to find another posting for the applicant outside Ethiopia due to the human rights abuses he appeared to be subjected to in the country. It is understandable that relocation outside Ethiopia would be attended by cost implications for the Organization.

Did the applicant suffer a “demotion” in any way?

82. The applicant, although he submitted that he was demoted by UNECA SSS after his ordeal with the Ethiopian Police, did not lead evidence to substantiate his claim. While I might infer that he may have been referring to the new duties he was assigned to following his release from custody, that inference alone is insufficient. I therefore find this claim to be without merit.

Conclusions

83. The Tribunal has tried to outline the applicable procedures in cases such as this and urges the Administration to ensure that its managers and responsible officials are well trained on how to handle similar cases because the safety and security of the United Nations and its officials are of paramount importance. The Tribunal condemns the nonchalance displayed by the respondent’s representatives in respect to the applicant’s mistreatment both in not assisting him as required and in not making an official report to the headquarters in New York. In this respect the Tribunal recalls *Tarjourman*⁶ where it was held:

“It is difficult to visualize matters of greater importance and concern to staff members, and to the Organization which depends upon them for faithful and efficient performance of their duties, than the expectation by the staff that the Organization will insist on respect for the staff’s functional immunity under the 1946 Convention on the Privileges and Immunities of the United Nations. Staff must be able to rely on efforts by the Organization to assure their protection against arbitrary arrest and detention and on assistance to staff members subjected to it. The Tribunal recognizes that, at least since 1987, the Administration appears to have taken appropriate measures in these regards. The Tribunal wishes to emphasize the ongoing need for vigilance and aggressive action to protect and defend staff rights in this area.”

84. In *James*,⁷ the Appeals Tribunal set aside the Dispute Tribunal’s order for compensation on the ground that inter alia, no compensation had been requested. The Tribunal acknowledges that judgment and respectfully takes the view that in the instant case, the applicant’s rights to due process have been breached. General Assembly

⁶ Former United Nations Administrative Tribunal Judgment No. 579, (1992) at paragraph X.

⁷ 2010-UNAT-009.

resolution 63/253 that established the reformed system of administration of justice emphasized that it would be,

“consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.”

Notwithstanding that the applicant did not canvass the issue of compensation for the breach of his right to assistance before it, the Tribunal considers it necessary to award the amount of 6 months’ net base salary as compensation for the breach of this right in order to do justice as between the parties.

Findings

85. In light of its considerations above, the Tribunal finds as follows:

- a. The UNECA Administration did not comply with the procedures which prescribe how to handle issues related to the arrest and detention of staff members.
- b. The UNECA Administration did not act to protect the applicant in a manner consistent with UN international legal instruments on human rights.
- c. The UNECA Administration failed to safeguard the applicant’s privileges and immunities as a staff member of the United Nations and to protect the interests, standards and values of the Organization.
- d. The OIC of the UNECA SSS at the time, in his actions and inactions, fell far short of many of the core values and competencies required of a United Nations Staff member and Manager with regard to how he dealt with the applicant’s arrest and detention.
- e. The said OIC did not report the matter of the applicant’s arrest and detention to UN authorities in New York as he was required to do.

f. The UNECA Administration constructively treated the applicant as having abandoned his post even though they did not initiate procedures for doing so in accordance with ST/AI/400.

86. In light of its findings above, the Tribunal **ORDERS**:

a. the respondent to pay the applicant's salary from 14 November 2007, the date it was withheld, to 26 March 2009, the date when the applicant was informed of the Secretary-General's decision to take no further action in respect of his complaint, with interest at 8% per month for the said period;

b. the applicant shall be paid six months' net base salary for the respondent's various due process failures; and

c. rejects all other pleas.

(Signed)

Judge Nkemdilim Izuako

Dated this 8th day of October 2010

Entered in the Register on this 8th day of October 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi