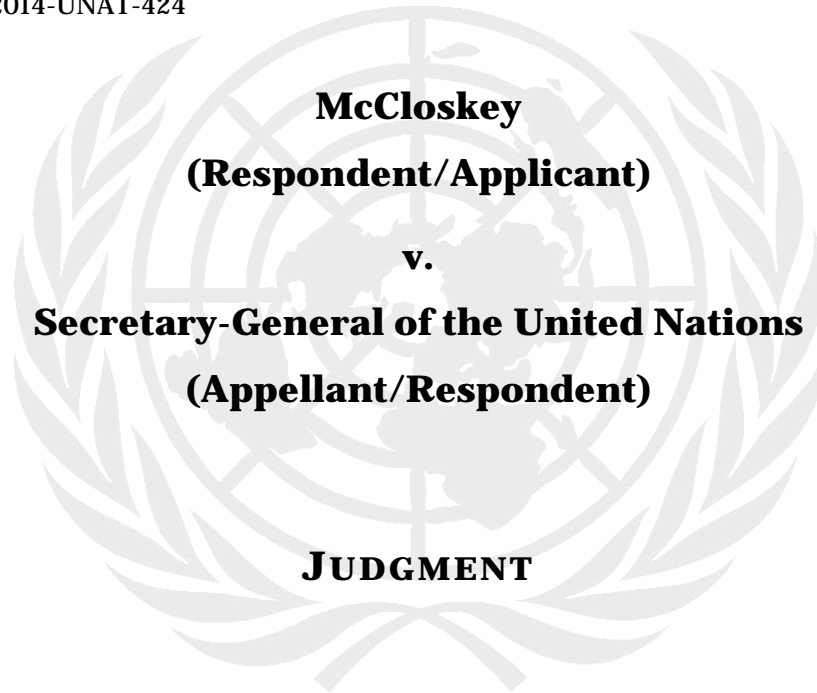




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-424



**McCloskey  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Rosalyn Chapman, Presiding  
Judge Sophia Adinyira  
Judge Luis María Simón

**Case No.:** 2013-478

**Date:** 2 April 2014

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Miles Hastie

**Counsel for Appellant/Respondent:** Phyllis Hwang

**JUDGE ROSALYN CHAPMAN, PRESIDING.**

1. On 22 March 2013, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment No. UNDT/2013/057, in the case of *McCloskey v. Secretary-General of the United Nations*. On 10 May 2013, the Secretary-General of the United Nations filed an appeal of the Judgment to the United Nations Appeals Tribunal (Appeals Tribunal), and on 12 July 2013, Mr. Peter McCloskey filed his answer.

**Facts and Procedure**

2. Since 1996, Mr. McCloskey has been a Senior Trial Attorney at the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) stationed in The Hague. He is a United States national, who pays income taxes to the United States Treasury through the Internal Revenue Service (IRS).

3. Mr. McCloskey is married to another United States national, who is employed as an executive for a company based in the Netherlands. His wife is also a United States taxpayer.

4. For 2007, the United Nations paid the IRS an advance in the amount of USD 52,596.00 to cover Mr. McCloskey's estimated income tax liability.<sup>1</sup> As in the past, Mr. McCloskey and his wife filed a joint income tax return with the IRS for 2007. However, for that tax year, the United Nations Income Tax Unit (ITU) for the first time required that Mr. McCloskey use his wife's foreign tax credits to offset his income tax liability to the IRS. Mr. McCloskey did as required and the IRS refunded the advance payment of USD \$52,596.00 to him.

5. For 2008 through 2010, the ITU again required that Mr. McCloskey use his wife's foreign tax credits to offset his income tax liability to the IRS. And he again did what the ITU required.

6. On 17 August 2010, the ITU sent Mr. McCloskey a written notice that the 2007 advance of USD 52,596.00 was an overpayment, which he must repay. Since then, the ITU has sent Mr. McCloskey this notice annually, including most recently on 29 December 2011 regarding the 2010 tax year.

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<sup>1</sup> Slightly different numbers were used to refer to the amount of the tax advance paid to Mr. McCloskey in 2007. For easier reading, only USD 52,596 is used throughout the text.

7. On 7 February 2012, Mr. McCloskey filed a request for management evaluation of: the ITU's requirement that he use his wife's foreign tax credits to offset his income tax liabilities for 2007 through 2010, as well as the requirement that he do the same for tax year 2011; his request for reimbursement of the value of his wife's foreign tax credits used in 2008 through 2010; and the ITU's determination that he received an overpayment in the amount of USD 52, 596.00, which he must repay. He supplemented that request on 16 March 2012.

8. Also on 7 February 2012, Mr. McCloskey submitted an application to the UNDT for suspension of action pending management evaluation. The UNDT denied Mr. McCloskey's application on 14 February 2012, in Judgment No. UNDT/2012/022.

9. On 20 March 2012, the Management Evaluation Unit (MEU) responded to Mr. McCloskey's requests, determining that the requests were not receivable because they were untimely. The MEU specifically found that "the decision date with respect to the overpayment in the amount of USD 52,596 and remittance request relating to the 2007 tax statement was 17 August 2010" and the tax statement of 29 December 2011 was the same decision, not a new decision.

10. On 18 June 2012, Mr. McCloskey filed an application with the UNDT seeking "rescission of the impugned decision requiring him to remit the amount of USD 52,59[6] as advanced to the IRS as an estimate of his 2007 Tax Settlement *and* reimbursement in the amount his tax liabilities were reduced in 2008, 2009 and 2010 through the forced use of his wife's foreign income tax credits". (Underline in original)

11. On 26 June 2012, by Order No. 121 (GVA/2012), the UNDT granted the Secretary-General's request to initially consider the issue of receivability. On 14 December 2012, the UNDT issued Judgment No. UNDT/2012/199 on receivability, in which it found that Mr. McCloskey's claims were "not receivable in so far as they sought to obtain reimbursement of the staff assessment deducted from his salary for 2007 [sic], 2008 and 2009". However, the UNDT also found that the application was receivable "in so far as it sought to contest the refusal to reimburse the 2010 staff assessment".

12. On 27 December 2012, the Secretary-General filed a brief addressing the merits. In his brief, the Secretary-General advised the UNDT that, in light of *Johnson*,<sup>2</sup> the ITU “has rescinded the challenged decision to require utilization of foreign tax credits. [Mr. McCloskey] is accordingly no longer required to use his spouse’s foreign tax credit to reduce his tax liability attributable to his 2010 United Nations earning”. The Secretary-General further advised the UNDT that the ITU “will request” Mr. McCloskey to file an amended 2010 tax return with the IRS that “does not claim the foreign tax credit”. Finally, the Secretary-General stated that because Mr. McCloskey had an outstanding overpayment from 2007, in the amount of USD 52,596, any tax reimbursement “will be offset against th[e] amount owed to the Organization by [Mr. McCloskey], with the remaining amount to be recovered in subsequent tax years”. On 15 March 2013, the Secretary-General filed an additional submission.

13. On 22 March 2013, the UNDT issued Judgment No. UNDT/2013/057, in which it applied *Johnson* and ordered the Secretary-General to reimburse Mr. McCloskey for the staff assessment (USD 34,920.00) deducted from his salary and other emoluments for 2010, plus interest thereon. The UNDT also opined that the ITU “may not use the amount ... to reduce [Mr. McCloskey’s] overpayment for previous years”.

### **Submissions**

#### **The Secretary-General’s Appeal**

14. The UNDT erred in concluding that *Johnson* is “fully applicable” to Mr. McCloskey’s case when the facts of the two cases are different. In the present case, the Organization rescinded its decision to require Mr. McCloskey to apply his wife’s foreign tax credits to reduce his 2010 income tax liability. However, the UNDT failed to consider this material difference from the facts in *Johnson*.

15. The ITU’s rescission of its decision to require Mr. McCloskey to apply his wife’s foreign tax credits to reduce his 2010 income tax liability to the IRS rendered his application to the UNDT moot. Thus, it was an error of law for the UNDT to consider as two entirely separate decisions the ITU’s decision to require Mr. McCloskey to use his wife’s foreign tax credits and the decision not to reimburse him for the use of those credits. Since

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<sup>2</sup> *Johnson v. Secretary General of the United Nations*, Judgment No. 2012-UNAT-240.

Mr. McCloskey was not required to use his wife's foreign tax credits, he cannot claim there is any obligation to reimburse him for their use.

16. The UNDT erred on a question of law in failing to recognize that the Organization can rescind an administrative decision in the course of an ongoing formal challenge to the decision. Once the administrative decision is rescinded, it is for the UNDT to determine the degree to which the application challenging the decision has been rendered moot and what adverse consequences, if any, continue to be suffered by the staff member.

17. The rescission of a contested decision can result in the imposition of additional administrative requirements on a staff member. In light of the rescission of the ITU's decision to require Mr. McCloskey to apply his wife's foreign tax credits, it is permissible for the ITU to "request" that he now follow the necessary administrative procedures that are a consequence of the rescission – namely, to file an amended tax return for 2010 in which he does not claim his wife's foreign tax credits. The Organization will reimburse Mr. McCloskey for any ancillary costs or penalties associated with the amended filing.

18. The UNDT erred in law and fact when it ordered that any reimbursement to Mr. McCloskey cannot be reduced by the 2007 overpayment of USD 52,596.00 to him. The determination of the overpayment cannot be separated from the decision to recover the overpayment. Since 2007, Mr. McCloskey has been given notice annually that the overpayment would be recovered from any future tax reimbursements, and such notice was given as recently as 17 August 2010. Since Mr. McCloskey did not timely request management evaluation of the August 2010 decision, or appeal the determination that his 2007 claim was not receivable, the UNDT erred in ordering that the overpayment cannot be deducted from any future tax reimbursements.

19. The Secretary General requests that the Judgment be vacated in its entirety. He also seeks to confirm that the ITU has properly requested that Mr. McCloskey should file an amended 2010 tax return in which he does not claim his wife's foreign tax credits. If he fails to do so, the Appeals Tribunal should find that there is no obligation for the ITU to reimburse him. However, if the Appeals Tribunal confirms that the ITU is required to reimburse Mr. McCloskey for the use of his wife's foreign tax credits in 2010, such reimbursement should be offset as a matter of law by the 2007 overpayment.

**Mr. McCloskey's Answer**

20. The UNDT did not err in applying *Johnson*. It makes no difference whether the administrative decision is rescinded by order of a tribunal or by the Organization. In either case, the ITU acted unlawfully in requiring the staff member to use foreign tax credits to reduce her or his obligation for United States income taxes. The adverse consequence of this unlawful action is the subject of the appeal.

21. The UNDT did not err in holding that Mr. McCloskey's application is not moot. When Mr. McCloskey filed his 2010 tax return with the IRS, the ITU acted unlawfully in requiring him to use his wife's foreign tax credits; he complied with the unlawful requirement and suffered financial harm. The subsequent rescission of the ITU's unlawful decision does not change those facts. Under Appeals Tribunal jurisprudence, the Organization must compensate Mr. McCloskey for the financial harm he suffered as a consequence of the ITU's unlawful action. Yet, instead of compensating Mr. McCloskey, the ITU wants him to file an amended 2010 income tax return with the IRS, to pay the tax owed and all attendant fees and penalties, and then to seek reimbursement from the Organization. That is not compensation.

22. There is no dispute that the Organization can rescind an unlawful administrative decision, as the Secretary-General disingenuously claims.

23. The UNDT did not adjudicate the issue of recovery of the 2007 overpayment since that matter was not before it (and is not before the Appeals Tribunal). Nevertheless, there is a distinction between a determination by the ITU of an overpayment and a later decision on the recovery of the overpayment. Decisions regarding the recovery of an overpayment are decisions governed by specific administrative instructions, which may be contested.

24. Mr. McCloskey seeks the dismissal of the appeal. He also requests that the Secretary-General be chastised for re-litigating matters previously determined in *Johnson*.

**Considerations**

25. Pursuant to Section 18 (article V) of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, the Organization has enacted measures "to ensure both equality of [tax] treatment among staff members and a form of

equity among Member States”.<sup>3</sup> These measures include the establishment of a Tax Equalization Fund

to which assessments on staff members’ salaries and emoluments were to be credited in lieu of a national income tax. The amounts credited to the Fund are entered in the accounts for each Member State’s assessment. Conversely, when a staff member paid from the budget of the Organization is subject to both a staff assessment and national income tax on salaries and emoluments earned at the United Nations, that staff member is reimbursed for the national tax paid and payable on salaries and emoluments in order to relieve the effect of double taxation. The refund is deducted from the account of the State that has levied the tax.<sup>4</sup>

26. A staff member who is a United States taxpayer and who is subject to double taxation:

may choose between a tax credit and a deduction to relieve the effects of double taxation. In that connection, ... the United States Internal Revenue Code, ... authorizes United States taxpayers subject to payment of income tax abroad in a given tax year to elect either a tax credit or a deduction. ... A foreign tax credit corresponds to income tax paid by a national ... of the United States to another State. For the purpose of relieving the effects of double taxation, the payment to settle the United States income tax obligation is made by means of a foreign tax credit.<sup>5</sup>

27. The Appeals Tribunal concluded in *Johnson* that to require a staff member to use available foreign tax credits:

would not only contravene the principle of equality of treatment among staff members if staff members from the United States were deprived of the benefit of reimbursement for using such tax credits not associated with income earned at the United Nations to relieve the effects of double taxation, but also the principle of equity among Member States irrespective of whether they choose to grant, or not to grant, an income tax exemption to their nationals, as these two principles form the basis for the staff assessment system in respect of taxation.<sup>6</sup>

28. Our jurisprudence in *Johnson* is controlling.

29. While Mr. McCloskey’s application was pending before the UNDT, the administrative decision to require him to use his wife’s foreign tax credits to reduce his 2010 income tax liability was rescinded. However, it was also decided that the amount of the foreign tax

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<sup>3</sup> *Ibid*, paras 31-33.

<sup>4</sup> *Ibid*, para. 32.

<sup>5</sup> *Ibid*, paras. 36-37.

<sup>6</sup> *Ibid*, para. 45.

credits (USD 34,920.00) applied by Mr. McCloskey would not be refunded to him by the ITU. The Secretary-General claims that the rescission of the decision moots Mr. McCloskey's request for a refund. That is not so.<sup>7</sup> As a consequence of the ITU's unlawful decision, Mr. McCloskey has been harmed in the amount of the foreign tax credits he was required to use since he no longer has use of these credits to reduce his or his wife's income tax liability in future years. Thus, his claim for a refund is not moot, as the UNDT correctly determined.<sup>8</sup>

30. The Secretary-General argues that the ITU need not provide a refund of the foreign tax credits to Mr. McCloskey. Rather, he contends that Mr. McCloskey should be responsible for obtaining his own refund by filing an amended 2010 income tax return with the IRS that does not use the foreign tax credits, and he should subsequently seek to recover reimbursement from the ITU of any costs, expenses and penalties attendant to the filing of the amended tax return. There is no authority cited by the Secretary-General for this unprecedented manner of correcting an unlawful decision regarding a staff member's tax obligations. And this unprecedented approach does not comport with our jurisprudence in *Johnson*.

31. For all these reasons, the Appeals Tribunal concludes that the Dispute Tribunal did not err in fact or law when it applied *Johnson* and ordered the ITU to refund to Mr. McCloskey the amount of the foreign tax credits he was unlawfully required to use in 2010 (USD 34,920.00), plus interest thereon.

32. On appeal, the Secretary-General urges the Appeals Tribunal to address the issue of the recovery of the 2007 overpayment. On the other hand, Mr. McCloskey contends that that issue is not before the Appeals Tribunal.<sup>9</sup>

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<sup>7</sup> *Johnson v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-395, paragraph 17 reads: "The Secretary-General thus contends that the present appeal has been rendered moot. However, we are satisfied that this is not the case since, with regard to the 2010 tax credits, Ms. Johnson had already complied with the now rescinded decision. Ms. Johnson used her foreign tax credit in 2010, before the Organization changed its policy and rescinded its decision to require her to apply her foreign tax credits for her 2010 tax returns."

<sup>8</sup> *Ibid.*

<sup>9</sup> The UNDT opined that the ITU should not recover the 2007 overpayment from the refund, stating: "While the [Dispute] Tribunal, by its Judgment [on Receivability] No. UNDT/2012/199 of 14 December 2012, declared the application not receivable in so far as it contested the statement of tax settlement sent to [Mr. McCloskey] on 29 December 2011, which showed an overpayment of USD52,59[6], the Administration has not yet decided whether to recover this overpayment and such a decision, if taken, will be a different administrative decision from those that have already been contested before the [Dispute] Tribunal and may give rise to another dispute."



33. Mr. McCloskey is correct. In its Judgment on Receivability No. UNDT/2012/199, the UNDT determined that Mr. McCloskey's challenge to the ITU's determination that he was overpaid in 2007 was not timely and was not receivable. Thus, the overpayment issue was not before the UNDT. Since neither the Secretary-General nor Mr. McCloskey has appealed the UNDT's legal conclusions on receivability, the overpayment issue also is not before the Appeals Tribunal and we will not address it.

**Judgment**

34. Judgment No. UNDT/2013/057 is affirmed and the Secretary-General's appeal is dismissed.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Simón

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar