



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ANTOINE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION DURING  
THE PROCEEDINGS PURSUANT TO  
ART. 10.2 OF THE UNDT STATUTE**

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**Counsel for the Applicant:**

Sètondji Roland Adjovi, *Etudes Vihodé*  
Charles A. Adeogun-Phillips, Charles Anthony LLP

**Counsel for the Respondent:**

Romy Batrouni, AAS/ALD/OHR  
Miryoung An, AAS/ALD/OHR

## **Introduction**

1. The Applicant, a staff member of the United Nations Truce Supervision Organization (“UNTSO”), filed an application on 30 August 2020 to contest: his placement on Administrative Leave Without Pay (“ALWOP”) effective 1 July 2020 for a period of three months or until the completion of the investigation and any disciplinary process (“contested decision 1”); and the 30 June 2020 decision by the Office of Internal Oversight Services (“OIOS”) to seize his personal smartphone for the purposes of an investigation (“contested decision 2”).

2. Pursuant to Order No. 162 (NBI/2020), the Applicant filed an amended application on 2 September 2020 that complies with paragraph 6 of UNDT Practice Direction No. 4. On the same day, he also filed an application for suspension of the contested decisions pursuant to art. 10.2 of the Statute and art. 14.1 of the Rules of Procedure of the Tribunal.

3. The Respondent filed a reply on 3 September 2020.

## **FACTS**

4. The facts have been garnered from the Applicant’s amended application on the merits of 2 September 2020, the Respondent’s reply and the supporting documentation.

5. On 23 June 2020, a widely circulated video appeared on social media showing two male individuals and a female individual driving along a busy street in a clearly-marked United Nations vehicle. The video captured one of the male individuals and the female in the back seat engaged in what appeared to be an act of a sexual nature as the vehicle was driven along a heavily trafficked street.<sup>1</sup> The video was filmed on the evening of 21 May 2020 in Tel-Aviv, Jerusalem.<sup>2</sup>

6. On 25 June 2020, Mr. Ben Swanson, Director, Investigations Division, Office of Internal Oversight Services (“ID/OIOS”), informed Mr. Alan Doyle, the UNTSO Chief of Mission Support (“CMS”) that ID/OIOS had received, “from

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<sup>1</sup> Amended application, annexes 6 and 7.

<sup>2</sup> Ibid., annex 1.

multiple sources”, a report of possible unsatisfactory conduct implicating UNTSO staff members in Jerusalem and that an investigation had been initiated.<sup>3</sup>

7. On 26 June 2020, Mr. David Rajkumar, an OIOS Investigator, informed the Applicant of the OIOS investigation that had been initiated. He further informed the Applicant that he was a subject of the investigation and that OIOS wanted to interview him. Mr. Rajkumar and Ms. Margaret Gichanga-Jensen, Chief of Section, OIOS/Vienna, interviewed the Applicant on 30 June 2020<sup>4</sup> and took possession of the Applicant’s smartphone and SIM card for forensic analysis.<sup>5</sup>

8. By memorandum dated 30 June 2020, Mr. Swanson provided Ms. Catherine Pollard, Under-Secretary-General, Department of Management Strategy, Policy and Compliance (“USG/DMSPC”) with OIOS’ preliminary investigation findings and identified the Applicant as the occupant of the rear passenger seat.<sup>6</sup>

9. By memorandum dated 1 July 2020<sup>7</sup>, Ms. Martha Helena Lopez, Assistant Secretary-General for Human Resources (“ASG/OHR”) informed the Applicant that as a result of the OIOS investigation, the USG/DMSPC had decided to place him on ALWOP for “a period of three months or until the completion of the investigation and any disciplinary process, whichever is earlier” pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). The Applicant’s placement on ALWOP became effective on 2 July 2020 when he received the ASG/OHR’s memorandum.

10. In a note dated 2 July 2020, Mr. Stéphane Dujarric, Spokesman for the Secretary-General, informed correspondents that according to information initially gathered during the OIOS investigation, two male international staff members who were in the United Nations Vehicle had been identified as having engaged in

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<sup>3</sup> Reply, annex R/1.

<sup>4</sup> Amended application., annex 3.

<sup>5</sup> Ibid., annex 16.

<sup>6</sup> Ibid., annex 29; see also Reply, annex 3.

<sup>7</sup> Reply, annex R/4.

misconduct, “including conduct of a sexual nature” and that due to the seriousness of the allegations, had been placed on ALWOP pending the conclusion of the OIOS investigation.<sup>8</sup> UNTSO released a similar statement on 3 July 2020.<sup>9</sup>

11. The Applicant requested management evaluation of the contested decisions on 14 July 2020.<sup>10</sup> The Applicant had not received a response to this request at the time he filed the current application.<sup>11</sup>

## **CONTESTED DECISION 1**

### **Receivability**

#### ***Respondent’s submissions***

12. The Respondent submits that the Applicant’s request for the Tribunal to alter the ALWOP to administrative leave with pay (“ALWP”) effective 1 July 2020 is not receivable because he is inviting the Tribunal to dispose of the substantive case by granting full relief whereas the purpose of an interim measure is to grant only temporary relief pending the outcome of substantive proceedings.<sup>12</sup>

13. The Applicant’s request for the Tribunal to credit his leave entitlements and associated point credits for home leave and rest and recuperation (“R&R”) fails to identify a contested administrative decision denying his leave entitlements or the point credits. The Applicant’s request for management evaluation dated 14 July 2020 does not include this request.

14. The Applicant’s request for “retraction of the 2/3 July 2020 press statements” seeks to restore a situation or reverse an allegedly unlawful act that has already been implemented. This request is beyond the scope of the interim measures.

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<sup>8</sup> Amended application., annex 4.

<sup>9</sup> Ibid., annex 5.

<sup>10</sup> Ibid., annex 22.

<sup>11</sup> SOA application, page 4, para. 7.

<sup>12</sup> *Kisambira* Order No. 80 (NY/2014,) para. 13.

***Applicant's submissions***

15. The Applicant's case is that his challenge against his placement on ALWOP is receivable because a decision to place a staff member on administrative leave produces continued direct legal consequences which can be properly suspended by the Tribunal since the decision is only deemed to have been implemented when it has been implemented in its entirety, that is – at the end of the administrative leave.<sup>13</sup>

***Considerations***

16. The Tribunal concurs with arguments cited by the Applicant that a decision of continuing effect is only deemed to have been implemented when it has been implemented in its entirety. The temporary and provisional nature of administrative leave does not remove the matter from the Tribunal's cognizance under art 10.2 of its Statute. If in doubt, such result is directly confirmed by staff rule 10.4(e). The application regarding contested decision 1 is receivable. The application for suspension of actions and other attendant claims for temporary reliefs that the Applicant advances under art. 10. 2 of the UNDT Statute, will be addressed in the merits.

**Merits*****Applicant's submissions***

17. The Applicant submits that the ALWOP decision is *prima facie* unlawful because he has not been accused of any sexual abuse and there is no exceptional circumstances to justify the decision. The reasons for his placement on ALWOP were untrue as there is no evidence to support the allegation that the unidentified female in the back seat is a sex worker. Moreover, there is no evidence of an act of a sexual nature; the Applicant has submitted that they were dancing and the investigation has not been able to prove him wrong. Lastly while the rule requires that administrative leave shall not be punitive, the Applicant's ALWOP has been

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<sup>13</sup> *Erefa* Order No. 002 (NBI/2019) referring to *Calvani* UNDT/2009/092; *Galliény* Order No. 060 (NY/2014); *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014).

since he has been deprived of his salary, which in turn has made it impossible for him to meet his family and social obligations.

18. The urgency is not self-created because the Applicant filed his application on the merits on the first day following the statutory period for management evaluation responses defined in staff rule 11.2(d). He filed this motion for interim measures immediately thereafter. The Applicant submits that he was placed on ALWOP on 1 July 2020 so that the Organization could release the 2/3 July 2020 press statements for the purposes of damage control. The Organization was aware that Inner City Press had released the Applicant's name when it issued the 2/3 July 2020 press statements, thereby violating the presumption of innocence. Since his name has already publicly been released, he has now been assumed to be guilty of the allegations in the court of public opinion, creating an urgent need to correct the record.

19. The reputational harm caused to the Applicant is obvious from the public sensalization of the case.

### ***Respondent's submissions***

20. The Applicant's placement on ALWOP pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 is lawful, reasonable and proportionate. The USG/DMSPC's decision was based on information provided in the OIOS Memorandum of 30 June 2020.<sup>14</sup> The totality of the information gathered by the OIOS investigation supports a conclusion that it was more likely than not that the Applicant has engaged in unsatisfactory conduct by using a clearly-marked United Nations vehicle to engage in acts of a sexual nature, in a public and visible manner, thereby failing to use the vehicle only for official purposes and to exercise reasonable care in its use. The requirement of "exceptional circumstances" as defined under section 11.4(b) has been met because the Applicant's conduct posed significant harm to the reputation of the United Nations and of UNTSO and is of such gravity that, if established, would warrant

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<sup>14</sup> Reply, annex 3.

separation or dismissal. This is also in line with the Secretary-General's past practice.

21. The Applicant has not demonstrated that he suffers irreparable harm from his placement on ALWOP. If the allegations against him are ultimately not sustained, any pay withheld from him will be restored in accordance with staff rule 10.4(d) and section 11.6 of ST/AI/2017/1. Furthermore, throughout the period of ALWOP the Organization makes the necessary payments and contributions to maintain the Applicant's entitlements to education grant, health, dental and life insurance coverage and his participation in the United Nations Joint Staff Pension Fund. The Applicant's contention that he was instructed not to leave his duty station is baseless. In the ALWOP letter, in relation to the Covid-19 pandemic, the Applicant was advised to seek assistance from Mission Support with respect to travel from the duty station. The negative damaging information published in the press, which the Applicant himself admitted "would be difficult to remove", is not attributable to the Organization.

22. The onus is on the Applicant to demonstrate the particular urgency of the case and the timeliness of his actions<sup>15</sup> but he has failed to do so. The Applicant's contention that the Organization has disclosed his name to the public/media outlets is baseless because the Organization's press releases contained no names. By refraining from disclosing any personal information in relation to the Applicant, the Organization did not violate the Applicant's presumption of innocence. It is unclear how suspending the ALWOP would help the Applicant "correct the record", including those articles already published and widely disseminated in news media.

### ***Considerations***

23. The justification provided to the Applicant for his placement on ALWOP was "*pursuant to Staff Rule 10.4 (from ST/SGB/2018/1) and Section 11.4(b) of ST/AI/2017/1.*"

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<sup>15</sup>*Jitsamruay*, UNDT/2011/206, para. 26. See also: *Villamoran*, UNDT/2011/126, para. 26; *Dougherty* UNDT/2011/133; *Maloka Mpacko* UNDT/2012/081; *Montecillo*, Order No. 54 (NY/2019), para. 36; *Nsubuga*, Order No. 85 (NBI/2019), para. 14; *Delsol*, Order No. 143 (NY/2019), para. 8.

24. Staff rule 10.4 provides in the relevant part:

[...]

(c) Administrative leave shall be with full pay except:

(i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, or

(ii) when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

25. ST/AI/2017/1 provides in the relevant part:

11.4 A staff member may be placed on administrative leave without pay by an authorized official when at least one of the following conditions is met:

(a) There are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay;

(b) There are exceptional circumstances that warrant the placement of the staff member on administrative leave without pay because the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix), and there is information before the authorized official about the unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

26. Staff rule 10.4(c) confirms that ALWOP, which departs from the fundamentals of the employment relation, is an exceptional measure and not a matter of vast administrative discretion. Consequently, application of ALWOP requires, primarily, the Respondent to show that legal premises allowing it are fulfilled.

27. For staff rule 10.4(c)(i) to be applicable it would be necessary that a staff member's actions were, at a minimum, accessory to sexual abuse or sexual exploitation. On the facts of the present case, as they are narrated, this would require that the woman filmed on the Applicant's lap aboard the United Nations vehicle was subject to sexual exploitation. The probable cause standard is not too



demanding. Admittedly, however, the requisite determinations have not been made as yet, and the Applicant has not been accused of sexual abuse or sexual exploitation in any form.

28. Before discussing the Administration's implementation of staff rule 10.4(c)(ii) "exceptional circumstances" provision in reliance on ST/AI/2017/1, the Tribunal wishes to recall its holding in the *Erefa* case.

[...] as a general matter, staff rule 10.4.a establishes imposing administrative leave as a prerogative, and not an obligation, on the part of the Secretary-General. Staff rule 10.4.c, as noted above, explicitly precludes administrative leave with full pay in sexual abuse cases, but it does not preclude leave with partial pay. ALWOP under staff rule 10.4.c remains an extraordinary measure. While originally designed to be of short duration, it may now extend throughout the duration of the investigation and disciplinary proceedings without limitation. [...] During this time the affected staff member cannot undertake another occupation and, under ST/AI/2017/1 – what the Tribunal finds at the present regulation unlawful, as discussed below – risks forfeiture of the withheld pay if he quits or does not cooperate. Onerousness of the ALWOP is not mitigated by the fact that there would be no undue delays. [...] Everything considered, interpreting staff rule 10.4.c as a sharp alternative between either no administrative leave at all or administrative leave without pay would pose an unreasonable restriction on the Secretary-General's ability to respond to situations which require balancing the interest of the disciplinary process and humanitarian concerns. Rather, this staff rule must be interpreted to the effect that the Secretary-General has discretion as to placing staff on administrative leave with partial pay, including in cases of sexual misconduct.

[...]

Turning to implementing instruments, it is noted that ST/AI/2017/1 goes beyond the language of the new staff rule 10.4.c in providing mandatory application of ALWOP to cases of sexual misconduct and, accordingly it dispenses with listing specific grounds for placement of a staff member on ALWOP. It only requires the minimum level of proof, albeit not quite in line with staff rule 10.4, which requires probable cause, this being a standard higher than "reasons to believe". Further, it introduces limitation on the restoration of the withheld pay in the event of resignation and non-cooperation, where it contradicts the new staff rule 10.4.d which provides that *any* pay shall be restored in the event the staff member be exonerated. There is currently no authorisation in the Staff Rules to forfeit remuneration of a staff member who resigned while presumed innocent.

[...]

The Tribunal considers that rights granted to staff under the Staff Rules and superior legal instruments may not be autonomously restricted by subordinate legal instruments. Subordinate instruments may only implement restrictions within the scope authorised in the superior acts. It accordingly finds that these provisions of ST/AI/2017/1, which introduce greater or additional limitations on staff members' rights against the language of the controlling staff rules, are illegitimate.<sup>16</sup>

29. Turning back to staff rule 10.4(c)(ii), this Tribunal notes that it clearly requires the Secretary-General to make *a case-specific determination* warranting administrative leave with partial pay or without pay. Had it been intended to resort to abstract criteria, they would have been articulated on the level of the staff rules, just as it has been done regarding sexual exploitation and sexual abuse. A reference to the gravity of the disciplinary violation and a certain threshold of proof and, as in section 11.4(b) of ST/AI/2017/1, rightly provides a limitation on the ALWOP, but does not amount to "exceptional circumstances". Thus, on the basis of staff rule 10.4(c)(ii), a requisite gravity and threshold of proof may serve as general conditions, in addition to which, however, individual circumstances of the case must speak in favour of ALWOP over administrative leave with full or partial pay, always, however, in consideration of the *purpose* of the administrative leave.<sup>17</sup> In other words, under staff rule 10.4(c)(ii), the Respondent is required to show why administrative leave is necessary, moreover, what legitimate interest necessitates that it be without pay. Resignation from determining the purpose of ALWOP and replacing it with a sole reference to gravity of a violation contradicts the presumption of innocence and denies any meaning to the assurance that ALWOP "shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure". It would practically mean that in all cases

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<sup>16</sup> *Erefa* Order No. 002 (NBI/2019).

<sup>17</sup> In this connection it is worth recalling the Appeals Tribunal holding in *Samandarov* 2018-UNAT-859 that "[t]he proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability." This Tribunal stresses that in the case of ALWOP it is not only the general proportionality principle that requires considering less drastic measures but an express directive of staff rule 10.4(c)(ii) that ALWOP be approached as an exceptional measure.

where separation is at stake - and most cases that the Tribunal receives indeed involve separation - an onus closely similar to an ultimate sanction is inflicted before the finding of misconduct is formally made. In this respect, the Tribunal regrets to find, once again, that ST/AI/2017/1 goes against the letter of staff rule 10.4(c) and (d) in that it clearly designed ALWOP to be applied akin to an anticipated measure of separation or dismissal.

30. Assuming that the Organization does not purpose to replace presumption of innocence with presumption of liability, and noting that economy is clearly the only interest of ALWOP which is not served by ALWP, the Tribunal reiterates<sup>18</sup> that in order for ALWOP to remain in line with the presumption of innocence, fiscal and other concerns need to be related to the length of the investigation vis-à-vis the financial situation of the staff member concerned. A staff member should not be surprised by a sudden loss of income before she or he could make provisions for sustaining him/herself and family during the investigation. Neither should placement on ALWOP serve to encourage resigning of expeditiousness in investigation, which is a risk where the Organization does not bear much cost of keeping a staff member of ALWOP. It follows that the financial burden of placing a staff member on administrative leave must be shared and administrative leave should be applied in a phased approach, with consideration given to leave with partial pay before ALWOP, the latter justified in genuinely exceptional cases, where objective reasons do not allow concluding the disciplinary process within a standard time.

31. Referring the above considerations to the facts of the present case, the Tribunal is satisfied that the nature of the alleged conduct and its unfortunate publicity are factors that may require that the individuals under investigation be removed from service pending investigation, notwithstanding that the circumstance of sexual exploitation is yet to be established. This is necessary to control the damage to the trust in the Organization by showing that members of the host population will not be exposed to individuals who willfully and publicly offend mores and endanger public safety in traffic, and may have engaged in sexual exploitation. This said, not an iota of reason has been given as to why

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<sup>18</sup> See *Abdallah* Order No 080 (NBI2017) corr.1

administrative leave with pay or partial pay, such as retaining the cost of living component of the salary, would not suffice to satisfy this purpose.

32. On the prongs of urgency and irreparable harm, the Tribunal finds that the Respondent applied ALWOP in violation of the presumption of innocence and as a punitive measure. This perception and attitude need to be urgently corrected as they cause irreparable harm to the Applicant's legal and financial interest. The application, therefore, is granted to the extent it seeks to suspend the "unpaid" aspect of administrative leave.

33. Regarding the claim to have the decision suspended with effect *ab initio*, the Tribunal recalls that suspension of action under art 10.2 of its Statute serves to provisionally rectify a situation based on *prima facie* determination, and not to pronounce the impugned decision null and void. Accordingly, the consistent jurisprudence of the Tribunal is that decisions of continuing effect are suspended only as to the non-executed part rather than reversed *ab initio*. In this respect, the Applicant's claim is refused.

34. Regarding the request to "credit the Applicant's leave entitlements and associated point credits for home leave and R&R if these have been withheld" the Tribunal notes that in his argument the Respondent does not explain whether these entitlements have been, in fact, withheld or not. The issue does not seem to be sufficiently regulated. The Tribunal, considers, however, that home leave and R&R are entitlements accrued through rendering work, and not through staying on administrative leave, whether voluntary or imposed and whether paid or unpaid. Not crediting these entitlements is thus not currently prejudicing the staff member's rights which must be protected in accordance with staff rule 10.4. This part of the Applicant's claim is refused. *De lege ferenda*, however, in situations where a staff member had been prevented from leaving the duty station pending completion of the disciplinary proceedings, the Respondent should consider also restoring the home leave points depending on the outcome of the process.

35. Finally, regarding the claim to have the Organization obligated to retract press statements made by Secretary-General's Spokesman and UNTSO, the Tribunal agrees that the statement attributing misconduct - as opposed to stating that

individuals were under investigation - was unfortunate and in the future should be avoided. It finds, nevertheless, the relief claimed by the Applicant has no sufficient nexus with correcting the impugned decision, i.e., whether the administrative leave is to be with or without pay, which has been effected by this Order. This part of the claim is, therefore, refused.

## **CONTESTED DECISION 2**

### ***Applicant's submissions on receivability and merits***

36. The Applicant submits that his challenge against the seizure of his personal phone is receivable because the investigators promised to return it within two weeks of its seizure but this has not been done. The evidence voucher provided to him when his smartphone was seized shows no estimated date of return and no information has been provided as to when it will be returned. The decision to seize and hold his personal property in violation of ST/SGB/2004/15 produces continued direct legal consequences. This decision is only deemed to have been implemented when it has been implemented in its entirety, that is – when the phone is returned to the Applicant.

37. The seizure is *prima facie* unlawful because there is no rule in support of it. ST/SGB/2004/15 is limited to equipment owned by the Organization and does not extend to personal equipment of staff members. The seizure of one's personal property, such as a phone, with no legal right to get it back or no information provided as to when it is going to be returned constitutes a serious abuse of power and violation of rights.

38. The Applicant submits that this matter is urgent because he has been unlawfully deprived of his personal property already for two months with no end in sight. He resides in a foreign country at the service of the Organization and needs to remain reachable to his family and friends to maintain his sanity. His contacts have only the number of his personal phone which has been seized so they cannot contact him.

39. Irreparable harm is a prospective concept, the high level of concern and probability that a negative action will occur to the detriment of the Applicant if

the interim measures are not granted. All of the Applicant's personal data is now unlawfully in the hands of his employer, who may leak it to the media. Such an invasion of privacy will likely damage the Applicant's personal and professional reputation, as well as his future career prospects. It is well settled jurisprudence that damage to the career prospects and reputation meets the standard for irreparable damage.

***Respondent's submissions on receivability and merris***

40. The Applicant's phone was handed to the OIOS investigator and has been forensically examined. Any decision relating to this matter has been implemented<sup>19</sup> and is therefore not receivable. Further, an applicant may only challenge a "final decision" that is taken at the conclusion of an administrative process and which has direct legal consequences. Preparatory or preliminary decisions and steps in an administrative process do not constitute administrative decisions. The Applicant's submission of his mobile phone to OIOS during his interview is a preliminary/preparatory step that took place in the course of the OIOS investigation. This does not constitute a final administrative decision for the purposes of art. 2.1(a) of the UNDT Statute.

41. There was no "seizure" of the Applicant's phone. The OIOS investigators did not take the phone forcefully from the Applicant but instead explained to him the basis of the request. After recording his objection, the Applicant submitted his phone to the investigators. The Applicant's request for the Tribunal to instruct the Respondent to immediately return his phone, destroy any data/analysis taken from it and issue an injunction preventing use of it is not receivable. The Applicant seeks issuance of declaratory orders against the Respondent which is outside the purview of art. 10.2 of the UNDT Statute.

42. The Applicant's submission of his mobile phone to the OIOS investigators is in accordance with staff rule 1.2(c) and section 6.2 of ST/AI/2017/1. He had a duty to fully cooperate with the OIOS investigation and to provide any communications technology equipment under his control. Further, the Applicant's

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<sup>19</sup> *Antoine* Order No. 139 (NBI/2020), para. 58.

assertion that his mobile phone was personal is misplaced. The Applicant's mobile phone contained a United Nations-issued Subscriber Identity Module ("SIM") card and was in effect used for official purposes. Thus, the Applicant's phone containing the United Nations-issued SIM card falls within the definition of an "ICT resource" set forth in section 1(b) of ST/SGB/2004/15 (Use of information and communication technology resources and data). Pursuant to section 9 of ST/SGB/2004/15, OIOS has authority to access all information and communication technology resources and data of United Nations staff members. Accordingly, there is no infringement of the Applicant's rights as a staff member and the OIOS investigator's request for submission of the Applicant's phone containing the United Nations-issued SIM card is lawful.<sup>20</sup>

43. The Applicant did not discharge the onus to demonstrate the particular urgency of the case. On 27 August 2020, the OIOS investigator informed the Applicant that his phone could be picked up on 2 September 2020. OIOS has received no response to this email. During the interview, the Applicant was advised to contact the Mission in order to obtain a new mobile phone if he needed a temporary replacement. The Applicant did not clarify why he could not communicate with his family and friends without using the specific mobile phone that was taken by the OIOS investigators. He also did not specify that he had asked OIOS for release of contacts listed in the mobile phone and that said request had been inappropriately denied.

44. The Applicant failed to demonstrate that the temporary deprivation of access to the mobile phone would cause him irreparable harm. The Applicant's assertions about alleged invasion of his privacy or alleged harm to his reputation/future career prospects remains speculative and lacks specifics. Further, the Applicant's contention that the Respondent would "leak" private information contained in his phone to the public, including media outlets, is baseless.

45. In any event, on 27 August 2020, the OIOS investigator informed the Applicant that his mobile phone was ready for his pickup on 2 September 2020.

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<sup>20</sup> *Antoine* Order No. 139 (NBI/2020), para. 59.

Therefore, the Applicant's request for immediate return of his mobile phone is moot.

### ***Considerations***

46. It is recalled that the basis for taking the Applicant's phone is indicated to be in section 6.2 of ST/AI/2017/1, which provides:

#### **Duty to cooperate**

6.2 Pursuant to staff regulation 1.2 (r) and staff rule 1.2 (c), staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information and communications technology equipment or other information under the control of the Organization *or under the staff member's control, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct* (emphasis added).

47. It is thus obvious that the claim to have a mobile phone (including a private one) surrendered for the purpose of processing information under ST/AI/2017/1 is derived from the staff member's duty to cooperate with an investigation, and not from the authorization to seize private assets on the part of OIOS or any other agent of the Organization.

48. By contrast, authorizations to seize, are provided for OIOS in section 9 of ST/SGB/2004/15:

#### **Investigations by OIOS**

[...]

9.2 The following provisions shall apply to investigations carried out by OIOS involving ICT resources or ICT data:

(a) Requests for access to ICT resources or ICT data by OIOS need not be in writing or submitted in advance, where it is not practicable to do so;

(b) OIOS shall have the authority to access all ICT resources and ICT data remotely without informing the staff member;

(c) Physical access to ICT resources located in a staff member's workspace, if practicable, shall be conducted in the presence of the staff member concerned and/or the head of the staff member's division, section or unit;



49. These authorizations are granted in relation to ICT resources as defined by section 1(b) of the same Bulletin which defines:

[...]

(b) *ICT resource*: any tangible or intangible asset capable of generating, transmitting, receiving, processing, or representing data in electronic form, where the asset is owned, licensed, operated, managed, or made available by, or otherwise used by, the United Nations.

50. It follows that, as noted by the Applicant, authority to carry out a seizure or other measures without a staff member's consent is limited to the assets remaining in the realm of the Organization. The Tribunal cannot agree with the Respondent's reading of section 1(b) of ST/SGB/2004/15 to the effect that a SIM card inserted in a private mobile phone renders such a phone an "ICT resource [...] otherwise used by the United Nations".<sup>21</sup> To accept it would mean that, under section 9, the investigators could forcibly seize such asset or access its contents without the staff member's consent. The Respondent admits, albeit only in a footnote, that he is not ready to go that far.<sup>22</sup> The Tribunal agrees with the Applicant that it would be inconsistent with the spirit of ST/SGB/2004/15. It notes, moreover, that also at the present time, where delineation between private and public spheres in managing electronic data is extremely difficult, such a sweeping license would be fundamentally inconsistent with respect for privacy; for example, giving the Organization claim to access and impound private computers on the basis that official accounts and databases are accessed from them – indeed a commonplace occurrence at a time when the Organization relies heavily on staff working from home on their private ICT equipment.

51. Accordingly, taking possession of a private ICT asset may only be through a staff member's consent and a refusal may only constitute a "failure to cooperate [which] may be considered unsatisfactory conduct" and may prompt negative inferences as to facts under investigation as contemplated by ST/AI/2017/1. The Applicant's contention, therefore, about irreconcilable contradiction between the

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<sup>21</sup> Reply, para 37

<sup>22</sup> Ibid, fn 44 "If the personal item is under the control of a staff member and it contains relevant information to an investigation, the staff member is to provide it to the investigation; however, the staff member is not required to do so".

provisions of ST/SGB/2004/15 and ST/AI/2017/1 is unfounded. This is not to detract from that fact that respect for private property, as well as privacy in general, dictate restraint in making requests for surrender of private assets, i.e., acting for a good cause and with proportionality, including that the asset, once surrendered, should be treated properly and returned promptly. For the same reasons, caution must be exercised in drawing negative inferences whereas sanctioning a refusal to surrender as unsatisfactory conduct should be an exceptional case.

52. Turning to the present case, the Tribunal is not convinced whether the case involved an administrative decision at all. The record shows that the Applicant handed over his phone to the investigators voluntarily albeit with some hesitance, after they asserted that they had authority to request it because of the Organization's SIM card. The pertinent communication was vague, no legal basis and/or sanction were invoked. Altogether, both sides of the table appear to have acted without a clear or common concept of authorizations and obligations involved, which is not surprising, given that the issue has been largely unexplored. If anything, there might have been a decision refusing to return the phone, after the Applicant withdrew his consent, as evidenced by the Respondent's reply in Case No. UNDT/NBI/2020/053<sup>23</sup>. However, the main claim has been rendered moot by the Respondent's returning the asset.

53. Regarding other related claims, for the reasons cited by the Respondent, the Tribunal agrees that admissibility of evidence in disciplinary proceedings is not a matter for adjudication in the regime of art. 10.2 of the UNDT statute, as these matters may be sorted out when, and if, a disciplinary measure is appealed. Neither is a claim for apology, notwithstanding whether the administration would have acted legally or not. This part of the claim is refused.

## **ORDER**

54. The application is granted in part, in that implementation of the impugned decision is henceforth suspended with respect to placing the Applicant on

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<sup>23</sup> See Antoine Order No. 139 (NBI/2020).

administrative leave without pay. In the remaining part, the application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 9<sup>th</sup> day of September 2020

Entered in the Register on this 9<sup>th</sup> day of September 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi