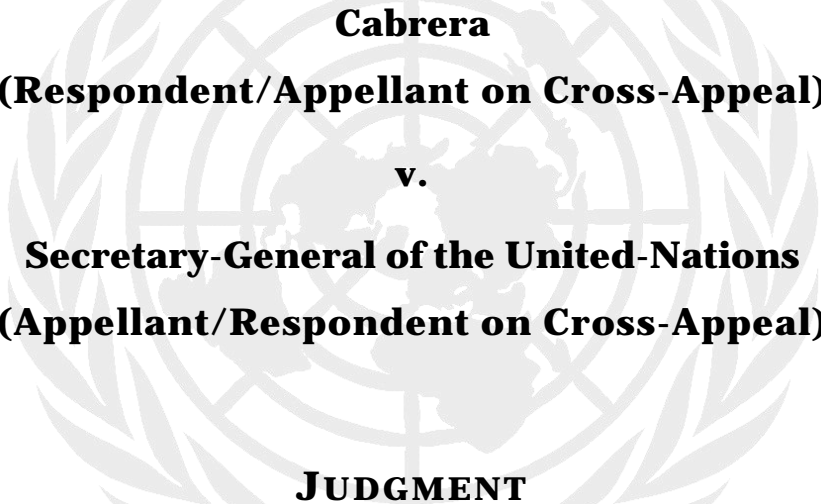




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-225



Cabrera
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)
JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Sophia Adinyira
Judge Mary Faherty

Judgment No.: 2012-UNAT-215

Date: 16 March 2012

Registrar: Weicheng Lin

Counsel for Respondent/Appellant on Cross-Appeal: George G. Irving

Counsel for Appellant/Respondent on Cross-Appeal: Amy Wood

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by the Secretary-General of the United Nations against Judgment No. UNDT/2011/081 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 6 May 2011 in the case of *Cabrera v. Secretary-General of the United Nations*.

2. The Secretary-General appeals the UNDT's award of two years' net base salary to Mr. Cabrera as compensation for the violation of his due process rights by being kept on Special Leave With Full Pay (SLWFP) during an investigation into allegations of procurement fraud. The UNDT concluded, and we agree, that it was not a preliminary investigation but rather a formal investigation and that the decision to place Mr. Cabrera on SLWFP constituted a de facto disciplinary suspension.

3. Since Mr. Cabrera received his full pay during the 10-month period that he was on special leave and also since he did not lose any money, we reduce the compensation for violation of his due process rights to 10 months net base pay. With this modification, the Appeals Tribunal grants the Secretary-General's appeal in part.

4. The application from the Staff Union for filing a friend-of-the court brief is dismissed.

Facts and Procedure

5. Mr. Cabrera joined the United Nations in 1979 as a G-level staff member. In 1991, Mr. Cabrera successfully took the professional category recruitment examination and was appointed to a position at the P-2 level, Economic Commission for Africa (ECA). In December 2001, Mr. Cabrera was promoted to the P-3 level as a Procurement Officer at the United Nations Headquarters in New York. Effective 1 April 2007, Mr. Cabrera was promoted to the P-4 level. On 8 November 2007, Mr. Cabrera was summarily dismissed for serious misconduct. Mr. Cabrebra's summary dismissal was the subject of a separate judgment.¹

¹ *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089.

6. On 7 March 2003, the Office of Internal Oversight Services, Internal Audit Division (OIOS/IAD) issued a draft internal Audit Report AN2003/42/1 titled “Audit of Systems Contract for Engineering Manpower to Peacekeeping Missions” (2003 Draft Report). The 2003 Draft Report was forwarded to the OIOS Investigation Division (OIOS/ID) which, upon further review, concluded that neither Mr. Cabrera’s nor his colleagues’ actions merited further action.

7. In 2004, OIOS/ID investigated claims stemming from the 2004 draft OIOS/IAD report and, similarly to the conclusions reached following its 2003 investigation, concluded that the allegations against Mr. Cabrera and his colleagues did not merit further investigation.

8. On 21 October 2005, the Under-Secretary-General (USG) for Management requested that the USG/OIOS order a new inquest into the Thunderbird/TCIL affair by the end of 2005. On 13 December 2005, the USG/OIOS proceeded to request that the OIOS Procurement Task Force (OIOS/PTF) investigate cases involving Thunderbird.

9. On 20 December 2005, OIOS/IAD completed a draft internal Audit Report AP2005/600/20 titled “Comprehensive Management Audit of the Department of Peacekeeping Operations—Procurement” (the 2005 Draft Report). The 2005 Draft Report was submitted to the Department of Management (DM) and to the Department of Peacekeeping Operations (DPKO), with a request for comments to be submitted by DM by 31 December 2005.

10. On 16 January 2006, Mr. Cabrera was informed that there were “allegations of procurement fraud” against him at which point Mr. Cabrera was under the understanding that “an investigation would be carried out”. On that same day, the Chef de Cabinet for the Secretary-General informed Mr. Cabrera as well as seven other staff members:

1. In view of the ongoing audit and investigation into the Organization’s procurement activities, the Secretary-General has decided that it is in the best interest of the Organization to place you on special leave with full pay [SLWFP] pursuant to staff rule 105.2(a)(i), effective immediately.

2. While on special leave, you will not be discharging any of your normal functions but will be expected to cooperate fully with all audit and investigation processes. The situation will be assessed following an appropriate determination of the facts, and you will be returned to duty if no further action is required at that time.

3. I wish to emphasize that your placement on special leave with full pay is purely administrative measure, which is not disciplinary in nature and is taken to assist the Organization in conducting a full assessment of the situation.

11. On 19 January 2006, OIOS/IAD submitted a final version of Audit Report AP2005/600/20 to DM and DPKO (the 2005 Final Report) which appeared to incorporate comments that had been provided by DM. On 23 January 2006, Mr. Cabrera was provided with a copy of the final report and was asked to provide comments, if any, by 1 February 2006. On 22 February 2006, a statement was given to the Member States responding to the findings of the 2005 Final Report:

[A]s a precautionary measure to protect the Organization, [the Chef de Cabinet], at the request of the Department of Management and Peacekeeping ... placed eight staff members on special leave with full pay while the issues raised by the audit are looked into more fully. This special leave is an administrative not a disciplinary measure and does not presume wrongdoing by the staff affected. We are looking carefully into the situation of each of those eight staff. For some, the investigatory arm of OIOS is undertaking an accelerated review within a broader investigation of other allegations of possible procurement-related wrongdoing by staff. OIOS has formed a 16-person special task force to handle these cases as quickly as possible. Several of the staff members on leave however, are not the subject of any current investigation and in their cases we have a management review under way to determine whether there were lapses or errors of management that we need to address before they can go back to work. Let me add that once that is resolved, we will happily welcome them back to the Organization as we are concerned to see them able to resume their careers without any inappropriate sanction.

12. On 15 March 2006, Mr. Cabrera submitted a request for administrative review of the 16 January 2006 decision to place him on SLWFP.

13. On 24 March 2006, a note was sent to the USG/OIOS that stated:

I have accepted your arguments and advise that all eight cases (of staff members placed on SLWFP), regardless of their severity at prima facie, are currently the subject of OIOS investigating and therefore, all individuals presently on administrative leave should remain on that status until the investigations are completed.

However, I must insist that OIOS places top priority in concluding the investigations related to those staff members on administrative leave as soon as possible. As you are aware, these staff members are already on leave for over two months, and we are all anxious to conclude the process for these cases in order to give the concerned individuals an indication of what action will be taken.

14. On 15 April 2006, the Officer-in-Charge of the Administrative Law Unit (OiC/ALU) informed Mr. Cabrebra that the decision to place him on SLWFP “was intended to prevent accusations that key personnel involved in procurement influenced the outcome of these investigations”. The OiC/ALU reiterated that the decision was “not linked to [Mr. Cabrera’s] performance or conduct, neither of which [were] being pre-judged”.

15. On 19 July 2006, the OIOS/PTF issued a report that dealt with the allegations made in the 2005 Final Report in relation to the Thunderbird and TCIL contracts. On 1 August 2006, Mr. Cabrera was informed that the OIOS/PTF had concluded that the evidence “did not support any findings that [Mr. Cabrera had] violated the regulations and rules of the Organization in connection with the award of ... contracts”. On the basis of this report Mr. Cabrera was requested to return to duty.

16. On 28 December 2006, Mr. Cabrera filed an appeal before the Joint Appeals Board (JAB) challenging his placement on SLWFP. On 27 June 2008, the JAB issued its report in which it found that “the respondent’s actions constituted a fundamentally serious and damaging violation of [Mr. Cabrera’s] due process rights as well as his reputation. It therefore unanimously recommends that [Mr. Cabrera] be compensated in the amount of 2 years net base salary at the time the decision was implemented on 16 January 2006”.

17. On 29 September 2008, Mr. Cabrera was informed that the Secretary-General had decided not to accept the JAB’s recommendations as he was “of the view that the decision to place [Mr. Cabrera] on SLWFP was taken in a manner that did not result in a violation of [Mr. Cabrera’s] due process rights or in damage to [Mr. Cabrera]’s reputation”.

18. On 29 December 2008, Mr. Cabrera appealed the Secretary-General’s decision not to follow the JAB’s recommendation in front of the former Administrative Tribunal and, following the implementation of the new internal system of justice, the case was transferred to the Dispute Tribunal. On 6 May 2011, the UNDT issued Judgment No. UNDT/2011/081 in which it found in favour of Mr. Cabrera and awarded him “two years’ net base salary in effect in January 2006 as compensation”.

19. On 20 June 2011, the Secretary-General appealed Judgment No. UNDT/2011/081. On 10 July 2011, Mr. Cabrera filed his answer and a cross-appeal. On 23 August 2011, Mr. Cabrera also filed a motion to file additional evidence. On 26 August 2011, the

Secretary-General filed his answer to Mr. Cabrera's cross-appeal and, on 9 September 2011, he responded to Mr. Cabrera's motion to adduce additional evidence.

Submissions

Secretary-General's Appeal

20. The Secretary-General submits that the UNDT erred in law in concluding that the OIOS investigation was not a preliminary investigation. The Secretary-General submits that under both the Staff Rules and under ST/AI/371, there is no basis to distinguish between a preliminary and a formal investigation as a staff member is only entitled to due process rights once he has been charged with misconduct.

21. The Secretary-General further submits that under former Staff Rule 110.4 "[n]o disciplinary proceedings may be instituted against a staff member unless he or she has been notified in writing, of the allegations against him or her". The process of providing staff members a written notification is generally referred to as "charging". As the UNDT confirmed in *Zerezghi*,²

[u]nder the former Staff Rules and ST/AI/371, it was only when a staff member was charged with misconduct that he or she became entitled to specifically enumerated due process rights, *i.e.* the right to be informed in writing of the charges, the right to receive a copy of the documentary evidence and the right to seek the assistance of counsel in his or her defence. No such rights existed during the investigation.

These conclusions have to be distinguished from *Sokoloff*³ where the specific UNDP/ADM/97/17 rule applied.

22. The Secretary-General submits that under the erroneous two-pronged test approach adopted by the UNDT to determine when the due process rights afforded by ST/AI/371 are triggered, "a report of misconduct must be determined to be well-founded, and the [Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM)] must have made a decision that the matter is of such gravity that it should be pursued further". However, even when using this standard, the test was not met as OHRM decided not to

² *Zerezghi v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/122.

³ Former Administrative Tribunal Judgment No. 1246, *Sokoloff* (2005).

pursue the matter. Consequently, the only possible conclusion is that the OIOS investigation remained a preliminary investigation.

23. The Secretary-General submits that the UNDT erred in law in concluding that Mr. Cabrera was entitled to the rights set out in paragraphs 6 through 9 of ST/AI/371 as the due process rights afforded to a staff member during the preliminary stage of an investigation are less than those afforded to a staff member once he or she has been charged with a misconduct.

24. The Secretary-General submits that the International Labour Organization Administrative Tribunal (ILOAT) has similarly held that the limitations of the due process rights afforded to staff members during the preliminary investigation stage whose purpose is to “ascertain all relevant facts” is inherently fair. The ILOAT has further held as has the UNDT, that the purpose of a preliminary investigation complies with the staff members’ due process rights “so long as they are informed with reasonable clarity of the allegations and evidence against them, and have a reasonable opportunity to counter or explain such allegations”⁴ which, in this instance, was the case.

25. The Secretary-General submits that the UNDT erred in its interpretation of the 16 January 2006 memorandum from the Chef de Cabinet to Mr. Cabrera. Indeed, the content of the memorandum only served the purpose of informing Mr. Cabrera that he was being put on SLWFP and did not in any way inform him that he was being charged with misconduct or that the decision to put him on SLWFP was in any way a disciplinary action. Consequently, none of the rights that the UNDT identified as having to be afforded to a staff member upon being charged with misconduct, including that of being represented by counsel, applied to Mr. Cabrera.

26. The Secretary-General submits that the UNDT erred in law by awarding Mr. Cabrera compensation in the amount of two years’ net base salary. The Secretary-General contends that, seeing that Mr. Cabrera was not entitled to the due process rights identified by the UNDT, the Administration did not fail any of its contractual obligations.

⁴ ILOAT Judgment No. 2771, 4 February 2009, paras. 15, 17-18.

27. The Secretary-General also notes that the award of two years' net base salary severely exceeds the amount of USD 30,000 that was awarded in *Toh*⁵ who was one of the other seven staff members who had been placed on SLWFP during the OIOS investigation for the "violation of his due process rights". Furthermore, the amount of compensation awarded in *Toh* included compensation for harassment which is a claim that Mr. Cabrera has not made in the present case.

28. The Secretary-General requests that the Appeals Tribunal set aside Judgment No. UNDT/2011/081, and that it "reduce the award of compensation to [Mr. Cabrera] by the amount of six months' net base salary".

Mr. Cabrera's Answer, Cross-Appeal and Motion to File Additional Evidence

Answer

29. Mr. Cabrera submits that the Secretary-General failed to state a valid ground for vacating the UNDT Judgment. Mr. Cabrera also contends that the Secretary-General does not appear to dispute the UNDT's findings and conclusions but rather attempts to reargue his case for the purpose of challenging the amount of compensation awarded by the UNDT as a result of the breach of Mr. Cabrera's due process rights.

30. Mr. Cabrera submits that the Secretary-General's argument that his due process rights were not affected due to the fact that the OIOS/PTF was only conducting a preliminary investigation during which he had not been charged "is merely a reformulation of the arguments reflected and rejected in the Judgment". Furthermore, Mr. Cabrera recalls that the UNDT Judgment determined that Mr. Cabrera had actually been charged "with misconduct on a *sub silentio* basis".

31. Mr. Cabrera submits that he was never given an opportunity to comment on the 2003 and 2004 OIOS/IAD reports nor on the draft 2005 OIOS/IAD report. Mr. Cabrera also submits that he was only provided with the opportunity to comment on the final 2005 OIOS/IAD report after he had been placed on SLWFP, as well as after his name had appeared in the press and in reports provided to the General Assembly. Finally, Mr. Cabrera

⁵ Former Administrative Tribunal Judgment No. 1492, *Toh* (2009).

submits that the decision to return him to full duty was never made public nor were any of the previous reports implicating him amended.

32. Mr. Cabrera submits that the Secretary-General does not address the fact that the investigation cannot be considered to be preliminary in nature seeing that the Secretary-General “took prejudicial administrative action against [Mr. Cabrera] based on [...] incorrect audit findings”. Mr. Cabrera also submits that not only were his due process rights denied, but he was actually prevented twice from addressing the allegations contained in the 2004 and 2005 draft OIOS/IAD reports.

33. Mr. Cabrera submits that the former Administrative Tribunal did not explain the basis for their decision in *Toh*. Consequently, “the jurisprudence of the former Tribunal, although of persuasive value, cannot be binding precedent for the new Tribunal”.⁶

34. Mr. Cabrera finally submits that the Secretary-General does not explain the basis on which the award by the UNDT Judgment should be reduced by six months.

Cross-Appeal

35. Mr. Cabrera submits that both the former Administrative Tribunal and the Appeals Tribunal⁷ have approved the award of additional compensation and legal costs as a result of result of the delays brought on by the “misuse of the legal process aimed at preventing or at least delaying the cause of justice”.

36. Mr. Cabrera requests that the Appeals Tribunal award him interest from the date of the original decision of 16 January 2006 or compensation for the delays incurred in the proceedings in the amount of USD 30,000 as well as USD 20,000 for legal costs.

Motion to File Additional Evidence

37. Mr. Cabrera submits that on 30 June 2011, the UNDT issued a judgment⁸ for one of the other seven staff members who had also been put on SLWFP. Mr. Cabrera submits that, at the time he filed his answer, Judgment No. UNDT/2011/123 had not been made available

⁶ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

⁷ Former Administrative Tribunal Judgment No. 1462, *Appellant* (2009); *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

⁸ *Johnson v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/123.

and therefore he was not able to bring that Judgment, and its relevance, to the attention of the Appeals Tribunal. Mr. Cabrera submits that “[t]he pleas and discussion of the issue of compensation are of particular relevance to the appeal at hand and in fact the [Dispute] Tribunal includes a finding that the clarifying rationale regarding its award for damages is applicable, *mutatis mutandis*, to *Cabrera* UNDT/2011/081”.

Secretary-General’s Answer to the Cross-Appeal and Observations on the Motion to File Additional Evidence

Answer to the Cross-Appeal

38. The Secretary-General submits that Mr. Cabrera has neither established that the UNDT erred, nor does he put forward any of the five defects mentioned in Article 2(1) of the Statute of the Appeals Tribunal on which a cross-appeal could be based.

39. The Secretary-General further submits that Mr. Cabrera’s request for additional compensation is not legally sustainable as Mr. Cabrera does not demonstrate any exceptional reasons to exceed the two years’ net base salary limit as required by Article 9(b) of the Statute of the Appeals Tribunal.

40. The Secretary-General also submits that the request to be awarded interest from 2006 onwards, in addition to the UNDT’s award, is legally unsustainable as it would equate to an award of punitive or exemplary damages.

41. The Secretary-General submits that a request for an award of legal costs has no merit as the Secretary-General has not abused the judicial process but rather just exercised his right to appeal. Furthermore, the Secretary-General submits that the UNDT had previously rejected Mr. Cabrera’s argument for costs following his application in front of the former Administrative Tribunal.

Observations on the Motion to File Additional Evidence

42. The Secretary-General does not have any objections to Mr. Cabrera’s motion as it is “fully within [the Appeals Tribunal’s] right to consider any jurisprudence of the Dispute Tribunal that it finds relevant to the case at hand”.

43. The Secretary-General notes that the “clarifying rationale’ provided in the Johnson Judgment [with regards to the Cabrera Judgment] appears to relate primarily to the question of when the Dispute Tribunal may award ‘moral damages’”. However, the Secretary-General notes that his appeal of Judgment UNDT/2011/081 is focused on the question of whether the OIOS/ID investigation was a preliminary investigation versus a formal investigation. Consequently, the Secretary-General submits that “the UNDT Judgment cited by [Mr. Cabrera] is not relevant for the consideration of the Appeal”.

Considerations

44. The sole question to be considered in this appeal by the Secretary-General is whether placing a staff member on SLWFP violates the staff member’s due process rights in any way. If the measure is a disciplinary one then certain rights automatically come into operation. But not so if the measure is purely administrative.

45. Under the former Staff Rules, the Secretary-General may deal with a staff member in any of the following ways:

- (a) place a staff member on special leave with full pay (SLWFP) (former Staff Rule 105.2(a)(i))
- (b) place the staff member under suspension with full pay or in exceptional circumstances, without pay (former Staff Rule 110.2(a))
- (c) place the staff member under suspension without pay (former Staff Rule 110.3(a)(iv))

46. What is clear after reading the above provisions is that there is a difference between placing a staff member on special leave and suspending them from duty. Special leave may be granted at the request of the staff member for the purpose of conducting advanced studies, research in the interest of the United Nations, in the case of illness, or for child care. In exceptional cases, the Secretary General may, at his own initiative, place a staff member on SLWFP, if he considers that to be in the interest of the Organization.

47. It is obvious that SLWFP is different from suspension (whether it be with full pay or without pay). The initiation of disciplinary proceedings is not a pre-requisite for putting a staff member on special leave. Indeed the staff member is always given full pay when placed on special leave by the Secretary-General under former Staff Rule 105.2(a)(i) “if he considers

such leave to be in the interest of the Organization”. However, a suspension with or without pay is altogether a different matter as a charge of misconduct is a pre-requisite for suspending a staff member. This is clear from former Staff Rule 110.2(a). Furthermore, under former Staff Rule 110.4(a) no disciplinary proceedings can be instituted against a staff member unless he has been notified of the allegations held against him. This is the stage when the staff member’s due process rights come into operation. These rights have been enumerated in former Staff Rule 110.4.

48. In the present case, the UNDT has actually created a new class of special leave, de facto disciplinary suspension - the staff member was put on special leave but was actually being suspended with full pay. The UNDT also made reference to the discussion in *Kamunyi*⁹ where a staff member had been put on SLWFP during an investigation into a possible wrong-doing by that staff member. In that case, the UNDT held that placing the staff member on SLWFP was a veiled disciplinary measure or a de facto disciplinary suspension.

49. We have also carefully examined Administrative Instructions (Revised Disciplinary Measures and Procedures) ST/AI/371 dated 2 August 1991 and find that SLWFP is not a disciplinary measure contemplated against a staff member even though under clause 5 a staff member can be suspended with pay (or without pay).

50. As far as staff members are concerned there is a lot of difference between leave with pay and suspension with pay. Because if a staff member is named in an investigation and then put on leave with pay, he is denied all his due process rights. However, when a staff member is suspended with pay it means that a preliminary investigation has been completed and appears to indicate that misconduct is well founded (clause 3), that the misconduct may pose a danger to other staff members or to the Organization or there is risk that evidence may be destroyed or concealed (clause 4), and that the misconduct is of such nature and gravity that suspension is warranted. Reference may also usefully be made to former Staff Rule 110.2.

51. Due process rights are listed in former Staff Rule 110.4. Placing a staff member on special leave denies him all the rights which he may otherwise be entitled to. Therefore, the

⁹ *Kamunyi v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/214.

UNDT rightly found, as held in *Kamunyi*, that in the specific circumstances of this case, special leave is a “veiled disciplinary measure” or “de facto disciplinary suspension”. The Appeals Tribunal cannot agree with the Secretary-General’s contention that the UNDT erred in concluding that the OIOS investigation was not a preliminary investigation. If it was a simple fact-finding mission then why was there a need to put Mr. Cabrera on leave? Mr. Cabrera was put on leave using all the reasons under which he could be suspended even though he was not. Therefore, even though Mr. Cabrera was exonerated at the end of the investigation, the OIOS investigation was a full-fledged investigation. The UNDT also correctly held that Mr. Cabrera was entitled to all the due process rights listed in paragraphs 6 to 9 of ST/AI/371. Mr. Cabrera was therefore entitled to compensation for the violation of his due process rights.

52. Mr. Cabrera was on a de facto disciplinary suspension (or special leave) from 16 January 2006 to 15 November 2006 (10 months). During this period he received full pay and suffered no monetary loss but faced anxiety and worry without the Secretary-General respecting his due process rights. In these circumstances, justice shall be amply served if compensation is reduced from two years’ net base pay to 10 months’ net base pay with interest on the usual terms.

53. Based on the above, Mr. Cabrera’s request for award of cost is not sustainable and his cross-appeal is rejected.

Judgment

54. The Appeals Tribunal grants the Secretary-General’s appeal in part and reduces the compensation to be awarded to Mr. Cabrera to 10 months’ net base pay.

Original and Authoritative Version: English

Dated this 16th day of March 2012 in New York, United States.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 7th day of May 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar