



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

Judgment No. 2018-UNAT-843

**Kozul-Wright
(Appellant/Respondent)**

v.

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

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2017-1126 & 2017-1128
Date:	29 June 2018
Registrar:	Weicheng Lin

Counsel for Mr. Kozul-Wright: Self-represented

Counsel for Secretary-General: John Stompor

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals against Judgment No. UNDT/2017/076, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 13 September 2017, in the case of *Kozul-Wright v. Secretary-General of the United Nations*.
2. Mr. Richard Kozul-Wright filed an appeal on 11 November 2017, and the Secretary-General filed his answer on 12 January 2018. The case was registered as Case No. 2017-1126.
3. The Secretary-General appealed the same UNDT Judgment on 13 November 2017, and Mr. Kozul-Wright filed his answer on 8 January 2018. The case was registered as Case No. 2017-1128.
4. By Order No. 316 (2018), the Appeals Tribunal consolidated these two cases.

Facts and Procedure

5. At the time of the events that gave rise to his appeal, Mr. Kozul-Wright served as Director, Division on Globalization and Development Strategies, United Nations Conference on Trade and Development (UNCTAD), at the D-2 level. He enjoyed diplomatic immunity according to Article V, Section 16 of the Agreement on Privileges and Immunities of the United Nations, concluded between the Organization and the Swiss Confederation on 19 April 1946 (Host Country Agreement).
6. On 12 February 2010, Mr. Kozul-Wright and his then wife, who was also a senior official of UNCTAD enjoying the same immunities, signed a lease agreement for an apartment in Geneva some distance from their workplace for the period 16 March 2010 to 31 March 2013, at a rental of CHF 10,175 per month. Prior to the expiration of the lease, Mr. and Mrs. Kozul-Wright decided to relocate to another apartment closer to their workplace to accommodate the fact that Mrs. Kozul-Wright suffered from a neurological disorder and her doctor recommended reducing the time and stress of a lengthy commute. They provided the landlord with a three-month notice and advertised the apartment at their own expense with a view to identifying a replacement tenant. They found a potential tenant who expressed some interest in the apartment, but the landlord did not accept him for reasons that remain contentious.

7. On 29 February 2012, Mr. Kozul-Wright and his then wife left the apartment and ceased paying the rent. An alternative tenant—found by the landlord—eventually took over the apartment as of December 2012.

8. The real estate agency representing the landlord instituted legal proceedings against Mr. and Mrs. Kozul-Wright, claiming the rent for the period March-November 2012. The matter was brought before the *Commission de conciliation en matière de baux et loyers* (the Commission), a Swiss domestic body created to seek amicable settlements in disputes regarding real estate rentals. The Commission determined on 2 October 2012 that the efforts for an amicable resolution had failed.

9. On 12 October 2012, the Permanent Mission of Switzerland to the United Nations Office and to other international organizations in Geneva (Swiss Mission) requested the Organization to lift diplomatic immunity to allow proceedings before the Geneva courts against Mr. and Mrs. Kozul-Wright.

10. By e-mail of 18 October 2012, the Legal Liaison Office, Office of the Director-General, United Nations Office at Geneva (UNOG) forwarded to Mr. Kozul-Wright a letter from the Swiss Mission in relation to the request from the landlord's attorney to waive their immunity. In this e-mail, the Senior Legal Adviser, UNOG, recommended that this "private matter" be settled out of court, failing which he would forward the request to the Office of Legal Affairs (OLA), United Nations Headquarters, for decision. On 26 October 2012, Mr. Kozul-Wright wrote to the Senior Legal Adviser, UNOG, that they did not consider the matter as private and requested the immunity not to be lifted, attaching relevant documentation including a medical certificate stating that Mrs. Kozul-Wright's condition could aggravate as a result of driving a long distance under stressful circumstances, which made a reduction of her driving time between her domicile and her work advisable. The Senior Legal Adviser, UNOG, replied, on 29 October 2012, indicating that he would transmit the request to OLA, which he did. By memorandum dated 12 November 2012, the Assistant Secretary-General (ASG), OLA, informed the Senior Legal Adviser, UNOG, of the decision to waive the immunity of Mr. and Mrs. Kozul-Wright for the purposes of civil proceedings for the alleged non-payment of rent for an apartment in Geneva. The Senior Legal Adviser, UNOG, informed the Swiss Mission of the decision to lift the immunities, by memorandum of 14 November 2012.

11. On 14 December 2012, Mr. Kozul-Wright e-mailed the ASG, OLA, asking for clarification of the reasons for lifting his and Mrs. Kozul-Wright's immunity. He made a request for management evaluation of the decision to waive his diplomatic immunity on 10 January 2013, which the Management Evaluation Unit rejected as irreceivable *ratione materiae*. Mr. Kozul-Wright did not further challenge this decision.

12. On 11 January 2013, the Senior Legal Adviser, UNOG, wrote to Mr. Kozul-Wright with respect to his request for clarification to the ASG, OLA, stating that the Organization's established practice is to waive diplomatic immunity so that staff members may properly deal with their private legal obligations. The Senior Legal Adviser concluded that the waiver of immunity in Mr. Kozul-Wright's instance was consistent with such practice, and added that immunity is conferred in the interests of the United Nations and not for the personal benefit of United Nations officials.

13. On 15 October 2015, a Geneva court ruled against Mr. and Mrs. Kozul-Wright and ordered them to pay CHF 90,450 plus five per cent interest as of 1 December 2012. Mr. and Mrs. Kozul-Wright did not appeal this judgment.

14. On 23 October 2015, the Organization lifted Mr. Kozul-Wright's immunity from legal process in the context of another claim for non-payment of rent by a different landlord.

15. On 8 April 2016, the landlord who had been awarded compensation by the Geneva court on 15 October 2015 requested the Swiss Mission to seek from the United Nations the waiver of Mr. Kozul-Wright's immunity with respect to the execution of the judgment. On 28 April 2016, the Swiss Mission requested the Senior Legal Adviser, UNOG, to lift Mr. Kozul-Wright's immunity. The Senior Legal Adviser forwarded this request to OLA on 2 May 2016. Mr. Kozul-Wright provided comments on that request to the ASG, OLA, on 3 May 2016, claiming that the legal proceedings in question were "frivolous and pursued merely to harass and extort money", and requested his immunity not to be lifted. By memorandum dated 9 May 2016, the ASG, OLA, advised the Senior Legal Adviser, UNOG, that Mr. Kozul-Wright's immunity should be lifted. On 10 May 2016, the Swiss Mission was informed of the lifting of Mr. Kozul-Wright's immunity for the execution of the judgment. Mr. Kozul-Wright was notified of the decision by a memorandum sent to him by the Senior Legal Adviser on the same day.

16. On 17 June 2016, Mr. Kozul-Wright requested management evaluation of the waiver of his diplomatic immunity as notified in the memorandum on 10 May 2016. This request was rejected as irreceivable by letter dated 20 July 2016.

17. On 14 October 2016, Mr. Kozul-Wright filed an application with the UNDT contesting the decision to waive his diplomatic immunity with regard to his dispute over the lease of the apartment, as notified to him by memorandum dated 10 May 2016.

18. On 13 September 2017, the UNDT in Geneva issued Judgment No. UNDT/2017/076 dismissing Mr. Kozul-Wright's application. The UNDT found the application to be receivable on the grounds that the immunities are incorporated in the terms of appointment of staff members and that the decision to waive immunity constituted an administrative decision which had a direct impact on Mr. Kozul-Wright. In this regard, the UNDT relied on Article 105 of the United Nations Charter (Charter), Staff Regulation 1.1(f), Staff Rule 1.2(b) and Section 2.3 of Administrative Instruction ST/AI/2000/12 (Private Legal Obligations of Staff Members) to conclude that the decision to waive immunity met all the features of the definition of an administrative decision over which the UNDT has jurisdiction.

19. On the merits, the UNDT concluded that the Administration had properly exercised its discretion to waive immunity, Mr. Kozul-Wright's due process rights had been respected and the Secretary-General and the Administration had acted reasonably and properly, taking account of all relevant considerations, in lifting the immunity. It accepted that the *raison d'être* of immunity is to enable the Organization's agents to discharge their functions adequately. However, in terms of Article 21 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly in 1946 (the Convention)¹, the Secretary-General has a duty to co-operate with the appropriate authorities of Member States to facilitate the proper administration of justice and to prevent the occurrence of any abuse in connection with any privileges and immunities. The lease of an apartment for personal accommodation, the UNDT held, is eminently a private matter and the move to take account of Mrs. Kozul-Wright's health needs was not for official purposes. Mrs. Kozul-Wright's health needs did not allow them to breach their civil commitments to third party nationals of Member States. To allow Mr. and Mrs. Kozul-Wright to evade their private responsibilities for the reasons put forward would bring the Organization into disrepute. The UNDT accordingly held that the Organization had properly

¹ United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol.1).

taken account of all relevant considerations and had acted reasonably. It thus dismissed Mr. Kozul-Wright's application.

Submissions

The Secretary-General's Appeal

20. Even though the UNDT dismissed Mr. Kozul-Wright's application, the Secretary-General has filed an appeal contending that the UNDT erred in law and exceeded its competence by concluding that a decision to waive immunity falls within its jurisdiction. Although, as a general rule, a successful party is not permitted to appeal, in this case there are countervailing interests which may warrant an exception to the rule. An appeal by a successful party is receivable, if it has a negative impact on the situation of the affected party.

21. The Secretary-General submits that the UNDT's reliance on Article 105 of the Charter, Staff Regulation 1.1(f), Staff Rule 1.2(b) and Section 2.3 of ST/AI/2000/12 to conclude that the decision to waive immunity was an administrative decision is misplaced. The UNDT failed to take into account the nature of the decision to waive immunity and the legal framework under which such decision is made. The Staff Regulations, the Staff Rules and subsidiary administrative issuances do not confer any rights on staff members regarding immunities. A decision to waive immunity has no effect on the staff member's terms of appointment. There is no effect on the staff member's entitlements, status or conditions of employment with respect to his or her relationship to the Organization merely as a result of the waiver. Rather, a waiver of immunity simply means that a staff member will be obliged to meet his or her legal responsibilities under the legal processes of the relevant Member State.

22. Moreover, the UNDT erred in finding that the jurisprudence of the UNDT, the Appeals Tribunal, the former United Nations Administrative Tribunal (former Administrative Tribunal) and the Administrative Tribunal of the International Labour Organization (ILOAT) was consistent with its conclusion that the decision to waive immunity is a contestable administrative decision.

23. The UNDT's assertion of jurisdiction to review decisions to waive immunity, the Secretary-General maintains, will destabilize the framework of legitimate expectations and assigned responsibilities under the Convention, as mirrored in the host country agreements concluded with the governments of the States wherever the United Nations is based. If allowed

to stand, the UNDT's decision on receivability, affirming a competence to review the decisions to waive immunity, will undermine the Secretary-General's authority to execute his obligations under the Convention and host country agreements. This will impact negatively on the Secretary-General and his obligation to cooperate with Member States to facilitate the administration of justice in the course of national judicial proceedings.

24. The Convention and the Host Country Agreement specifically provide that the Secretary-General has not only the right but the duty to waive immunity where specified conditions are satisfied. They further provide that the United Nations shall co-operate, at all times, with the appropriate authorities to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned therein. The provisions of the Convention and host country agreements create legally-binding obligations on the Secretary-General vis-à-vis the Member States that are parties to the Convention and the host country agreement.

25. In practical terms, if the UNDT were permitted to review decisions to waive immunity, the Secretary-General would no longer be able to assure Member States of the finality of his decisions until the time limit for filing an application with the UNDT has expired or, if an application had been filed with the UNDT, until proceedings before the UNDT and the Appeals Tribunal have concluded. Once seized of jurisdiction, the UNDT would be competent to suspend the contested decision or order other temporary relief.² Consequently, national judicial proceedings would potentially be disrupted by proceedings before the UNDT and the Appeals Tribunal. The Secretary-General would potentially be placed in the untenable position of not being able to comply with his international treaty obligations pending the resolution of proceedings before the Tribunals. This in turn would have serious implications in a range of matters, particularly in sensitive criminal investigations and proceedings.

26. The Secretary-General accordingly submits that the UNDT erred in law and exceeded its competence in finding that the decision to waive immunity is a contestable administrative decision.

27. The Secretary-General requests that the Appeals Tribunal review his appeal on an expedited basis, find it to be receivable, reverse the UNDT's decision that Mr. Kozul-Wright's application was receivable and dismiss the application in its entirety on that basis.

² In terms of Article 2(2) and Article 10(2) of the Statute of the UNDT.

Mr. Kozul-Wright's Answer

28. Mr. Kozul-Wright submits that the Secretary-General's appeal is not receivable because he has not established a compelling reason to make an exception to the general rule that a party cannot appeal a judgment in his or her favour. The Secretary-General, he alleges, is clearly seeking a policy determination on political issues and has not demonstrated how the exercise of jurisdiction by the UNDT has damaged the Organization. Moreover, the broad legal question involving the Tribunals' jurisdiction over the Organization's relations with Member States was never raised in response to the management evaluation request or in reply to the application. The existing jurisprudence supports the UNDT's conclusion on receivability.

29. Mr. Kozul-Wright submits further that the Secretary-General fails to distinguish between organizational immunity, which is a matter between the Organization and Member States, and functional/diplomatic immunity of officials which is incorporated in the terms of employment for all international civil servants. Officials of the Organization are covered by Article 105 of the Charter which confers "such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization". The provision is referenced in Staff Regulation 1.1 and Staff Rule 1.2 and incorporated in individual letters of appointment. It is thus a condition of service.

30. Mr. Kozul-Wright accordingly requests that the Secretary-General's appeal be dismissed.

Mr. Kozul-Wright's Appeal

31. Mr. Kozul-Wright contends that he essentially complied with the terms of the applicable rental contract and the legal obligations arising under it and had found a replacement tenant who was a senior executive at a large American multinational company based in Geneva, but whom the landlord rejected. Moreover, every rental contract in Geneva involving a United Nations official is subject to a diplomatic clause which allows for ending the contract for work-related reasons subject to three months' notice.

32. Mr. Kozul-Wright contends that the termination of the lease was for an official purpose related to the employment of his then spouse and her health condition. The Senior Legal Advisor's conclusion that the dispute was a private matter and his prejudicial assumption tainted the entire process. The UNDT's finding that his case was given full consideration by the

Administration is contradicted by the fact that the Administration never discussed the matter with the medical authorities, including the Organization's own medical services which subsequently agreed that Mrs. Kozul-Wright's Parkinson's disease constituted a ground to grant early retirement which confirms the centrality of her health to this case.

33. Privileges and immunities, according to Mr. Kozul-Wright, are granted to a staff member to enable him or her to undertake his or her functions "without undue pressure" and "in adequate conditions", including pressure and conditions relating to the staff member's health. The capacity of a staff member with Parkinson's disease to undertake her duties without further adding to pressures caused by the disease itself was a central matter and the legal office was obliged to consider this before defining the case as purely private. Mr. Kozul-Wright submits that the UNDT erred in both fact and law.

34. Mr. Kozul-Wright requests that the Appeals Tribunal vacate the UNDT Judgment, order the rescission of the decision to waive immunity and award one-year net base pay as compensation.

The Secretary-General's Answer

35. The Secretary-General submits that Mr. Kozul-Wright has not demonstrated that the UNDT failed to exercise the jurisdiction vested in it. Contrary to his assertions, the UNDT expressly considered Mr. Kozul-Wright's argument that Mrs. Kozul-Wright's medical condition transformed their rental dispute with their landlord into something other than a private matter. The UNDT noted that Mr. Kozul-Wright complained that the medical condition was not given appropriate weight in the decision to waive immunity and that he claimed that the matter was not a private one since the motivation for the move was to allow Mrs. Kozul-Wright to perform her duties in the Organization's service. The UNDT correctly concluded that the lease for a staff member's personal accommodation is "eminently a private matter" and that the move was not for official purposes.

36. Mr. Kozul-Wright failed to demonstrate that the UNDT erred in law or fact resulting in a manifestly unreasonable decision. First, as to Mr. Kozul-Wright's contention that the UNDT misrepresented the facts regarding his rental dispute, that he adhered to the provisions of the rental agreement and upon moving, paid for further two months in accordance with the three-month notice condition, the Secretary-General contends that these factual assertions do

not affect the private nature of the underlying rental dispute. Moreover, the record in the present case does not support the assertions of misrepresentation in the Judgment.

37. Secondly, contrary to Mr. Kozul-Wright's contention, there was no requirement for the medical service to be consulted in the context of the decision to waive immunity. Furthermore, the Organization fully considered Mr. Kozul-Wright's arguments regarding Mrs. Kozul-Wright's medical condition as is evidenced in the memorandum by the ASG, OLA on the waiver of immunity for the purposes of the proceedings before the Geneva court.

38. Mr. Kozul-Wright has failed to establish that the decision to waive immunity should be rescinded and that he should be awarded compensation. Mr. Kozul-Wright has neither demonstrated that the UNDT failed to exercise the jurisdiction vested in it, nor has he demonstrated that the UNDT erred in law or fact resulting in a manifestly unreasonable decision. He has also failed to provide any evidence of harm; thus, his request does not satisfy the statutory requirements for an award of compensation.

39. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety. He also renews his request that the Appeals Tribunal reverse the UNDT's conclusion that Mr. Kozul-Wright's application was receivable, vacate the UNDT Judgment and dismiss his application in its entirety on that basis.

Considerations

40. Before considering the merits of the arguments on the receivability, it is necessary as a preliminary matter to determine if the appeal of the Secretary-General is itself receivable. The Secretary-General was the successful party before the UNDT and hence his right to appeal against the Judgment is circumscribed. In *Sefraoui*,³ this Tribunal held that a party in whose favour a case has been decided is not permitted to appeal against the judgment on legal or academic grounds. The rule is however not absolute.

41. In *Ngoma-Mabiala*,⁴ this Tribunal permitted an appeal by the Secretary-General even though the UNDT had dismissed the staff member's application as not receivable on the ground that he had not exhausted the mandatory first step of requesting management evaluation. The

³ *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048, para. 18.

⁴ *Ngoma-Mabiala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-361, paras. 17 to 23.

Secretary-General, however, appealed against a discrete issue (namely that the UNDT did not have jurisdiction to make certain observations recorded in its judgment) and sought their redaction. The Appeals Tribunal held that although the Secretary-General was “the beneficiary” of the judgment in his favour on the receivability issue, he was entitled to appeal regarding the objectionable observations since there were two factors which distinguished the appeal from the finding in *Sefraoui*.

42. Firstly, the observations were made in circumstances where the Secretary-General had specifically limited his reply to the application to the issue of receivability and had sought and obtained leave, in terms of Article 19 of the UNDT Rules of Procedure, to have receivability considered as a preliminary issue and had reserved the right to file a further submission addressing the merits of the claim. Secondly, the UNDT effectively embarked on a consideration of the merits of the application and purported to make findings of fact and analyzed those factual findings against the then applicable Staff Rules.

43. This Tribunal has subsequently provided further clarification of the principles on which a successful party may file an appeal in *Saffir and Ginivan*.⁵ Before an appeal may be allowed, the judgment of the UNDT must entail a concrete and final decision which generates “the harm that constitutes the condition *sine qua non* of any appeal”.⁶ The Appeals Tribunal held:⁷

... It is not enough to claim that the grievance comes from the reasoning of the judgment, from all or part of its motivation or from the rejection of certain or all of the arguments submitted by a party.

... The right to appeal arises when the decision has a negative impact on the situation of the affected party. That means that a judgment can contain errors of law or fact, even with regard to the analysis of the tribunal’s own jurisdiction or competence and yet, be not appealable.

... If the errors attributed to the judgment do not have an impact on the final outcome of the process, an appeal concerning those errors would become moot because it would be merely academic or theoretical, since the adopted decision itself was taken in favour of the appellant without generating damage to the impugning party.

44. In the present case, the Secretary-General argues that although the UNDT dismissed Mr. Kozul-Wright’s application on the merits, its ruling that his waiver of immunity was an administrative decision subject to judicial review has a significant negative impact on the

⁵ *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466.

⁶ *Ibid.*, para. 16.

⁷ *Ibid.*, paras. 17 to 19.

practical fulfillment of his duty to co-operate with Member States to facilitate the administration of justice in the course of national judicial proceedings. The receivability ruling impacts negatively upon his authority to execute his obligations under the Convention. If his decisions on waiver of immunity are subject to an overriding review power by the internal justice system, the Secretary-General will not be able to assure Member States of the finality of his decision until the internal justice proceedings are finalized with the result that the national judicial proceedings will be delayed and disrupted. The negative implications of the UNDT ruling for the Secretary-General, in his view, are of such an order as to justify allowing him to appeal the ruling, despite his success on the merits.

45. Article 2(1) of the Appeals Tribunal Statute provides for appeals against judgments in which it is, *inter alia*, asserted that the UNDT has exceeded its jurisdiction or competence or has erred on a question of law. In this appeal, the Secretary-General raises both grounds of appeal alleging that the UNDT erred on a question of law and exceeded its competence in finding that it had jurisdiction *ratione materiae*. In *Ngoma-Mabiala*, the Secretary-General was allowed to appeal because the UNDT had erred in law and exceeded its jurisdiction in commenting upon the merits of the case although it had dismissed the application as not receivable. The present appeal is similar because the UNDT may have erred in law or exceeded its jurisdiction or competence by receiving the application when it might not be receivable *ratione materiae*. We therefore receive the Secretary-General's appeal and address the claim that Mr. Kozul-Wright's application was improperly received *ratione materiae*.

46. In terms of Article 2(1)(a) of the UNDT Statute, the UNDT shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General as the Chief Administrative Officer of the United Nations to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent Regulations and Rules and all relevant administrative issuances in force at the time of the alleged non-compliance.

47. Various statutory instruments of the Organization govern the question of privileges and immunities. Article 105 of the Charter provides:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

48. Sections 20 and 21 of the Convention provide as follows:

SECTION 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

49. In addition, Section 30 of the Convention provides:

SECTION 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

50. Staff Regulation 1.1(f) provides:

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.

51. Staff Rule 1.2(b) provides:

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.

52. In summary, the privileges and immunities of the representatives and officials of the Organization derive from the Charter and are circumscribed as necessary for the independent exercise by them of their functions in connection with the Organization. First and foremost, the privileges and immunities are granted to officials in terms of Section 20 of the Convention in the interests of the United Nations and not for the personal benefit of the officials themselves. The power to waive the immunity of any official in any case vests in the Secretary-General who has the right and the duty to waive the immunity where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. Moreover, the Organization is obliged to co-operate at all times with the appropriate authorities of Member States to facilitate the proper administration of justice and prevent the occurrence of any abuse in connection with the privileges and immunities. And finally, the Staff Regulations and Rules provide that the privileges and immunities do not excuse failures to observe the laws of the countries in which the staff members are located, nor do they furnish an excuse for non-performance of their private obligations, and evince a clear intention that the Secretary-General “alone” must decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.

53. These principles are repeated and embodied in the Host Country Agreement, Section 17 of which explicitly recognizes that the privileges and immunities are accorded to officials of the United Nations not for personal benefit of the individuals themselves, but in the interests of the United Nations and that they may be waived, if the immunity would impede the course of justice and waiver would not prejudice the interests of the Organization. Moreover, Section 15(a) of the Host Country Agreement makes it plain that officials of the Organization are immune “from legal process in respect of words spoken or written and all acts performed by them” only if such are performed in an “official capacity”.

54. The primary question for consideration, arising in both the appeal of the Secretary-General and that of Mr. Kozul-Wright, is whether the decision of the Secretary-General to waive immunity is an administrative decision. If it is not, then Mr. Kozul-Wright’s application to the UNDT was not receivable and both appeals fall to be

disposed of on that limited jurisdictional basis. The inquiry is whether the UNDT erred and exceeded its competence in finding that the decision of the Secretary-General to waive immunity is a contestable administrative decision.

55. An administrative decision is a unilateral decision of an administrative nature taken by the Administration involving the exercise of a power or the performance of a function in terms of a statutory instrument which adversely affects the rights of a staff member and produces direct legal consequences. A decision of an administrative nature is distinguished from other governmental action of a regulatory, legislative or executive nature.⁸

56. Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.⁹ What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

57. In relation to appointments, promotions, and disciplinary measures, decisions directly impacting on the terms of appointment or contract of employment of the individual staff member normally will be administrative in nature. A key characteristic of an administrative decision subject to judicial review in terms of Article 2 of the UNDT Statute is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment.¹⁰ In other instances, however, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals.¹¹

⁸ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.

⁹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50, citing *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18 and citations therein. See also *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661, para. 25.

¹⁰ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49, citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 17.

¹¹ *Obino v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-405, paras. 18-21.

58. In the present case, the UNDT, after citing the provisions of the relevant statutory provisions, held as follows:¹²

... Clearly, these provisions lay down the existence of immunities for the Organization's staff and set out their contours—which, relevantly, include the possibility for the Secretary-General to waive them. In view of this, it is patent that immunities have been incorporated into the terms of appointment of United Nations staff members—including at the highest level of the Organization's legal order and ever since its inception—thereby becoming part and parcel of their status and conditions of service.

... Furthermore, a decision to waive the immunity of a given staff member has evident—potentially dramatic—effects on his or her legal situation. In the case at hand, such consequences are significant and extremely concrete. In this light, the Tribunal finds that the contested decision meets all the features of the definition of an administrative decision (...) and notably the most cardinal of them, i.e., having “a direct impact on the terms of appointment or contract of employment of the individual staff member”[.]

59. The UNDT's finding that the decision to waive the immunity is an administrative decision is predicated on two aspects: the immunities are a term of the contract of employment and any waiver impacts directly on them. The Secretary-General correctly submits that such is an insufficient basis for the conclusion that a decision to waive a staff member's immunity is an administrative decision. The conclusion pays insufficient attention to the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

60. As discussed, the various statutory provisions governing immunities reiterate that they are conferred in the interests of the Organization and not for the personal benefit of the individuals themselves¹³ and that it is the Secretary-General “who alone may decide” whether the privileges should be waived.¹⁴ The privileges and immunities reflect legally binding international obligations between the Organization and the Member States which are conferred by the Member States through the Charter, the Convention and other relevant international instruments on the Organization. The Member States have accorded such immunities as are necessary for the fulfillment of the Organization's purposes.

61. Hence, when responding to requests for the waiver of an official's immunity, the Organization must comply with its legal obligations to the requesting Member State under the relevant international agreement, which in this case explicitly limits immunity to official acts and

¹² Impugned Judgment, paras. 38 and 39.

¹³ Section 20 of the Convention.

¹⁴ Staff Regulation 1.1(f).

obliges the Secretary-General to co-operate at all times with the appropriate authorities to facilitate the proper administration of justice and to prevent the occurrence of any abuse in connection with the privileges and immunities.

62. Thus, the decision of the Secretary-General in regard to any waiver is paramount. By virtue of his elevated position in the Organization, he is best placed to appreciate the nature of the Organization's obligations to a Member State, what form of co-operation will be in the interests of the Organization, and whether non-waiver is necessary for the fulfillment of the purposes of the Organization. The factors he will take into consideration often may be political in nature and will involve issues of comity. His exercise of the power entails the exercise of an international duty between subjects of international law; and any difference arising out of the application of the power potentially will be a matter for deliberation by the International Court of Justice in terms of Section 30 of the Convention. These considerations imbue a decision of the Secretary-General to waive immunity with an executive or political character, negating the categorization of the decision as one administrative in nature.

63. Moreover, the consequences of holding such decisions to be administrative decisions would be disruptive of the requirements of comity. If the UNDT could review decisions of the Secretary-General to waive immunity, the latter would not be able to comply with his treaty obligations pending the resolution of proceedings before the internal justice system. This could impact particularly negatively in sensitive criminal investigations in which the Secretary-General could be asked to waive immunity without prior notice to the staff member in order to protect evidence or witnesses.

64. In the premises, these specifics cumulatively militate against classifying decisions by the Secretary-General to waive immunity as administrative decisions. They are rather executive or policy decisions. It follows that Mr. Kozul-Wright's application to the UNDT was not receivable *ratione materiae* and should have been dismissed on that ground alone.¹⁵ The appeal of the Secretary-General accordingly should be upheld and the appeal of Mr. Kozul-Wright may be dismissed without any consideration of its merits.

¹⁵ This finding is in keeping with those of other international administrative tribunals. See, for instance, former Administrative Tribunal Judgment No. 1465, *Lesar* (2009); ILOAT Judgment No. 933 (1988); ILOAT Judgment No. 1543 (1996); and ILOAT Judgment No. 2190 (2003).

Judgment

65. The Secretary-General's appeal is upheld; Mr. Kozul-Wright's appeal is dismissed; and Judgment UNDT/2017/076 is vacated.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Halfeld

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar