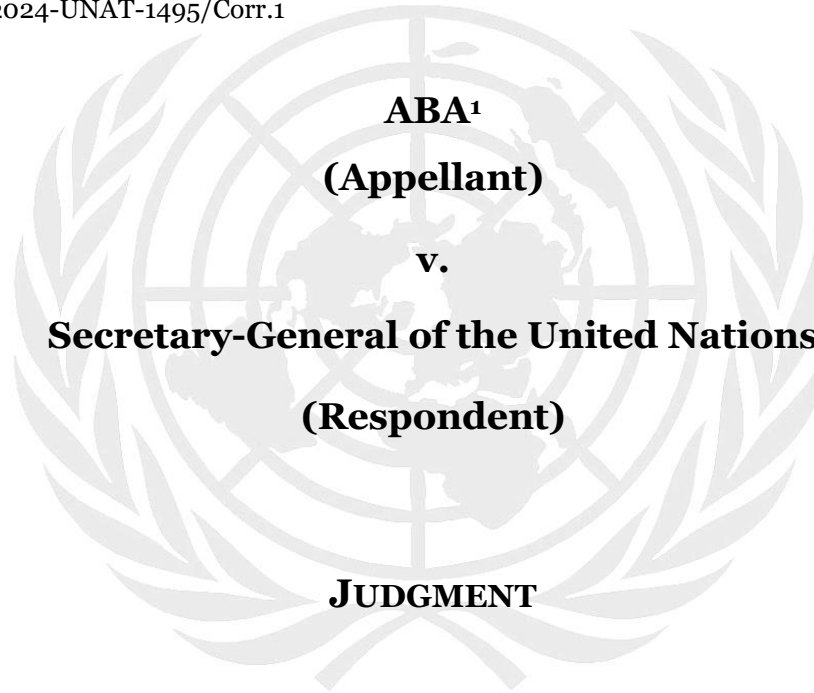




**UNITED NATIONS APPEALS TRIBUNAL**  
**TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2024-UNAT-1495/Corr.1



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Before: Judge Gao Xiaoli, Presiding  
Judge Nassib G. Ziadé  
Judge Leslie F. Forbang

Case No.: 2024-1924

Date of Decision: 25 October 2024

Date of Publication: 5 December 2024

Registrar: Juliet E. Johnson

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Counsel for Appellant: Setondji Roland Adjovi & Anthony K. Wilson

Counsel for Respondent: Rupa Mitra

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<sup>1</sup> This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

**JUDGE GAO XIAOLI, PRESIDING.**

1. ABA, a staff member serving at the United Nations Assistance Mission in Afghanistan (UNAMA), filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) challenging the Administration's decision to impose on him the disciplinary measure of demotion by one grade with deferment for three years of consideration for eligibility for promotion, and to commence gender sensitivity/awareness training (contested decision).
2. In preparation for holding a hearing on the merits of his application, the UNDT issued Order No. 54 (GVA/2024), in which it approved several measures to protect the anonymity and well-being of the alleged victim (Vo1) in the case (impugned Order no. 1).<sup>2</sup>
3. ABA filed a motion for reconsideration of these protective measures for Vo1, which was denied by the UNDT in Order No. 56 (GVA/2024) (impugned Order no. 2).<sup>3</sup>
4. On 27 May 2024, ABA filed an interlocutory appeal of paragraph 27(c) and part of paragraph 38(c) of impugned Order no. 1 and the entirety of impugned Order no. 2, with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
5. For the reasons set forth herein, the Appeals Tribunal finds the interlocutory appeal not receivable.

**Facts and Procedure**

6. On 8 May 2023, the Assistant Secretary-General for Human Resources (ASG/OHR) issued a formal letter to convey the disciplinary decision taken by the Under-Secretary-General for Management Strategy, Policy, and Compliance (USG/DMSPC) with regards to ABA's conduct.<sup>4</sup>
7. The USG/DMSPC determined that there was clear and convincing evidence that on or around 11 April 2021, while in the office of the First Reporting Officer (FRO) of Vo1, ABA had hugged Vo1, pressed her chest against him, and kissed her.<sup>5</sup>

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<sup>2</sup> *Applicant v. Secretary-General of the United Nations*, Order No. 54 (GVA/2024), paras. 27(c) and 38(c).

<sup>3</sup> *Applicant v. Secretary-General of the United Nations*, Order No. 56 (GVA/2024), para. 24.

<sup>4</sup> 8 May 2023 Letter to ABA from ASG/OHR (Sanction Letter).

<sup>5</sup> *Ibid.*, page 2.

8. The USG/DMSPC concluded that ABA's actions constituted misconduct in violation of Staff Regulation 1.2(b) and (f), Staff Rule 1.2(f)<sup>6</sup> and Section 3.5(c) of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

9. The USG/DMSPC decided to impose on ABA the disciplinary measure of demotion by one grade with deferment for three years of consideration for eligibility for promotion, and in addition, that ABA commence gender sensitivity/awareness training.<sup>7</sup>

10. On 5 August 2023, ABA filed an application with the UNDT challenging the contested decision. At the time he was acting *pro se*.

11. As the UNDT began to prepare for an oral hearing on the merits of his case, ABA retained counsel to assist him. In Order No. 039 (GVA/2024), the UNDT instructed the parties to identify relevant witnesses for the hearing.<sup>8</sup>

12. ABA proposed eleven witnesses, including VO1, to testify at the hearing. The Secretary-General also submitted a response, and with regard to VO1, stated the following:<sup>9</sup>

The Respondent affirms VO1's willingness to testify at the hearing and respectfully requests that the UNDT make the following accommodations in order to safeguard her anonymity and well-being:

- (i) that her testimony be held *in camera*;
- (ii) the preservation of VO1's anonymity throughout the proceedings and in the judgment; and
- (iii) that [ABA] will not be virtually present during VO1's testimony.

13. ABA was not afforded the opportunity to comment on this request.

14. On 17 May 2024, the UNDT issued impugned Order no. 1. In that Order, the Dispute Tribunal held in paragraph 27, that:

... With respect to VO1, as has been the past practice, the Tribunal sees no detriment to the proceedings in granting the Respondent's request vis-à-vis protecting her anonymity and well-being. Consequently, the Tribunal decides that:

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<sup>6</sup> Secretary-General's Bulletin ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).

<sup>7</sup> Sanction Letter, page 2.

<sup>8</sup> *Applicant v. Secretary-General of the United Nations*, Order No. 039 (GVA/2024), para. 18.

<sup>9</sup> Respondent's Response to Order No. 39 (GVA/2024), para. 5.

- a. VO1's testimony will be held in camera;
- b. VO1 will not be named during the proceedings and Judgment; and
- c. [ABA] will not be virtually present during VO1's testimony.

15. Paragraph 38(c) of impugned Order no. 1 reiterated that "VO1's testimony will be held in camera and without [ABA's] virtual presence".

16. On 20 May 2024, ABA submitted a motion for reconsideration of paragraph 27(c) of impugned Order no. 1. ABA argued that it was a fundamental principle of fairness that he was entitled to know the case against him, including being present when *viva voce* evidence was adduced. He averred that he was fully entitled to be present during proceedings when his accusers testify. In support, he cited several sexual misconduct cases where the accused staff member was able to be present when the victim testified, even if the staff member's camera and microphone were turned off.

17. On 22 May 2024, the UNDT denied the motion for reconsideration in impugned Order no. 2. The Tribunal reasoned as follows:<sup>10</sup>

... The Tribunal does not see any detriment to these proceedings in accommodating VO1's request. [ABA] is represented by Counsel, and will have full access to the audio recording and transcript of VO1's testimony through the case management portal. Moreover, even if he was virtually present, [ABA] would not be allowed to interfere or interact with VO1. Thus, it is simply untenable that the principle of fairness or any of [ABA's] due process rights will be harmed in any way.

... Furthermore, this is a disciplinary case involving an alleged victim of sexual harassment who, as provided by the Respondent in the CMD dated 24 April 2024, is no longer a staff member of the United Nations and thus, over whom the Tribunal has no subpoena power.

... By simply objecting to the decision to accommodate VO1's request and justifying it on selective jurisprudence, [ABA] has failed to explain how he would be impacted by simply not being able to listen *live* to her testimony.<sup>11</sup>

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<sup>10</sup> Impugned Order no. 2, paras. 18-20.

<sup>11</sup> Emphasis in original.

18. The UNDT further noted that motions for reconsideration may only succeed under exceptional circumstances, such as the discovery of new evidence or a misapprehension of law or fact, and that ABA had not met this threshold.<sup>12</sup>

19. The UNDT concluded that it was “in the best interests” of the proceedings to accommodate VO1’s request and did not see any detriment to ABA’s rights.<sup>13</sup>

20. On 27 May 2024, ABA filed an interlocutory appeal of paragraph 27(c) and part of paragraph 38(c) of impugned Order no. 1 and all of impugned Order no. 2. Simultaneously, he filed a motion with the UNDT to suspend proceedings in Case No. UNDT/GVA/2023/039 until the Appeals Tribunal resolved his appeal. The UNDT granted his request by Order No. 62 (GVA/2024).<sup>14</sup>

21. On 30 May 2024, ABA filed a motion for expedited consideration of his interlocutory appeal before the UNAT. By Order No. 565, the Appeals Tribunal granted his request and set his appeal for decision in its 2024 Fall Session.<sup>15</sup>

## **Submissions**

### **ABA’s Appeal**

22. ABA submits that his interlocutory appeal is receivable because the UNDT clearly exceeded its jurisdiction or competence when it issued the impugned Order no. 1 without first providing him an opportunity to be heard.

23. ABA submits that the Respondent’s “request” regarding the testimony of VO1 was in effect a motion to exclude him from the proceedings while VO1 testified, but the UNDT granted the request without seeking or hearing any comments or arguments from ABA.

24. ABA argues that the UNDT’s decision on such a crucial matter based only on submissions of the Respondent undermined the fundamental integrity of the judicial process and violated principles of natural justice and due process.

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<sup>12</sup> *Ibid.*, paras. 21-22.

<sup>13</sup> *Ibid.*, para. 23.

<sup>14</sup> *Applicant v. Secretary-General of the United Nations*, Order No. 62 (GVA/2024), para. 20(c).

<sup>15</sup> *ABA v. Secretary-General of the United Nations*, Order No. 565 (2024), para. 12.

25. ABA submits that the interlocutory appeal is receivable because the violation of ABA's rights would be irreparable if not resolved now.

26. ABA brings this appeal at this stage of the proceedings because the refusal to permit him to participate while VO1 is testifying prevents him from providing necessary real-time instructions to his appointed legal counsel which places him at a significant disadvantage. Waiting until the outcome of the UNDT case and then appealing the due process violation cannot correct the harm to him.

27. ABA submits that it is in the interests of judicial economy to allow this preliminary matter to be adjudicated rather than waiting until the entire case is disposed of after hearing witnesses and filing closing arguments before possibly needing to raise an appeal against the improper exclusion of ABA during VO1's testimony.

28. ABA points out that he had personally conducted all of the evidentiary analysis and prepared all of the written submissions from the time he received the 13 June 2022 letter from the Administration containing the allegations of misconduct until 15 April 2024 when he retained counsel. ABA submits that he knows the case intimately and had expected to assist his counsel during the oral proceedings, including notifying his counsel in real time as to when evidence provided by VO1 was false and what follow-up questions to ask.

29. ABA also argues that if he had *not* retained counsel, then as a self-represented applicant, he would have had the right to cross-examine VO1 personally.

30. ABA claims that in his motion for reconsideration he cited relevant cases where the Respondent had made motions to exclude the accused staff member during the victim's testimony, and these motions were rejected. ABA relies on *Zahoor*,<sup>16</sup> *Kazazi*,<sup>17</sup> and *Saint Lot*.<sup>18</sup> In these cases, the UNDT had permitted the applicants to be present during the testimony of the victim but with their cameras turned off and microphones muted.

31. ABA objects to the UNDT's "pejorative claim" that the cases he cited constituted "selective jurisprudence". ABA submits that his references were directly on point.

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<sup>16</sup> *Zahoor v. Secretary-General of the United Nations*, Order No. 221 (NBI/2020), para. 11.

<sup>17</sup> *Kazazi v. Secretary-General of the United Nations*, Order No. 111 (NBI/2022), para. 5.

<sup>18</sup> *Saint-Lot v. Secretary-General of the United Nations*, Order No. 005 (NY/2022), paras. 9 and 15.

32. ABA counters that, by contrast, the authorities relied on by the UNDT in the impugned Orders were not on point. In one case, the applicant did not object to being excluded from the proceedings,<sup>19</sup> but here, ABA clearly does object. In another case,<sup>20</sup> the UNDT relied on medical evidence submitted by the Respondent as a basis to exclude the applicant from the proceedings while the victim testified. There was no such medical evidence presented here. Moreover, ABA points out that in both of these cases, the applicants were permitted the opportunity to comment on the requests to exclude their presence, and he was not given such an opportunity.

33. ABA requests that the Appeals Tribunal grant his request to be present in the proceedings while VO1 testifies so that he can assist his counsel. ABA agrees not to have his camera and microphone switched on and states that he would not talk to VO1.

34. ABA requests that the Appeals Tribunal vacate paragraph 27(c) and part of paragraph 38(c) of impugned Order no. 1 and the entirety of impugned Order no. 2 and remand the case to another UNDT judge to continue consideration of the case on the merits.

### **The Secretary-General's Answer**

35. The Secretary-General submits that the interlocutory appeal of impugned Order nos. 1 and 2 is not receivable. Pursuant to the UNAT's settled jurisprudence, only appeals against final judgments are receivable. Relying on *Olexandr Maruschak*, the Secretary-General notes that a dissatisfied party "must await the delivery of the UNDT's substantive judgment before being able to appeal against the impugned interlocutory order as part of an appeal against the rendered 'judgment'".<sup>21</sup>

36. The Secretary-General points out that the impugned Orders are not final judgments, but rather come within the UNDT's competence to issue appropriate case management orders. The Secretary-General relies on *Richard Loto* for the proposition that "issues of admissibility of evidence, hearing procedure and the like must await an appeal against the UNDT's substantive or final judgment before they can be aired".<sup>22</sup>

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<sup>19</sup> *Applicant v. Secretary-General of the United Nations*, Order No. 136 (GVA/2023).

<sup>20</sup> *Applicant v. Secretary-General of the United Nations*, Order No. 11 (GVA/2022).

<sup>21</sup> *Olexandr Maruschak v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1282, para. 16.

<sup>22</sup> *Richard Loto v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1362, para. 82.

37. The Secretary-General submits that the UNAT has held that it will not lightly interfere with UNDT's management of its cases. The Secretary-General further points out that ABA was ultimately heard by the UNDT when the UNDT considered ABA's arguments in his motion for reconsideration of impugned Order no. 1. The fact that ABA disagreed with the UNDT's rejection of this motion in impugned Order no. 2 does not bring the matter into the narrow exception to the well-established rule against interlocutory appeals.

38. The Secretary-General claims that ABA's argument that he would be caused irreparable harm if his interlocutory appeal is not heard now is baseless. The UNAT routinely reviews UNDT judgments that contain staff members' claims of procedural unfairness, including on whether there has been compliance with the principles and proscriptions of *audi alteram partem*.

39. The Secretary-General submits that there is no judicial efficiency achieved by allowing the interlocutory appeal. The effect of allowing this appeal is the opposite, because it requires an additional ruling from the Appeals Tribunal before the UNDT can render its final judgment, a judgment that could ultimately be in ABA's favour.

40. The Secretary-General submits that even if the UNAT finds the interlocutory appeal receivable, his complaints have no merit. The UNDT cited two instances in which the exact same witness protection measures were applied.

41. The Secretary-General rejects ABA's argument that he may need to assist his counsel during VO1's testimony. The Secretary-General counters that ABA's two counsel are expected to know their client's case. The UNDT is not obligated to accommodate counsel who are inadequately acquainted with their clients' cases.

42. The Secretary-General submits that ABA will have full access to the audio recording and transcripts of VO1's testimony through the case management portal. Thus, the essential elements of ABA's due process rights are satisfied, because he will be fully informed of the charges against him, the identity of his accusers and their testimony, and that he will be able to mount a defence and to call into question the veracity of their statements.

43. For all the foregoing reasons, the Secretary-General requests that the Appeals Tribunal uphold impugned Order nos. 1 and 2, and dismiss the interlocutory appeal.



### Considerations

44. The issues raised in this appeal are as follows: i) Is the interlocutory appeal receivable? ii) If the appeal is receivable, did the UNDT err in denying ABA's request to be virtually present during the testimony of VO1 (even with camera off)?

*Is the interlocutory appeal receivable?*

45. The Statute of the Appeals Tribunal does not clarify whether the Appeals Tribunal may hear an appeal only from a final judgment of the UNDT on the merits, or whether an interlocutory decision made during the course of the UNDT proceedings may also be considered a judgment subject to appeal.<sup>23</sup>

46. However, in *Tadonki (No. 1)*, the Appeals Tribunal has emphasized that most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct.<sup>24</sup> For example, in *Calvani*, the Appeals Tribunal held that an appeal by the Secretary-General from an interlocutory order of the UNDT for the production of a document was not receivable.<sup>25</sup> We have observed that cases before the UNDT could seldom proceed if either party were able to appeal to the Appeals Tribunal if dissatisfied with an interlocutory decision made during the course of the proceedings. Therefore, generally, only appeals against final judgments are receivable.<sup>26</sup> The appealable interlocutory order, as a category of UNDT decision which amounts to a "judgment" and is therefore appealable, must be rare and exceptional.

47. The Appeals Tribunal has held in *Tadonki (No. 1)*, *Onana*, and *Kasmani*, that an interlocutory appeal is receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.<sup>27</sup> In *Ajdini et al.* and similar cases touching on jurisdictional matters such as whether a staff member has filed a timely request for management evaluation prior to initiating formal litigation, or the waiver of time-limits for management evaluation, the appeals of such

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<sup>23</sup> *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 20.

<sup>24</sup> *Tadonki v. Secretary-General of the United Nations (No. 1)*, Judgment No. 2010-UNAT-005, para. 11.

<sup>25</sup> *Calvani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-032, paras. 8-9.

<sup>26</sup> *Bertucci* Judgment, *op. cit.*, para. 23.

<sup>27</sup> *Ibid.*, para. 21, citing *Tadonki (No. 1)* Judgment, *op. cit.*; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008, and *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.

UNDT Judgments and even Orders were held to be receivable.<sup>28</sup> It is because “there is the need to receive the appeal now rather than wait for the issue to be raised in an appeal against the final judgment”.<sup>29</sup>

48. In *Nicole Wynn*,<sup>30</sup> we concluded that the fact that “the Secretary General was not provided with an opportunity to be heard on the motion” did not amount to the Dispute Tribunal “clearly” exceeding its jurisdiction and competence, given the general authority granted to the Dispute Tribunal pursuant to Article 19(1) of the UNDT Rules of Procedure (UNDT Rules) that it “may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties”.<sup>31</sup>

49. In the present case, ABA submits that the UNDT clearly exceeded its jurisdiction or competence when it issued impugned Order no. 1 without providing him an opportunity to be heard on the matter. We have to reiterate that Article 19(1) of the UNDT Rules grants the Dispute Tribunal broad discretion with respect to case management and the UNDT may “issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties”. Obviously, the issuance of impugned Order no. 1 falls within the UNDT’s jurisdiction and thus the Tribunal did not exceed its jurisdiction or competence. Therefore, ABA’s complaint that the UNDT did not give him an opportunity to reply to the Respondent’s initial request for protective measures for Vo1 before the UNDT issued impugned Order no. 1 is not a ground for us to grant the interlocutory appeal.

50. Moreover, the UNDT entertained ABA’s “motion for reconsideration” of impugned Order no. 1, and so ABA was able to make his arguments against the protective measures for Vo1, which the UNDT rejected in the subsequent impugned Order no. 2.

51. Lastly, ABA submits that the interlocutory appeal is receivable because the violation of ABA’s rights would be irreparable if not resolved now, since the refusal to permit him to participate

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<sup>28</sup> *Adjini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108, paras. 25 and 29.

<sup>29</sup> *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 22.

<sup>30</sup> *Nicole Wynn v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1419, paras. 3, 34-36.

<sup>31</sup> *Ibid.* para. 35.

while VO1 is testifying prevents him from providing necessary real-time instructions to his appointed legal counsel which places him at a significant disadvantage.

52. We recall that, in *Olexandr Maruschak*,<sup>32</sup> we have established another type of interlocutory appeal that is receivable, where an error by the UNDT is effectively irremediable by the final UNDT judgment (or on appeal therefrom) and it would be manifestly unreasonable for the UNDT's order or other decision to remain in effect. Contrary to ABA's arguments, this exception is not applicable here either.

53. In the present case, the UNDT's refusal to permit ABA to participate while VO1 is testifying cannot be considered as effectively irremediable by the final UNDT judgment and appeal therefrom. As the Secretary-General's response correctly pointed out, the UNAT routinely reviews UNDT judgments that contain claims of procedural unfairness, including on whether there has been compliance with the principles and proscriptions of *audi alteram partem*.

54. Therefore, this interlocutory appeal is not receivable.

55. As this appeal is not receivable, we need not address the second issue.

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<sup>32</sup> *Maruschak* Judgment, *op. cit.*, paras. 17, 21-22.

**Judgment**

56. ABA's interlocutory appeal is not receivable.

Original and Authoritative Version: English

Decision dated this 25<sup>th</sup> day of October 2024 in New York, United States.

*(Signed)*

Judge Gao, Presiding

*(Signed)*

Judge Ziadé

*(Signed)*

Judge Forbang

Judgment published and entered into the Register on this 5<sup>th</sup> day of December 2024 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar