UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2020/059
Judgment No.: UNDT/2023/120
Date: 7 November 2023
Original: English

Before: Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, LPAS, UNOG

Introduction

1. By application registered under Case No. UNDT/GVA/2020/059, the Applicant contests the "[t]he manner in which her complaints of harassment and abuse of authority [against the former United Nations High Commissioner for Human Rights (the "former HC") and the Chief, Human Rights Council Branch ("HRCB"), United Nations Office of the High Commissioner for Human Rights ("OHCHR")] were processed and the decision to close them without further action".

2. For the reasons outlined below, the Tribunal dismisses this application in its entirety.

Facts

Complaint against the former HC

3. On 1 February 2017, the "Inner City Press and blog" published a confidential memorandum from the Ethics Office, dated 7 October 2016, referencing allegations raised by the Applicant to the Ethics Office and the Office of Internal Oversight Services ("OIOS") concerning what she qualified as OHCHR providing names of Chinese Human Rights defenders attending the Human Rights Council ("HRC") sessions to a Member State. The article also mentioned that the Applicant had suffered from retaliation at OHCHR. A similar article was also published on 1 February 2017 on the Government Accountability Project's website.

4. On 2 February 2017, OHCHR published a press release ("the Press Release"), which was also forwarded to all OHCHR staff, concerning the practice of confirming names of human rights defenders who were accredited to attend HRC sessions to the Chinese delegation. In the final paragraph, the Press Release stated:

> GAP and the Inner City Press also refer to a staff member at the UN Human Rights Office in relation to this case, who they assert is a whistle-blower and who they allege suffered reprisals at the hands of the Office. In fact, the staff member has never faced reprisals. The staff member has had her contracts renewed and remains employed by the organization on full pay. She has made allegations against various managers. These have been taken seriously, leading to two separate independent investigations that have been carried out to

> determine whether or not there is any substance to her allegations. In both instances, the claims made by the staff member were found to be unsubstantiated.

5. On 20 February 2017, the Applicant wrote to the former HC taking issue with the content of the Press Release and requesting a retraction and correction of it on the grounds that, in her view, it:

a. Misrepresented the policies of OHCHR regarding the sharing of information about Non-Governmental Organization ("NGO") participants in OHCHR meetings, with the Chinese government; and

b. Publicly discussed confidential complaints she had made. The Applicant requested a retraction and correction of the Press Release.

6. On 13 March 2017, the Applicant filed a complaint of abuse of authority ("First Complaint") with the Assistant Secretary-General ("ASG"), Office of Human Resources Management ("OHRM"), against the former HC regarding the Press Release, under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

7. On 14 March 2017, the former HC informed the Applicant that he would not retract or correct the Press Release. He recalled that all her allegations in her letter of 20 February 2017 had been reviewed and/or investigated by internal mechanisms of the Organization, including OIOS, the Ethics Office, and an independent fact-finding panel established pursuant to ST/SGB/2008/5.

8. On 17 July 2017, the Applicant filed an application before the Dispute Tribunal, registered under Case No. UNDT/GVA/2017/052 (Reilly), contesting the decision to conclude her 20 July 2016 complaint of harassment against her First and Second Reporting Officers with only managerial action, and for "defamation" and "violation of her privacy rights" resulting from the publication of the above-mentioned Press Release.

9. By letter of 11 January 2018, the ASG, OHRM, informed the Applicant that the Secretary-General had decided to wait for the completion of the proceedings before the Dispute Tribunal in Case No. UNDT/GVA/2017/052 (Reilly) to make a final decision on her complaint against the former HC.

10. By application filed on 16 March 2018, registered under Case No. UNDT/GVA/2018/024, the Applicant contested the implied decision not to process her complaint of abuse of authority against the former HC. The Tribunal adjudicated this case by its Judgment *Reilly* UNDT/2019/094 of 24 May 2019.

11. As a result of this Tribunal's rulings in *Reilly* UNDT/2019/094, by letter dated 21 June 2019, emailed to the Applicant on 22 June 2019, the ASG, OHRM, informed the Applicant that "a [formal fact-finding] investigation [would] be convened to investigate the matters [the Applicant] raised in [her] complaint".

12. On 29 September 2019, the Applicant filed a complaint of unsatisfactory conduct, abuse of authority, harassment and discrimination against the ASG, OHRM, and the former Acting ASG, OHRM.

Complaint against the Chief, HRCB, OHCHR

13. On 30 September 2019, the Applicant filed a complaint of abuse of authority ("Second Complaint") with the ASG, OHRM, against the Chief, HRCB, OHCHR, under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority) and ST/AI/2017/1 (Unsatisfactory conduct, investigations, and the disciplinary process).

14. On 8 November 2019, the Applicant was informed that the matters raised in her Second Complaint would be investigated.

Investigation and outcome of the complaints

15. By letter of 21 November 2019, the Under-Secretary-General ("USG"), Department of Management Strategy, Policy and Compliance ("DMSPC"), informed the Applicant of the appointment of an investigation panel () to investigate her First and Second Complaints.

16. By email of 25 November 2019 to the USG, DMSPC, the Applicant objected *inter alia* to having a single investigation panel investigating her two complaints.

17. By email of 2 December 2019, the Panel responded to several questions from the Applicant. One of them concerned the Panel's scope of work, on which the Panel conveyed the following to the Applicant:

> the current fact-finding investigation … will not deal with your allegation, initially made in February 2013 and then reiterated more recently, concerning the provision of confidential information to the Chinese delegation. […] [The Panel] will be looking at the events and actions surrounding the [Press Release] by the Office of the High Commissioner in February 2017, and the alleged consequent reprisals.

18. On 23 May 2020, the Panel submitted its investigation report.

19. By letter dated 10 June 2020 ("contested decision" or "closure letter"), the USG, DMSPC, informed the Applicant that following her review of the investigation report and the information collected, she "determined that there [was] insufficient evidence to support the allegations [the Applicant] raised" and, consequently, she "[would] be taking no further action on the complaints".

Procedural history

20. On 10 August 2020, the Applicant requested management evaluation of the contested decision.

21. By email of 24 September 2020 to the Applicant, the Management Evaluation Unit referred to her request for management evaluation and informed her that "[a]ny recourse that [she] may wish to pursue may be addressed to the United Nations Dispute Tribunal in accordance with staff rule 11.4".

22. On 22 December 2020, the Applicant filed the application referred to in para. 1 above.

23. On 29 January 2021, the Respondent filed his reply, *inter alia* contesting the receivability of part of the application.

24. Following the completion of two appeals of the Applicant before the United Nations Appeals Tribunal ("Appeals Tribunal" or "UNAT"), the instant case was assigned to the undersigned Judge on 3 April 2023.

25. Pursuant to Order No. 29 (GVA/2023) of 4 April 2023, the Tribunal held an in-person case management discussion ("CMD") on 26 April 2023, with the participation of the Applicant, her Counsel, and Counsel for the Respondent.

26. In response to Order No. 44 (GVA/2023) issued after the CMD:

a. The Respondent filed *ex parte*, on 5 May 2023, the investigation report with all material annexed to it;

b. The Respondent filed under seal, on 9 May 2023, redacted versions of the investigation report and of all the material annexed to it, and of the terms of reference of the Panel; and

c. The Applicant filed a rejoinder, on 16 June 2023, after being given access to the above-mentioned under seal filings.

27. By Order No. 90 (GVA/2023) of 3 August 2023, the Tribunal:

a. Considered itself sufficiently informed to render its judgment without the need for additional disclosure of evidence or the holding of a hearing on the merits; and

b. Instructed the parties to file their respective closing submission.

28. On 30 August 2023, the parties filed closing submissions.

Consideration

Applicable law

29. Although the First Complaint was made under ST/SGB/2008/5, its investigation and the contested decision were undertaken under ST/SGB/2019/8 and ST/AI/2017/1, in keeping with sec. 8.3 of ST/SGB/2019/8. This is further

confirmed in para. 3 of the 21 November 2019 letter that the USG, DMSPC, addressed to the Applicant (see para. 15 above).

Scope and standard of judicial review

30. Art. 2.1(a) of the Tribunal's Statute confers jurisdiction on the Tribunal to examine the lawfulness of administrative decisions. The administrative decision under scrutiny is the decision to close the Applicant's complaints of abuse of authority with no further action.

31. In determining the lawfulness of an administrative decision relating to an investigation of a complaint, the Tribunal may examine the propriety of the procedural steps that preceded and informed the decision arrived at insofar as they might have impacted the final outcome (see *Kostomarova* UNDT/2016/009, para. 44). In this connection, sec. 5.6 of ST/SGB/2019/8 provides as follows:

> Where an affected individual or alleged offender has grounds to believe that the procedure followed in respect of the handling of a formal report of prohibited conduct was improper upon being informed of the outcome of the matter … the affected individual or alleged offender may contest the matter pursuant to chapter XI of the Staff Rules.

32. In assessing the legality of the decision to close the Applicant's complaints with no further action, "the Tribunal must examine whether the Administration breached its obligations pertaining to the review of the complaint and the investigation process that ensued, as set out primarily in [the applicable Bulletins of the Secretary-General]" (see, e.g., *Duparc et al.* UNDT/2021/077, para. 34; *Belkhabbaz* UNDT/2018/016/Corr.1, para. 82).

33. Before commencing this exercise, however, it is recalled that, in cases of harassment and abuse of authority, the Tribunal is not vested with the authority to conduct a fresh investigation into the initial complaint (see *Messinger* 2011-UNAT-123, para. 27). As in discretionary decisions of the Organization, it is not the Tribunal's role to substitute its own decision for that of the Administration (see, e.g., *Sanwidi* 2010-UNAT-084, para. 40).

34. The Appeals Tribunal indeed held in *Sanwidi* that:

> 42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

35. The Tribunal may, however, "consider whether relevant matters have been ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse" (see *Sanwidi*, para. 40).

36. If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see *Belkhabbaz* 2018-UNAT-873, para. 80). "When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision" (see also *Belkhabbaz*, para. 80).

37. In light of the foregoing, and having reviewed the parties' submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

a. Whether the application in its entirety is receivable;

b. Whether the investigation into the Applicant's complaints was properly conducted;

c. Whether the Administration committed any errors in arriving at the contested decision; and

d. Whether the Applicant is entitled to any remedies.

Whether the application in its entirety is receivable

38. The Applicant contests "the manner in which her complaints of harassment and abuse of authority" against the former HC and the Chief, HRCB, OHCHR, were investigated. She requests for rescission of the decision to close the complaints with no further action on them, and for an order recommending investigation by an external independent investigatory body, among other remedies.

39. The Respondent maintains that the first part of the Applicant's complaint, concerning "the manner in which her complaints of harassment and abuse of authority were processed", is not receivable *ratione materiae.* The Respondent claims that the above aspect of the application does not constitute an administrative decision subject to appeal. He also submits that the Applicant has not demonstrated how, and why, the way the investigation was conducted affected her terms and conditions of appointment, or how this would have changed the outcome of the investigation and/or the contested decision. Finally, he asserts that the mere fact that the Applicant disagrees with the conduct of an investigation does not mean that it was unlawful or that it directly affected her rights.

40. Art. 2.1(a) of the UNDT Statute provides that the Tribunal has jurisdiction to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance with a staff member's terms of appointment or contract of employment. The terms "contract" and "terms of appointment" include all pertinent Regulations and Rules, and all relevant administrative issuances in force at the time of the alleged non-compliance.

41. The Appeals Tribunal has clarified that art. 2.1(a) covers the pertinent Regulations, Rules, Bulletins, and Administrative Instructions issued by the Secretary-General, including ST/SGB/2008/5, under which discrimination, harassment, including sexual harassment, and abuse of authority are prohibited. The Appeals Tribunal has explained that when a complaint concerns issues covered by

ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with an outcome, he or she may request judicial review of the administrative decision taken. These observations equally apply to ST/SGB/2019/8.

42. The Appeals Tribunal has also held that the UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation. (*Nwuke* 2010-UNAT-099).

43. The Appeals Tribunal reiterated the above position in the latter case of *Argyrou* 2019-UNAT-969 (para. 38), emphasising that "the UNDT is competent under its jurisdiction to determine if there was a proper investigation in terms of ST/SGB/2008/5 and to review whether any administrative decision arising from the process was in compliance with the terms of the aggrieved individual's terms of contract".

44. It is recalled that the aspect of the application whose receivability the Respondent is objecting to relates to the manner in which the Applicant's complaints of abuse of authority, which were laid under ST/SGB/2008/5 and ST/SGB/2019/8, were investigated. This fact brings that aspect of the application in the ambit of *Nwuke*.

45. Based on this, and in keeping with established jurisprudence, there can be no doubt that the Tribunal has jurisdiction over those aspects of the instant application under art. 2.1(a) of the UNDT Statute. The totality of the application is therefore receivable *ratione materiae*.

Whether the investigation into the Applicant's complaints was properly conducted

46. Sec. 5.20 of ST/SGB/2008/5 and sec. 5.6 of ST/SGB/2019/8 allow an aggrieved/affected individual who has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, to appeal pursuant to chapter XI of the Staff Rules. Under this section, the Tribunal may

therefore examine the propriety of the procedural steps that preceded and informed the impugned decision (*Kostomarova* UNDT/2016/009, para. 44).

47. In conducting this review, the Tribunal will be guided by established principles in *Sanwidi* (see paras. 33 and 34 above).

The Applicant's arguments in her application

48. In her application, the Applicant advances the following arguments in support of her challenge of the contested decision:

a. The Respondent's delay in conducting the investigation of her complaint against the former HC;[1]

b. The alleged conflict of interest of the USG, DMSPC,[2] and of the Panel members;[3]

c. The failure to appoint a Panel member of similar grade to one of the subjects;[4]

d. The Panel's treatment of her two complaints in one investigation report;[5]

e. The Panel's decision to destroy audio recordings of witness testimony;[6]

f. The Panel's failure to re-interview her;[7]

g. The Panel's investigation of the practice of providing human rights defenders' names to the Chinese government ahead of HRC sessions, which was outside its terms of reference;[8]

1 Application on the merits, paras. 28-30.
2 Ibid., paras. 31-32.
3 Ibid., paras. 33-37.
4 Ibid., annex 16.
5 Ibid., paras. 38-42.
6 Ibid., paras. 43-49.
7 Ibid., paras. 50-52.
8 Ibid., paras. 53-55.

h. The Panel's decision to investigate her contacts with Member States and the press;[9] and

i. Factual errors contained in the closure letter vitiate it.[10]

The Applicant's arguments in her rejoinder

49. In her rejoinder, the Applicant further argues that:

a. The terms of reference that the USG, DMSPC, issued included significant misrepresentations of the Applicant's complaints and thereby created bias against her (paras. 1-8);[11]

b. The USG, DMSPC, failed to disclose vital evidence to the Panel and thereby prevented investigation of one of the subjects;[12]

c. The Panel misled her by suggesting it would not investigate the practice of providing the names of human rights defenders attending the Human Rights Council to the Chinese Government;[13]

d. The Panel's conclusions regarding the practice runs contrary to the documentary record and is manifestly unreasonable;[14]

e. The Panel accepted evidence of witnesses regarding the lack of risk associated with telling the Chinese Government which Human Rights defenders would be attending the Human Rights Council without checking if it was supported by the documentary record;[15]

[9] Ibid., paras. 56-60.
[10] Ibid., paras. 61-64.
[11] Applicant's rejoinder, paras. 1-8.
[12] Ibid., paras. 9-11.
[13] Ibid., paras. 12-16.
[14] Ibid., paras 17-35.
[15] Ibid., paras. 36-44.

f. The Panel had before it evidence that the Chief, HRCB, OHCHR, repeatedly misrepresented the policy by which names were provided to the Chinese Government;[16]

g. The Panel had evidence proving that other individuals had misrepresented the practice;[17]

h. The Panel had evidence that the Press Release misrepresented the practice;[18]

i. The Panel's conclusions regarding the absence of defamation in the description of the practice in the Press Release are premised on their erroneous findings of fact in that regard.[19]

j. The Panel's findings regarding the Applicant's misunderstanding as to whether the practice was ongoing or began in 2013 are erroneous, illogical and do not conform to the documentary record;[20]

k. The Panel's findings regarding the last paragraph of the Press Release are contradicted by the contemporaneous documentary record and are manifestly unreasonable;[21]

l. The Panel characterized the Applicant's allegation that the Press Release misrepresented the practice as being a disagreement of opinion concerning the importance or risk posed by the practice rather than a factual allegation OHCHR lied about what they had done;[22]

[16] Ibid., paras. 45-64.
[17] Ibid., paras. 65-76.
[18] Ibid., paras 77-88.
[19] Ibid., paras. 89-91.
[20] Ibid., paras. 92-100.
[21] Ibid., paras. 101-106.
[22] Ibid., paras. 107-117.

m. The Panel made findings on the refusal to withdraw the Press Release and refusal to permit the Applicant to speak with the press on a faulty premise;[23]

n. The Panel reached the manifestly unreasonable conclusion that the Chief, HRCB, OHCHR, was not involved in the drafting of the Press Release and was not responsible for the contents. Such finding goes against the documentary record and evidence of witnesses;[24]

o. The fact-finding investigation is marked by specific indicia of bias;[25] and

p. The Panel's failure to interview relevant witnesses, to pose relevant questions to witnesses, to follow up on evidence supporting the Applicant's allegations, and the Panel questioning witnesses on issues of fact on which they could have no information.[26]

The Applicant's arguments in her closing submission

50. In her closing submission, the Applicant reiterates her arguments in paras. 49.b, k, o, and p above and adds that:

a. The USG, DMSPC, did not have the authority to act as responsible official;[27] and

b. The Panel failed to evaluate witness evidence in a coherent manner.[28]

[23] Ibid., paras. 118-122.
[24] Ibid., paras. 123-128.
[25] Ibid., paras. 129-138.
[26] Ibid., paras. 139-155.
[27] Applicant's closing submission, paras. 8-11.
[28] Ibid., paras. 15-18.

Examination of the above arguments

Delay in conducting the investigation of the Applicant's complaint against the former HC

51. The issue of the Respondent's delay in processing the Applicant's complaint against the former HC, which is the subject of this application, was successfully litigated by the Applicant (see *Reilly* UNDT/2019/094). Basing on the Tribunal's decision, the Applicant now asserts that the justification provided by the Respondent for the delayed processing of her complaint was unilateral and constituted an unlawful deviation from the policy, and an *ex post facto* excuse. She adds that the Respondent's initial reluctance to investigate her complaint constitutes evidence of an institutional attitude to the complaint, which permits an inference of bias.

52. The fact, however, that the Tribunal found the Respondent's explanations for the delay to have been unpersuasive (see *Reilly* UNDT/2019/094, para. 49), does not permit an inference of bias against the Respondent. The Tribunal arrived at that conclusion principally because the legal framework did not permit the Respondent discretion over the issue, and not on the premise that the reason that was advanced lacked in credibility. Based on this, the Applicant's argument that the delay is evidence of an institutional attitude to her complaint, and that bias may be inferred from the Respondent's initial reluctance to investigate her complaint, is rejected as speculative.

53. The Tribunal is moreover persuaded by the argument that the issue of the delayed investigation was adjudicated and remedied in *Reilly* UNDT/2019/094, and that it is not, therefore, relevant to the contested decision in this application. Seeking to bring it back to the table is attempting to re-litigate an issue that the Tribunal has already pronounced itself on, which is improper.

54. The Tribunal therefore finds no merit in this argument, and it is rejected.

Conflicts of interest

55. Staff regulation 1.2(m) defines conflict of interest in the following terms:

> [a] conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

56. Art. 27.1 of the Tribunal's Rules of Procedure defines the term "conflict of interest" as including "any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her".

57. Art. 27.2 further provides that:

> A conflict of interest arises where a case assigned to a judge involves any of the following:
>
> (a) A person with whom the judge has a personal, familiar or professional relationship;
>
> (b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;
>
> (c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.

58. The Appeals Tribunal's Rules of Procedure contain the same language on this matter. As was determined in *Duparc* UNDT/2022/074, although relating to Judges, these provisions can be useful to enlighten the Tribunal's interpretation of the term "conflict of interest" within the Organization (*Wilson* 2019-UNAT-961, para. 19).

59. It has moreover been held that the test for determining whether a person is biased or not is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the said person is biased (*Masri* 2016-UNAT-626, para. 21).

Conflict of interest of the USG, DMSPC

60. The Applicant maintains that the USG, DMSPC, was intimately involved in her "unilateral transfer" in October 2019 about which the Applicant raised various complaints. She adds that the action was found to have been retaliatory at the *prima facie* level by an Alternate Chair of the Ethics Panel, and that it was suggested to her that this transfer was specifically for the protection of the Chief, HRCB, OHCHR. The Applicant further claims that she proposed the USG, DMSPC, to the Panel as a potential witness in the investigation.

61. Based on the above, the Applicant concludes that the USG, DMSPC had a clear conflict of interest in presiding over the treatment of her complaints and observes that, nonetheless, the USG, DMSPC, selected the members of the Panel, drafted their terms of reference, and made the contested decision.

62. The Respondent disputes the above assertions and explains that the only involvement of the USG, DMSPC, in the Applicant's reassignment was in clarifying the issue of re-assignment authority that the Applicant had raised, and that she executed that role in her official capacity as USG, DMSPC. The Respondent asserts that the USG, DMSPC, was not "intimately involved" in the process and that the authority and primary responsibility for the Applicant's reassignment was exercised by the High Commissioner for Human Rights.

63. The Applicant does not dispute the Respondent's explanation about the nature of the role of the USG, DMSPC, in her reassignment. The Tribunal, therefore, accepts the Respondent's explanation.

64. If the only involvement of the USG, DMSPC, in the Applicant's reassignment was in clarifying the issue of re-assignment authority, which the Applicant had raised as has been determined, nothing on record can support a finding that the personal interests of the USG, DMSPC, interfered with the performance of her

official duties and responsibilities or with her integrity, independence and impartiality so as to ground a finding of conflict of interest. There is no evidence that the USG, DMSPC, had any personal interest in the matter. The claim about her alleged conflict of interest fails.

65. The Applicant also seeks to support her contention of conflict of interest against the USG, DMSPC, on the basis that she (the Applicant) proposed the USG, DMSPC, to the Panel as a potential witness in the investigation, which is not disputed.

66. It is noteworthy that the Panel did not interview the USG, DMSPC. Merely proposing a person as a witness is not sufficient to support a finding of conflict of interest against that person. Such a claim must be accompanied by an indication of the relevance of the proposed testimony and how not hearing it would vitiate the investigation.

67. According to the Applicant, the relevance of the testimony of the USG, DMSPC, related to the latter's awareness "of refusals of OHCHR to obey instructions for the Applicant's protection that the Panel indicated it would investigate" (see para. 144 of the Applicant's rejoinder). The Tribunal does not, however, find the suggested evidence sufficiently relevant, as to ground a finding of bias against the USG, DMSPC.

68. Recalling that the test for determining whether a person is biased or not is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the said person is biased (see para. 59 above), the facts do not support a finding that the participation of the USG, DMSPC, in the appointment of the Panel and the determination of its terms of reference permitted a reasonable apprehension of conflict of interest.

69. The Tribunal finds no merit in this argument, and it is therefore rejected.

Conflict of interest of the Panel members

70. The Applicant asserts that the Panel members were former Human Resources officials who had previously worked with the ASG, OHRM. She also claims that they worked for offices in the common system involved in the defending of managerial actions. She, therefore, expresses concern alleging that by the time of the investigation, the Organization had declared its position in relation to the Press Release in open Court, and a subsequent investigation finding that it had been an act of abuse of authority would undermine the position taken by the Organization in that regard. The Applicant claims that this is why senior management could not preside over an independent investigation of her complaints and issues arising from it. Finally, the Applicant alleges that the Panel was renumerated for its investigation by individuals who already had an official position regarding the quality of the Press Release.

71. The general principle of law is that a person called upon to take a decision affecting the rights or duties of other persons subject to his/her jurisdiction must withdraw in cases in which his/her impartiality may be open to question on reasonable grounds (*Messinger*).

72. It is noteworthy that the Applicant does not attribute any apprehension of bias to personal interests of any of the Panel members. Rather, she relates it to the panel members' former official positions, and how they relate to other officials in the Organization.

73. There is no evidence to suggest that the Panel members had any personal interest in the outcome of the investigation. The factors relied on by the Applicant are mere conjectures and speculations that do not support a finding of existence of reasonable apprehension of bias or conflict of interest on the part of the Panel members.

74. The submission that senior management could not preside over an independent investigation of the Applicant's complaints for the reasons that she advances is speculative. Also, if accepted, it would set a very dangerous precedent that might bog down the processing of complaints in the Organization.

75. Since this claim concerns allegation of bias or conflict of interest on account of former official positions of the panel members, absent evidence of existence of personal interest, the Tribunal finds unsubstantiated the allegation of bias or conflict of interest of the Panel members. The Tribunal finds no merit in this argument, and it is rejected.

Failure to appoint a panel member of similar grade to one of the subjects

76. The Applicant seeks to challenge the composition of the Panel arguing that "it is clearly inappropriate for individuals so far below the level of a USG [(i.e., the level of the former HC)] to conduct the investigation into the former [HC]".[29] She adds that the Panel's "appointment to investigate wrongdoing by a USG … violates the UN's own internal best practices guidance in this regard [as no member of the Panel] is at the appropriate level".[30]

77. The Tribunal notes that annex 33 to the application is a document titled "Guidelines for UN SECRETARIAT Managers. How to deal with possible discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2008/5)" (hereinafter "the Guidelines"). Para. 1 of that document *inter alia* provides that "the present guidelines are aimed at supporting informed decision-making relating to the implementation of [ST/SGB/2008/5] with a particular focus on the roles and responsibilities of managers. As each case has its own unique facts and features, it is not possible to provide more than a guideline to the process to be followed".

78. Concerning the appointment of a fact-finding panel, para. 33.c of the Guidelines states that the responsible official should

> Make efforts to appoint a diverse panel, with at least one member who is at the same or higher functional level than the alleged offender. Efforts should also be made to take into account the language requirements of the complainant as well as the alleged offender.

[29] See annex 16 to the application, p. 140 of the case file.

[30] Ibid., p. 139 of the case file.

79. By their nature, guidelines are general recommendations about the process of how to arrive at a course of action. Contrary to rules, guidelines do not prescribe a specific behaviour. For a challenge against the composition of a fact-finding panel to have a chance to succeed based on non-compliance of a guideline, an applicant has to show how such non-compliance vitiates the investigation process and violates due process rights.

80. In the instant case, the Applicant did not provide evidence in the above respect. Consequently, the Tribunal finds no merit in this argument. It is rejected.

The treatment of two complaints in one investigation report

81. The Applicant maintains that the treatment of her two complaints in one investigation report was a procedural error. According to her, there was no plausible reason for that decision since the two complaints were filed years apart, were governed by different policies and related to different facts and individuals. She therefore argues that that decision presupposed that there would be no negative findings concerning any of the subjects, since the due process requirements that compel disclosure of a negative report would pose confidentiality issues in the event of a negative finding.

82. In the Respondent's view, there was no conflict or other procedural impediment to this approach. He also advances that the central allegation in the two complaints concerned the subjects' involvement in the publication of the 2017 Press Release and associated disputes with the Applicant. Since the complaints raised common allegations, the Respondent claims that it was appropriate to have a joint investigation due to an overlap in the witnesses and documentary evidence, and that the joint approach ensured that the investigation was concluded effectively and expeditiously. In the Respondent's view, it was therefore an appropriate use of resources. Finally, the Respondent added that in the event that there was a need to disclose the report or other information, any confidential aspects could have been redacted.

83. The Tribunal notes that there is no legal bar to the treatment of two complaints in one report. The assertion that the decision represents a procedural error is therefore not legally founded.

84. Additionally, the Applicant has not demonstrated how and why the decision affected her rights under the applicable bulletin. The assertion that the decision could present confidentiality issues is speculative. It is not even supported by evidence, since no such issues arose anyway. There is no basis for the belief that any negative report or information would have been shared in ways that would pose confidentiality issues. As demonstrated by the Respondent, it was possible to solve such a problem if or when it arose. The assertion that the decision demonstrates that the outcome of the investigation was preordained is therefore unfounded.

85. Consequently, the Tribunal finds no merit in this argument. It is rejected.

The decision to destroy audio recordings of witnesses' testimonies

86. The Respondent explains that the Panel indicated that they would dispose of audio recordings of witnesses' testimonies after the signing of the interview reports. Some witnesses agreed to have their recordings being kept and some did not.

87. The Applicant argues that when the Panel began the interviews indicating that recordings would be disposed of, they were aware that the investigation report would not be transmitted to the ASG, OHRM for disciplinary action. This, in the Applicant's view, indicates that the outcome of the investigation was preordained.

88. The Applicant explains that she had sought and received both written and oral assurances from the Panel that all interviews would be audio-recorded, and all recordings maintained. At the stage of transmission of the summary prepared by the Panel, she was informed that signing such would result in immediate deletion of the audio recording. She asserts that the summary notably excluded the focus of the Panel, who was mandated, in her view, to investigate the Press Release issued in 2017 and the Applicant's contacts with Member States and the press in 2019. The Applicant felt that the Panel had abused having her under oath to subvert the investigation and instead gather evidence against her, and she wished to preserve evidence of such. The Applicant added that the Panel did not, however, include

communications on this issue as annexes to its report. She also indicates that the recording of her interview is not included in the Respondent's annexes, and whether or not it was transmitted to the responsible official needs to be clarified.

89. In the Tribunal's view, a finding that the outcome of the investigation was preordained basing only on the fact that the panel began the interviews with an explanation that it would dispose of the recordings, cannot be sustained.

90. The Panel was not legally required to make the recordings. Sec 6.7 of ST/AI/2017/1 provides that recordings *may* be made. What is mandatory is a written record, such as transcripts/synopsis of interviews. And this, only if a report is transmitted to the ASG, OHRM, for disciplinary action, which was not so in this case.

91. The Tribunal also notes that at para. 34 of its report, the Panel explained in detail its rationale and approach concerning the recordings. There is no evidence in support of the Applicant's claim that the Panel "destroyed" the audio recordings. The Panel clearly stated that evidence would be preserved by means of signed statements from each interviewee. More importantly, the report states that in line with advice from Human Resources, all available audio recordings were kept and only the audio recording of five witnesses who objected to not disposing of them were not submitted to the responsible official.

92. Consequently, the Tribunal finds no merit in this argument. It is rejected.

The Panel's failure to re-interview the Applicant

93. The Applicant claims that the closure letter indicated that in the course of the investigation, new facts or allegations were raised that had not been covered in her original interview. She should, therefore, have been re-interviewed in accordance with the Guidelines (cf. para. 77 above). She asserts that the Panel declined to re-interview her and that this is incompatible with an even-handed independent investigation.

94. The Tribunal notes that the Applicant does not specify the new facts or allegations she sought to be re-interviewed about, and the nature of evidence she sought to adduce. The Tribunal is therefore not in position to determine whether her further evidence was relevant and would have changed the outcome of the process.

95. The Tribunal in addition notes that under ST/AI/2017/1, re-interviewing a witness/complainant/subject is an investigative action that falls under the prerogative of the responsible official. Sec 7.4 of this administrative instruction provides in its relevant part that:

> the responsible official shall review the report to determine whether the official agrees with the findings of the investigation and, where further clarification on the findings of the investigation is required, may request additional information, including the taking of specific investigative action.

96. The above prerogative is echoed in the Guidelines. Para. 48, titled "Making further inquiries", provides that:

> The responsible official may make any further enquiries he/she considers necessary to enable him/her to conduct an assessment of the investigation report/evidence. For example, he/she may decide to ask the panel for clarification or to request the panel to undertake additional interviews on certain points or of new or different witnesses. Any further inquiries should be in writing and a full record kept of any action taken.

97. Consequently, the Tribunal finds no merit in this argument. It is rejected.

The Panel's investigation of the practice and the Applicant's allegation of being misled

98. The Applicant claims that contrary to the Panel's terms of reference and to the information she was given, the Panel investigated the practice of confirming the names of accredited human rights defenders to the Chinese government before their attendance at HRC sessions. She bases this claim on the contents of the closure letter and explains that since she was informed that the issue would not be examined, she did not present evidence relevant to it. She concludes that the Panel deliberately misled her to act to her detriment, in that they only ensured that they

did not receive evidence to support an act of misconduct before making findings that it did not occur, and that this constitutes evidence of bias on the Panel's part.

99. The Respondent contends that the Applicant's assertion is a misperception that bears no consequences on the outcome of the process. The Respondent submits that considering that the Panel informed her that the investigation "[would] be looking at the events and actions surrounding the [Press Release]" this necessarily included investigating whether her claim that the Press Release was false and misleading insofar as it represented the practice, was established or not. The Respondent advances that this does not amount to investigating whether the Applicant's claim that the practice was improper was established. The Respondent concludes that consistent with the Panel's notification to the Applicant, the investigation was not mandated to establish the merits of the practice. Rather, it merely established what the practice had been.

100. The Respondent further asserts that the closure letter informed the Applicant that the Panel investigated her two complaints and found that there was insufficient evidence to support the claims made. It was specifically found that the Press Release "accurately described" the practice and was responsive to the allegations made in the press reports. The Applicant had a full opportunity to provide evidence and she provided substantial evidence as to what she considered the practice was. While the Panel found the Office's description of the practice "to be an accurate description of the practice in place in 2013", "[f]urther analysis of this was not in the Panel's terms of reference and might require a separate and independent review." Thus, contrary to her claims, the Panel did not attempt to mislead the Applicant.

101. The Tribunal considers that the process of handling complaints, including the establishment of interview Panels and formulation of terms of reference is a function of law. The Guidelines (see para. 77 above) were formulated to promote due process throughout the handling of complaints.

102. To this end, paras. 34 and 35 of said Guidelines provide as follows:

> 34. After the responsible official has appointed a fact-finding panel, he/she should:

> a. Inform the panel in writing of its terms of reference and its obligations under the Bulletin and provide the panel with the relevant documentation.
>
> b. Inform the complainant and the alleged offender, in writing, of the establishment of the panel, its composition and mandate, the timing of the investigation, the duty to co-operate with the investigation, and the policy contained in ST/SGB/2005/21 (protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations). Sample memoranda are attached to these guidelines as Annex II.
>
> 35. When formulating the terms of reference for the Panel, the responsible official should give consideration to the scope of the investigation.
>
> 36. A clear scope of investigation should be established by identifying the facts alleged, the type(s) of prohibited conduct to be investigated, the party(ies) who are claimed to have engaged in that conduct and the period when the possible misconduct occurred. Matters and/or parties not within the prescribed scope should not be included as part of the investigation, without a prior re-consideration of the terms of reference by the responsible official.

103. It is clear from the above provisions that transparency and the right to information are major themes in the formal dispute-resolution process. To this end, the Panel informed the Applicant that they would not investigate the practice in issue. Rather than having been a mere formality, the provision of such information to the complainant was to ensure foreseeability of action to enable her to prepare and participate in the process in a meaningful way.

104. By email of 2 December 2019, the Panel communicated to the Applicant that "[a]s part of [its] review with a more limited scope, [it would] be looking at the events and actions surrounding the [2017] Press Release".[31]

105. Para. 5 of the investigation report states the following in its relevant part:

> Specifically, the Panel was tasked to investigate the circumstances surrounding the issuance of the Press Release, namely, to assemble

[31] Annex 17 to the application, p. 142 of the case file.

> the facts relevant to the Administration's subsequent determination of whether:
>
> (i) The Press Release was responsive to the allegations made in the press articles, providing a fair defense of OHCHR and its practices at that time, before the HRC sessions; and/or
>
> (ii) The Press Release defamed Ms. Reilly, unjustifiably undermining her long-held position that participants should not be named in advance of HRC sessions and/or, otherwise contained false statements connected to Ms. Reilly, resulting in unjust harm to Ms. Reilly's reputation.

106. A reading of the Panel's report supports a conclusion that contrary to the Applicant's arguments, the Panel did not investigate the practice. Rather, it gathered information to understand the accreditation process and information sharing to reach a conclusion on the two Press Release-related issues outlined in para. 105 above. The Panel's investigation and line of questioning on the Press Release sought also to contextualize the practice of confirming names and understand the Organization's and the Applicant's view on it. This does not amount to an investigation of the practice and was necessary to assess the Applicant's objections to the Press Release.

107. The record also shows that the Applicant submitted rather extensive evidence in connection with her objections to the Press Release and as such, in relation to the practice of confirming names.

108. The Tribunal finds no merit in the Applicant's argument that the Panel misled her with respect to the scope of its investigation in connection with the practice of confirming names.

109. The Tribunal finds no merit in this argument. It is rejected.

The Panel's decision to investigate the Applicant's contacts with Member States and the press

110. The Applicant claims that the Panel devoted the majority of her interview to seeking information about her contacts with the press. She claims that they took the opportunity of an interview under oath to gather evidence not in relation to the complaints it was mandated to investigate but in relation to her actions in other

aspects. She further argues that such improperly obtained information was used by the USG, DMSPC and the Deputy High Commissioner to seek to intimidate her into ceasing such communications, which prejudiced her. The Applicant advances that the alleged Panel's decision to deviate from its mandate in such a manner and the subsequent use to which the Administration placed that element of the Panel's investigation are evidence of their lack of independence and bias. The Applicant also claims that combining the decision to misrepresent an investigation of the practice with the decision to deviate from their mandate to investigate the Applicant's contact with members states gives the impression of a political cover up.

111. The Respondent explains that the Applicant claimed that she was defamed because of the Press Release. Accordingly, the Panel also sought to establish the extent to which information concerning her case may have been communicated by sources external to OHCHR and the Applicant herself. For this reason, her complaints required the Panel to consider her contacts with external parties.

112. The Tribunal is persuaded by the Respondent's argument. The Panel did not investigate the Applicant's contacts with Member States or the press. As it was with its approach on the practice of confirming names, the Panel merely sought to understand how information about the Applicant went into the public domain.

113. Additionally, the Tribunal considers that the Panel's acknowledgement of the Applicant's interactions with the press and Member States are both immaterial to the determination of the issues under dispute, and incapable of impacting the legality of the contested decision. The Applicant was never investigated nor disciplined for the public communications she held with external parties and that were touched upon during the investigation under the instant scrutiny.

114. The issue of outside communication is a function of law under the applicable rules and regulations, namely ST/SGB/2018/1, staff rule 1.2(t) and staff regulation 1.2(i) and (o). The Tribunal is aware that the investigation and disciplinary process that followed the Applicant's conduct are under litigation in Case No. UNDT/GVA/2022/006 (Reilly). Any alleged prejudice arising from the

use of information in the Panel's investigation report is to be adjudicated in that case and outside of the scope of judicial review in the instant case.

115. The Tribunal finds no merit in the Applicant's argument. It is rejected.

Factual errors in the closure letter/contested decision vitiate it

116. Annex 30 to the application contains a summary by the Applicant of alleged factual errors in the contested decision, which, she argues, vitiate it.

117. The Tribunal notes that some of the issues the Applicant highlights under this head have already been traversed: the Applicant's objection to the Panel's treatment of two complaints in one report; the Panel's alleged destruction of interview audio recordings; the failure of the Panel to re-interview the Applicant; the Panel's alleged undue investigation of the issues surrounding the practice of confirming names; and the Applicant's contacts with Member States and the press. The Tribunal will therefore not revisit them.

118. The allegation relating to the Panel's failure to interview witnesses that the Applicant proposed is examined and rejected in paras. 186 to 198 below.

119. The remaining sections of the contested decision with which the Applicant takes issue relate to:

a. Para. 5, with respect to the death of a human rights activist and the responses of OHCHR to the Applicant's concerns; and

b. Para. 7, concerning the alleged role of the Chief, HRCB, OHCHR, in the Applicant's performance reports, contract extensions or assignments after the Applicant left HRCB in late 2013.

120. Concerning the death of a human rights activist, the Applicant asserts that she never alleged that it was linked to actions of OHCHR. The Tribunal notes that no such claim is made in the contested decision. In its relevant part, para. 5 of the contested decision reads that "the Panel found that the Press Release refuted the false and damaging claim that OHCHR's actions may be linked to … the tragic death of [a] human rights defender".

121. The record shows that the link was made in the press articles published in February 2017. The contested decision refers to the Panel's finding, which was arrived at when it examined whether the Press Release of OHCHR addressed allegations in those articles. The contested decision does not attribute the link to the Applicant, it merely refers to one of the findings in connection with allegations made in the press articles.

122. With respect to the alleged role of the Chief, HRCB, OHCHR, in the Applicant's performance reports, contract extensions or assignments after the Applicant left HRCB in late 2013, the Tribunal notes that, in the Second Complaint, the Applicant claimed that "[the Chief, HRCB, OHCHR,] used his position of influence, power and authority in an effort to influence [her] performance evaluation, prospects of promotion, and contract renewal".

123. The Applicant takes issue with categorising the matter as the Chief, HRCB, OHCHR, "playing a role". She argues that her claim was that he "intervened" to encourage negative comments about her performance.

124. In the Tribunal's view, the alleged factual error that the Applicant raises is merely grounded on her preference for a specific wording. This renders the argument immaterial and inconsequential. The Tribunal therefore finds no merit in the argument and rejects it.

The terms of reference that the USG, DMSPC, issued included significant misrepresentations of the Applicant's complaints and thereby created bias

125. In her rejoinder, the Applicant argues that the USG, DMSPC, incorrectly identified the practice of confirming names to the Chinese delegation as a policy matter,[32] and misrepresented the defamation the Applicant complained of and the content of her complaint against the Chief, HRCB, OHCHR.[33] She also takes exception with how the USG, DMPSC, worded certain aspects of her complaint in the Panel's terms of reference.

[32] Applicant's rejoinder, para. 1.

[33] Ibid., paras. 4-5.

126. In the Tribunal's view, the USG, DMPSC, was entitled to delineate the scope of the Panel's investigation. In this connection, it was reasonable for the USG, DMSPC, to inform the Panel that it was not to investigate whether the practice was justified, and to qualify the examination of this issue as a "policy matter".

127. Having perused the terms of reference and considered the Applicant's arguments, the Tribunal is satisfied that there are no misrepresentations in the former. Moreover, since the Panel had access to the Applicant's complaints, it was in a position to address any alleged misrepresentations if they existed.

128. It is also clear that at least one of the alleged misrepresentations that the Applicant complains of results from her misreading of the terms of reference. The Applicant, for example, argued that in para. 7 of the terms of reference, the USG, DMSPC,

> misrepresent[ed] the content of her complaint against [the Chief, HRCB, OHCHR,] specifically instructing the Panel to investigate [said Chief's] failure to allow her to speak to the press or to order correction of the [Press Release]. Neither action is within the legal authority of [the Chief, HRCB, OHCHR,] and the Applicant at no point made any complaint against him in either regard.

129. The pertinent paragraph in the terms of reference reads as follows in its relevant part:

> Concerning the Second Complaint, the Panel is requested to assemble the facts relevant to the Administration's subsequent determination of whether [the Chief, HRCB, OHCHR,] participated in the matters detailed at paragraphs 4 to 6 above, that is, the decisions of [the former HC] and/or OHCHR concerning the issuance of the Press Release, the failure to approve [the Applicant's] request to speak to the press and take the action requested in [the Applicant's] memorandum dated 20 February 2017.

130. Contrary to the Applicant's arguments, the USG, DMSPC, did not instruct the Panel to investigate the failure of the Chief, HRCB, OHCHR, "to allow the Applicant to speak to the press or to order correction of the [Press Release]". The USG, DMSPC, clearly indicated that the Panel was to look into whether the Chief,

HRCB, OHCHR, participated in the issuance of the Press Release and/or in not allowing the Applicant to speak to the press, further specifying that it was the former HC who had taken the decisions in question. This argument is consequently rejected.

The USG, DMSPC, failed to disclose vital evidence to the Panel and thereby prevented investigation of one of the subjects

131. The Applicant claims that during her first interview, she informed the Panel about the existence of the former HC's comments on her complaint and recorded this fact in a follow-up email. She argues that the USG, DMSPC, however, failed to disclose this "vital evidence" to the Panel and thereby prevented the investigation of one of the subjects, i.e., the former HC. She asserts that by failing to provide the Panel with the written response of one of the two subjects of investigation, the USG, DMSPC, sought to ensure that the Panel would be unable to find him guilty of the allegations and thus to subvert the investigation.

132. The comments of the former HC are referred to in the letter of the ASG, OHRM, to the Applicant of 11 January 2018 (see para. 9 above). They constitute one of the documents that the ASG, OHRM, considered to decide whether to investigate the matter or not. Its absence from the documentary record available to the Panel does not support a conclusion that the USG, DMSPC, sought to subvert the investigation.

133. Indeed, without the former HC's comments, and given that he declined to cooperate with the fact-finding investigation, the Panel, based on an analogical application of sec. 6.18 of ST/AI/2017/1, was entitled to draw adverse inferences about his role in the actions that the Applicant complained about, which it did.

134. The Tribunal notes that at para. 30 of its report, the Panel recorded that "the former HC did not participate in the interview process and was therefore not able to provide information regarding his role in some of the events and allegations under review. Consequently, it was difficult for the Panel to draw a complete picture about his involvement".

135. The record shows that the absence of the former HC's comments on the First Complaint did not preclude the Panel from properly investigating it through its consideration of other documentary and testimonial evidence.

136. The Tribunal moreover notes the contradictory nature of the Applicant's pleadings. While she challenged the legality of seeking comments from the former HC,[34] she is now asking the Tribunal to consider those comments as "vital" information which, if missing, should vitiate the investigation. That contradiction only points to an attempt by the Applicant to embark on a fishing expedition.

137. All factors considered, the Tribunal determines that the Applicant's allegation constitutes a minor omission with no impact on the quality of the investigation and its outcome. There is no merit in the Applicant's arguments. They are rejected.

The Panel's conclusions regarding the practice runs contrary to the documentary record and is manifestly unreasonable

138. The Tribunal reiterates its conclusion that the Panel did not investigate the practice (see para. 106 above). In its examination of whether the Press Release responded to the allegations made in the articles published, the Panel gathered information to understand what the practice was and how it was interpreted by different actors.[35] The Panel documented its conclusion that the Organization and the Applicant had a diametrically opposed interpretation of what the practice was. The fact that the Applicant disagrees with the Panel's conclusion does not support the claim that it was unreasonable.

139. Consequently, the Tribunal finds no merit in the Applicant's argument and rejects it.

[34] See Annex 12 to the application (Applicant's complaint for harassment and abuse of authority against the ASG, OHRM, and the former Acting ASG, OHRM) and sec. 2 of said complaint (pp. 122-123 of the case file).

[35] Investigation report, paras. 40-92 (sec. VI – Investigative Details).

The Panel accepted evidence of witnesses regarding the lack of risk associated with telling the Chinese Government which Human Rights defenders would be attending the Human Rights Council without checking if it was supported by the documentary record

140. The Tribunal recalls its finding that the Panel was not tasked to investigate the practice (see para. 106 above). Rather, the Panel was tasked to gather information to understand the accreditation process and information sharing to reach a conclusion on the two Press Release-related issues outlined in para. 105 above. Any risk assessment of the practice is related to an investigation of the practice itself and whether it was justified or not. This was not within the scope of the Panel's investigation.

141. It is also recalled that information about whether the practice entailed risks for human rights defenders was not central to the Panel's focus of investigation. It is merely one of the elements gathered in a process geared at understanding the accreditation process and information sharing. It is inconsequential to the outcome of the investigation and therefore not a reason to find that the investigation was not properly conducted.

142. The Tribunal finds no merit in the Applicant's argument and, consequently, rejects it.

The Panel had before it evidence that the Chief, HRCB, OHCHR, repeatedly misrepresented the policy by which names were provided to the Chinese Government

143. The Applicant argues that various pieces of evidence were ignored by the Panel.[36] She also claims that there was sufficient evidence to establish that the Chief, HRCB, OHCHR, publicly defamed her[37] and encouraged negative comments or complaints against her,[38] and/or misrepresented the practice of providing names to Member states and/or China. She contends that she submitted a

[36] Applicant's rejoinder, paras. 45-64.

[37] Investigation report, para. 206.

[38] Ibid., first bullet under "Main Findings" after para. 279.

video to the Panel of the Chief, HRCB, OHCHR, [39] very clearly and unambiguously denying the existence of the policy, which evidence is incontrovertible.

144. The investigation report shows that the Panel examined the Applicant's allegations against the Chief, HRCB, OHCHR, and concluded that they were not supported by evidence. Para. 206 of the investigation report reads in its relevant part as follows:

> There are clear differences of views, between [the Applicant], on the one hand, and [the Chief, HRCB, OHCHR,] and the Office, on the other, regarding the practice of confirming names to the Chinese. However, that does not mean that every time [the Chief, HRCB, OHCHR,] or others in management described or confirmed the practice that had been carried out, it represented an attack on [the Applicant's] integrity or professional competence, or that it was defaming her. … In the instance in question, [the Chief, HRCB, OHCHR,] had not been referring in any way to [the Applicant]. [The Applicant] provided no evidence or facts to back up her claim that [the] response [of the Chief, HRCB, OHCHR,] at this event had publicly defamed her. The Panel noted, from the [Applicant's] allegations, that frequently, when OHCHR or [the Chief, HRCB, OHCHR,] chose to provide a clarification on the subject of confirming names to the Chinese (back in 2013), and the position of the Office was not in agreement with [the Applicant's] position on the subject, this was construed by [the Applicant] to be a defamation of her. In this case, the complainant has again attempted to characterize [the] actions and words [of the Chief, HRCB, OHCHR,] negatively, in the absence of any tangible evidence.

145. The fact that the Applicant disagrees with the Panel's finding is no basis for challenging the investigation on this ground. The Tribunal finds no merit in the Applicant's argument. It is, consequently, rejected.

The Panel had evidence that other individuals had misrepresented the practice

146. The subjects of the Applicant's complaints were the former HC and the Chief, HRCB, OHCHR. Whether other persons misrepresented the practice was not in the Panel's terms of reference and was of no consequence to the Panel's findings.

[39] Ibid., para. 202

147. It is clear that the Applicant, by these arguments, is seeking to advance claims about the lawfulness of the practice. The Tribunal reiterates, however, that the Panel was not tasked with investigating if the practice was justified or not.

148. The Tribunal finds no merit in the Applicant's argument and, consequently, rejects it.

The Panel had evidence that the Press Release misrepresented the practice

149. The Tribunal considers that review of any of the Panel's findings about the Press Release would be an exercise in futility in view of the Appeals Tribunal findings in *Reilly* 2022-UNAT-1309 (para. 91) that

> the decision to issue a press release in response to publications falls within the discretion of the Organization and is a managerial prerogative and … the specific part of it which concerned the issue of the provision of names of Chinese human rights activists to the Chinese government fell outside the scope of [the UNDT's] judicial review due to the general nature of its content and to the fact that it embodied a managerial strategy to respond to what the Organization has perceived as being "damaging" of its own image. Under these circumstances, [the first part] of the [Press Release] did not have a tangible individual direct impact on [the Applicant] and consequently it was not an administrative decision subject to judicial review per Article 2(1)(a) of the UNDT Statute. Put another way, the [Press Release] was not about [the Applicant], but about OHCHR's good name and about promptly setting the public record straight in light of the publications by GAP and ICP. Thus, the first part of the [Press Release] obviously was aimed at rebuilding the confidence of individuals who worked with OHCHR and of Member States that collaborated with OHCHR and as such it had no bearing on [the Applicant's] employment status, as the Secretary-General correctly argues.

150. The Tribunal determines that issues relating to the Press Release and its contents, including whether the Applicant was defamed on account of those contents, have been finally determined by the Appeals Tribunal.

151. The Tribunal, therefore, determines that the Panel's conclusions at issue are not reviewable. The Applicant's argument is, consequently, rejected.

The Panel's conclusions regarding the absence of defamation in the description of the practice in the Press Release are premised on their erroneous findings of fact in that regard

152. The Applicant alleges inaccuracies in the conclusions of the Panel and claims that:

a. The Panel's finding of absence of defamation in the description of the practice is premised on its erroneous findings of fact in that regard;[40]

b. Her original report regarding the Chief, HRCB, OHCHR, resulted in an investigation report rather than a closure report. This, in her view, means that her complaint was substantiated, contrary to the assertion in the Press Release that all her reports were investigated and found unsubstantiated;

c. The exact nature of the practice, the timing of the provision of names, the level of knowledge of the Chinese Government and the misrepresentation of the practice by the Chief, HRCB, OHCHR, to the High Commissioner are all facts that are proved by documents that were before the Panel;[41] and

d. By denying the practice she reported, OHCHR was publicly branding her as a liar (just as the Chief, HRCB, OHCHR, had done privately in his email to the High Commissioner of 24 January 2017).

153. The Applicant concludes that the above errors in findings of fact resulted in a faulty conclusion that the description of the practice in the Press Release did not defame the Applicant.

154. The Tribunal reiterates its decision that a review of any of the Panel's findings about the Press Release would be an exercise in futility (see para. 149 above), and that issues relating to the Press Release and its contents, including whether the Applicant was defamed on account of those contents, have been finally determined by the Appeals Tribunal (see para. 150 above). The Panel's conclusions at issue are not reviewable. The Applicant's argument has no merit and is rejected.

[40] Applicant's rejoinder, para. 91.
[41] Ibid., para. 89.

The Panel's findings regarding the Applicant's misunderstanding as to whether the practice was ongoing or began in 2013 are erroneous, illogical and do not conform to the documentary record

155. Whether the practice was ongoing or began in 2013 is relevant to the Applicant's challenge of the 2017 Press Release. In her 20 February 2017 memorandum to the former HC (para. 4),[42] the Applicant stated:

> In paragraph 7, the [Press Release] states that "Chinese authorities, and others, regularly ask the UN human rights office, several days or weeks prior to Human Rights Council meetings, whether particular NGO delegates are attending the forthcoming session. The Office never confirms this information … until it is sure that there is no obvious security risk. In context, the use of the present tense carries the (false) implication … that this was a continuing practice, established before March 2013. In fact, the practice was introduced for the first time in March 2013 and applied only to requests from the Chinese delegation (footnote omitted).

156. The Panel addressed this issue at para. 134 of its report in the following terms:

> [The Applicant], in paragraphs 4 and 5 of her 20 February 2017 memo, criticized the [Press Release] for giving the impression that the practice of confirming names was already in place prior to March 2013, while she was certain it was a new practice that began with the March 2013 session. She faulted the [Press Release] for having used the present tense of a verb, which she felt implied that it was a continuing practice. She was convinced that the Office had incorrectly described the practice. When the Panel met with [the Applicant] in December2019, [she] told the Panel that she only subsequently learned (at some point after the issuance of the [Press Release]) that indeed the practice of confirming names by the Human Rights Council Branch was an ongoing practice in 2013. The [Press Release] had correctly described this. [The Applicant] had somehow reached an incorrect understanding of that issue and maintained that view for more than four years. She did not tell the Panel that she had been mistaken. She explained it as the staff of the Human Rights Council Branch having carried out a subterfuge in February/March 2013 with the intention of misleading [her] to draw false conclusions.

157. The Panel also referred to the Applicant's interview during which she suggested that "there was a bit of subterfuge happening", and noted "that much of

[42] Annex 9 to the application.

[the Applicant's] critique of the practice had been built on what the Panel considered to be a false assumption on her part".

158. The Tribunal is satisfied that the Panel adequately examined this matter and properly supported its conclusions in its report. The fact that the Applicant disagrees with the Panel's conclusion does not support a challenge of the lawfulness of the investigation.

159. The Tribunal finds no merit in the Applicant's argument and, consequently, rejects it.

The Panel's findings regarding the last paragraph of the Press Release are contradicted by the contemporaneous documentary record and are manifestly unreasonable

160. The Applicant takes issue with the Panel's findings at para. 147 of its report. She disagrees with the Panel's conclusion that:

a. It "did not find that any of the evidence presented by [the Applicant] demonstrated factual errors or false statements in the [Press Release]";

b. "On the criterion that defamation requires false statements to have been communicated, orally or in writing, the Panel did not consider that criterion to have been met"; and

c. "[T]he discussion about reprisals and what type of wrongdoing had been found in the investigations were not issues that the Panel found to be statements about the [the Applicant]. They were certainly matters that dealt with actions by the organization and investigations about other staff members; but ultimately for the office to say that staff had not taken action against [the Applicant] or that investigations had only turned up minor wrongdoing by the accused, the Panel saw no connection with defamation or defamatory statements that damaged [the Applicant's] reputation".

161. The Applicant argues that the above conclusions by the Panel, arising from its examination of the last paragraph of the Press Release, are contradicted by the contemporaneous documentary record and are manifestly unreasonable.[43]

162. She also argues that to suggest the last paragraph of the Press Release only addresses internal processes is manifestly unreasonable and demonstrates bias.[44]

163. The Tribunal is aware that said paragraph of the Press Release was the subject of litigation both before this Tribunal and the Appeals Tribunal. In its Judgment *Reilly* 2022-UNAT-1309 (para. 95), the Appeals Tribunal affirmed the findings of the UNDT when it held that:

> the last paragraph of the [Press Release] … did not breach confidentiality of the investigations related to [the Applicant's] complaints and it was not defamatory of her … maintenance of confidentiality to the maximum extent possible, after the information had already been made public by ICP and GAP, was exactly the way the [Press Release] was crafted, balancing between OHCHR's needs to promptly inform the public in response to extremely serious allegations and the requirement to protect the confidentiality of the investigations[.] OHCHR properly minimized [the Applicant's] exposure by not providing any more information about her, without even naming her, than was necessary to sufficiently respond to and refute the substance of the allegations put forth publicly by GAP and ICP. Under these same circumstances and balancing criteria, the issuance of the [Press Release] as a whole was a reasonable and hence lawful exercise of the Administration's relevant discretion.

164. Based on the foregoing, the argument that the Panel's finding is manifestly unreasonable and demonstrates bias is no longer tenable.

165. Additionally, the Tribunal reiterates its determinations that a review of any of the Panel's findings about the Press Release would be an exercise in futility (see para. 149 above), and that issues relating to the Press Release and its contents, including whether the Applicant was defamed on account of those contents, have

[43] Applicant's rejoinder, paras. 101-106.

[44] Ibid., para. 101.

been finally determined by the Appeals Tribunal (see para. 150 above). The Panel's findings at issue are thus not reviewable.

> *The Panel characterized the Applicant's allegation that the Press Release misrepresented the Practice as being a disagreement of opinion concerning the importance or risk posed by the practice rather than a factual allegation OHCHR lied about what they had done*

166. The Applicant points out that the above characterization arises from the Panel's statement in the subheading before para. 129 of its report, which reads as follows:

> Issue 2 - The Press Release defamed [the Applicant], unjustifiably undermining her long-held position that participants should not be named in advance of HRC sessions and/or, otherwise contained false statements connected to [the Applicant], resulting in unjust harm to Ms. Reilly's reputation.

167. The Tribunal notes that the characterization is linked to the Applicant's argument that the Press Release defamed her. The Applicant also added that "[by] denying what had occurred[,] OHCHR publicly branded [her] as a liar, which is defamation, because she was telling the truth".[45]

168. The Panel's finding about the different perspective that the Organization and the Applicant had concerning the practice is fully documented in the Panel's report. Yet, the Applicant disagrees and seeks to challenge the Panel's findings based on this disagreement. The Tribunal finds, as it has in other parts of this Judgment, that such disagreement is not enough to mount said challenge.

169. Additionally, the Tribunal recalls its finding at para. 154 above, that the issue of whether the Applicant was defamed on account of the content of the Press Release has been finally determined by the Appeals Tribunal. There is therefore no merit in the Applicant's argument, and it is rejected.

[45] Ibid., para. 117.

The Panel findings about the refusal to withdraw the Press Release and the refusal to permit the Applicant to speak with the press were wrongly premised

170. The Applicant claims that the Panel made findings about the refusal to withdraw the Press Release and the refusal to permit her to speak with the press on a faulty premise. She argues that the Panel "mistakenly accepted the premise that the purpose of the Press Release was to 'correct the public understanding' regarding the practice" and yet "the Press Release misrepresented the practice" and instead denied "that which had been accurately alleged".

171. The Tribunal reiterates its determinations that a review of any of the Panel's findings about the Press Release would be an exercise in futility (see para. 149 above) since issues relating to the Press Release and its contents, including whether the Applicant was defamed on account of those contents, have been finally determined by the Appeals Tribunal (see para. 150 above). The Panel's findings at issue are thus not reviewable.

The Panel arrived at a manifestly unreasonable conclusion that the Chief, HRCB, OHCHR, was not involved in the drafting of the Press Release and was not responsible for its contents. This finding went against the available documentary and witness evidence

172. The Applicant takes issue with the Panel's conclusion that the Chief, HRCB, OHCHR, "was not involved in the drafting of the Press Release and was not responsible for the contents".[46] The Applicant asserts that this finding directly contradicts the documentary record before the Panel, including witness evidence, which expressly referred to the role of the Chief, HRCB, OHCHR, in drafting the Press Release. She argues that the Panel's finding was manifestly unreasonable.

173. The Panel's finding in the above respect was "that [the Chief, HRCB, OHCHR,] had been consulted on technical matters by the informal 'crisis committee' during its work on the Press Release but he had not participated in the decision of [the former HC] to initiate and issue the Press Release or in its drafting".

[46] Ibid., paras. 123-128.

174. The Tribunal considers that although a "technical consultation" can be interpreted as a certain level of involvement, the technical advisory role of the Chief, HRCB, OHCHR, does not support a claim that the Panel's conclusion was unreasonable.

175. The Tribunal finds no merit in the Applicant's argument and, consequently, rejects it.

The investigation is marked by specific indicia of bias

176. The Applicant maintains that the investigation was marked by specific indicia of bias (see para. 49.o above). She specifies the following aspects of the investigation process to back her claim:

a. The Panel presented her evidence simply as "claims" she made;[47]

b. Her purported biography includes only a volunteer role prior to her Master's degree in Human Rights and omits almost her entire professional experience in Human Rights, apparently to invite the reader to give less credibility to her account;[48]

c. The Panel discussed the "personality" of the Applicant, the former HC and the Chief, HRCB, OHCHR, apparently to discredit her account. For instance, while the former HC was described in positive terms as "someone who would not compromise his principles nor hesitate to take on difficult human rights issues", an apparently identical personality trait in the Applicant was described in negative terms, i.e., as failure to "accept disagreement with her point of view and in this regard could be contentious";[49] and

d. The Panel did not detail the reason for the Applicant's refusal to sign her interview record;[50] and

[47] Ibid., para. 130.
[48] Ibid., para. 131.
[49] Ibid., para. 132.
[50] Ibid., para. 133.

e. The Panel was "happy to imply that [she] had publicly linked the death of a human rights activist to the practice complained of without a single item or evidence or reference".[51]

177. In the Tribunal's view, the aspects listed in para. 176.a to c above, on which the Applicant bases this claim, represent mere differences in presentation style. This renders her arguments overly speculative. The fact that the Panel categorised the Applicant's evidence as "claims", for example, only represents a choice of language. Indeed, all the examples cited by the Applicant do not sufficiently ground a conclusion that the Panel was biased. The Applicant's assertion is, therefore, rejected.

178. Concerning the alleged Panel's failure to explain why the Applicant did not sign her interview record, the Tribunal notes that para. 34 of the investigation report addresses this matter. The Applicant's disagreement with the disposal of audio recordings of interviews is at the heart of her refusal to sign, and review, her interview record. The Applicant's assertion is, therefore, also rejected.

179. With respect to implying that the Applicant linked the death of a human rights activist to the practice she complained of, the Panel's statement in the investigation report, to which the Applicant refers to, does not support the Applicant's claim. Para. 118 of the investigation report reads as follows:

> It is the Panel's understanding that [the Applicant] did not herself make the linkage between the Office's confirmation of names and the death of [a human rights activist], in the period immediately following [said activist's] death. Later on, the matter was less clear, as [the Applicant's] contacts with the press were more frequent, and the press reports that followed continued to make the linkage.

180. The first sentence categorically establishes that the Applicant was not the source of the linkage between the death of the human rights activist and the practice. The Tribunal is not persuaded that the second sentence amounts to "[happily implying] that [the Applicant] publicly linked" both events.

[51] Ibid., para. 134.

181. The Tribunal finds no merit in the Applicant's argument and, consequently, rejects it.

The Panel failed to interview relevant witnesses, to pose relevant questions to witnesses, to follow up on evidence supporting the Applicant's allegations, and pose questions to witnesses on issues of fact on which they could have no information

182. The Appeals Tribunals has held that an investigation panel "may opt to limit the testimony it hears, but it must do so on reasonable and proper grounds" (see *Belkhabbaz* 2018-UNAT-873, para. 77).

183. The Tribunal is also alive to the position that an investigation panel has wide discretion in determining which witnesses it finds relevant. Failure to interview one or some witnesses will result in a procedural violation only in limited circumstances. (cf. *Abdellaoui* UNDT/2018/114; *Belkhabbaz* UNDT/2018/016).

184. The Applicant argues that the Panel failed to interview relevant witnesses[52] and repeatedly posed questions on the practice to persons not in fact involved in the process, whose only possible source of information was the Chief, HRCB, OHCHR.[53]

185. She also complains that the Panel failed to interview relevant witnesses she proposed,[54] which precluded the possibility of obtaining evidence to support some of her complaints. She also asserts that the Panel failed to pose relevant questions to witnesses, failed to follow up on evidence supporting her allegations, and posed questions to witnesses on issues of fact on which they could have no information.

The Panel's failure to interview witnesses that the Applicant proposed

186. The Respondent asserts that the proposed witnesses that the Applicant identified in paras. 141, 142, 143, 144, 145, 146, 147 and 148 of her rejoinder had no direct knowledge of the allegations she raised in her complaints. He added that one of the witnesses proposed by the Applicant, alluded to in para. 149 of the same

[52] Ibid., paras. 139-149.
[53] Ibid., para. 151.
[54] Ibid., paras. 140-149.

rejoinder, retired from the Organization and declined to be interviewed in another case. The other one, as per the Respondent's submission, had no direct knowledge about the relevant issues. The Respondent concludes that the Applicant has not demonstrated how, and why, interviewing the proposed witnesses would have changed the outcome of the process.

187. The investigation report (para. 32) indicates that

> [t]he Panel had to move from quite a long list of suggested witnesses (almost 50), provided by [the Chief, HRCB, OHCHR,] and [the Applicant], to the actual list that was used. The process of reducing the list to a manageable size took into account avoiding duplication, ruling out journalists and other external names, and generally applying as a key consideration whether the suggested individual appeared to have a direct involvement in the allegations and/or with one or more of the principals in the investigation.

188. In the Tribunal's view, the foregoing submissions support a conclusion that the decision to limit the number of witnesses was not arbitrary. The decision was reasonable and in keeping with the established jurisprudence.

189. The Tribunal is also persuaded by the Respondent's arguments at para. 186 above and finds that, indeed, the witnesses alluded to at paras. 141, 142, 144, 145, 146, 147, 148, and 149 of the Applicant's rejoinder were not relevant to the Panel. Their proposed evidence related to the policy of confirming names of accredited activists, which was outside the Panel's terms of reference, or related to statements allegedly made concerning a matter of law (witness proposed at para. 147 of the Applicant's rejoinder).

190. Concerning the two proposed witnesses alluded to in para. 140 of the Applicant's rejoinder, the Tribunal notes that they are external to the Organization (EU Delegates). Additionally, para. 217 of the report sheds light on the reasons supporting the Panel's decision not to interview them:

> As concerns a possible [2013] meeting of the 27-member European Union delegations with [the Chief, HRCB, OHCHR], as alleged by [the Applicant], the Panel could not verify whether the European Union had approached [the Chief, HRCB, OHCHR,] or not. [The Applicant] has not provided any evidence of [the] alleged meeting [of the Chief, HRCB, OHCHR,] with the EU, could not provide the

> date of such a meeting, and had not presented any evidence of [the Chief, HRCB, OHCHR,] having defamed her. She was also not sure if it was a meeting of the full EU delegation of 27 members, as she had stated in her complaint.

191. The Tribunal finds that, under the above circumstances, the lack of relevance of the witnesses in question permits a conclusion that the Panel's decision not to interview them was in line with the criteria laid out in its report concerning selection of witnesses (see para. 187 above), and it was reasonable.

192. Finally, with respect to the proposed witness mentioned in para. 143 of the Applicant's rejoinder, the Applicant asserts that the relevance of this witness related to her allegation about the former HC's intention "to transfer [her] to Mauritania as a condition of renewal of her contract". She further claimed in her rejoinder that "[d]espite indicating that they would investigate subsequent retaliation by [the former HC] given the time that has passed between report and investigation, the Panel include[d] no analysis of their findings of such in their report". In support of this claim, the Applicant referred to annex 3.98 to the investigation report.

193. The Tribunal recalls that the Applicant's complaint against the former HC, as laid out in her 13 March 2017 memorandum to the then ASG, OHRM, was based on the issuance of the 2 February 2017 Press Release. This is also supported by para. 5 of the Panel's report setting the scope of its fact-finding investigation in connection with this complaint, namely whether the Press Release *inter alia* i) "was responsive to the allegations made in the press articles", and ii) defamed the Applicant, and whether the former HC's failure to, *inter alia*, authorize the Applicant to speak to the press was fair and justified.

194. The record shows that the witness in question had information about the Applicant's allegation on a transfer to Mauritania, which as per the Applicant's account is an event that occurred "in late 2017",[55] after filing her complaint against the former HC. Chronologically speaking, it follows that such testimony fell outside of the scope of the Panel's investigation.

[55] See annex 3.98 to the investigation report, p. 1200 of the case file.

195. Concerning the Applicant's claim that the Panel indicated that it would investigate subsequent alleged retaliation, the Tribunal finds that the Applicant's representation of such statement lacks precision. The document the Applicant refers to in this respect, i.e., annex 3.98 to the investigation report, is an email exchange of 9 December 2019. In its relevant part, the email from the Panel to the Applicant reads as follows: "[r]egarding more recent events and acts, as they relate to the two subjects under consideration, **and that may fall within the scope of [the Panel's] terms of reference**, [the Panel is] open to reviewing such matters" (emphasis added).

196. The Panel's statement about looking into "more recent events", i.e., after the filing of the Applicant's complaints, was not unqualified. It is clear in the email that, once again, relevance was a key factor in determining what proposed evidence to consider/hear.

197. Based on the above, the Tribunal determines that the grounds on which the Panel based its refusal to interview some of the witnesses that the Applicant proposed were reasonable and proper.

198. The Tribunal finds no merit in the Applicant's argument and, consequently, rejects it.

The Panel's failure to pose relevant questions to witnesses, to follow up on evidence supporting the Applicant's allegations, and the Panel questioning witnesses on issues of fact on which they could have no information

199. The Applicant bases this argument on her claim that "[a]t the time of the Panel interviews, the only persons remaining in the UN system with direct knowledge of what had occurred in 2013 were the Applicant, the Chief, HRCB, OHCHR, and another staff member".[56] She therefore asserts that "[t]he information of all other witnesses questioned necessarily [came] from the Chief, HRCB, OHCHR".[57]

[56] Applicant's rejoinder, para. 151.
[57] Ibid.

200. It must be clarified that the Panel was not tasked to investigate the events of 2013. Its task was to assess *inter alia* if the Press Release responded to the allegations made in the press articles. The record shows that the Panel thoroughly interviewed different persons to understand what the practice had been.

201. The Tribunal therefore finds no merit in the Applicant's argument and, consequently, rejects it.

The USG, DMSPC did not have the authority to act as responsible official

202. With respect to her First Complaint, the Applicant argues that "the decision to investigate was taken by the ASG, OHRM but the matter mysteriously came under the control of the USG, DMSPC".

203. Concerning her Second Complaint, the Applicant asserts that the responsible official was to be the head of entity, i.e., the then High Commissioner for Human Rights, and that "[n]othing prevented the then High Commissioner for Human Rights from carrying out this responsibility in relation to [her] second complaint", adding that "[n]o mechanism under the rules existed for the USG, DMSPC, to assume control".

204. The Tribunal notes that the Applicant only raised this argument in her closing submission. Prior to that stage of the proceedings, she had not challenged the authority of the USG, DMSPC, to act as responsible official.

205. It is procedurally improper for parties to raise new matters in their closing submissions since this denies the opposite party a chance to respond to those new matters. This fact alone supports a decision to reject the argument.

206. The record is moreover clear about the reasons for the failure by the ASG, OHRM, to set up the Panel and its terms of reference. On 29 September 2019, the Applicant filed a formal complaint of, *inter alia,* abuse of authority against the ASG, OHRM (see para. 12 above). In that complaint, she specifically requested that "[the ASG, OHRM, and staff in her reporting lines recuse] themselves from any further involvement in decisions regarding [her assignment] or [her] cases before the Tribunal".

207. With respect to the then High Commissioner for Human Rights, the Tribunal considers that as the Applicant's Second Complaint raised issues about the practice of OHCHR, the then High Commissioner was not in position to handle it without giving an appearance of conflict of interest. Also, issues about the practice that the Applicant raised were already under examination in connection with the First Complaint, which the USG, DMSPC, was handling.

208. It is also of note that the Applicant did not raise the matter with the USG, DMSPC, when the latter wrote to her on 21 November 2019 informing her that an investigation would be conducted, and a Panel had been appointed (Annex 14 to the application).

209. Based on the above, the Tribunal finds no merit in the Applicant's argument and, consequently, rejects it.

The Panel failed to evaluate witness evidence in a coherent manner

210. The Applicant complains that the Panel systematically failed to gather evidence, to consider irrefutable evidence in its possession and to evaluate witness evidence in a coherent fashion. Also, that it failed to establish facts through evidence and, more importantly, by a marked disregard for primary, contemporaneous, documentary evidence. She concludes that the terms of reference, the investigation report, and the manner of questioning of witnesses demonstrate that the Applicant did not receive the investigation she was contractually entitled to.

211. The Tribunal reiterates the legal position that it has no jurisdiction to conduct a *de novo* investigation of the Applicant's complaints under ST/SGB/2019/8 or ST/SGB/2008/5 (see *Messinger* 2011-UNAT-123, paras. 2, 25 and 30).

212. In *Duparc* UNDT/2022/074, this Tribunal held that the assessment of the evidence and determining the weight to be attached to it falls within an investigation panel's inherent discretion. Further, that the Organization "has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether an investigation regarding all or some of the charges is

warranted" (*Benfield-Laporte* 2015-UNAT-505, para. 38). The Tribunal will not depart from that position.

213. Consequently, the Tribunal finds no merit in this argument, and it is rejected.

Whether the Administration committed any errors in arriving at the contested decision

214. While the Tribunal may examine the lawfulness of administrative decisions under art. 2.1(a) of its Statute, it cannot compel the Administration to take disciplinary action against a staff member, that being an institutional privilege (see, e.g., *Abboud* 2010-UNAT-100, para. 34; *Benfield-Laporte* 2015-UNAT-505, para. 37; *Oummih* 2015-UNAT-518/Corr.1, para. 31).

215. In arriving at the final decision on the Applicant's complaints, the responsible official was bound by sec. 5.5(i)(ii) of ST/SGB/2019/8 and sec. 7.4 of ST/AI/2017/1.

216. Sec 5.5(i)(ii) of ST/SGB/2019/8 provides as follows:

> (i) The affected individual and the alleged offender shall be informed on a strictly confidential basis of the outcome of the matter, as follows:
>
> …
>
> (ii) By the responsible official, if the matter is closed with no action by the responsible official pursuant to sections 7.4 or 7.5 (a) of ST/AI/2017/1 or following a referral from the Assistant Secretary-General for Human Resources pursuant to section 8.2 (b) of ST/AI/2017/1, or if the responsible official has taken managerial or administrative measures pursuant to section 7.5 (b) of ST/AI/2017/1 or following a referral from the Assistant Secretary-General for Human Resources pursuant to section 8.2 (b) of ST/AI/2017/1, with a copy to the head of entity of the affected individual and alleged offender and to OIOS and the Assistant Secretary-General for Human Resources[.]

217. Sec.7.4 of ST/AI/2017/1 provides as follows:

> Where an investigation not conducted by OIOS ("non-OIOS investigation") finds that there is no factual basis indicating that a staff member engaged in unsatisfactory conduct, the responsible official shall review the report to determine whether the official

> agrees with the findings of the investigation and, where further clarification on the findings of the investigation is required, may request additional information, including the taking of specific investigative action. If the responsible official agrees that there is insufficient evidence that a staff member engaged in unsatisfactory conduct, the responsible official shall take no further action and inform the subject of the investigation in writing. If the responsible official does not agree with the findings of the investigation, sections 7.5, 7.6 or 7.7 apply, as appropriate.

218. That upon receipt and review of the investigation report the responsible official, by memorandum of 10 June 2020 containing a summary of the Panel's findings, informed the Applicant of the outcome of the process, namely the decision to close her complaints with no action taken, which is the last stage of the process, is not disputed. Thus far, the responsible official complied with sec. 5.5(i)(ii) of ST/SGB/2019/8 and sec 7.4 of ST/AI/2017/1 cited above.

219. Assessed for procedural merit, therefore, the decision to close the Applicant's complaints remains unassailable.

220. In view of all of the above, the Tribunal finds that the decision to close the Applicant's complaints without further action was lawful.

Whether the Applicant is entitled to any remedies

221. Given the Tribunal's finding that the contested decision was lawful pursuant to sec. 5.5(i)(ii) of ST/SGB/2019/8 as well as sec. 7.4 of ST/AI/2017/1, there are no grounds for entertaining any remedy in favour of the Applicant.

Conclusion

222. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(*Signed*)
Judge Margaret Tibulya
Dated this 7th day of November 2023

Entered in the Register on this 7th day of November 2023
(*Signed*)
René M. Vargas M., Registrar, Geneva