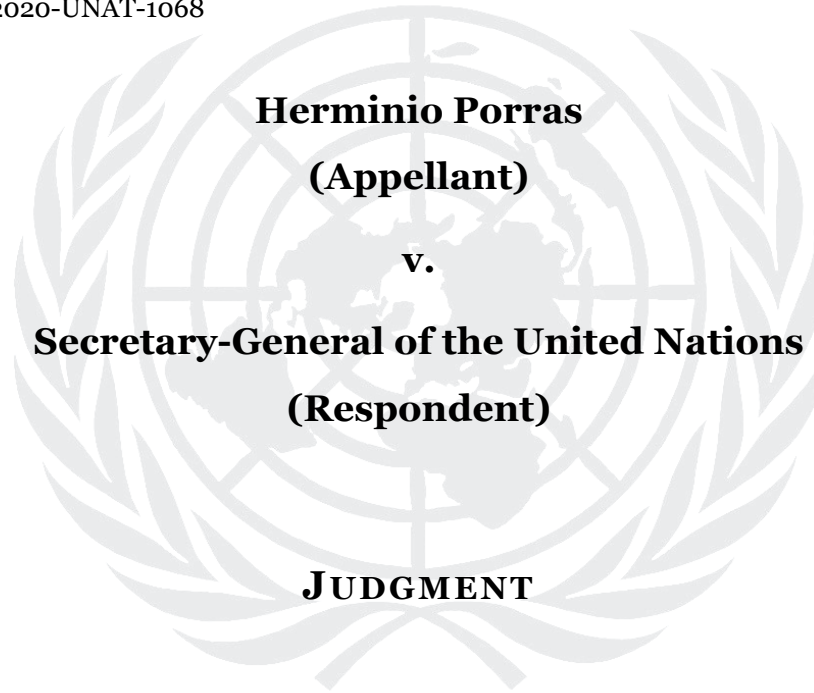




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-1068



**Herminio Porras  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge John Raymond Murphy
Case No.:	2020-1370
Date:	30 October 2020
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-represented
Counsel for Respondent:	André Luiz Pereira de Oliveira

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Appellant, a former P-4 Logistics Officer, working with the United Nations Interim Security Force for Abyei (UNISFA or the Organization) in Sudan and subsequently assigned to Gok Machar in South Sudan, contests the decision not to renew his fixed-term appointment. He appeals Judgment No. UNDT/2019/178 wherein the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) held the Organization had fulfilled its legal obligations towards the Appellant and the impugned decision was lawful.
2. We find the UNDT erred in this determination for reasons set out below.

**Facts and Procedure**

3. In its Judgment, the Dispute Tribunal made the following factual findings, which the parties do not dispute:<sup>1</sup>

... On 26 April 2016, the Applicant was temporarily reassigned within UNISFA from Abyei to Kadugli, Sudan.

... On 9 February 2017, the Ministry of Foreign Affairs of Sudan sent UNISFA a *Note Verbale* stating, among other [things], that Sudan was “not willing to have the Applicant as part of mission personnel and wished that he leave UNISFA Kadugli base immediately”. The reason given was that the Applicant had impeded religious practices in the camp, in violation of the Status of Forces Agreement.

... On 3 April 2017, the UNISFA Chief Human Resources Officer (CHRO), informed the Applicant of the Government of Sudan’s unwillingness to have him serve as part of UNISFA’s mission. By the same memorandum, the CHRO informed the Applicant of UNISFA’s decision to temporarily assign him to Gok Machar in South Sudan for 90 days pending UNISFA’s efforts to reassign him to another mission.

... Effective 18 July 2017, following the expiration of the Applicant’s 90-day temporary duty assignment period and due to the lack of an alternative reassignment option, the Applicant was reassigned to Gok Machar together with the post, which was reflected in his personnel action. His fixed-term appointment was renewed first until 30 June 2018 and then until 30 June 2019.

... On 5 July 2018, the General-Assembly approved, as part of the 2018/2019 budget, the redeployment of the post from Gok Machar in South Sudan to the [Supply Chain Performance Management Unit (SCPMU)] in Abyei.

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<sup>1</sup> Impugned Judgment, paras. 4-11 (internal footnotes omitted).

... On 4 December 2018, the Applicant acknowledged the reclassification of the post, its changed job description and movement from Gok Machar to the ... SCPMU ... in Abyei.

... On 14 May 2019, the Applicant was notified of the expiration of his fixed-term appointment and informed that he was to be separated from service upon expiry of ... his appointment on 30 June 2019. The Chief of Mission Support (CMS) informed the Applicant that the functions of P-4 Logistics Officer were required in Abyei and not in Gok Machar while the efforts to place him in another mission had not materialized. By the same memorandum, the CMS stated that UNISFA was uncertain that the Applicant would be issued with a Sudan Visa to work in Abyei as a Logistics Officer considering the circumstances under which he had been moved out of Kadugli.

... The Applicant requested management evaluation on 10 June 2019 and received the response on 18 July 2019.

4. On 22 July 2019, the Appellant filed an application before the UNDT contesting the decision not to renew his appointment.

5. On 16 December 2019, the UNDT dismissed the application and held that:

- It was undisputed that based on a *Note Verbale* from the Sudanese Ministry of Foreign Affairs, the Appellant had been declared *persona non grata* (PNG) in Sudan; and that the consequence of a *persona non grata* declaration under international law was that the sending state (which includes the United Nations) had to recall its agent. This situation forced the exercise of the Secretary-General's discretion in placing the Appellant outside the country.
- Considering the views of the Sudanese Government about the Appellant's presence in Sudan and the sensitive political nature of UNISFA's operations in Abyei, UNISFA had no legal obligation to attempt to obtain a visa for the Appellant unlike in the cases of *Milicevic* and *Tal*.<sup>2</sup>
- The duty of the Organization to alleviate the predicament in which a staff member finds him-/herself following his/her expulsion from the host country through no fault of his or her own is to be interpreted in consideration of balancing legitimate interests of the Organization and the staff member. The

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<sup>2</sup> *Milicevic v. Secretary-General of the United Nations*, Judgment No. UNDT/2018/101; *Tal v. Secretary-General of the United Nations*, Order No. 109 (NBI/2017).

scope of the Organization's duty was to be determined in relation to what was possible and reasonable under the circumstances.

- By creating for the Appellant a position in South Sudan and maintaining it for over two years, the Organization provided him with employment on the same conditions for a period considerably exceeding the term of his appointment at the date of the PNG declaration.
- The Appellant failed to specify what other steps he expected the Organization to take other than placing him on the COSMOS platform and informing the then Field Personnel Division of the Department of Field Support (FPD/DFS) of his situation. The Organization could not be held responsible for his non-selection for any of the positions he had applied for.

6. The Appellant appealed to the United Nations Appeals Tribunal (Appeals Tribunal) on 15 April 2020 and the Secretary-General filed his answer on 15 June 2020.

### **Submissions**

#### **Appellant's Appeal**

7. The Appellant requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety and rescind the decision to separate him from service, or in the alternative to rescission, award him, at a minimum, one-year net base salary in compensation for the Organization's unlawful decision.

8. He says that the actual reason for why he was moved out of Kadugli had nothing to do with religious practices and protecting the interest of the Organization but due to harassment by a representative of the Sudanese Government/Brigade General. He was never informed of the *Note Verbale* at the time and it was the obligation of the Organization to protect him from retaliation.

9. The Appellant asserts the non-renewal was "ill-motivated" and the result of a "long-running animosity" held against him by the Chief of Human Resources (HR) against whom he had reported in 2015 for possible misconduct. It was for this reason that he was initially re-assigned from the post in Abyei which the Mission "refused to return him to under

the guise of frustration of contract due to [*persona non grata*]”. This history and reason was why he was re-assigned and was “ignored” by the UNDT.

10. The Appellant submits that the UNDT erred by concluding that the decision not to renew the Appellant’s appointment on the basis of the inability to assign him within Sudan subsequent to the *persona non grata* declaration, was a lawful and justified exercise of discretion. The UNDT mistook the facts as the Organization never actually applied for the visa or made any enquiries of the Sudanese Government concerning its possible issuance; rather, the Organization used a speculative justification for the non-renewal, namely that it would be “uncertain” the visa might be issued. This is reflective of bias against the Appellant as he was advised by the new Representative of the Sudanese Government in Kadugli that he should apply for the visa and as other staff members never got the Sudanese visa yet have been working in Abyei. The Organization did not use their best or any efforts in this regard.

11. The UNDT exceeded its competence and erred in finding that the Appellant’s placement on a post in Gok Machar for two years fulfilled its obligation to make good faith efforts to relieve him of the predicament of the *persona non grata* declaration. In so doing, the UNDT improperly interpreted the jurisprudence dealing with the scope of the duty of care towards fixed-term appointees. The UNDT rejected the Appellant’s case in erroneous reliance on the fact that a *persona non grata* declaration was a *force majeure*, over which the Organization was essentially powerless. In *Hassouna*,<sup>3</sup> the UNDT accepted that the Organization can attempt to negotiate with the host country or make efforts such as the reapplication for a visa, rather than simply determining that overturning the *persona non grata* decision is impossible and all efforts necessarily fruitless.

12. He says the Organization did not act in good faith, as the Chief of HR failed to upload his profile in COSMOS in a timely and complete manner, and as a result, none of the Missions contacted the Appellant. Therefore, the UNDT erred in finding that the efforts to place the Appellant in another Mission had not materialized when in fact no such efforts had been undertaken. The Appellant says that his reputation has been severely damaged by the Organization.

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<sup>3</sup> *Hassouna v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/094.

**The Secretary-General's Answer**

13. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

14. He submits that the UNDT correctly concluded that the Organization had fulfilled its obligations towards the Appellant before taking the contested decision. The Organization's decision not to renew the Appellant's appointment was based on valid reasons and followed proper procedure.

15. Staff Regulation 4.5 (c) and Staff Rule 4.13 (c) establish that "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service". The Appeals Tribunal has recognized the Secretary-General's broad discretion in relation to decisions on internal management which are, consequently, subject to limited judicial review.<sup>4</sup> The Appeals Tribunal has ruled that an international organization necessarily has the power to restructure some or all of its departments or units.<sup>5</sup> Since the Appellant had been declared *persona non grata* by the Sudanese Government and the General Assembly approved redeployment of his post back to Abyei, the Organization was unable to renew his fixed-term appointment.

16. The Secretary-General says the Organization properly exercised its discretion when deciding not to renew his appointment and that this decision was not tainted by improper motives. First, the Secretary-General submits that the Appellant did not raise before the UNDT arguments regarding the alleged retaliation by the Chief of HR and he has not demonstrated any convincing reason to raise them now on appeal. This argument constitutes an "additional pleading", which should be dismissed on this ground alone.

17. Second, the Organization properly applied its discretion in deciding not to renew the Appellant's fixed-term appointment. With the Appellant being declared *persona non grata* in Sudan and the post in Gok Machar, which the Appellant had been encumbering, no longer available, it was lawful for the Organization not to renew the Appellant's fixed-term appointment. The Appellant's reliance on the judgments in *Milicevic* and *Tal* is misplaced as those cases can be distinguished on their facts.

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<sup>4</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-234, para. 39.

<sup>5</sup> *Toure v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-660, para. 29.

18. Third, the Organization fulfilled its obligation to make good faith efforts to relieve the Appellant from the predicament of the *persona non grata* declaration. The Organization found him an alternative employment on the same conditions for over two years in Gok Machar, South Sudan. Further, the Organization proactively engaged in relieving the Appellant from the predicament of being declared *persona non grata* by engaging in efforts to find him an alternative suitable position outside Sudan. The Organization met its obligations towards him, insofar as he was employed with the Organization beyond the term of the fixed-term appointment that he had held at the time he was declared *persona non grata*. Further, the fact that a staff member is declared *persona non grata* does not mean that the staff member will be employed indefinitely by the Organization.

19. Contrary to the Appellant's assertion, the UNDT findings are in line with the jurisprudence in *Hassouna* where it was held that the Secretary-General cannot plead frustration of the contract by *force majeure* and use the conduct of a third party to exempt him from his obligations towards the appellant. In this case, at the time of being declared *persona non grata*, the Organization respected the contract with the Appellant and provided him with an extension of his appointment beyond its term. Therefore, the Organization took adequate measures to relieve the staff member from the obstacles imposed by having been declared *persona non grata*.

### **Considerations**

20. The primary issue is whether the UNDT erred when it concluded that the Organization's decision not to renew the Appellant's fixed-term contract was a lawful and justified exercise of its discretion and that his placement in Gok Machar fulfilled its obligation to make good faith efforts to relieve the Appellant of the predicament of the *persona non grata* declaration.

#### *Legal framework for non-renewal of fixed-term appointments*

21. The starting point in this appeal is the well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment. Staff Regulation 4.5(c) provides that “[a]

fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”. Staff Rule 4.13 provides that:<sup>6</sup>

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time, to persons recruited for service of a prescribed duration, including persons temporarily seconded by national Governments or institutions for service with the United Nations, having an expiration date specified in the letter of appointment.

(b) A fixed-term appointment may be renewed for any period up to five years at a time.

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14 (b).

22. The Appeals Tribunal has found that the renewal of the appointment of a staff member on successive contracts does not, in and of itself, give grounds for an expectancy of renewal, unless the Organization has made an express promise that gives the staff member an expectancy that his or her appointment will be extended.<sup>7</sup>

23. Separation as a result of expiration of a fixed-term appointment takes place automatically, without prior notice, on the expiration date specified in the letter of appointment.<sup>8</sup>

24. In addition, the Appeals Tribunal has held that despite this, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Organization has not acted fairly, justly, or transparently with the staff member or was motivated by bias, prejudice or improper motive. The staff member has at least an initial burden of establishing such factors played a role in the administrative decision.<sup>9</sup>

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<sup>6</sup> See also *Agha v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-916, para. 16; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-949, paras. 25-27; *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25; *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 33.

<sup>7</sup> *Agha v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-916, para. 16; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-949, para. 25.

<sup>8</sup> See Staff Rule 9.4 which provides that “[a] temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment”. See *Koumoin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-119, para. 20.

<sup>9</sup> *Agha v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-916, para. 17 and *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32.



25. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate.<sup>10</sup> The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.<sup>11</sup>

*Was the non-renewal decision a lawful and justified exercise of the Respondent's discretion?*

*i) Allegations of improper motives*

26. The Appellant says the decision not to renew the Appellant's fixed-term contract was unlawful as it was tainted by "bias, prejudice, and impropriety in the decision-making process". In particular, he alleges that the decision was ill motivated due to a long-running animosity against him by the Chief of HR against whom he had reported prior possible misconduct.

27. However, this is a new allegation and supported by additional evidence not before the UNDT. A party is not allowed to raise a new issue with additional evidence to the Appeals Tribunal, which was available to it while its case was pending before the UNDT. Nor should a party argue a different position on appeal than at the first instance.<sup>12</sup>

28. In the present case, the Appellant did not raise in his application to the UNDT allegations of improper motives, bias or prejudice as reasons for the unlawfulness of the non-renewal. Rather, before the UNDT, he argued that the decision to transfer him was temporary and that the Organization failed in its duty to alleviate the consequences of the *persona non grata* declaration against him, including failing to explore the possibility of his redeployment to Abyei. There is no mention, express or implied, of improper motives, bias or prejudice in his submissions to the UNDT.

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<sup>10</sup> *Agha v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-916, para. 18 and *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-949, para. 27.

<sup>11</sup> *Ibid.*

<sup>12</sup> See *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042, para. 32.

29. As stated by the Appeals Tribunal in *Abu Salah*<sup>13</sup>, it is quite “unreasonable” for the Appellant to assert that the UNDT erred with respect to allegations which were not raised before the UNDT for its consideration and hence were not part of his case before the lower tribunal. Therefore, we do not accept and consider these allegations as appropriate for consideration.

30. We agree that while these may constitute additional pleadings which would require exceptional circumstances to be presented to the Appeals Tribunal pursuant to Article 31 of its Rules of Procedure and Section II.A.3 of Practice Direction No. 1, they are not present here.

*ii) Exercise of the Organization’s discretion to Not Renew*

31. However, we find the UNDT did err in finding the Organization properly exercised its discretion in not renewing the Appellant’s fixed-term appointment in all the circumstances then prevailing, particularly the circumstance of the availability of the Appellant’s old post in Abyei.

32. There is no dispute that the Appellant was declared *persona non grata* in February 2017 based on the *Note Verbale* from the Sudanese Ministry of Foreign Affairs. Under international law and conventions, a sovereign state “may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission.” This is a fundamental principle of diplomatic relations and has been codified in Article 9 of the Vienna Convention on Diplomatic Relations.

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<sup>13</sup> *Abu Salah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-974, para. 47.

33. The UNDT has previously considered situations of staff members who have been declared *persona non grata*.<sup>14</sup> In *Milicevic*, the UNDT concluded that this principle applies *mutatis mutandis* to staff members working for the United Nations in a country that declares them *persona non grata*. This necessarily forces the exercise of the Secretary-General's discretion to reassign or place them outside the country where s/he has lost the ability to perform their work. "If a staff member is declared [*persona non grata*] by a host country, the Organization has no alternative but to remove that staff member, because such declaration falls within the sovereign prerogative of the host country."<sup>15</sup>

34. We adopt the UNDT's view that under these circumstances it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds themselves following their expulsion from the host country.<sup>16</sup> That obligation arises because of the unilateral and unquestionable nature of a *persona non grata* declaration including that it may be made irrespective of fault or misconduct by the individual so declared and because of the inability of that individual to challenge and reverse its effect.

35. Faced with the Sudanese Government declaring the Appellant *persona non grata* and ordering him to leave the country immediately, the Organization responsibly reassigned the Appellant to another post in Gok Machar with similar employment conditions for two years. During this time, the Organization attempted to assist the Appellant with applications to various posts and other missions. This is in line with the "duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country through no fault of his or hers".<sup>17</sup>

36. However, with the General Assembly resolution re-deploying the post back to Sudan as part of the 2018/2019 budget peacekeeping operations, the Appellant's post was now available in Abyei. With this development, there is no evidence that an attempt was made by the Organization to reconsider the now dated *Note Verbale* and to obtain a visa for the Appellant for his potential re-deployment.

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<sup>14</sup> See *Milicevic v. Secretary-General of the United Nations*, Judgment No. UNDT/2018/101, *Hassouna v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/094 and *Tal v. Secretary-General of the United Nations*, Order No. 109 (NBI/2017).

<sup>15</sup> *Milicevic v. Secretary-General of the United Nations*, Judgment No. UNDT/2018/101, para. 34.

<sup>16</sup> *Hassouna v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/094, para. 51.

<sup>17</sup> *Tal v. Secretary-General of the United Nations*, Order No. 109 (NBI/2017).

37. The question is whether, in these circumstances, the Organization's decision not to renew the Appellant's fixed-term appointment was in accordance with its duty to act fairly, justly, transparently and in good faith with its staff members.<sup>18</sup>

38. Although there is no expectation of a renewal of fixed-term appointments, the Appeals Tribunal has determined that the Organization must make good faith efforts to find alternative employment for the staff member. The Organization effectively created a similar position in Gok Machar for the Appellant which they maintained for two years, providing him with employment in the same conditions. He was given an opportunity to apply for other positions during this time. The Organization shared the Appellant's PHP and roster membership details with all missions and uploaded his profile in the Cosmos system in 2017. In 2018, the Organization shared the Appellant's list of applications through the *Inspira* system with Career Support. These are certainly laudable good faith efforts on the part of the Organization to find the Appellant alternative employment.

39. However, there was one important alternative employment available to the Appellant, namely his old post in Abyei. We find it was unreasonable under the circumstances for the Organization not to at least review the dated *Note Verbale* with the Sudanese Government and to attempt to obtain a visa for the Appellant to be redeployed back to his old post in Abyei or if this was not possible, at minimum to explain to him why such an attempt could not be made.

40. The UNDT found that the *Note Verbale* issued by the Sudanese Foreign Minister was "firm" and, considering the "sensitive political nature" of UNISFA operations in Abyei, the UNDT did not consider the Organization had a legal obligation to undertake an attempt to obtain the visa for the Appellant. However, the UNDT failed to consider that the *Note Verbale* at the time of the non-renewal decision was dated and there was no indication that the Organization made any efforts to review the status *Note Verbale* with the Sudanese Government before the non-renewal. Nor was there a specific explanation provided as to why these efforts could not be made in these circumstances. Therefore, the UNDT's finding that the *Note Verbale* was "firm" is an error of fact that results in a manifestly unreasonable decision.

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<sup>18</sup> *Jafari v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-1222, para. 31 and *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 33.

41. Although, in his submissions before the Appeals Tribunal, the Appellant references statements from the “new Representative of the Sudanese Government” in Kadugli that he says would not “object” to the issuance of a visa to the Appellant, this does not appear to be in evidence before the UNDT and is therefore new evidence. The Appeals Tribunal is not the forum to introduce new evidence that could have or should have been presented before the UNDT and therefore this evidence cannot be admitted or relied upon without prior leave.

42. Despite this, we find troubling the lack of explanation from the Organization as to why it could not have made some attempt to review the *Note Verbale* with the Sudanese Government after some time had passed (and therefore, potentially have a visa issued to the Appellant). This does not support the UNDT’s finding that the Organization fulfilled its obligations to alleviate the Appellant’s predicament and made all available good faith efforts to find the Appellant alternative employment before the non-renewal.

43. Therefore, we find that the impugned decision not to renew the Appellant’s fixed-term appointment was unlawful.

#### *Compensation*

44. In light of the conclusion that the Appellant’s non-renewal was unlawful, and pursuant to Article 9 of the Appeals Tribunal Statute, we rescind the non-renewal and in lieu of reinstatement order the payment to the Appellant of four months’ net base salary. This figure is based on the circumstances of the case, particularly the fact there was no guarantee the Appellant would have had a visa issued to him before the non-renewal.

**Judgment**

45. We vacate the UNDT Judgment and order rescission of the impugned decision and in lieu of reinstatement, order four months' net base salary be paid to the Appellant.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2020.

*(Signed)*

Judge Sandhu, Presiding  
Vancouver, Canada

*(Signed)*

Judge Colgan  
Auckland, New Zealand

*(Signed)*

Judge Murphy  
Cape Town, South Africa

Entered in the Register on this 18<sup>th</sup> day of December 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar