



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2017-UNAT-797

**Benamar  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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**Before:** Judge Martha Halfeld, Presiding  
Judge Richard Lussick  
Judge Dimitrios Raikos

**Case No.:** 2017-1082

**Date:** 27 October 2017

**Registrar:** Weicheng Lin

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**Counsel for Mr. Benamar:** Richard Sédillot

**Counsel for Secretary-General:** Stéphanie Cartier

**JUDGE MARTHA HALFELD, PRESIDING.**

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to both the Organization's guards at Mr. Benamar's house, the baby's mother had broken the window panes before the policemen arrived.<sup>5</sup>

8. There followed two meetings with the General Secretary of the MFA of Burkina Faso, first only with Mr. Benamar and Mr. Jaquemet and then also with the "Vice-Consul" and the mother, in October 2013. These meetings served to return the baby to his home and therein the mother decided to come back. However, she later changed her mind, left, and eventually checked into a psychiatric clinic.<sup>6</sup>

9. The description of the ensuing events is taken from the impugned Judgment:<sup>7</sup>

... On 30 October 2013, the Applicant's lawyer filed a motion before the Tribunal de Grande Instance of Ouagadougou to determine custody of the child.

... On 29 November 2013, the Applicant filed a complaint against X with the Public Prosecutor of Burkina Faso at the Tribunal de Grande Instance of Ouagadougou for trespassing, abduction and complicity in the abduction and forcible confinement of his child and the child's mother. On 10 January 2014, the Tribunal de Grande Instance of Ouagadougou

immunities, and refusal to comply with local laws. Part of the complaint was also directed against the Resident Representative of UNHCR in Burkina Faso, another UNHCR staff member in Burkina Faso and a driver.

... On 11 April 2014, the Inspector General's Office of UNHCR ("IGO") received another written complaint from the Applicant's former partner addressed to the High Commissioner, in which she alleged that the Applicant had abducted their son, S.M. Benamar. IGO then opened an investigation into the allegations and, having noted that the complaint was not patently frivolous, assigned an investigator to the case.

... On 13 March 2015, the Applicant's Counsel filed with the Public Prosecutor at the Tribunal de Grande Instance of Paris a complaint, dated 5 May 2014, against the child's mother for abduction of a minor and extortion; against Mr. Dieudonné Kazumba (supposedly a consul of the Democratic Republic of the Congo), for abduction of a minor in an organized gang and usurpation of title; and against X, for abduction of a minor in an organized gang and trespassing.

... In an e-mail dated 6 June 2014, an IGO investigator informed the Applicant that he was the subject of an investigation and summoned him for an interview. In the e-mail, the investigator also informed the Applicant that "the allegations against [him] [were] related to [his] purported failure to comply with the provisions of the order of 10 January 2014 of the Tribunal de Grande Instance of Ouagadougou in Burkina Faso regarding custody of [his] son, [S.M.] Benamar".

... The Applicant responded to the e-mail the following day, informing the IGO investigator that the case would be litigated before the Court of Appeal of Ouagadougou on 16 July 2014 and requesting a response to the complaints that he had filed. He also provided the e-mail address of his lawyer.

... An initial telephone interview was conducted with the Applicant on 30 June 2014, at the start of which the Applicant was officially informed that he was the subject of the investigation. During the interview, the investigators asked the Applicant to provide them with the documentation relating to the appeal filed against the order of 10 January 2014, as well as any other documents that would corroborate that the Applicant had custody of his son S.M. Benamar at the time that he had brought the child to Jordan and at the time of the interview.

... By decision No. 94 of 20 August 2014, the Court of Appeal of Ouagadougou confirmed that custody of the child S.M. Benamar had been entrusted to the mother, awarding maintenance to the mother and granting the Applicant visitation rights. The child's mother sent a certified copy of this decision by e-mail to the Inspector General of UNHCR on 3 September 2014, requesting him to ensure that the Applicant complied with the courts' decisions.

... On 17 October 2014, the Applicant filed an appeal on points of law before the Court of Cassation of Burkina Faso against the decision of the Court of Appeal.

... In an e-mail of 27 October 2014, the IGO investigator asked the Applicant to confirm, before 1 December 2014, that he was complying with the terms of decision No. 94 of the Court of Appeal, particularly with regard to the handover of the child to his former partner. She also informed him that a “failure to confirm ... [could] constitute professional misconduct”.

... A second telephone interview was conducted by the IGO investigator with the Applicant on 15 December 2014, during which the Applicant stated that “all remedies [had not] been exhausted and [were] far from having been exhausted,” and that his appeal to the Court of Cassation was still pending. The investigators asked him to provide them with proof, before 7 January 2015, that (1) the decision of the Court of Appeal was not enforceable and (2) the Applicant had filed an appeal to the Court of Cassation. They reiterated that request by e-mails of 30 December 2014 and 12 January 2015, granting the Applicant an extension until 13 January 2015.

... The Applicant replied by e-mail on 13 January 2015, indicating, *inter alia*, that the decision of the Court of Appeal would be subject to an appeal before the Court of Cassation, that it was not enforceable beyond the borders of Burkina Faso, and that, if necessary, he would refer the matter to the competent international authorities. He also noted that the best interests of his son were at stake and that, after the aggression and forcible confinement that his son had been subjected to, it was inconceivable that he should again be placed in contact with his aggressors.

... On 11 February 2015, the Applicant was temporarily reassigned to the UNHCR representative office in Hungary, effective 1 April 2015. On his travel authorization application, signed on 22 February 2015, he listed himself and his son, S.M. Benamar. He also listed his son on the dependency allowance application form, signed on 15 February 2015. The Applicant travelled from Amman to Budapest on 1 April 2015 and the Organization paid his son’s travel expenses.

... By an e-mail of 25 February 2015, the IGO investigator replied to the Applicant’s message of 13 January 2015, requesting him to send a copy of the appeal on points of law before 5 March 2015 and informing him that, after that deadline, IGO would consider the order of the Court of Appeal as final.

... In an e-mail of 5 March 2015, the Applicant sent a certificate of 2 March 2015, signed by his Counsel, affirming that an appeal on points of law had been filed before the Supreme Court of Burkina Faso against the decision of the Court of Appeal of Ouagadougou.

... The investigator acknowledged receipt of the certificate in an e-mail of the same date, while emphasizing that he had requested a copy of the statement in support of the appeal on points of law, and giving the Applicant until 10 March 2015 to send it to him.

... In an e-mail of 10 March 2015, the Applicant informed the investigator that his lawyer, who was on mission at the time, had contacted his colleague in Burkina Faso, who had prepared the appeal, requesting him to obtain a copy of the statement.

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your first report [on] 1 September 2016. If you refuse to submit a report every six months or if you refuse to comply with the court orders, I will initiate a new disciplinary process that could lead to more severe disciplinary measures.

... On 27 June 2016, the Applicant filed an application with the United Nations Dispute Tribunal contesting the disciplinary measures imposed on him by the High Commissioner of UNHCR.

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... On 27 September 2016, the [Dispute] Tribunal held a directions hearing and, on 28 November 2016, a hearing on the merits was held.

10. The UNDT rendered its Judgment on 10 April 2017 dismissing the application in its entirety. The Dispute Tribunal concluded that the decision to impose disciplinary measures against Mr. Benamar had been lawfully taken. It found, in particular, that (i) the facts underlying the allegations of misconduct against Mr. Benamar had been satisfactorily established; (ii) the established facts amounted to misconduct; (iii) the disciplinary measures imposed were proportionate to the gravity of the misconduct; and, (iv) Mr. Benamar's right to due process was respected during both the preliminary investigation and the disciplinary proceedings.

11. On 18 September 2017, Mr. Benamar filed a motion for leave to file additional pleadings and documents. The Secretary-General filed his response to the motion on 2 October 2017.

## **Submissions**

### **Mr. Benamar's Appeal**

12. Mr. Benamar submits that the UNDT erred in law in finding that the Administration sufficiently took into account the "best interests of the child" as a mitigating circumstance in the determination of disciplinary measures against Mr. Benamar. Recognition of the best interests of the child should have led the Organization to refrain from penalizing Mr. Benamar, "as the sole purpose of his conduct was to protect his son (...) from the dangers to which he was exposed". The UNDT also erred on questions of fact resulting in a manifestly unreasonable decision "by ignoring the circumstances of the alleged acts perpetrated by Mr. Benamar". Moreover, the UNDT erred in finding that the disciplinary measures were proportionate when in fact they were excessive. In particular, the UNDT failed to take into account the mitigating circumstances, namely Mr. Benamar's positive performance evaluations, his years of employment with no history of



disciplinary proceedings and the fact that the child was currently supported entirely by him. Instead, the UNDT accorded “excessive importance” to the sole aggravating circumstance, namely his refusal to comply with orders of the Burkina Faso courts.

13. Mr. Benamar further asserts that the UNDT erred in law by not finding that he should have been exonerated of the charges of misconduct. The Dispute Tribunal erred in finding that the Burkina Faso courts had fully considered the child’s best interests and had based their decision to award custody to the mother on a sound and comprehensive reasoning. The fact that Mr. Benamar himself had referred the matter to these courts “does not prevent him from criticizing the

16. Based on the foregoing, Mr. Benamar requests that the UNDT Judgment be vacated, the Administration's decision to impose disciplinary measures be rescinded, his rights be retroactively restored and he be reinstated in the position of Senior Administration Officer. Alternatively, if the Appeals Tribunal should find that the disciplinary proceedings were not invalid, Mr. Benamar asks that the disciplinary sanctions be reduced "to a fair level". In addition, he requests that an oral hearing be held before the Appeals Tribunal and that a witness, namely Mr. Stéphane Jacquemet, who was the UNHCR representative in Burkina Faso in October 2013, be heard during such hearing.

### **The Secretary-General's Answer**

17. The Secretary-General submits that the UNDT correctly concluded that the facts underlying the allegations of misconduct 8namely that Mr. Benamar (i) had not respected the final and enforceable decision No. 94 of 20 August 2014 of the Court of Appeal of Ouagadougou; (ii) had not promptly notified the Secretary-General in writing of the change of his status; and, (iii) had knowingly failed to cooperate with an investigation by the IGO 8had been established.

18. The UNDT also correctly found that such facts supported the finding of misconduct. Mr. Benamar had violated (i) Staff Rule 1.2(b) by failing to cede custody of his son to Ms. J.W.G. in disregard of a final and enforceable court order; (ii) Staff Rule 1.2(c) by failing to provide a copy of his statement of appeal to the Court of Cassation to the IGO during the investigation despite repeated requests; and, (iii) Staff Rule 1.5(a) by failing to inform the Administration that he did not legally have physical custody of his son, even when he travelled with him to his new duty station for official purposes and received reimbursement from the Organization for the expenses thereof.

19. The Secretary-General further contends that the UNDT did not err in concluding that the disciplinary measures were proportionate to the misconduct. In view of its limited review of the proportionality of disciplinary measures, the UNDT correctly found that the Administration had not exceeded the bounds of its broad discretion in determining the disciplinary measures. In particular, the UNDT found that the Administration had taken due account of both mitigating circumstances (including the child's best interests, especially in the context of the events of 20 October 2013) and aggravating circumstances to determine the appropriate measures.

20. The Secretary-General claims that Mr. Benamar has failed to establish any other error by the UNDT warranting a reversal of the Judgment. In particular, Mr. Benamar has not established any error by the UNDT in not finding that Mr. Benamar should have been exonerated of the charges of misconduct. As the UNDT correctly observed, decisions concerning the legal and physical custody of a child are matters exclusively for national courts and the UNDT does not have the authority to grant or deny such custody. By submitting arguments regarding who should be granted custody, Mr. Benamar is in fact seeking the Appeals Tribunal to interfere with decisions of national courts and their assessment of this matter. In any event, the UNDT appropriately considered the circumstances surrounding the events of 20 October 2013 as well as the principle of the best interests of the child in reviewing the Administration's decision to impose disciplinary measures. The fact that Mr. Benamar himself had initiated the judicial proceedings before national courts is relevant because it shows that he had confidence in the justice system and only started his criticism when the outcome was unfavorable to

in particular with respect to the child's best interests, and had provided detailed and reasoned ground to support its decision.

23. Finally, the Secretary-General asserts that Mr. Benamar's request for oral testimony by a witness before the Appeals Tribunal is not in accordance with the Statute and Appeals Tribunal Rules of Procedure (Rules) and should, thus, be denied. Neither of these sets of rules expressly provides for a hearing of witnesses during the Appeals Tribunal's oral proceedings. In any event, Mr. Benamar has not claimed, let alone established, that any exceptional circumstances warrant the introduction of additional evidence and he has not shown that this evidence was not available to him at the stage of the UNDT oral proceedings. In fact, Mr. Jacquemet did testify before the UNDT.

24. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

### **Considerations**

Oral hearing

25. Mr. Benamar requests that the Appeals Tribunal hear the testimony of Mr. Stephane Jacquemet, a former UNHCR representative in Burkina Faso. Article 18(1) of the Rules establishes:

Oral proceedings

... The judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and  
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26. Moreover, the witness whom Mr. Benamar wishes to call to testify before us was already



39. Mr. Benamar also claims that the Dispute Tribunal's decision is erroneous on a question of law because it did not consider the fact that he acted in the best interests of the child as sufficient grounds for exoneration, but only as a mitigating circumstance.

purposes of this administrative appeal, the fear of recurrence of violence, which he claims to have occurred during the “abduction”, is groundless as there is no evidence of a violation of the principle of the best interests of the child. Besides, this principle was expressly considered by the Court of Appeal in its decision.

46. The UNDT did not err in finding that Mr. Benamar’s refusal to comply with the national court’s order, his failure to inform the Organization of his change in status and to cooperate in the investigation constitute violations of Staff Rules 1.2(b), 1.2(c) and 1.5(a) and also Staff Regulations 1.1(f) and 1.2(r), which respectively state:

Staff Rule 1.2(b)

Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts.

Staff Rule 1.2(c)

Staff members have the duty to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

Staff Rule 1.5 (a)

Staff members shall be responsible for supplying the Secretary-General with relevant information, as required, both during the application process and on subsequent employment, for the purpose of determining their status under the Staff Regulations and Staff Rules as well as for the purpose of completing administrative arrangements in connection with their employment. Staff members shall be held personally accountable for the accuracy and completeness of the information they provide.

Staff Regulation 1.1 (f)

The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located, nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, the staff member shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.



Staff Regulation 1.2(r)

Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

47. Fourth, we agree with the well-reasoned findings of the UNDT that the alleged fact about bias, ineffectiveness and inadequacy of the national system of justice in Burkina Faso is not relevant as regards the competence of this internal justice system.

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7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter. If more time is required, it shall be granted upon the staff member's written request.

57. Also in Akello, we held:<sup>16</sup>

... Furthermore, it has not been suggested that as soon as Ms. Akello was identified as a wrongdoer (that is post the (...) investigation), she was not afforded a right to counsel. Paragraph 99 of the UNDP Legal Framework provides:

The charge letter initiates the disciplinary proceedings. In that letter, the staff member is notified in writing of the formal charges ... [and the staff member is] given a specified period of time ... to answer the charges and produce countervailing evidence, if any. The staff member shall also be notified of his or her right to counsel to assist in his or her defence, and be informed as to how to obtain the assistance of the Panel of Counsel.

... While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the Applicant case, our jurisprudence remains that the due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in Powell that at the preliminary investigation stage, only limited due process rights apply.

58. It follows that the UNDT handled the case correctly, as no error of law or fact leading to a manifestly unreasonable decision was established.

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<sup>16</sup> Akello v. Secretary-General of the United Nations , Judgment No. 2013-UNAT-336, paras. 35-36 (internal citations omitted).

**Judgment**

59. The appeal is dismissed and Judgment No. UNDT/2017/025 is affirmed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of October 2017 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Raikos

Entered in the Register on this 8<sup>th</sup> day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar