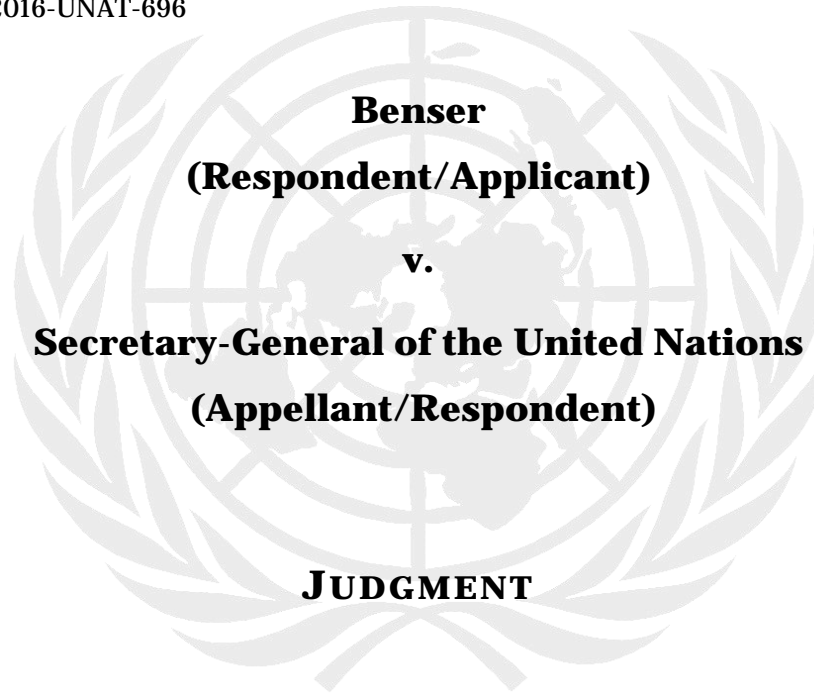




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-696



**Benser
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Deborah Thomas-Felix Judge Sabine Knierim
Case No.:	2016-926
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Ms. Benser: Robbie Leighton, OSLA

Counsel for Secretary-General: Noam Wiener

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/016, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 8 March 2016 in the case of *Benser v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 9 May 2016, and Ms. Amina Benser filed an answer on 10 June 2016.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:¹

... The Applicant is a staff member in the General Service category [in the Department for General Assembly and Conference Management (DGACM)]. On 2 September 2008, the Applicant joined the Organization at the G-3 level on a short-term appointment in the Department of Management.

... In 2009 the Applicant, who was then an Administrative Assistant at the G-3 level, applied to sit a competitive examination for language reference assistants. This application was in response to [ST/IC/2009/27] the “2009 competitive examination for language reference assistants.” That Information Circular informed staff members that the examination was being conducted under the framework of ST/AI/1998/4 [(Competitive examinations for the placement of general service)] and related categories in particular occupational groups.[... ²]

... The Applicant successfully completed the competitive examination for language reference assistants and was placed on a roster of successful candidates.

... On 1 May 2011, the Applicant was promoted to the G-4 level as an Administrative Assistant with the Department of Field Support.

... On 7 June 2012, the Applicant was selected from the roster of successful candidates in the 2009 competitive examination and placed on the position of Language Reference Assistant. The Applicant’s assignment to this position was subject to a two-year probationary period and she was paid a special post allowance from the G-4 to the G-6 level.

... Towards the end of the Applicant’s probation period, on 29 May 2014, she was informed that she would be provided with a further fixed-term appointment rather than a continuing appointment. The Applicant sought to challenge this decision.

¹ Impugned Judgment, para. 4.

² Administrative Instruction ST/AI/1998/4 is hereinafter referred to as “the Particular Occupational Groups Examination AI”.

... On 2 June 2014, the Applicant received an email from a Human Resources Officer indicating that the decision not to grant the Applicant a continuing appointment would be upheld. The email indicated that staff rule 4.14(b) applied only to candidates recruited at the professional level following a competitive examination.

... On 7 June 2014, the Applicant was promoted from the G-4 to the G-7 level after successfully completing her two-year probationary period. She was granted a fixed-term rather than a continuing appointment.

... On 17 June 2014, the Applicant requested management evaluation of the decision not to grant her a continuing appointment.

... On 11 July 2014, the Applicant received a management evaluation upholding the decision.

3. In Judgment No. UNDT/2016/016 now under appeal, the Dispute Tribunal found that, as Ms. Benser had successfully completed a competitive examination and was appointed to a post requiring language skills, she fulfilled the requirements of Staff Rule 4.16(b).³ The UNDT was of the view that Staff Rule 4.16 did not include any exception and did not distinguish between posts requiring language skills in the General Service and the Professional levels. It found the Secretary-General's interpretation of Staff Rule 4.16 as applying only to Professional level staff from the language services too restrictive. It also found that the Secretary-General was "wrong" to argue that the contested decision corrected a previous mistake of having granted continuing appointments to two of Ms. Benser's language reference assistant colleagues. The Dispute Tribunal found that, as she had completed the two-year probationary period, Ms. Benser fulfilled the requirements of Staff Rule 4.14(b),⁴ and should have been granted a continuing appointment. In the view of the Dispute Tribunal, granting Ms. Benser a continuing

³ Staff Rule 4.16 titled "Competitive examinations" reads, in part:

(b) Boards of examiners shall make recommendations to the Secretary-General in respect of the following:

(i) Appointment

appointment to P-1 and P-2 posts that are subject to the system of desirable ranges and to posts requiring special language competence at the United Nations Secretariat shall be made exclusively through competitive examination. Appointment to posts at the P-3 level in the United Nations Secretariat shall be made normally through competitive examination;

(ii) Recruitment to the Professional category of staff from the General Service and related categories in the United Nations Secretariat

recruitment to the Professional category at the United Nations Secretariat of staff from the General Service and related categories having successfully passed the appropriate competitive examinations shall be made within the limits established by the General Assembly. Such recruitment shall be made exclusively through competitive examination.

⁴ Staff Rule 4.14 titled "Continuing appointment" reads, in part: "(b) Staff members recruited upon successful completion of a competitive examination pursuant to staff rule 4.16 shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service."

appointment would not lead to an unlawful and unequal treatment of other occupational groups, as asserted by the Secretary-General. The Dispute Tribunal ordered rescission of the decision not to grant Ms. Benser a continuing appointment, or alternatively, payment of USD 5,000 to her as compensation in lieu of such appointment. The Dispute Tribunal, however, rejected Ms. Benser's request for moral damages, as she had failed to adduce any pleadings or evidence to show harm from the contested decision.

Submissions

The Secretary-General's Appeal

4. The Dispute Tribunal erred in law by finding that the relevant paragraphs in General Assembly resolutions 63/250 and 65/247 applied to staff in the General Service category, that the reference to posts requiring special language skills in Staff Rule 4.16(b) applied to staff in the General Service category, and that the two General Assembly resolutions provided a mandate for the Secretary-General to grant continuing appointments to staff in the General Service category serving in language posts after service of only two years on a fixed-term appointment. These findings were based on a misinterpretation of paragraph 23, Section II, of General Assembly resolution 63/250 and paragraph 50, Section VI, of General Assembly resolution 65/247.⁵ The UNDT's error stems from its failure to consider the 2006 Report of the Secretary-General on the Composition of the Secretariat (A/61/257; hereinafter the 2006 Report) that limits the definition of language posts to staff in the Professional category.

5. By providing that conversion to continuing appointments should be resumed according to current practices for candidates who had successfully passed competitive examinations for language staff, General Assembly resolutions 63/250 and 65/247 were referring solely to staff in the Professional category who were serving in positions in the conference servicing area requiring special language skills and who have been recruited and vetted in accordance with ST/AI/2000/1

⁵ General Assembly resolution 63/250, Section II, para. 23 reads: "*Reaffirms* that, while continuing appointments are not implemented, successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service will continue to be granted open-ended appointments according to the current practice." General Assembly resolution 65/247, Section VI, para. 50 reads: "*Recalls* paragraph 23 of section II of its resolution 63/250, and decides that successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service will be granted continuing contracts, notwithstanding the provisions contained in paragraphs 51 to 61 of the present resolution."

(Special Conditions for Recruitment or Placement of Candidates Successful in a Competitive Examination for Posts requiring Special Language Skills). These resolutions, by definition, could not have been referring to staff in the General Service category.

6. The Dispute Tribunal erred in law in ruling that posts requiring special language skills referred to in Staff Rule 4.16(b) are posts to which staff in the General Service category are hired pursuant to successful completion of an examination administered according to the Particular Occupational Groups Examination AI. However, that Administrative Instruction is unrelated to the appointment of “special language posts” and has nothing to do with special language positions that are in the Professional category. In contrast to ST/AI/1998/7 (Competitive Examinations for Recruitment and Placement in Posts Requiring Specific Language Skills in the Professional Category, hereinafter the Special Language Examination AI), the Particular Occupational Groups Examination AI has a different purpose and governs examinations administered from time to time in order to create rosters of viable candidates in a large variety of General Service competencies, including skills ranging from bookkeeping to language assistance services.

7. The UNDT erred on two points in determining that the administrative issuance comparable to ST/AI/2000/1, for staff in the General Service category, was Information Circular ST/IC/2009/27. First, it was an error to equate an information circular with an administrative instruction, as the former holds a lower position in the normative hierarchy of the Organization. Secondly, while ST/AI/2000/1 lists the posts that can be filled exclusively by way of the competitive examinations administered according to ST/AI/1998/7 and provides explicit reference to the conditions for conversion to permanent appointment, ST/IC/2009/27, on the other hand, applied only to one examination scheduled on 9 October 2009 and did not mention conversion of fixed-term appointments to continuing appointments.

8. In the present case, Ms. Benser was hired pursuant to an examination administered according to the Particular Occupational Groups Examination AI; she was not hired to a post which falls under the exception set forth in Staff Rule 4.16(b). Consequently, she is not eligible for conversion to a continuing appointment after two years of service.

9. The Secretary-General requests that the Appeals Tribunal vacate Judgment No. UNDT/2016/016.

Ms. Benser's Answer

10. The Secretary-General seeks to re-litigate the case by relying on new evidence and arguments not submitted to the Dispute Tribunal. Before the UNDT, he did not adduce the 2006 Report as evidence, nor did he argue that the relevant General Assembly resolutions should be interpreted by reference to that report. For this reason alone, the appeal should be dismissed.

11. The General Assembly was fully aware of the definition of language posts in the 2006 Report. Yet, its resolutions made no reference to “language posts” as defined by the Secretary-General. They referred to “staff from language services”. Indeed, none of the promulgated rules on continuing appointments use the terminology “language posts” or make reference to the 2006 Report’s definition. The Secretary-General’s reliance on the 2006 Report’s definition is therefore without legal basis.

12. The use of different terminology by the General Assembly indicates that its resolutions were referring to something different from “language posts”. In contrast to “language posts”, “language services” is a reference to an organizational unit rather than specific posts.

13. The UNDT’s finding that Ms. Benser works in “language services” is not contested by the Secretary-General and therefore does not form part of the present appeal. Since she works in “language services”, the relevant General Assembly resolutions clearly apply to her.

14. The prevailing practice up until Ms. Benser was refused a continuing appointment was to grant language reference assistants a continuing appointment after two years’ probationary service, such as in the case of her two language reference assistant colleagues. The Secretary-General does not contest the UNDT’s finding in this regard. Consequently, he cannot challenge this finding on appeal.

15. The Dispute Tribunal correctly found that the competitive examination by which Ms. Benser was recruited fell under the provisions of Staff Rule 4.16(b).

16. The Secretary-General has failed to identify any promulgated issuance that establishes the differentiation between General Service and Professional staff. The differentiation does not exist in law.

17. Ms. Benser requests that the Appeals Tribunal affirm the Dispute Tribunal Judgment.

Considerations

18. In 2009, Ms. Benser, who was then an Administrative Assistant at the G-3 level, successfully completed the competitive examination for language reference assistants and was placed on a roster of successful candidates. On 7 June 2012, she was selected from that roster and appointed to the position of Language Reference Assistant, subject to a two-year probationary period.

19. Towards the end of her probationary period, on 29 May 2014, Ms. Benser was informed that she would not be given a continuing appointment but would be given a further fixed-term appointment instead. The reason given was that she had not been hired for a “post[...] requiring special language competence at the United Nations Secretariat”, as described in Staff Rule 4.16(b), which applied only to posts at the Professional level, and therefore she was not eligible to be considered for a continuing appointment because Staff Rule 4.14(b) applied only to candidates recruited at the Professional level following a competitive examination.

20. Ms. Benser challenged this decision by application to the UNDT. The Dispute Tribunal rescinded the contested administrative decision and ordered the Secretary-General to grant Ms. Benser a continuing appointment retroactively from 7 June 2014 or, as an alternative, the Secretary-General could elect to pay Ms. Benser compensation in the amount of USD 5,000.

21. The Secretary-General submits that the UNDT erred in law by finding that the relevant paragraphs in General Assembly resolutions 63/250 and 65/247 applied to staff in the General Service category, and that the reference to posts requiring special language skills in Staff Rule 4.16(b) applied to staff in the General Service category. According to the Secretary-General, “[t]his finding was based on a misinterpretation of paragraph 23, Section II, of General Assembly resolution 63/250 and paragraph 50, Section VI, of General Assembly resolution 65/247 ... these paragraphs apply only to staff in the Professional category”. The Secretary-General also submits that the misinterpretation stems from the UNDT’s failure to consider the 2006 Report that limits the definition of “language posts” to staff in the Professional category.

Do General Assembly resolutions 63/250 and 65/247 apply to staff in the General Service category?

22. Paragraph 23, Section II, of General Assembly resolution 63/250

Reaffirms that, while continuing appointments are not implemented, successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service will continue to be granted open-ended appointments according to the current practice.

Paragraph 50, Section VI, of General Assembly resolution 65/247

Recalls paragraph 23 of section II of its resolution 63/250, and decides that successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service will be granted continuing contracts, notwithstanding the provisions contained in paragraphs 51 to 61 of the present resolution.

23. These provisions clearly entitle successful candidates from national competitive examinations and staff from language services to be granted continuing appointments after two years of probationary service. They make no distinction between Professional level and General Service level staff.

24. The UNDT recognised that the use of the words “will continue” in paragraph 23, Section II of General Assembly resolution 63/250 indicated that, before and after the adoption of the resolution, “open-ended (continuing) appointments were granted to the staff members from language services after two years of probationary service”.⁶

25. The Secretary-General argues that the UNDT’s failure to consider the 2006 Report that limits the definition of language posts to staff in the Professional category led it to erroneously find that General Assembly resolutions 63/250 and 65/247 mandated the Secretary-General to grant continuing appointments to all staff members from language services in the United Nations Secretariat after only two years of service.

26. The 2006 Report provides the following definition of “language posts”: “Posts at the Professional level requiring special language skills in the conference servicing area (interpreters, translators/précis-writers, editors, verbatim reporters, proofreaders/copy

⁶ Impugned Judgment, para. 31.

preparers, revisers and terminologists) who are recruited through competitive language examinations”.

27. The Secretary-General claims that, based on this definition, “reference to language posts in General Assembly resolutions 63/250 and 65/247 apply only to staff in the Professional category.”

28. The Secretary-General submits that the UNDT failed to consider the 2006 Report. We note that a reference to the 2006 Report was foot-noted in the Respondent’s reply filed with the UNDT and dated 7 November 2014. It is not mentioned in the UNDT Judgment and there is no record of it as being among the submissions from the Secretary-General to the UNDT.

29. In any event, this argument does not assist the Secretary-General. His definition concerns “language posts” carrying out the specific functions mentioned in the definition. Although this definition had been presented to the General Assembly well over two years before the first of the subject resolutions was adopted (resolution 63/250), the General Assembly did not refer to “language posts” in either resolution 63/250 or resolution 65/247. The General Assembly deliberately used the terminology “staff from language services”, indicating that they were not referring to the posts defined by the Secretary-General as “language posts”.

30. It is not contested that Ms. Benser works in “language services”.⁷ “Language services” was the terminology used by the General Assembly when it passed those resolutions. It may be that “language posts” are part of “language services”. If so, they apply to those staff members engaged in the specific functions mentioned in the definition, and cannot apply to Ms. Benser’s area of employment.

31. Another argument of the Secretary-General is that the UNDT erred in its interpretation of General Assembly resolution 63/250 because it failed to apply the resolution “according to the current practice”, as required by the resolution’s wording, which states explicitly that “staff from language services after two years of probationary service will continue to be granted open-ended appointments *according to the current practice*”.⁸ The

⁷ See *ibid.*, para. 59.

⁸ General Assembly resolution 63/250, Section II, para. 23. Emphasis added by the Secretary-General.

Secretary-General contends that the 2006 Report, which includes a section on the definition of language posts, should “serve as the most reliable source for determining what the *current practice* was regarding ‘staff from language services’”.

32. We do not agree that the “current practice” was to appoint staff from language services at the Professional level. The said resolutions make no distinction between Professional level and General Service level staff.

33. On the question of “current practice”, the UNDT found that Section II, paragraph 23 of General Assembly resolution 63/250 indicates that before and after the adoption of the resolution, continuing appointments were granted to staff from language services after two years of probationary service. Two of Ms. Benser’s colleagues received continuing appointments prior to her completion of her probationary period. The Secretary-General claims that this was done in error. However, the UNDT found that:⁹

Prior to the contested decision, the practice was to grant permanent or continuing appointments to staff members on similar posts at the same [General Service] level. This practice was therefore based on the correct interpretation of the relevant legal provisions. The Respondent is therefore wrong when arguing that the contested decision corrected a previous mistake.

34. We find that the UNDT’s conclusion was correct in fact and law. We therefore agree with Ms. Benser’s submission that “the relevant ‘past practice’ is the provision of permanent appointments to language reference assistants ... From this the proper meaning of A/RES/63/250 can be gleaned.”

35. We find no error in the UNDT’s reasoning that:¹⁰

[Paragraph] 23 of section II of General Assembly resolution 63/250 and [paragraph] 50 of section VI of General Assembly resolution 65/247 include two categories of staff members in the United Nations Secretariat who have the right to be granted a continuing appointment after two years of probationary service: (a) successful candidates from national competitive recruitment examinations; and (b) staff from language services. It is clear that the will of the General Assembly as legislator was for these provisions, which refer to the staff regulations and rules, to apply to all successful external candidates from the national competitive examinations and to all staff members from language services in the United Nations Secretariat.

⁹ Impugned Judgment, para. 60.

¹⁰ *Ibid.*, para. 38.

Do Staff Rules 4.14(b) and 4.16(b) apply to staff at the General Service level?

36. Staff Rules 4.14 and 4.16 operate in implementation of General Assembly resolutions 63/250 and 65/247.

37. Staff Rule 4.14 on continuing appointments provides:

- (a) A continuing appointment is an open-ended appointment.
- (b) Staff members recruited upon successful completion of a competitive examination pursuant to staff rule 4.16 shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service.
- (c) The Secretary-General shall prescribe the criteria determining staff members' eligibility for consideration for continuing appointments.

38. Staff Rule 4.16 on competitive examinations states:

(a) Boards of examiners established by the Secretary-General shall ensure the regularity of the competitive examinations administered in accordance with conditions established by the Secretary-General.

(b) Boards of examiners shall make recommendations to the Secretary-General in respect of the following:

(i) Appointment

appointment to P-1 and P-2 posts that are subject to the system of desirable ranges and to posts requiring special language competence at the United Nations Secretariat shall be made exclusively through competitive examination. Appointment to posts at the P-3 level in the United Nations Secretariat shall be made normally through competitive examination;

(ii) Recruitment at the Professional category of staff from the General Service and related categories in the United Nations Secretariat

recruitment to the Professional category at the United Nations Secretariat of staff from the General Service and related categories having successfully passed the appropriate competitive examinations shall be made within the limits established by the General Assembly. Such recruitment shall be made exclusively through competitive examination.

(c) Staff members appointed to the Professional category after a competitive examination shall be subject to mandatory reassignment, under conditions established by the Secretary-General.

39. Staff Rule 4.14(b) does not make any distinction between General Service level and Professional level staff recruited on successful completion of a competitive examination.

40. Pursuant to Staff Rule 4.14(b), a staff member in the language services needs to satisfy the following mandatory and cumulative conditions to be granted a continuing appointment: (a) the staff member in the United Nations Secretariat must be recruited upon successful completion of a competitive examination pursuant to Staff Rule 4.16; (b) the staff member must complete two years on a fixed-term appointment; and (c) the staff member's service must have been satisfactory.

41. We therefore agree with the UNDT's finding that Staff Rule 4.14(b) applies to all appointments to posts requiring special language competence within the United Nations Secretariat, including appointments to posts at the General Service level, such as Ms. Benser's post.

42. Staff Rule 4.16(b)(i) applies to (a) the appointment of P-1 and P-2 level posts that are subject to the system of desirable ranges at the United Nations Secretariat, and to (b) the appointment to posts requiring special language competence in the United Nations Secretariat.

43. Staff Rule 4.16(b)(i) makes no distinction between posts requiring special language competence at the General Service level and posts requiring special language competence at the Professional level. It follows that Staff Rule 4.16(b)(i) is applicable to all appointments to posts requiring special language competence within the United Nations Secretariat, including posts at the General Service level.

44. We find no error in the following reasoning of the UNDT in this regard:¹¹

... Moreover, according to the general legal principle of interpretation, *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the interpreter of the law cannot distinguish where the law does not distinguish and cannot create and/or add an exception(s) to an established rule with a general applicability and thereby limit its area of application. The [Dispute] Tribunal considers that, for staff rule 4.16 to apply only to P-level posts, the first part of staff rule 4.16(b)(i) should have had a different content such as, for instance: "Appointment to P-1 and P-2 level posts that are subject

¹¹ *Ibid.*, para. 49.

to the system of desirable ranges and to P-level posts requiring special language competence at the United Nations Secretariat, shall be made exclusively through competitive examination”.

45. The UNDT concluded, from ST/IC/2009/27, the Information Circular establishing the competitive examination taken by Ms. Benser, that language assistants have special language competences. It found as a fact that the post to which Ms. Benser was recruited was one requiring special language competence.¹² The UNDT also made a finding that Ms. Benser was working in language services.¹³ This is not disputed by the Secretary-General. Both General Assembly resolutions refer to “staff from language services”, which applies to Ms. Benser’s situation. We see no error in these findings.

46. We find that the following conclusions by the UNDT are factually and legally correct:¹⁴

... It results that [Ms. Benser], who is a staff member in the United Nations Secretariat: (a) successfully completed a competitive examination pursuant to [Staff Rule] 4.16 ...; (b) was appointed on a post which requires special language skills; (c) successfully completed a two-year probationary period on a fixed-term contract as a Language Reference Assistant in DGACM; and (d) had provided satisfactory service. Pursuant to staff rule 4.14(b), she was therefore entitled to be granted a continuing appointment.

...

... The Tribunal concludes that, after two years on a fixed-term contract in the language services of DGACM and a satisfactory service during this period, [Ms. Benser] had the right to be granted a continuing appointment based on the mandatory provisions from para. 23 of General Assembly resolution 63/250 and para. 50 of General Assembly resolution 65/247.

47. It follows from the foregoing paragraphs that we find that the Secretary-General has failed to demonstrate any error of law by the Dispute Tribunal, and that the appeal must fail.

¹² ST/IC/2009/27, para. 3, states that the main duties and responsibilities of language reference assistants are to carry out research in three official languages of the United Nations and provide support to translators to ensure accuracy, uniformity and timeliness in the translation of United Nations documents and publications by supplying the relevant language services with reference material and terminology information. The Information Circular sets out other requirements, including language skills.

¹³ Impugned Judgment, para. 59.

¹⁴ *Ibid.*, paras. 58 and 62.

Judgment

48. The appeal is dismissed in its entirety, and Judgment No. UNDT/2016/016 is affirmed.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Knierim

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar