



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/039
Judgment No.: UNDT/2023/114
Date: 12 October 2023
Original: English

Before: Judge Sean Wallace
Registry: Nairobi
Registrar: Eric Muli, Officer-in-Charge

IRAMBONA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. On 14 April 2022, the Applicant filed an application in which he contests: (a) the implied decision to refer allegations of theft, of which he was accused, to Burundian national authorities; (b) the implied decision to waive his immunity in relation to the theft case of which the Applicant was accused; (c) the decision to retain monies paid by the Applicant to the United Nations in relation to a theft which has not been investigated and in relation to which no disciplinary finding was ever made; and (d) the decision not to pay his last month's salary and separation entitlements.

2. On 23 May 2022, the Respondent filed his reply in which he contested the receivability of the application and asserted that should the application be found receivable by the Tribunal, the Applicant's claims have no merit.

3. The Tribunal held oral hearings from 6 to 7 September 2023, and, on 21 September 2023, the parties filed their closing submissions.

Facts

4. The following facts are not disputed by the parties (unless otherwise stated).

5. The Applicant is a former staff member with the now-closed Office of the Special Envoy of the Secretary-General for Burundi ("OESG-B"). He was separated from service on 30 June 2021 upon the closure of OESG-B.¹ At the time of his separation, he was serving as an Administrative Assistant at the G-6/X level² with responsibility for the payment of local vendors from cash that was stored in a safe in the OESG-B compound.³

6. According to Office protocol, access to the safe required two sets of keys. The Applicant kept one set of keys while the other set was kept in the Office of the Chief

¹ Application, section VII, page. 3, para. 1.

² *Id.*

³ Reply, annex R/1 titled *Incident report: (Background)*, page 1.

of Mission Support (“CMS”).

7. On either Friday, 18 June 2021 or Monday, 21 June 2021, the Applicant received the second set of keys from the Office of the CMS. He did not return the CMS’ keys.

8. In the morning of Tuesday, 22 June 2021, the CMS sought to inquire about the completion of all pending payments to the remaining vendors, but the Applicant was absent from the office that day and unreachable by phone. The CMS asked an OSESG-B security officer to report the Applicant’s absence and requested that the United Nations Department of Safety and Security (“UNDSS”) be informed.

9. In the evening of 22 June 2021, the Applicant called the CMS explaining that he had been occupied all day and could not use his phone to call or text. The CMS went to the Applicant’s house with the office driver, and upon their arrival, the Applicant told them that he had left the keys in the OSESG-B office.

10. The CMS took the Applicant to the office to retrieve the keys. Once in his office, the Applicant collected the set of keys normally kept by the CMS and gave them to the CMS. The CMS also requested the second set of keys normally kept by the Applicant. When the Applicant said he left them in his house, he and the CMS returned to the Applicant’s house where the CMS collected the second set of keys.

11. The Applicant explained to the CMS that he would not be able to come to the office the next day in the morning due to a court appointment. The CMS stated that she would take care of the remaining payments and final deposit of the cash balance at the United Nations bank account with the Finance Assistant the next day, 23 June 2021.

12. On 23 June 2021 in the morning, the CMS and other OSESG-B personnel⁴ gathered to open the safe. The Applicant was not present at the office, and despite several attempts, they could not get into the safe.

⁴ The Security officer, the logistics officer, the logistics officer on TDY from UNGSC, the Property Management officer and the Supply Assistant were present.

13. The CMS called the Applicant repeatedly, including by video call, for his assistance since he frequently opened the safe. When all attempts to open the safe failed, the CMS called the Applicant requesting his presence at the premises. The Applicant arrived on site at around 10:30 a.m.

14. When all efforts to open the safe using the keys and combination were unsuccessful, the CMS requested the safe to be broken as a last resort.

15. Upon opening of the safe, The CMS, the Applicant, and other OSESG-B personnel established that Burundian Francs (“BIF”) 16,672,117 and USD12,000 in cash, were missing from the OSESG-B safe.

16. The missing money was reported to the Chief of Mission, the Head of DSS, and local security personnel. Both the CMS and the Applicant were interviewed regarding the circumstances surrounding the missing money.

17. Eventually that day, the Applicant wrote and signed a statement stating,

I, Adolphe Irambona, accept that I lost the money that were in the safe while I was with all the keys for the cashier office (12,000\$ and 17,900,500 BIF). I accept to do my best to pay the lost funds by tomorrow 24/06/2021 before 12 hours. Fail to which police action should be taken against me. The funds are for the OSESG-Burundi. I am an administrative assistant.” (Annex R/2).⁵

18. The next day, 24 June 2021, the Applicant returned to the Mission office and made telephone calls to family and friends trying to raise the money. When he was unsuccessful in collecting the entire sum, the Applicant wrote and signed a second statement:

I, Adolphe Irambona, I am handing over ten million and five hundred thousand (10,500,000.00 BIF) to Mr. Kennedy Alai as part of the payment of the lost money from the Impact Funds. The remaining amount will be paid by tomorrow 25/06/2021. According to the

⁵ Although both Applicant’s contemporaneous statements, Annex R-2 and Applicant’s Annex 1, are hearsay, they fall within clearly recognized exceptions to the hearsay rules as admissions of a party opponent and admissions against interest. *AAC v. Secretary-General*, 2023-UNAT-1370, para. 50. (“Modern legal systems allow for the admission of hearsay evidence in the interests of justice.”)

management, this is the last additional day and if I fail to this agreement police action should be taken against me.” (Application Annex 1).

19. When the Applicant did not pay the balance that next day, a criminal complaint was filed with the police, and he was handed over to the local authorities on 25 June 2021.

20. The Applicant separated from the Organization on 1 July 2021 following the closure of the OSESG-B on 31 May 2021.

21. On 14 July 2021, the Applicant deposited BIF15,000,000 in a United Nations account at the Interbank Burundi.

22. On 15 July 2021, the Applicant was released from prison.

23. On 16 October 2021 the Applicant wrote to the Regional Service Centre in Entebbe (“RSCE”) asking when his separation would be processed, and when his entitlements would be paid.⁶

24. The Applicant’s Counsel wrote to the UNDSG in Burundi on 18 October 2021, to ask if there had been a decision to waive immunity in the Applicant’s case, if monies had been taken from the Applicant and if so on what basis, whether there was an ongoing investigation and whether he had been paid separation entitlements.⁷

25. On 2 December 2021, the Applicant filed a request for management evaluation of three decisions: (a) the implied decision to refer the theft of which he was accused to national authorities; (b) the implied decision to waive immunity in relation to the theft case of which he is accused; and (c) the decision to retain monies paid by the Applicant to the United Nations in relation to a theft which has not been investigated and in relation to which no disciplinary finding has ever been made.⁸

⁶ Application, section VII, page 4, para. 17. See application, annex 8(b) titled *Statement in support of MER Irambona*, para. 18.

⁷ Application section VII, page 4, para. 16.

⁸ *Id.*, annex 8(a) titled *Management Evaluation Request*. See application, section VII, page 5, para. 18.

26. The Departments of Political and Peacebuilding Affairs and Peace Operations (“DPPA”) informed the Office of Internal Oversight Services on 10 February 2022 that the Administration had decided not to go forward with a disciplinary process against the Applicant for efficiency and economy reasons, stating that “*following consultations with ALD/OHR, the matter has been closed with a Note to file that was transmitted to OHR to be placed in the relevant Case Management System*”⁹.

27. On 14 April 2022, the Management Evaluation Unit (“MEU”) replied to the Applicant’s request for management evaluation, stating that the Organization had decided to process his separation payments.¹⁰

28. The RSCE wrote to the Applicant on 21 April 2022, informing him that his final payment was approved and sent him pension forms to fill and return as soon as possible.¹¹

29. On 25 April 2022, the Organization processed payment of all entitlements due to the Applicant except for the pension fund, which is processed separately.¹²

Issues

The implied decision to refer allegations of theft to Burundian national authorities and the implied decision to waive the Applicant’s immunity in relation to the theft case.

Applicant’s submissions

30. On the question of receivability and timeliness, the Applicant stated that he has never been informed of a decision to refer an allegation of theft to Burundian national authorities. He only received from the Prosecutor, on 1 November 2021, the criminal complaint filed against him by the CMS. Accordingly, the deadline for management

⁹ Reply, annex R/5.

¹⁰ *Id.*, annex R/6.

¹¹ *Id.*, annex R/7.

¹² *Id.*, annex R/8.

evaluation should start from that date.

31. The Applicant claims that the OSESG-B *Chef de Bureau's* complaint to Burundian national authorities on behalf of the United Nations flies in the face of the privileges and immunities of the United Nations staff members. As a United Nations staff member, he benefited from functional immunity and that the sole authority to determine whether a particular action comes under such functional immunity lies with the United Nations Secretary-General. He stated that the prescribed procedures were not followed by the CMS who did not refer the theft for proper investigation instead of engaging national Burundian authorities to detain him.

Respondent's submissions

32. The Respondent claims that no rule bars the Organization from requesting host country authorities to investigate crimes committed within their jurisdiction.

33. The Respondent's position is that the referral to Burundian local authorities does not constitute an administrative decision and cannot be challenged directly before the United Nations Dispute Tribunal. The application refers to conduct in relation to the theft incident. Therefore, the portion of the application contesting the implied decision to refer the allegation of theft to Burundian national authorities is not receivable *ratione materiae*.

34. The Respondent maintains that there was no decision to waive the Applicant immunity and that this portion of the Application contesting that decision is not receivable *ratione materiae*. Respondent also claims that the application is time-barred.

The decision to retain monies paid by the Applicant to the United Nations.

Applicant's submissions

35. The Applicant understood that the money would be held pending an investigation and returned to him, should he be cleared of the theft. The Administration failed to inform him regarding the process for retention of money by the Organization.

In the absence of a proper investigation, there was an implied decision to retain this money.

36. The Applicant submits that recovery of financial loss by the Organization through an act of misconduct is a decision within the authority of the United Nations Under-Secretary-General (“USG”) for Management, upon advice from the United Nations Assistant Secretary-General (“ASG”) for Human Resources Management.¹³

Respondent’s submissions

37. The Respondent submits that it was the Applicant’s decision to repay certain missing amounts to the Organization. Therefore, it cannot be considered as a contestable administrative decision. The decision not to refund the money did not violate any staff regulation or rule.

38. Moreover, the Applicant’s request for management evaluation was not timely submitted rendering that portion of the application not receivable *ratione materiae*.

Considerations

Receivability

39. In *Christensen* 2013-UNAT-335, the United Nations Appeals Tribunal (“the Appeals Tribunal”) held that: “the UNDT is competent to review its own competence or jurisdiction in accordance with Article 2(6) of its Statute” when determining the receivability of an application (*Id.* at para. 20).

40. The Applicant has challenged, *inter alia*, two related decisions: (a) the implied decision to refer the theft of which he was accused to national authorities; and (b) the implied decision to waive his immunity in relation to the theft case of which he is accused. These are interesting issues and important arguments that go to the very heart of diplomatic immunity. However, these issues are not receivable because the

¹³ The Applicant claims that such decision can only be taken after a decision to impose a disciplinary measure, which has never happened.

Applicant waited too long to request management evaluation of these decisions.

41. Since the decisions are “implied”, the exact date of the decisions cannot be ascertained. The Appeals Tribunal has instructed that “[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine”. (*Rosana* 2012-UNAT-273, paras. 21-22 and 25). Under this test, “the exercise of determining the date of an implied administrative decision must be conducted by determining when the staff member actually knew or should reasonably have known about the implied decision he or she contests.” (See, e.g., *Survo* 2016-UNAT-644, para. 26; and *Awan* 2015-UNAT-588, paras. 18-19).

42. In this case, the evidence is very clear that the Applicant actually knew about the implied decision to refer the theft allegation to the Burundian national authorities and should reasonably have known about the related implied decision to waive immunity in relation to those allegations on 25 June 2021. On that date, by his own testimony, the Applicant was taken by United Nations security personnel to the Burundian police, placed into local custody, and interrogated by the local police regarding the theft. Clearly, he knew of these (implied) decisions at that time.¹⁴ Thus, the deadline for requesting management evaluation was 23 September 2021.

43. Even if this Tribunal were to toll the time for requesting management evaluation for the period when the Applicant was in custody (because he presumably was unable to file a request during that period), he was released from custody on 15 July 2021. That would mean that his request for management evaluation was due on or before 13 October 2021.

44. However, the record reflects that the management evaluation request was not filed until 2 December 2021 (seven to ten weeks too late). Although the Applicant testified that he filed in early September, there is nothing in the record to support this testimony, and the Tribunal finds that it is not credible.

¹⁴ Although the Applicant claims that he received the criminal complaint from the Prosecutor on 1 November 2021, he did not testify to this, and thus there is no evidence to support the claim.

45. The Applicant's Counsel's letter of 18 October 2021 asking if there was a decision to waive immunity cannot reset the clock. (*Abu Rabei* 2020 UNAT-1060, para. 24; *Qassem* 2021-UNAT-1132 para. 25. A staff member cannot reset the time for management review by asking for a confirmation of an administrative decision communicated to him earlier. *See also, Abu Nqairah* 2018 UNAT-854).

46. Accordingly, the challenge to: (a) the implied decision to refer the theft of which he was accused to national authorities; and (b) the implied decision to waive immunity in relation to the theft case of which he is accused are untimely and shall be dismissed.

47. The analysis is similar for the remaining challenge, to the implied decision not to return the money.¹⁵

48. According to the Applicant's testimony, and the two written statements that he signed, he was directed by the Organization to pay these monies and did so. A direction to pay money implies that the money will not be returned.¹⁶ Thus, the Applicant knew or should have known, at the time he paid the money, that the money would not be returned to him.

49. The final payment made by the Applicant was on 14 July 2021. Thus, the deadline for requesting management evaluation is 12 October 2021 (or perhaps 13 October 2021 if the period was tolled for the additional day when he was in Burundian custody, as noted in paragraph 43 above).

50. Since the Applicant did not request management evaluation until 2 December 2021, it is time-barred, and this part of the case is not receivable.

51. Apparently anticipating the receivability issue, the Applicant argued in his application that "[t]he decision to retain monies from the Applicant in relation to the

¹⁵ A fourth challenge, to the decision to not pay his final entitlements and to delay processing his separation, was withdrawn as moot.

¹⁶ The Applicant also testified that he understood that the money would be returned to him after an investigation. For the reasons set forth below, that testimony is not credible.

alleged theft is a decision of continuous implementation akin to a decision to place an individual on administrative leave”. (Application, para. 21).

52. The Applicant does not cite any authority for this proposition, but presumably he is referring to *Calvani* UNDT/2009/092 and *Ba* UNDT/2012/025. However, this argument is unavailing.

53. First, both *Calvani* and *Ba* arose in the context of applications to suspend decisions placing the staff members on administrative leave. The Respondent argued that those decisions could not be suspended by the Tribunal because they had already been implemented. (*Id.* citing *Nwuke* UNDT/2012/002). That context, and thus the analysis therein, is entirely different and distinguishable from the situation here, where the issue is not to suspend a decision but rather the deadline for requesting management evaluation of the decision.

54. The concept of continuous implementation makes sense in the *Calvani/Ba* context because there is still something for the Tribunal to suspend while the suspension is ongoing. This is not true with respect to setting the time for requesting management evaluation.

55. Second, application of the *Calvani/Ba* continuous implementation concept in the context of this case would mean that there would never be a deadline for requesting management evaluation. If continuous implementation were applied to the implied decision not to return the money, the Applicant need not request management evaluation for six months after the decision, or even years or decades later.

56. As pointed out in *Kompass*, Order No. 099 (GVA/2015), some decisions, “such as the non-renewal of a fixed-term appointment, while they continue to produce legal effects beyond their implementation, they are characterized by the fact that the commencement and completion of their implementation are simultaneous.” (*Id.*, para.18). That is certainly the situation here, where the implied decision not to return the money was commenced and implemented simultaneously, at the time that the Administration received the money from the Applicant.

57. Since the “continuous implementation” argument does not apply to this case, the claim is not receivable for failure to timely request management evaluation.

The decision to retain monies Applicant paid to the United Nations.

58. Even if the challenge were receivable, the claim would fail on the merits.

59. The Applicant challenges “the decision to retain monies paid by the Applicant to the UN in relation to a theft which has not been investigated and in relation to which no disciplinary finding has ever been made.” The record shows that the Applicant made two payments to the OSESG-Burundi for: BIF10,500,000.00 on 24 June 2021; and BIF15,000,000.00 on 14 July 2021. He challenges the failure to return those sums to him.

60. The jurisprudence is clear that there is a presumption of regularity, pursuant to which it is presumed “that official acts have been regularly performed.” (*See, e.g., Nastase* 2023-UNAT-1367, para. 25; *Rolland* 2011-UNAT-122, para. 26; *De Cruze* UNDT/2011/099, para. 36). If the Administration is able to even minimally show that there was a rational basis for the decision, then the presumption of regularity stands satisfied. (*Nastase* at para 29).

61. The presumption of regularity is a rebuttable one. Thus, once the minimal showing has been made by the Respondent, the burden of proof shifts to the Applicant to show through clear and convincing evidence that the decision was arbitrary or tainted by improper motives. (*Nastase, Rolland, and De Cruze*).

62. Applying that test in this case, the Applicant signed two statements in connection with the payments he made in this case. In the first statement (Annex R/2) he says “I, Adolphe Irambona, accept that I lost the money that were in the safe while I was with all the keys ...[and] I accept to do my best to pay the lost funds ... The funds are for the OSESG-Burundi.” In the second statement (Application, Annex 1), he says “I, Adolphe Irambona, I am handing over then millions and five hundred thousand (10,500,000.00 BIF) to Mr. Kennedy Alai as part of the payment of the lost money from the Impact Funds.”

63. Thus, on their face, the documents indicate the money belongs to the Organization. These documents alone certainly meet the Administration's requirement to minimally show that there was a rational basis for its decision not to return the funds to Applicant. Thus, the presumption of regularity has been satisfied, and the burden shifts to the Applicant to rebut the presumption by clear and convincing evidence.

64. The Applicant claims that "he was coerced to sign [these statements]" by being held against his will for over two days by men with guns at the order of UN personnel." (Comments on reply, page 7, paras.33-34).

65. The Applicant argues that it is "simple logic, the Applicant would not have agreed to pay monies without some coercion on the part of the Administration." (Applicant's Closing Submission, para. 20). However, this "logic" is simplistic and not "simple", because it assumes that coercion is the only reason people agree to do things.

66. Common sense tells us that people act (say and do things) for a variety of reasons, only one of which is coercion. People voluntarily make agreements because it seems like their best option at the moment and do so out of a variety of motivations. The fact that they later change their minds and/or regret their previous decision does not mean that the initial decision was the product of coercion. Often it means that they have new or different information, that circumstances have changed, or that their motivations have evolved.

67. Scientific research on in-custody confessions supports the common-sense view that coercion is but one of many reason that people act (in that research, confess to crimes) and is one of the least prevalent reasons that they do so.¹⁷

¹⁷ See, e.g., May, L., Raible, Y., Gewehr, E. *et al* How Often and Why Do Guilty and Innocent Suspects Confess, Deny, or Remain Silent in Police Interviews? *J Police Crim Psych* 38, 153–164 (2023). <https://doi.org/10.1007/s11896-022-09522-w> ("The most frequently mentioned reasons for true confessions were that the evidence seemed to indicate guilt and the suspect's feeling of guilt. This result is in line with a review by Moston and Engelberg (2011) showing that the strength of evidence is a major predictor for a confession, and the meta-analysis by Houston et al. (2014) who found that true confessions were associated with the suspects' emotional reactions to the interview and their perceptions of the evidence and their guilt. However, suspects also frequently reported the hope to get a lower sentence as a reason for true confessions. ... The main reasons for false confessions were to protect another person/the real offender and police/interviewing pressure.")

68. Thus, to meet his burden of proof, the Applicant cannot rely on this faulty claim of “simple logic”, but must present evidence that his statements were, in fact, the result of coercion by the Administration.

69. The Applicant testified at length in the hearing. According to him, on 22 June 2021, he was “kidnapped and spent the entire morning with the kidnappers who took his phone.” The kidnappers asked him about his role at the United Nations and about a United Nations position for which he was a candidate. The kidnappers made him sign a document that he was no longer interested in that new position and then left him at Lake Tanganyika. According to him, that evening he saw on his phone that people from his office had tried to call him. He contacted Ms. Maimouna Haidara (who was Chief of Mission Support) and Mr. Kennedy Alai (a security officer at the Mission), and they told him not to report the kidnapping.

70. The Applicant further testified that Ms. Haidara came to his house that evening to recover the Cashier’s Bureau keys that he had retained (against Mission policy). When he told her that those keys were in the office, they drove there together, and he turned in those keys. Ms. Haidara also asked for his set of keys, which he turned over. He testified that he spent that night at home and returned to the office at 8:00 a.m. the next morning. He left at 9:00 or 9:30 a.m. to report the kidnapping but was kept waiting so he did not make the report. Then he was ordered to return to the office. He arrived back at the office around 10:30 a.m. to find Mission officials struggling to open the safe.

71. Eventually the safe was opened by “demolishing” it. That is when the missing money was discovered.

72. According to the Applicant’s repeated testimony, he was “locked in a container”, but in cross-examination he conceded that all the offices on the premises were prefabricated units made from containers. So, the “container” turns out to be an

In citing this research, the Tribunal wants to make clear that it does not minimize the danger of coerced confessions. It merely seeks to make the point that coercion just one of many reasons for such confessions and, by extension, one of many reasons for people like the Applicant to act.

office just like the one where he had worked for several years.¹⁸

73. The Applicant testified that he spoke to UNDSS staff and then to the Head of Office, Mr. Ely Dieng. He said that Mr. Dieng “accused me of being responsible and said that if I did not pay back the money within the next two hours then I would be put in prison.” The Applicant says that he was intimidated and that is why he signed the first statement, (Annex R/2).

74. Much of the Applicant’s testimony is consistent with that of the other witnesses. However, the Applicant’s testimony differs in some key parts and the Tribunal does not find the Applicant’s testimony to be credible on those points.¹⁹ Instead the Tribunal accepts the testimony from Security Officer Kennedy Alai and Charles Tive (Chief Security Adviser for Burundi in UNDSS) that the Applicant volunteered to pay the money in order for the matter not to go any further beyond the office level.

75. First of all, the Applicant’s testimony about being kidnapped to be interrogated about his career plans is simply incredible. He claims that he went to report the kidnapping the day after it happened but that he did not report it because “I was kept waiting” until he was called to return to the Mission offices. Yet he has never reported

¹⁸ Albeit, at the time of this incident, the offices had no electricity because the Mission was being shut down and the power was cut off.

¹⁹ This Tribunal is cognizant of the decision in *AAC* 2023-UNAT-1370 and has applied it in reaching this judgment. The *AAC* panel acknowledges that “[w]e have digressed at length in this Judgment to make these remarks (*obiter dicta*) about the UNDT’s practice of fact-finding ...” (*AAC* at para. 62). However, it does not indicate what parts are *obiter dicta* and what is *ratio decidendi*. This Tribunal has not expressly discussed in this Judgment the various factors that were used in analysing the credibility of each witness since it views that discussion in *AAC* to be *obiter dicta*. However, to be clear for purposes of appellate review, the Tribunal **did** consider those factors (in *AAC* para. 47) and other related factors, such as: viii) whether the witness has a motive not to tell the truth; ix) whether the witness has an interest in the outcome of the case; x) whether the witness’ testimony was consistent; xi) whether the witness’ testimony was differed from statements made by the witness on any previous occasion; xii) the intelligence and apparent understanding of the witness; xiii) whether the witness appeared to understand the questions clearly and answer them directly; xiv) whether the witness had any relationship with the administration or the applicant. (*See generally*, pattern jury instructions on witness consideration/credibility from the U.S. 3rd, 5th, 6th, 7th, and 11th Circuits and the states of Maryland, Virginia, Nevada, Washington, and North Carolina. *See also*, references to methodologies, procedures, and findings of national and other jurisdictions. *AAC* at paras. 42, 63, and p.15 footnote 11).

this kidnapping in the two years since, although one would expect a kidnapping victim to report the crime (and he expressed a desire to report it that morning).

76. Second, the Applicant also gave similarly incredible testimony that he was detained overnight at a Burundian military camp unbeknownst to the camp commander. Again, it seems beyond belief that a civilian could be brought under armed guard into a military camp and nobody would ask any questions.

77. Third, the Applicant's claim, about being threatened with imprisonment if he did not pay the money within two hours, is not consistent with the known facts. The statement he gave, supposedly in response to that threat, makes no mention of payment within two hours and says only that he would do his best to pay the money by the following day.

78. Moreover, throughout the period of 23-24 June, the Applicant had access to his phone and made numerous calls to friends and family to round up the funds. There is no evidence that, while making these calls, the Applicant ever complained to anyone that he was being detained against his will or threatened.

79. On the other hand, Mr. Alai testified that "everything that happened was at [the Applicant's] request ... He said, I don't know what happened, but I am going to pay it." Similarly, Mr. Tive testified that the Applicant said "he didn't take the money, but he admitted that he takes responsibility by violating the key protocol ... [He] clearly stated that he was responsible, he couldn't think of nobody else who is, because he violated the key protocol."

80. The testimony of these witnesses seems more plausible and more credible than that of the Applicant.

81. Even if the Applicant's testimony were to be believed, which it is not, that testimony does not support his original claim that the first statement was coerced by his being held against his will for two days. By his own testimony the Applicant spent the night before at his home, came to the office for an hour or so in the morning, left to report "the kidnapping", and returned to the office before the theft was even discovered.

Thereafter, he had only been at the office for a few hours before signing the first statement. These two claims are contradictory.

82. According to his testimony, the Applicant “was in a position of weakness. I was under pressure.” That statement is deemed to be true. It is clear that the Applicant was under pressure and in a position of weakness largely because the evidence pointed to him as the cause of the missing money. Under those circumstances, common sense says that he may have freely chosen to avoid further problems²⁰ by agreeing to pay the money because “I lost the money that were in the safe while I was with all the keys.” Paying the money, without admitting committing the theft, could have seemed the best option under those circumstances.

83. In sum, the credible evidence shows that the theft was discovered on 23 June. When confronted that same day with the fact that he had all the keys when the money disappeared, the Applicant agreed to pay back the money to avoid the case going beyond the office level. Thus, the Tribunal finds that the first statement was not the result of duress from the Administration.

84. The same is true as to the second statement. After signing the first agreement, the Applicant was driven back to his residence, where he spent the night before being returned to the office.²¹ (As noted above, the Tribunal gives no credibility to the Applicant’s fantastical testimony that he was taken to spend the night at a military camp, apparently without the knowledge of the camp commander.²²)

85. The Applicant spent much of the next day making phone calls to friends and family trying to round up the funds he had promised to pay. When he was unable to

²⁰ Mr. Alai testified that the Applicant said that he was not on good terms with his wife, that she had some influence with the local police, and that he did not want any further problems.

²¹ To be clear, the Applicant was “escorted” by security personnel to his home that night. However, according to his testimony, that had been the practice for some time prior to the discovery of the missing money. The reason for this escort was that the Applicant had reported being followed by armed men and so the United Nations gave him protection.

²² According to the Applicant, when he was taken back to the camp the following night, “the camp commander asked why I was there and, when he realized that I was not in the military, he said I have to leave.”

gather the entire amount, the Applicant asked for more time. He then signed a second document promising to pay the remainder by the following day, 25 June. Again, the Tribunal does not find that this second statement resulted from duress from the Administration.

86. In addition to claiming duress, the Applicant argues that he “understood that monies that he paid at that stage would be held pending an investigation as to whether he had committed any fraud” (Comments to reply, page 7, para. 35). However, this argument (and his subsequent testimony) is contradicted by his two contemporaneous statements that he “accept[ed] to do my best to pay the lost funds”, that money was “from the Impact Funds”, and “are for the OSESG-Burundi.” Neither of these statements makes any mention of a possibility that the money would be returned to him on completion of an investigation.

87. The claim is also inconsistent with the credible testimony from Mr. Alai, Mr. Tive, and Ms. Maimouna Haidara (CMS) that there could be no United Nations investigation because the Mission was shutting down.

88. And this claim, that the money would be returned after an investigation, is inconsistent with the lack of any action by the Applicant to pursue an investigation either with the police, the Burundi courts, or the Administration (beyond the application in this case). Indeed, his initial inquiry of the Organization was when he could expect his final entitlements, without any mention of an investigation or the return of money. One reasonably would expect that, if the Applicant thought an investigation would clear him of liability and result in the return of the money, he would have done something to pursue that investigation. He has not, which casts doubt on his claim that he understood the monies would be returned to him.

89. Finally, the Applicant argues that “[r]ecovery of financial loss incurred by the Organization through an act of misconduct is a decision within the authority of the USG for Management upon advice from the ASG for Human Resources Management. Specific provisions apply in circumstances where a staff member will separate from service before conclusion of the investigation where the USG for Management can

choose to withhold entitlements from the staff member on a provisional basis pending completion of the disciplinary process.” (Application, para. 28 citing to ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) paras. 9.5 and 9.6). However, this argument also lacks merit.

90. ST/AI/2017/1, paragraph 9.5 states, *inter alia*, that “[t]he Under-Secretary-General **may** then decide to recover, in part or in full, any financial loss suffered by the Organization pursuant to staff rule 10.1 (b). Staff rule 10.1(b), in turn, says that “the staff member **may** be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member’s conduct.” And ST/AI/2017/1, paragraph 9.6 states “the Under-Secretary-General for Management **may** decide to withhold the estimated financial loss suffered by the Organization from the staff member’s final separation entitlements.” The use of “may” confirms that these provisions are permissive, not mandatory. (*Azar* 2021-UNAT-1104, para. 33). The Applicant cites no authority saying these procedures must be used to recovery money owed to the Organization.

91. Furthermore, ST/AI/155/Rev.2 (Personnel payroll clearance action) provides that “[s]taff members separating from service, in accordance with their contractual obligations to the United Nations are responsible for: (a) Settling all indebtedness to the United Nations.” (*Id.*, sec. 11). The jurisprudence recognizes that the provisions for recovery like those the Applicant references are for when the staff member does not settle their debt. (*Azar* UNDT/2021/125 para. 21. Procedure contemplates “notice given to the separating staff member, in order to enable him/her to take an informed decision whether to offer a kind of surety in exchange for the release of “entitlement documents). Clearly this contemplates settlement of the debt in an informal fashion.

92. In essence, the Applicant’s argument is that when a staff member says, “I am indebted to the United Nations, I want to settle my debt, and here is the money”, the Organization cannot accept the repayment offer but must follow the ST/AI/2017/1 procedures. “Simple logic” tells us that this argument does not make sense.

93. In conclusion, the Tribunal determines that the Applicant has failed to sustain his burden of proving by clear and convincing evidence that the decision not to return the money was irrational, unreasonable, or unfair in any manner.

Conclusion

94. The application is denied.

(Signed)

Judge Sean Wallace

Dated this 12th day of October 2023

Entered in the Register on this 12th day of October 2023

(Signed)

Eric Muli, Officer-in-Charge