Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2010/027 (UNAT 1624)
Judgment No.:	UNDT/2011/006
Date:	10 January 2011
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

KUNANAYAKAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Edward P. Flaherty

Counsel for Respondent:
Serguei Raskalei, UNOG

Introduction

1. In June 2008, the Applicant filed an application with the former UN Administrative Tribunal contesting the decision of the Office of Internal Oversight Services ("OIOS") not to carry out an investigation into the disappearance of documents and personal effects she had placed in her office.

2. She requests the Tribunal:

a. To order her case to be treated as a category I matter under the classification system adopted by OIOS for the purpose of identifying complex and serious cases, and order that Office to carry out an investigation;

b. To award her the sum of USD25,000 as compensation for the loss of and/or damage to her personal effects and take into consideration, in determining the amount of compensation, the time spent by the Applicant to recover those personal effects and reconstitute her files;

c. To award her the sum of USD500,000 for the moral and material damage caused to her;

d. To order the Respondent to issue a report formally recording the facts as laid out by the Applicant;

e. To hold an oral hearing and order the Respondent to produce a number of documents.

Facts

3. The Applicant entered the service of the United Nations Office of the High Commissioner for Human Rights ("OHCHR") in 1994 on a short-term appointment, which was converted into a fixed-term appointment the following year and subsequently extended several times. In 1998, she was appointed to the post of Secretary of the Commission on Human Rights Working Group on Enforced or Involuntary Disappearances, at level P-4.

4. Starting in January 2004, the Applicant was placed on medical leave. Her appointment was terminated and she was granted a disability benefit with effect from June 2005.

5. On 6 December 2005, the Applicant sent an email to the Officer-in-Charge of the Safety and Security Section, OHCHR in which she explained that, on 16 November 2005, she had visited the OHCHR premises to collect her belongings, where she found that certain confidential documents and personal effects were missing from the office she had previously occupied.

6. On 16 December 2005, the Officer-in-Charge of the Safety and Security Section, OHCHR informed the Applicant that he had forwarded her request to the Head of the Safety and Security Section of the United Nations Office at Geneva ("UNOG").

7. In December 2005 and February 2006, the Applicant made inquiries of the Officer-in-Charge of the Safety and Security Section, OHCHR and then the Head of the Section at UNOG about progress on her request. The Head of the Safety and Security Section replied to her on 27 February 2006 that her request had been transmitted to the staff member in that Section responsible for the UNOG annexes.

8. By email of 16 March 2006 to the Under-Secretary-General for Internal Oversight Services, the Applicant asked OIOS to investigate the disappearance of her personal belongings and confidential documents, stating that UNOG had no intention of pursuing her request. The Under-Secretary-General replied, on the same day, that the request had been forwarded to the Investigations Division, OIOS.

9. In a confidential information note dated 23 March 2006 that was not sent to the Applicant, the UNOG Safety and Security Section stated that the Applicant's allegations had been examined and a number of witnesses questioned. The note also stated that a succession of staff members had occupied the Applicant's office after she had left OHCHR, and that repeated attempts had been made to reach her, without success, so that she could collect her personal

belongings, which had, therefore, remained in the corridor outside her former office.

10. On 7 April 2006, the Applicant sent a second email to the Under-Secretary-General for Internal Oversight Services asking what steps had been taken on her request. The Applicant was informed, in a telephone conversation with a staff member of the Investigations Division on 12 April, that OIOS had decided to take no action on her request but to refer the matter to the UNOG Safety and Security Section. During that conversation, she was asked if she consented to her identity being disclosed to that Section so that the matter could be referred to it, and the Applicant gave her agreement. The staff member of the Investigations Division confirmed the decision of OIOS by email on 21 April 2006, in which she asked the Applicant to confirm by email, as soon as possible, that she agreed to the disclosure of her identity.

11. By letter of 12 May 2006, the Applicant once again requested OIOS to investigate the disappearance of her personal effects and confidential documents. The Director, Investigations Division informed her by letter dated 7 June 2006 that the Division did not intend to conduct an investigation "at th[at] time" and that the case would be referred to the UNOG Safety and Security Section since it was "a Category II matter involving an alleged theft".

12. On 13 June 2006, the Applicant contested the classification given to the case by the Director, Investigations Division. Relying on the OIOS report A/58/708 to the General Assembly on strengthening the investigation functions in the United Nations, she contended that at least two of the sub-categories of category I were relevant to her case.

13. On 26 June 2006, the Applicant submitted a request to the Secretary-General for review of the decision of 7 June 2006 by the Director, Investigations Division rejecting her request for an investigation and classifying her case as falling within category II. The Administrative Law Unit acknowledged receipt of her request on 21 July 2006, and on 19 October 2006 the Applicant referred the matter to the Joint Appeals Board ("JAB").

14. In its report of 11 October 2007, the JAB considered that the Applicant's appeal should be rejected insofar as it related to the disappearance of official documents of the Organization, on the grounds that the applicable provisions were intended to protect the interests of the Organization and not those of staff members. It also took the view that the Director, Investigations Division had correctly exercised her discretionary powers in deciding that the Applicant's request concerning the disappearance of her personal belongings was a category II matter. The JAB, consequently, recommended that the appeal be rejected.

15. By letter of 30 November 2007, the Applicant was notified of the Secretary-General's decision to accept the conclusions and recommendations of the JAB and, therefore, to reject the appeal.

16. Having obtained an extension of time, on 30 June 2008 the Applicant filed an application with the former UN Administrative Tribunal contesting the Secretary-General's decision. On 15 January 2009, having requested, and been granted, an extension of time by the Administrative Tribunal, the Respondent filed his answer to the application. Having been granted two extensions of time, the Applicant submitted observations on 18 June, and the Respondent filed comments on those observations on 24 December 2009.

17. Pursuant to the transitional measures laid down in United Nations General Assembly resolution 63/253, the case, which could not be decided by the former UN Administrative Tribunal before its abolition on 31 December 2009, was transferred on 1 January 2010 to the Dispute Tribunal.

18. By letter of 16 November 2010, the Registry of the Dispute Tribunal notified the parties that the Judge assigned to the case had decided to hold a hearing, in French, on 2 December 2010.

19. On 30 November 2010, the Respondent filed written submissions contesting the admissibility of the application. On 1 December 2010, the Applicant objected to the lateness of the objection of inadmissibility raised by the Respondent and also disputed its substance.

20. At the hearing on 2 December 2010, the Judge asked Counsel for the Applicant to confirm that the Applicant had informed OIOS in writing that she consented to the disclosure of her identity to the Safety and Security Section. Counsel for the Applicant replied by email on 10 December 2010, and the Respondent filed comments on that reply with the Registry on 13 December 2010.

Parties' contentions

21. The Applicant's contentions are:

a. The application is receivable. OIOS is an integral part of the administrative machinery of the Organization and, in spite of its operational independence, cannot be considered as an entity distinct from the Secretariat, which must be held responsible for the decision of OIOS by virtue of the duty of care incumbent upon it. Besides, the fact that the Applicant did not make a claim for compensation for loss of, or damage to, her personal belongings pursuant to staff rule 106.5 in force at the time and administrative instruction ST/AI/149/Rev.4 has no bearing on the admissibility of her application, as the right of appeal cannot be lost merely by addressing a request to an authority that lacks competence;

b. The decision to classify the facts in dispute as a category II matter is vitiated by irregularity. Given the importance and confidentiality of the documents in her custody, which she had placed under lock and key, OIOS should have classified the facts as a category I matter, since they revealed gross mismanagement, waste of resources, abuse of authority and substantial violations of United Nations rules, regulations or administrative issuances, and should have been made the subject of complex proactive investigations aimed at studying and reducing risk to United Nations staff and property. A final reason for a category I classification was the fact that the Safety and Security Section did not have the necessary authority or the means to conduct a credible and meaningful investigation;

c. OIOS had a duty to conduct an investigation in accordance with paragraph 4 of the Secretary-General's bulletin ST/SGB/273 dated 7 September 1994 establishing that Office, as well as the other instruments governing its activities and the case law of the former UN Administrative Tribunal. After 13 June 2006, the Applicant received no further communication from OIOS though she had given her verbal consent to the disclosure of her identity during her telephone conversation in April 2006 with a staff member of the OIOS Investigations Division;

d. The Respondent has failed in a number of respects in his obligations to protect data. First, he failed to safeguard the confidentiality of documents of the Working Group on Enforced or Involuntary Disappearances while the Applicant was on medical leave, and there is no evidence that the Administration attempted to contact her so that she could retrieve her personal documents and effects. Furthermore, the Respondent failed to take the immediate measures necessary to identify or recover the missing documents. He was also in breach of his obligations because the Safety and Security Section decided to close the matter after an incomplete investigation, although the confidential information note of 23 March 2006—which came to the Applicant's attention only during the proceedings before the JAB—contained sufficient evidence to justify pursuing the investigation. The Applicant points out, in this connection, that "key witnesses" were not questioned;

e. The Tribunal should not concern itself merely with the official documents of the Organization, given that the missing documents also included the personal files of staff members under the Applicant's supervision, her own performance evaluations and job applications, and evidence of the harassment to which she had been subjected within OHCHR since 1994;

f. The manner in which her personal belongings and the confidential documents in her custody were removed is clear evidence of malice, bad faith and prejudice against the Applicant amounting to harassment. It also

offended her dignity. In addition, the fact that confidential documents of the Organization had been left in a corridor for all to see compromises her professional integrity.

22. The Respondent's contentions are:

a. The application is irreceivable as the OIOS decision does not constitute an "administrative decision" within the meaning of article 2 of the Statute of the Tribunal and cannot be imputed to the Secretary-General because that Office is independent. Moreover, the Applicant did not, as she should have done, make a claim for compensation for loss of, or damage to, her personal belongings pursuant to staff rule 106.5 in force at the time, or administrative instruction ST/AI/149/Rev.4;

b. The Tribunal may concern itself only with the disappearance of the Applicant's personal belongings since the rules protecting the confidentiality of United Nations documents are intended to protect the Organization's interests and not those of its staff members;

c. The Applicant has failed to show that there was any connection between the harassment she claims to have suffered and the OIOS decision not to investigate. The arguments and claims she makes in this regard must therefore be rejected;

d. Under its mandate, as laid down in bulletin ST/SGB/273, and under the case law of the former UN Administrative Tribunal, OIOS has discretionary power in deciding whether to carry out an investigation at the request of a staff member. In the present case, it exercised its discretionary power appropriately and showed due diligence. Since the Applicant gave no written authorisation for the disclosure of her identity, OIOS was under no obligation to refer the matter to the Safety and Security Section;

e. The review of the matter by the Safety and Security Section was conducted in a timely, fair and adequate manner;

f. The Applicant has adduced no evidence that documents and personal belongings had disappeared from her former office. Moreover, it was her own responsibility to make arrangements for such items. Besides that, even if the Applicant had made a claim for compensation for loss or damage to personal effects under staff rule 106.5 then in force and administrative instruction ST/AI/149/Rev.4, such a claim could not have succeeded on the merits;

g. The Applicant has failed to discharge the burden of proof with regard to the allegations of malice, bad faith, prejudice and harassment.

Judgment

23. The Tribunal considers, first, that the Applicant's request for the production by the Respondent of a number of documents is not justified in the present case, and that the pleadings and documents already on the file afford sufficient material on which to base its decision.

24. Moreover, while the Tribunal finds it regrettable that the Respondent raised the question of inadmissibility only at a very late stage, it is bound to address it before ruling on the lawfulness of the contested decision as this is a matter of the Tribunal's jurisdiction which it would, in any event, have been bound to raise on its own motion (Judgment UNDT/2011/005, *Comerford-Verzuu*).

25. In this connection, it should be remembered that the application in the present case was transferred to the Dispute Tribunal pursuant to General Assembly resolution 63/253, which decided that all cases pending on 1 January 2010 before the former UN Administrative Tribunal would be transferred with effect from that date to this Tribunal.

26. The Statute of the former UN Administrative Tribunal, as laid down in General Assembly resolution 55/159, provided that it was "competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the

terms of employment of such staff members" (article 2.1). That Tribunal made it clear through its case law that, in order to be receivable, an application must invoke an administrative decision whereby the applicant was harmed. It defined, notably in Judgment No. 1157, *Andronov* (2004), what was meant by an administrative decision and stated, in Judgment No. 1213 (2004): "The Tribunal must first make a determination on the issue of receivability. A finding that the case is not receivable would negate the need to enter into its merits. The essential element of an appeal is that there is a contested 'administrative decision'."

27. Article 8 of the Statute of the present Tribunal provides that "[a]n application shall be receivable if … [t]he Dispute Tribunal is competent to hear and pass judgment on the application, pursuant to article 2 of the present statute". Article 2 of the Statute states that the Tribunal shall be "competent to hear and pass judgment on an application filed … against the Secretary-General as the Chief Administrative Officer of the United Nations … [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms 'contract' and 'terms of employment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance".

28. It follows from what has been said above that the jurisdiction of the former UN Administrative Tribunal, like that of the new Dispute Tribunal, is limited to ruling on the lawfulness of administrative decisions.

29. The Tribunal must therefore examine whether the OIOS decision not to investigate the disappearance of the documents and personal belongings the Applicant had placed in her office is an appealable administrative decision.

30. According to General Assembly resolution 48/218 B dated 29 July 1994, OIOS shall "investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken" (para. 5(c)(iv)). Resolution 59/287 of 13 April 2005 furthermore

recognises that OIOS "has established an efficient mechanism to enable all staff members … to convey directly their allegations to the Office of Internal Oversight Services".

31. The Secretary-General's bulletin ST/SGB/273 of 7 September 1994 establishing OIOS provides:

> 16. The Office shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken.
> …
> 18. The Office may receive and investigate reports from staff … reporting perceived cases of possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority.

32. The language of those resolutions and that bulletin make it clear that staff members of the Organization have the right to report cases of presumed violation of their rights directly to OIOS provided those cases fall within the categories listed in the above-cited paragraph 18 of bulletin ST/SGB/273 and request it to carry out an investigation, and, therefore, that the refusal to carry out such an investigation breaches their rights under a rule in force at the time the matter is reported to OIOS.

33. That analysis is supported by the Judgments of the Appeals Tribunal in *Nwuke* 2010-UNAT-099 and *Abboud* 2010-UNAT-100 of 29 December 2010. Those two cases relate to refusals by the Administration to investigate complaints by the staff members concerned. The Appeals Tribunal considered that it was competent to exercise judicial control over such decisions of a discretionary nature, to the extent that the rights of the claimant were directly affected. The Appeals Tribunal thus held, in *Nwuke*:

> 28. So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

> 29. In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.
> 30. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.
> …
> 40. … The Administration must decide within its discretion whether or not to conduct investigations. The Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation, a staff member had a right to an investigation and it may be subject to judicial review under Articles 2(1)(a) and 10(5) of the UNDT Statute and Articles 2 and 9 of the Statute of the Appeals Tribunal.
> 41. The General Assembly established the new internal justice system and approved the Statutes of both the UNDT and the Appeals Tribunal. The member states of the United Nations made a great effort to achieve an "independent, transparent, professionalized, adequately resourced and decentralized system … 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" (A/RES/63/253, preamble, paragraph 2).
> 42. According to the Statutes, the jurisdiction of both Tribunals and the content of the possible judgments they can render match those high goals and the UNDT should not decline to exercise its competence in matters like the present, when the respective right is provided for to the claimant by the rules.

34. In view of the foregoing, it appears at first sight that this Tribunal has jurisdiction to rule on the decision of the OIOS not to launch its own investigation in response to the Applicant's request. That said, the Tribunal is bound to examine the legal arguments that could operate to negate such jurisdiction.

35. It must, first of all, reject one of the Respondent's arguments, to the effect that the OIOS decision is not an administrative decision appealable to the Tribunal. The Respondent maintains that, given the independence of OIOS, the Secretary-General cannot be held responsible for the unlawfulness of decisions over which he has no power.

36. Resolution 48/218 B provides that the purpose of OIOS "is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization" (para. 5(c)), and bulletin ST/SGB/273 states that "[t]he purpose of this Office … is to assist the Secretary-General in fulfilling his internal oversight responsibilities" (para. 1). What is more, the bulletin reaffirms, as does the resolution (para. 5(a)), that the Office "shall exercise operational independence under the authority of the Secretary-General" (para. 2).

37. The Tribunal considers that, while it is clear from the foregoing that the General Assembly intended to confer "operational independence" on OIOS—which prevents any staff member, even the Secretary-General, from giving it instructions in its investigative work—the General Assembly must, in stating that the Office acts under the authority of the Secretary-General, have intended to acknowledge that the Secretary-General was administratively responsible for any breaches or illegalities OIOS might commit. In fact, contrary to what the Respondent contends, in an organization like the United Nations it would be inconceivable for one of its offices to be able to act without potentially engaging the liability of the Organization and thus of the Secretary-General, in his capacity as Chief Administrative Officer.

38. Secondly, under both the former and the present internal justice systems, before filing an application with the Tribunal, the staff member must request the Secretary-General to review the contested decision or carry out a management evaluation. The purpose of that formal requirement, imposed by resolutions 55/159 and 63/253 respectively as a prior obligation on the staff member, is to allow the Secretary-General to overturn the contested decision if he considers it necessary. However, where the contested decision is a decision taken by OIOS in the exercise of its investigative functions, the Secretary-General may not, by virtue of resolution 48/218 B, annul or modify that decision.

39. It follows that the Secretary-General, faced with the Applicant's request for review of the decision of OIOS refusing to conduct an investigation, had no choice but to confirm that decision. The Tribunal therefore finds itself confronted

with two principles, explained above, which are difficult to reconcile: on the one hand, the operational independence of OIOS and on the other, the binding nature of the request to the Secretary-General for review or management evaluation of the decision taken by OIOS in the exercise of its investigative function. When faced with apparently contradictory instruments of equal value, the Tribunal must necessarily give precedence to the staff member's right of access to justice. It must find, therefore, that the fact that the Secretary-General may not modify the OIOS decision cannot operate to prevent the staff member from contesting it before the Tribunal.

40. In the view of the Tribunal, while the General Assembly intended when establishing OIOS that it should be operationally independent of the Administration and the Secretary-General, nowhere in the General Assembly resolution, nor in any of the legislative history of the resolution establishing OIOS, is it stated that the decisions of that Office cannot be subject to judicial review. Furthermore, it is unacceptable in a legal system such as that of the United Nations that a staff member should not have access to justice to assert his or her rights.

41. Lastly, the Secretary-General raises one final ground in support of his argument that the OIOS decision not, itself, to undertake the investigation requested by the Applicant cannot be contested before the Tribunal. The Respondent contends that there is another legal recourse available to a staff member to obtain an investigation into facts by which he or she was allegedly harmed, namely to request the Administration to conduct such an investigation and, if it refuses, to contest that decision first to the Secretary-General, and then before the Tribunal. In the present case, there were indeed two options open to the Applicant to request the investigation she wanted: the first, which she chose, was to apply directly to the OIOS, and the second was to request the Administration to launch an investigation. But, where two avenues exist, there is no basis for treating the decision in the first case (that of OIOS) as a purely discretionary decision not subject to any control, while the decision in the second is subject to control.

42. It follows from the foregoing that the OIOS decision not to undertake the investigation requested by the Applicant is an administrative decision appealable to the Tribunal.

43. Having regard to the nature of the mission conferred on OIOS, the Tribunal can exercise no more than a minimum degree of control over the lawfulness of its operational decisions, limited to verifying the regularity of the procedure followed, and determining whether there was a mistake of fact or a manifest error in the exercise of its discretion.

44. It is clear from the documents on file and the arguments made at the hearing that the refusal of OIOS to investigate the facts brought to its attention by the Applicant was motivated by the view taken by the OIOS Investigations Division as stated in its letters of 21 April and 7 June 2006, which the Applicant contests, that the investigation requested by the Applicant could be entrusted to another investigative unit.

45. The possibility for the OIOS to classify cases into two separate categories depending on their seriousness and complexity was introduced in report A/58/708 on strengthening the investigation functions in the United Nations, which that Office submitted to the General Assembly in 2004. It drew a distinction between category I, which included high-risk, complex matters and serious criminal cases and category II, covering cases of lower risk to the Organization, and suggested that "a policy on the role of programme managers in investigative activities"be developed , setting out "procedures on classifying cases as category I or category II and on following up thereafter". That proposal was later enshrined in General Assembly resolution 59/287 of 13 April 2005.

46. The above-mentioned instruments show that, when it receives a request from a staff member for an investigation, OIOS must, as a preliminary matter, determine whether to undertake the investigation itself or refer the matter to another investigative unit. Thus, contrary to the Applicant's contention, the instruments cited above permitted OIOS, if it thought it appropriate to do so, to entrust the investigation to the Safety and Security Section.

47. The Tribunal must now consider whether, in determining that the case fell within category II, the OIOS Investigations Division committed a manifest error as to the nature of the investigation requested. The Applicant states that, among the documents and effects that disappeared were bank statements, medical statements, private and confidential letters, personal photographs, files on staff members under her responsibility, and notes relating to the work of the Commission on Human Rights Working Group on Enforced or Involuntary Disappearances and of OHCHR, as well as personal files on the harassment she suffered and on her professional career.

48. With regard to the confidential documents of the Organization entrusted to her, the Tribunal recalls that administrative instruction ST/AI/326 (The United Nations Archives) of 28 December 1984, which was in force at the time of the events, specifies:

> 9. All records, regardless of physical form, created or received by a member of the Secretariat in connection with or as a result of the official work of the United Nations are the property of the United Nations.
>
> …
>
> 10. Prior to separation from the United Nations, members of the Secretariat shall make arrangements for transferring to the Archives Section those records in their possession not retained for their successor and shall not remove any records from the United Nations premises…

49. Furthermore, according to staff rule 101.2(g), which was in force at the time of the events, "[s]taff members shall not intentionally alter, destroy, misplace or render useless any official document, record or file entrusted to them by virtue of their functions, which document, record or file is intended to be kept as part of the records of the Organization". According to those provisions, the Applicant has no grounds for complaint based on the disappearance of official documents—even if they were confidential—that did not belong to her and, moreover, she herself was responsible for safeguarding the documents entrusted to her care.

50. As for the Applicant's personal documents, it should be pointed out that administrative instruction ST/AI/326 defines "private papers" as "those that have

no connection with official work of the United Nations but which have been kept in their office" (para. 12). It further provides: "Members of the Secretariat to be separated are entitled … to retain their private papers" (para. 10). The Tribunal is of the opinion that, in accordance with this last provision, the preservation of personal papers is a matter for the staff member. It was therefore up to the Applicant to retrieve the papers she wished to keep.

51. In the light of the foregoing, and contrary to what the Applicant maintains, the Tribunal considers that neither the nature of the documents nor their confidentiality justified a decision by OIOS that the case fell within category I. Consequently, it takes the view that the decision by OIOS not to conduct an investigation itself, but to refer the case to the Safety and Security Section, was a legitimate and reasonable exercise of its discretionary powers.

52. In addition, though Counsel for the Applicant indicated at the hearing on 2 December 2010 that she was contesting not only the OIOS decision not to conduct an investigation itself, but also the failure of the Administration to take any action on her request for an investigation, the Respondent specified that the reason why no further action had been taken was that, while she had been asked to do so, first by email on 21 April 2006 and then by letter on 7 June 2006, the Applicant had not confirmed in writing that she consented to the disclosure of her identity to the Safety and Security Section.

53. When questioned on this point by the Tribunal at the hearing, Counsel for the Applicant replied, by email of 10 December 2010, that the Applicant had given her consent orally, in the telephone conversation on 12 April 2006, for her identity to be disclosed and that the requirement for consent was in any event superfluous as the Safety and Security Section—with whom she had been in contact up to May 2006—knew who she was.

54. The Tribunal would point out, first, that paragraph 18 of bulletin ST/SGB/273 provides:

> … the procedures described [in the bulletin] are put in place, under which staff members and others can make directly to the Office suggestions and reports which shall be received and handled in

> complete confidence …. These procedures … are designed to protect individual rights, the anonymity of staff and others, due process for all parties concerned and fairness during any investigation, as well as to protect against reprisals.
>
> …
>
> (b) The Under-Secretary-General for Internal Oversight Services shall designate the officials authorized to receive such suggestions and reports. The designated officials shall be responsible for safeguarding the said suggestions and reports from accidental, negligent or wilful disclosure, as well as for ensuring that the identity of the staff members and others who have submitted such reports to the Office is not disclosed, except as otherwise provided in the present bulletin. Unauthorized disclosure of the said suggestions and reports shall constitute misconduct, for which disciplinary measures may be imposed. Except in regard to subparagraph (e) below, the identity of staff members and others submitting suggestions and reports to the Office may be disclosed only where such disclosure is necessary for the conduct of proceedings, whether administrative, disciplinary or judicial, and only with their consent;
>
> (c) The above procedures and requirements for the protection of the identity of staff and others making suggestions and reports shall also apply to staff and others who provide information to or otherwise cooperate with the Office;

55. Administrative instruction ST/AI/397 of 7 September 1994 entitled "Reporting of inappropriate use of United Nations resources and proposals for improvement of programme delivery" is intended, among other things, to inform staff members of the measures taken to ensure confidentiality. That instruction provides:

> Information received through the Reporting Facility that proves, upon investigation, to be accurate will be used in such a way that the source is not disclosed except with permission.

56. Moreover, the "Manual of investigation practices and policies" dated 4 April 2005, one of the purposes of which is to clarify the procedures followed in OIOS investigations, sets out the confidentiality requirement in these terms:

> The General Assembly has mandated that OIOS establish procedures to ensure that complainants who wish to contact it with information have a secure and confidential means to so do that will protect their identity. Procedures have been established which enable staff to report matters without fear of disclosure of their

> identities without their consent. Those procedures are set out in ST/AI/397 of 7 September 1994 …

57. It is clear from the foregoing that OIOS is bound to protect the anonymity of staff members who contact it to report cases of presumed irregularity and that it may not disclose their identity to another unit unless it has obtained their prior consent to do so: if it does not, its staff members risk liability under paragraph 18(b) of bulletin ST/SGB/273. While none of the three instruments referred to above provides that the consent of the person concerned must be given in writing, such a requirement would appear indispensable in order to prove, if necessary, that the staff member has consented and protect OIOS staff members from the risk of liability.

58. Therefore, the Applicant herself forfeited the possibility of having her request dealt with by the Safety and Security Section.

59. Thus, without it being necessary to rule on the question whether the OIOS decision of 7 June 2006 is a decision confirmative of that of 21 April 2006, or, consequently, whether the application is receivable under the applicable time limits, the application must be rejected on the merits.

Decision

60. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 10th day of January 2011

Entered in the Register on this 10th day of January 2011

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva