UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2015/144
Order No.:	139 (GVA/2015)
Date:	10 July 2015
Original:	English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KOMPASS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON A MOTION FOR INTERIM MEASURES

Counsel for Applicant:
Alexandre Tavadian, OSLA
Robbie Leighton, OSLA

Counsel for Respondent:
Stéphanie Cochard, UNOG
Kara D. Nottingham, UNOG

Introduction

1. By application filed on 8 July 2015, the Applicant contests:

   a. The authorisation by the Under-Secretary-General for the Office of Internal Oversight Services ("USG/OIOS") of an investigation into allegations of possible misconduct against the Applicant;

   b. The implied refusal to suspend said investigation pending the outcome of the assessment of an independent panel appointed by the Secretary-General to review the Organization's response to the allegations of sexual abuse and exploitation of minors by foreign military forces deployed in the Central Africa Republic ("CAR").

2. In the context of these proceedings, the Applicant also filed on 8 July 2015, a motion requesting the suspension of the contested decisions pending the outcome of the application on the merits.

Background and facts

3. The Applicant works at the Office of the High Commissioner for Human Rights ("OHCHR"), Geneva, as Director, Field Operations and Technical Cooperation Division (D-2). His first reporting Officer is the Deputy High Commissioner.

4. In mid-July 2014, the Chief, Rapid Response Unit and Peace Missions Section, OHCHR, provided to the Applicant a copy of a report containing serious allegations of paedophilia allegedly committed in the CAR by French military.

5. According to the Applicant, on or about 23 July 2014, he raised the contents of the report with the Deputy Ambassador of France. The Applicant states that shortly thereafter he informed the Deputy High Commissioner that he had seen the report and had discussed the allegations therein with the Deputy Ambassador of France.

6. The Applicant further avers that, having received assurances from the French authorities that the information obtained from the United Nations would be handled with utmost confidentiality, on 30 July 2014, he shared with them a copy of the report. The Applicant alleges that he informed the Deputy High Commissioner about this on 7 August 2014.

7. The Respondent submits that the High Commissioner for Human Rights ("High Commissioner") learned on 6 March 2015 that the Applicant allegedly leaked "confidential un-redacted preliminary investigative notes" with respect to allegations of sexual abuse of children in CAR, including notably the names and other identifying information pertaining to the child-victims.

8. The Applicant further maintains that during a meeting on 12 March 2015 with the Deputy High Commissioner, the latter informed him that in light of his handling of the matter, the High Commissioner had requested his resignation, adding that the Under-Secretary-General for the Department of Peacekeeping Operations had made such request. The Applicant did not resign.

9. After receiving a request from the High Commissioner to that effect, on 9 April 2015, the USG/OIOS instructed the Director, Investigations Division, OIOS, to launch an investigation for possible misconduct by the Applicant. The USG/OIOS confirmed her decision in this respect by email of 10 April 2015.

10. During a meeting held on 17 April 2015, the High Commissioner informed the Applicant that he had requested an investigation into possible misconduct committed by him and that he had decided to place him on administrative leave with full pay.

11. By memorandum of the same day, the Officer-in-Charge, Division of Administration, UNOG, informed the Applicant that, upon recommendation of the High Commissioner, the Acting Director-General, UNOG, had decided to place him on administrative leave with full pay pending investigation into allegations of misconduct raised against him on the basis of staff rule 10.4.

12. Having made the requisite request for management evaluation, on 29 April 2015, the Applicant filed with this Tribunal an application seeking the suspension of the implementation of his placement on administrative leave during the pendency of management evaluation. By Order No. 99 (GVA/2015) of 5 May 2015, the Tribunal granted such suspension. On 14 May 2015, the Applicant was informed that the decision to place him on administrative leave was rescinded.

13. On 22 June 2015, the Secretary-General appointed a three-member external independent panel ("the Panel") to conduct a review of the United Nations' response to the allegations of sexual exploitation and abuse of children by foreign military forces in the CAR. The Panel's Terms of Reference include:

> 1. A description of the procedures in place at the time in the CAR and in the United Nations generally to respond to the Allegations, including but not limited to procedures relating to prevention, investigation, victim protection, and informing appropriate authorities of States or regional organizations for judicial or other responses;
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> …
>
> 3. An assessment of the actions taken, including whether such actions were in accordance with applicable procedures;
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> 4. An assessment as to whether, at any stage, there was any incident of abuse of authority by senior officials, in connection with the Allegations, including in connection with the communication of the Allegations to one or more third parties, taking into account the procedures applicable to protection from retaliation and abuses of authority;

14. By email dated 1 July 2015, the Chief of Section, Investigation Division, OIOS—Vienna Office, invited the Applicant for a "Subject interview" scheduled on 13 July 2015. The email stated that the interview was convened to discuss a report of possible misconduct, specifically, that the Applicant "had shared a copy of an un-redacted confidential investigation report with a third party; namely the French Permanent Mission in Geneva, without authorization".

15. On 2 July 2015, Counsel for the Applicant wrote to the USG/OIOS objecting to an investigation into allegations of misconduct by OIOS until the report of the Panel was completed and its outcome made public. He based his

objection on the "perceived apprehension of bias and apparent lack of impartiality and independence of OIOS". Notably, he referred to a number of communications of the USG/OIOS with other senior official of the Organization that had been leaked to the media and which "irreparably compromise[d] the independence and impartiality of OIOS and cast doubt as to its ability to conduct a fair and impartial investigation in this matter". In this view, Counsel for the Applicant requested the USG/OIOS to postpone the interview of 13 July 2015 with the Applicant until the outcome of the review conducted by the Panel was known. He added that, in the absence of a reply by 6 July 2015, he would assume that the request had been denied.

16. The Applicant submitted the two contested decisions for management evaluation on 6 July 2015. On the same day, he filed an application for suspension of action pending management evaluation. On 8 July 2015, the Management Evaluation Unit ("MEU") issued its evaluation letter, dated 7 July 2015.

17. Having received the management evaluation letter, the Applicant filed a motion for withdrawal of his suspension of action application on 8 July 2015, which was granted by Order No. 138 (GVA/2015) of 9 July 2015.

18. Also on 8 July 2015, the Applicant filed a substantive application challenging the two same decisions and moved for the suspension of the two contested decisions as an interim measure pending the determination of the application on the merits.

19. At the Tribunal's request, both parties filed additional information on 9 July 2015.

20. The Respondent filed comments on the motion for interim measures on 9 July 2015.

Parties' contentions

21. The Applicant's primary contentions may be summarized as follows:

Receivability

a. The decision to authorize the investigation meets the criteria to be considered as a reviewable administrative decision; in particular, it creates direct legal consequences for the Applicant. Staff rule 1.2(c) requires staff members to cooperate with "duly authorized" audits and investigations. The reference to "duly authorized" investigations suggests that a staff member has no obligation to cooperate with an investigation that is not so;

b. Staff members should not be expected to cooperate with an unlawful investigation and must be permitted to raise an apprehension of bias at the earliest opportunity. The contrary would lead to them being subjected to an unlawful investigation;

c. In *Nguyen-Kropp & Postica* 2015-UNAT-509 , whilst holding that, in general, appeals against a decision to initiate an investigation are not receivable, the Appeals Tribunal uses the phrase "generally speaking", which suggests that this principle admits exceptions;

d. Also, *Nguyen-Kropp & Postica* had not established a reasonable apprehension of bias and sought a definite end of the investigation. Unlike them, the Applicant is prepared to undergo an investigative process, provided that the latter meets the minimum standards of natural justice and procedural fairness. Moreover, *Nguyen-Kropp & Postica* states that "tribunals should not interfere with matters that fall within the Administration's prerogatives, including its *lawful* internal processes" (emphasis added). In the instant case, the processes appear to be unlawful;

e. A staff member's right to an impartial and independent investigation and decision-maker is part of the limited due process rights that apply during the preliminary investigation stage;

f. In any event, the OIOS refusal to await the outcome of the assessment conducted by the Panel is a separate administrative decision, to which the findings in *Nguyen-Kropp & Postica* are irrelevant;

Prima facie unlawfulness

g. The decisions are *prima facie* unlawful for the following reasons:

i. The investigation into allegations of misconduct has not been duly authorized, as required by staff rule 1.2(c). Even if an official has the statutory power to authorize an investigation, he or she may be disqualified from exercising that power where he or she is, or appears to be, biased. The fact that the decision-maker has, or reasonably appears to have, formed views or made pre-determinations with respect to a party or the issue in a process raises a reasonable apprehension of bias;

ii. In this case, the USG/OIOS expressed in two separate emails of 9 and 10 April 2015 her views that the Applicant had committed misconduct and communicated her strong views to her subordinates;

iii. The USG/OIOS held prior discussions with the High Commissioner, who had reported the Applicant for misconduct and requested that he be investigated, breaching the Applicant's right to confidentiality and communicating confidential information to the principal complainant;

iv. Furthermore, the Director, Investigations Division, OIOS, opined that the USG/OIOS acted as an accomplice with other senior officials and recused himself from the investigation. A former United Nations anti-corruption investigator expressed his views that the USG/OIOS conduct undermined the independence of OIOS. Further, the Secretary-General entrusted to the Panel, rather than to OIOS, to assess, *inter alia*, if senior officials of the Organization abused their authority or retaliated against the Applicant;

v. The USG/OIOS chose to significantly deviate from OIOS standard operating procedures in authorizing this particular investigation. This appears to be the only investigation that she

personally authorized, and she did so without receiving the usual recommendations;

vi. As regards the refusal to postpone the investigation, it makes no sense to investigate the Applicant before the Panel reaches its conclusions. The Panel's Terms of Reference include the question of whether OHCHR or the United Nations in general had clear protocols or procedures governing the disclosure of documents to third parties and whether senior officials of the Organization abused their authority or attempted to retaliate against the Applicant. The Panel's conclusions on these issues will have a direct impact on the investigation initiated by OIOS;

vii. In addition, there appears to be a double standard in affording the senior officials the benefit of having an independent panel examine their behaviour, whereas the Applicant is requested to subject himself to OIOS, whose head appears to be biased. The Applicant is entitled to have his actions investigated by an independent panel;

Urgency

h. The Applicant has been convened to an interview within the framework of the OIOS investigation on 13 July 2015, while the Panel was directed to submit its conclusions within ten weeks as from July 2015. Unless the contested decisions are suspended, the Applicant will be compelled to attend an interview which is part of an unlawful investigation before any reviewing body has had a chance to review the lawfulness of the decisions, even though there is no urgency to hold the interview scheduled on 13 July 2015;

Irreparable damage

i. According to the relevant case-law, the harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed;

j. Compelling the Applicant to attend an interview that is part of an unlawful investigation may result in the collection of self-incriminating evidence which may be used against him in a subsequent process;

k. The Applicant's psychological state has been adversely affected by the unlawful actions of the Administration. He had to observe in silence top officials of the Organization making defamatory statements about him to various interlocutors, while the Staff Rules and Regulations forbid him to make public statements in his defence;

l. The investigation will further smear the Applicant's reputation.

22. The Respondent's primary contentions may be summarized as follows:

Receivability

a. The Tribunal may review only those administrative decisions that have a direct and negative impact on the staff member's rights. The decisions to authorize an investigation and not to postpone an interview with the subject of the investigation do not produce direct legal consequences for the Applicant; these decisions cannot be characterized as final administrative decisions, being only preparatory steps in reaching a final conclusion in the process. The Appeals Tribunal in *Nguyen-Kropp & Postica* 2015-UNAT-509, stated that "initiating an investigation is merely a step in the investigative process and it is not an administrative decision which the UNDT is competent to review under Article 2(1) of its Statute";

b. The Applicant is not simply challenging his interview scheduled on 13 July 2015, but rather the entire investigation and, more precisely, the decision taken on 10 April 2015 to authorize same. This decision was already implemented upon the commencement of the investigation, which has significantly progressed and is nearing completion. The decision is thus implemented and cannot be suspended;

c. While OIOS is a part of the Secretariat and thus subject to the Organization's justice system, the scope of the Tribunal's review over OIOS

operations—unlike those of other entities—must be narrowly tailored and restricted due to the unique and independent status of OIOS. The Tribunal is therefore not competent to review matters concerning the operational considerations of OIOS;

d. The purpose of an interim measure is not to grant a relief which would constitute a final resolution, but only temporary relief pending the outcome of substantive proceedings. The Applicant requests the exact same relief in both his application on the merits and his motion for interim measures (*Faye* Order No. 115 (NY/2015));

Prima facie unlawfulness

e. Under General Assembly Resolution 48/218 B and ST/SGB/273 (Establishment of the Office of Internal Oversight Office), the USG/OIOS is ultimately responsible for the administration and activities of the Office. Neither the OIOS Investigation Manual nor the OIOS Investigations Division Procedure on Investigation Intake or other internal guidelines remove the USG/OIOS the authority to initiate an investigation. As expressly specified in the above-mentioned Manual, it does not confer, impose or imply any new rights or obligations;

f. The USG/OIOS made a determination that, given the sensitive political nature of the case, added to the media attention elicited by it, it was prudent for her to make a decision concerning the initiation of an investigation. Any insinuation of bias is speculative and no similar inference can be made from the Secretary-General's appointment of the Panel;

g. The decision not to postpone the interview was properly motivated. The Panel's review and the OIOS investigation have different object and purpose, the latter being limited to alleged misconduct by the Applicant. They may continue to run in parallel, as there is no legal provision which bars OIOS from proceeding with an investigation while another wholly separate body conducts an assessment of a related matter. The Applicant's assertion that his interview may result in an unlawful collection of self-

incriminating evidence which may be subsequently used against him is unfounded;

Urgency and irreparable damage

h. There is no urgency, nor irreparable harm that would warrant the suspension of the contested decisions;

i. All potential harm caused to the Applicant's reputation would be restored if and when he is cleared of the allegations. If not entirely, any such harm could be adequately compensated in the award of damages.

Consideration

23. At the outset, it must be reiterated that the General Assembly has repeatedly emphasized that the tribunals of the internal system of administration of justice shall not have any powers beyond those conferred under their respective statutes (see, e.g., A/RES/67/241 of 24 December 2012, para. 5).

24. Pursuant to art. 2.1(a) of its Statute, the Tribunal shall be competent to hear and pass judgment on an application filed "[t]o appeal an *administrative decision* that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (emphasis added). The Tribunal's subject-matter jurisdiction is thus limited to reviewing "administrative decisions". According to the definition adopted by the Appeals Tribunal, "administrative decision" within the meaning of art. 2 of the Statute is a "unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order" (see, e.g., *Tabari* 2010-UNAT-030; *Schook* 2010-UNAT-013; *Tintukasiri* 2015-UNAT-526). This definition is the basis of the Tribunal's decision, which is expected to "recognize, respect and abide by the Appeals Tribunal's jurisprudence" (*Igbinedion* 2014-UNAT-410 (full bench)).

25. One of the key characteristics of an appealable administrative decision is that it produces "direct legal consequences affecting a staff member's terms or

conditions of appointment" (*Bauzá Mercére* 2014-UNAT-404; *Ngokeng* 2014-UNAT-460; *Wasserstrom* 2014-UNAT-457).

26. Accordingly, a decision constituting a mere component of a complex decision-making process is not an appealable administrative decision. Indeed, such preparatory or preliminary decisions alone do not deploy legal effects; hence, they are not reviewable by the Tribunal in themselves, but only as part of the final decision, once the latter has been reached (*Ishak* 2011-UNAT-152; *Elasoud* 2011-UNAT-173; *Gehr* 2013-UNAT-313).

27. It is relevant to the present case that, in *Nguyen-Kropp & Postica* 2015-UNAT-509, the Appeals Tribunal's considered a decision to authorize an OIOS investigation to be preparatory. This Judgment ruled explicitly (para. 34) that "[i]nitiating an investigation is merely a step in the investigative process and it is not an administrative decision which the UNDT is competent to review under Article 2(1) of its Statute."

28. In view of this unambiguous ruling, the Tribunal cannot but conclude that the motion at hand is irreceivable.

29. The Tribunal notes, however, that the Appeals Tribunal makes a more nuanced statement in the same Judgment (para. 31):

> Generally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.

30. By using the phrase "generally speaking", the Appeals Tribunal seems to suggest that there may be exceptions to the principle it enunciates. Moreover, the Judgment pursues:

> This accords with another general principle that tribunals should not interfere with the matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct this processes in full and to finality.

31. Indeed, this passage may be read as implying, *a contrario*, that tribunals might be entitled to interfere with internal processes of the Administration which are not lawful.

32. However, even assuming that there is room for exceptions to the Appeals Tribunal's explicit finding that the initiation of investigations does not amount to a reviewable decision, the Applicant does not demonstrate, concretely, that his case falls within any acceptable exception to that principle.

33. At any rate, the relevant case-law indicates that such an exception may only be envisaged in the presence of a decision tainted by a flaw of an obvious and fundamental nature. Only under such conditions, a deviation from the general rule might be justified. In this sense, the Tribunal held in *Hashimi* Order No. 93 (NY/2011):

> There may be cases when the decision to launch an investigation and the manner in which it is carried out may be so plainly unlawfully and in actual or imminent breach of the staff member's legal rights so as to render such decision capable of being reviewed by the Tribunal.

34. Moreover, regarding the above criteria, a parallelism may be established with the Appeals Tribunals well-settled jurisprudence that, even if appeals against interlocutory rulings clearly fell, as a matter of principle, outside its jurisdiction, such appeals could exceptionally be receivable if the first instance court had manifestly exceeded its jurisdiction or competence (see *Tadonki* 2010-UNAT-005; *Onana* 2010-UNAT-008; *Kasmani* 2010-UNAT-011; *Bertucci* 2010-UNAT-062). In this respect, the Appeals Tribunal has emphasized that, for such an exception to operate, "the excess of jurisdiction or competence must be 'clear' or 'manifest'" (*Porter* 2015-UNAT-507; see also *Wamalala* 2013-UNAT-300).

35. Finally, the foregoing comports with the general principle that exceptions to general rules must be construed in a narrow and strict manner (see e.g., *Kasmani* 2010-UNAT-011; *Tran Nguyen* UNDT/2015/002).

36. Against this background, the Tribunal observes that, while the Applicant makes a case of apprehension of bias and apparent lack of impartiality regarding

the contested decision, the motion fails to demonstrate, to the required standard, that such a flaw, if true, reached the threshold of being obvious and fundamental.

37. The Applicant advances three main arguments in this regard. First, in his view, the USG/OIOS has pre-determined the Applicant's case, as shown in two internal emails:

a. On 9 April 2015, the USG/OIOS wrote:

> The investigators will also determine his level of knowledge with the chain of command and appropriate procedures, and unfortunately in his case and at his level, ignorance will not be an excuse. It was his duty to know and comply.

b. On 10 April 2015, she wrote:

> [I]t was clear that [the Applicant] had already admitted to informally transmitting the entire report to the French Mission in Geneva, without going through management and normal processes, which would require specific authorization to do so from the High Commissioner, appropriate redaction of the report, and preparation of a logged Note Verbale to accompany the transmission. [The Applicant] is absolutely familiar with such requirements.

38. After examination of both communications in their context, they may well reflect, rather than a pre-judgement by the USG/OIOS of the misconduct allegations, her assessment of whether or not there were sufficient reasons to believe that misconduct may have occurred so as to warrant an investigation. Beyond that, it still remains to be proven that the USG/OIOS, who does not directly conduct or supervise the investigation in person, in any manner interfered in the fact-finding proceedings or imposed any views on the investigators.

39. Second, the Applicant avers that the USG/OIOS has exchanged on the Applicant's matter with officials not assigned to the investigation and revealed confidential information with senior United Nations managers, including the principal complainant, i.e., the High Commissioner.

40. Again, having reviewed the relevant exchanges, it appears that the alleged misconduct at issue was reported to the USG/OIOS for investigation separately by

different senior officials of the Organization. Based on the evidence available to the Tribunal, the contents of their exchanges do not seem to go much beyond that, and the USG/OIOS did not reveal information on the matter that her interlocutors did not possess already. As to a potential concertation with the High Commissioner, the chain of emails before the Tribunal tends to show that he limited himself to request an investigation into the matter.

41. Third, the Applicant points out that the USG/OIOS by-passed the standard operating procedures in OIOS for the authorization of an investigation. In this respect, it is indisputable that the USG/OIOS did depart from her Office's usual practices in this case. However, from the outset she gave a justification for that, namely, the political sensitivity of the issue, which, on its face, is not manifestly unreasonable in light of its considerable echo in the media. Importantly, legally speaking, the USG/OIOS, as the head of OIOS and the official responsible for all its activities, and in line with the Secretary-General's Bulletins ST/SGB/273 (Establishment of the Office of Internal Oversight Services) and ST/SGB/2002/7 (Organization of the Office of Internal Oversight Services), has the authority to initiate an OIOS investigation. Further, nothing in the OIOS internal guidelines, particularly in the OIOS Investigations Division Procedure on Investigation Intake, removes this authority from her.

42. Additionally, it is worth noting that the decision to initiate an investigation on allegations that a senior staff member has leaked internal documents cannot *per se* be said to be a totally unreasonable or nonsensical course of action. In this context, the Tribunal notes that in his motion, the Applicant himself states to be "prepared to go through an investigative process".

43. For all the foregoing, the Tribunal is not satisfied that the decision to initiate the OIOS investigation on the Applicant's conduct was obviously and fundamentally flawed. Therefore, the Tribunal does not find it justified to deviate from the general principal pursuant to which initiating an investigation is merely a step in the investigative process, hence, not an administrative decision which the Tribunal is competent to review.

44. Lastly, the Applicant submits, in the alternative, that, even if the authorization of the litigious investigation was not to be deemed an appealable administrative decision, the instant application challenges as well the refusal to put on stay the OIOS investigation while awaiting for the results of the Panel's review.

45. This submission has no merit. Suspending a previous decision, is nothing else than a temporary neutralization of this original decision. As such, the former is, in terms of substance, of the very same nature as the latter. Therefore, the suspension of a decision lacking the quality of an administrative decision cannot itself amount to an administrative decision.

46. It follows that the refusal to put on stay the OIOS investigation cannot, at this stage, be reviewed by the Tribunal in an isolated manner.

Conclusion

47. In view of the foregoing, the Applicant's motion for interim measures is rejected.

(*Signed*)
Judge Thomas Laker
Dated this 10th day of July 2015

Entered in the Register on this 10th day of July 2015
(*Signed*)
René M. Vargas M., Registrar, Geneva