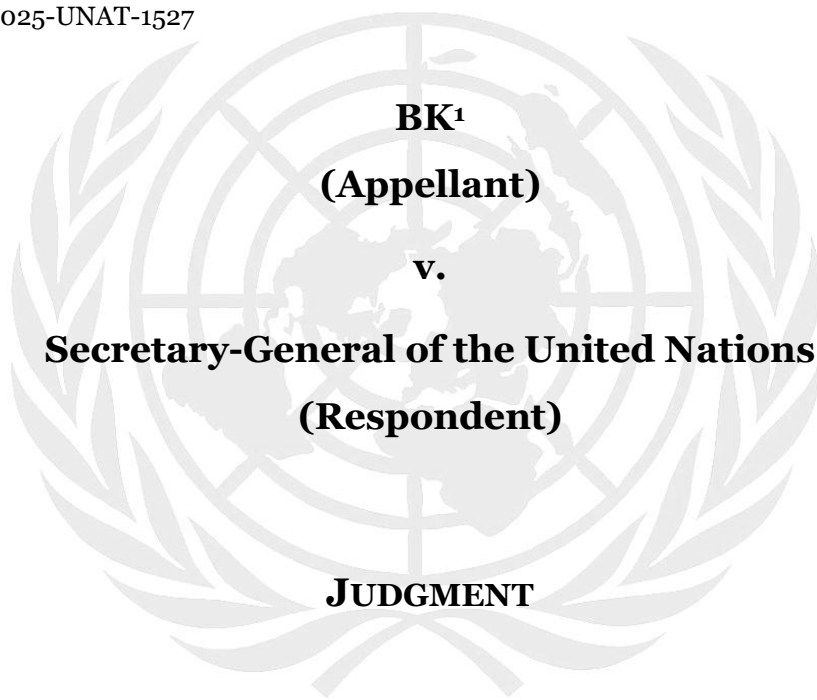




UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2025-UNAT-1527



BK¹
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Nassib G. Ziadé, Presiding Judge Leslie F. Forbang Judge Graeme Colgan
Case No.:	2024-1922
Date of Decision:	21 March 2025
Date of Publication:	28 April 2025
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Amanda Stoltz

¹ Following the anonymization of the party's name by the United Nations Dispute Tribunal (UNDT).

JUDGE NASSIB G. ZIADÉ, PRESIDING.

1. BK,² a staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR), contested the decision to reduce, with immediate effect, his Standard Assignment Length (SAL) on medical grounds (contested decision).
2. By Judgment No. UNDT/2024/015 (impugned Judgment),³ the United Nations Dispute Tribunal (UNDT) dismissed the application on the merits.
3. BK lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure⁴

5. BK joined UNHCR in September 2009 as Finance Associate (G-6) in Budapest.⁵ He was promoted to Senior Project Audit Associate (G-7) in 2015. In 2016, he was converted to the Professional category and reassigned as Regional Project Control Officer (P-3) in Sarajevo. After an assignment to Port of Spain in Trinidad and Tobago, he was reassigned to Addis Ababa (duty station) on 21 December 2020 as Project Control Officer.
6. In November 2021, the security situation in Ethiopia deteriorated such that the Federal Government declared a nationwide state of emergency.⁶ The United Nations Crisis Management Team decided to allow non-essential staff and their dependents to move away from the duty station voluntarily, subject to the Head of Agency deciding on each staff member's role. The United Nations Department of Safety and Security (UNDSS) sent an e-mail to this effect to UNHCR staff on 8 November 2021.

² The United Nations Dispute Tribunal (UNDT) granted BK's motion for anonymity by Order No. 100 (NBI/2023).

³ *BK v. Secretary-General of the United Nations*, Judgment dated 22 March 2024.

⁴ Summarized from the impugned Judgment as relevant to the appeal.

⁵ Impugned Judgment, para. 5.

⁶ *Ibid.*, para. 7.

7. On 10 November 2021, BK notified UNHCR that he was confirming his voluntary move as a non-essential staff member with his family, effective that night.⁷ A few hours later, the Senior Human Resources (HR) Officer responded, informing BK that he could not leave the country before a telecommuting request was duly approved by UNHCR, or unless approved annual leave covered the duration of his absence away from the duty station. A series of e-mail exchanges ensued, whereby BK sought approval to telecommute, but the Head of Agency did not have the opportunity to consider whether this was operationally possible for BK's job functions. BK proceeded to take uncertified sick leave (USL) from 10 to 26 November 2021.

8. On 10 November 2021, BK left the duty station with his family and never returned.⁸

9. On 10 January 2022, the UNHCR Ethiopia staff were notified that the restrictions had been lifted with respect to family members, and all staff were encouraged to contact HR for further guidance on the return to the duty station.⁹

10. BK had no approved telecommuting request from 16 January to 27 February 2022.¹⁰ He took annual leave on 20 January 2022 and USL on 28 February 2022.

11. From 1 March 2022, BK was on certified sick leave (CSL).¹¹ The Medical Section indicated that his CSL was expected to continue to at least February 2023, at which time he was to be re-evaluated. BK exhausted his maximum entitlement of 195 days on full-pay CSL on 16 September 2022. He then remained on half-pay CSL until 24 March 2023.

12. Following several e-mail and Microsoft Teams exchanges with Senior Medical Officers from the Division of Human Resources (DHR) in Nairobi and Geneva, and in view of BK's statements that his health condition was "improving (...) at [a] slow rate", the Medical Section requested BK to undergo an Independent Medical Examination (IME) in order to obtain "comprehensive information" about his condition (IME request).¹² BK was sent the IME consent form on 31 May 2022.¹³ On 16 August 2022, he responded citing issues with the consent form but also including a signed copy with comments.

⁷ *Ibid.*, paras. 8-10.

⁸ *Ibid.*, paras. 8 and 13.

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*, para. 12.

¹¹ *Ibid.*, para. 13.

¹² *Ibid.*, para. 14; 24 May 2022 e-mail from the Medical Section.

¹³ Impugned Judgment, para. 14.

13. The IME was conducted on 17 August 2022 and a report was issued on 24 September 2022 (IME Report).¹⁴ BK received a copy of the IME Report on 5 October 2022, and the accompanying e-mail included the following reasons and advice from the Medical Section:¹⁵

Based on the evaluation you still require treatment and extended sick leave to ensure you are on the correct path to recovery along with the additional medical armamentarium provided to you (...).

Actions emanating from the report on the administrative aspect have been made to ensure your health and well[-]being are upheld and as a result the following apply.

- a. A medical Constraint C, D and E for 1 year subject to evaluation upon expiry period.
- b. A SAL reduction with immediate effect.

Your sick leave has been extended accordingly to the end of the year 2022 and further review (...) planned in Mid-February 2023 as part of follow-up assessment after which the progress report will help assess your fitness to work (return to work, Extended Sick leave with SLWOP [Special Leave Without Pay] or Disability)[.]

14. On 11 October 2022, BK received the contested decision—approval by the Director of the DHR (D/DHR) dated 5 October 2022, of a memorandum of the Medical Section dated 3 October 2022 (Memorandum).¹⁶ The Memorandum stated:¹⁷

Based on the information at our disposal, we recommend a SAL reduction with immediate effect.

15. On 3 December 2022, BK filed a request for management evaluation. On 16 January 2023, the Deputy High Commissioner replied to BK's request for management evaluation, stating that it was not receivable and that he could proceed directly to the UNDT.¹⁸

16. On 2 January 2023, BK filed his application with the UNDT.

The impugned Judgment

17. By Judgment No. UNDT/2024/015 dated 22 March 2024, the UNDT dismissed the application.

¹⁴ *Ibid.*, paras. 15 and 39.

¹⁵ 5 October 2022 e-mail from the Medical Section.

¹⁶ Impugned Judgment, para. 26.

¹⁷ The Memorandum, para. 2. In addition, it advised that the Medical Section was “putting in place a medical constraint until October 2023 determining that [BK could not] serve in C/D/E duty stations”.

¹⁸ Impugned Judgment, paras. 17-18.

18. The UNDT noted that BK had not refuted the Secretary-General's submission that his request for telecommuting from 29 November 2021 to 15 January 2022, signed on 2 December 2021, had never been submitted.¹⁹

19. The UNDT held that there had been clear evidence of health concerns emerging from BK's records kept by UNHCR and he had not challenged these records.²⁰ BK himself referred to his medical condition in his correspondence. He had reported ill for some months before the IME request. He agreed to the IME by way of consent. His best interests and also those of UNHCR were considered. The IME request was part of a larger concern for the protection of UNHCR and the staff, including BK.²¹ The approach of seeking his consent to the IME was correct and the IME request was fair and reasonable.

20. The UNDT found that UNHCR had not subscribed to Administrative Instruction ST/AI/2019/1 (Resolution of disputes relating to medical determinations) and it was therefore not applicable to BK's situation.²² The objection to Dr. H, the doctor who performed the IME, would have to be based on evidence that can be specifically proven. The fact that Dr. H had worked for an organization that was partly funded by UNHCR should not be problematic. In the case of an IME, the situation is not adversarial in nature. It is questionable whether consideration of some remote connection would be warranted. In any event, the Tribunal would not be qualified to evaluate the medical soundness of the IME Report. To establish bias, BK would have to ask for the appropriate medical review.

21. The UNDT found that, given that BK did not reject the factual basis for conducting the IME and the statutory basis for the IME existed, there should have been no reason to pressure or persuade BK to consent to it.²³ No management evaluation was required in this case as an evaluation would require a medical review. There is no evidence that the Administration did not follow the medical determination.

¹⁹ *Ibid.*, para. 35.

²⁰ *Ibid.*, paras. 43-51.

²¹ The UNDT further noted that it was of some significance that the Organization pursued the IME as part of a collaborative process (*ibid.*, para. 65).

²² Impugned Judgment, paras. 54-62. The UNDT noted that even if ST/AI/2019/1 were in principle applicable, none of the circumstances giving rise to a conflict of interest pursuant to it existed in this instance (*ibid.*, para. 63).

²³ *Ibid.*, paras. 67-68.

22. Turning to BK's allegation that UNHCR was misusing the IME process to dismiss staff, the UNDT held that he had not produced evidence of such facts and that far from UNHCR being unjust, BK had not been fair to UNHCR when he apparently had been abusing the opportunities for telecommuting and taking CSL and USL for his own purposes.²⁴

23. The UNDT found that it was not possible for it to order an investigation into the IME and UNHCR or "remove" the IME.²⁵ The contested decision was rational, procedurally correct and appropriate. Also, there was no basis for an award of damages for negligence or otherwise. There was no evidence of malpractice in the conduct of the IME. In any event, even if there was a basis for finding that BK's rights were violated, no evidence of damage had been provided.

Procedure before the Appeals Tribunal

24. On 22 May 2024, BK filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Secretary-General filed an answer on 5 August 2024.

Submissions

BK's Appeal

25. BK requests the Appeals Tribunal to declare that the contested decision was not legal, rational, procedurally correct and appropriate, and dismiss the accusation that he had not come to equity with "clean hands".

26. First, BK argues that the UNDT erred on a question of law when it failed to determine that the contested decision was the result of an unlawful IME process. The IME process was invalid due to a conflict of interest and a series of instances of retaliation or intimidation. The evidence for Dr. H's conflict of interest should have been sufficient. The contested decision should have been based solely on the medical assessment of BK's condition, not dependent on his performance.

27. BK submits that not sharing the IME Report with the staff member was unacceptable. On 4 August 2022, he expressed his concerns that the IME consent form contradicted the relevant rules.

²⁴ *Ibid.*, paras. 69-72.

²⁵ *Ibid.*, paras. 74-78.

28. BK claims that during the examinations, Dr. H complained of being under extreme pressure from UNHCR and agreed to a prognosis of BK becoming able to return to work gradually in about two months, yet indicated a period of three to four months to UNHCR in order to meet its expectations. Dr. H was working for a non-profit organization (NGO), of which UNHCR was the main donor. The fact that Dr. H did not recuse herself made the IME process unlawful according to the United Nations definition of a conflict of interest.

29. Second, BK contends that the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision, when it failed to consider his 15-year record of “clean hands” at UNHCR and accepted the Secretary-General’s accusation. BK was non-essential staff according to the Head of Agency because his role was not on the UNHCR Business Continuity Plan endorsed by the Head of Agency. Also, he informed the Head of Agency on 10 November 2021, as required. He immediately left the duty station because there was a high risk of flights being cancelled.

30. Citing an UNHCR manual on travel for safety and security reasons (Manual), BK submits that UNHCR failed to make a decision on reassignment or travel to the home country within 30 days following the evacuation, contrary to UNHCR rules. UNHCR refused to assist or even respond to his inquiries and he had no other option but to proceed with the school enrollment of his children to avoid missing the start of the school term in January in Hungary. By lifting the restrictions with respect to family members on 10 January 2022, UNHCR again breached paragraph 7.3.28 of the Manual and failed to comply with its duty of care.

31. BK contends that the Secretary-General misled the UNDT by stating that BK’s request for telecommuting, signed on 2 December 2021, had never been submitted. Approval to telecommuting was not a prerequisite for the voluntary nor the mandatory evacuation, as during evacuation there is no alternative to working remotely. Nevertheless, on 16 November 2021, he submitted a request for telecommuting from 22 November 2021 until 21 January 2022.

32. BK reiterates that, contrary to the duty of care, there are also other examples of the Medical Section abusing the IME and SAL reduction process to terminate staff, instead of supporting their return to work. Unfortunately, neither of the colleagues who shared similar experiences with BK felt safe to disclose this information due to fear of retaliation. Rejection of this appeal would be a further discouragement for the UNHCR staff to speak up.

The Secretary-General's Answer

33. The Secretary-General requests the Appeals Tribunal to uphold the impugned Judgment and dismiss the appeal.

34. The Secretary-General argues that the UNDT correctly found the contested decision lawful. BK has failed to demonstrate any error on the part of the UNDT.

35. The Secretary-General submits that BK has failed to demonstrate that the UNDT erred on a question of law. He appears to repeat the arguments presented before—and rejected by—the UNDT. In any event, his assertion as to what Dr. H indicated to him has been impermissibly introduced for the first time on appeal. Moreover, his new argument is unsubstantiated and lacks any support. The UNDT also correctly determined that BK had consented to the IME. He takes issue with language that was not even included in the consent form that he ultimately signed. Maintaining the confidentiality of the IME, a copy of the IME Report was, in fact, shared with him. Notwithstanding the impermissibility of introducing new arguments on appeal, he has not elaborated on the relevance of his reference to his performance.

36. The Secretary-General contends that BK has failed to demonstrate that the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision, by finding that BK did not have clean hands. Contrary to BK's description of the communication dated 8 November 2021 of the UNDSS, it made clear that requests by non-essential staff to move voluntarily would have been subject to further review and decision. No mandatory evacuation was ordered. Moreover, BK did not raise before the UNDT any issues regarding the evacuation process or the accuracy of the Secretary-General's observations of 2 February 2023 on the telecommuting request of 2 December 2021.

Considerations

37. The primary issue before us is whether the UNDT erred in its determination that UNHCR's decision to reduce BK's SAL was legal, rational, procedurally correct and proportionate.²⁶

38. In this regard, we observe that the Appeals Tribunal does not sit as a trier of fact but instead sits in review of the proceedings of the first instance Tribunal. Accordingly, as set forth in the

²⁶ *Likukela v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-737, para. 28; *Karseboom v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-601, para. 43.

UNAT Statute, our function is to determine whether the UNDT made errors of law or fact or in procedure, or exceeded (or failed to exercise) its jurisdiction.²⁷ Reflecting the United Nations two-tier formal system of internal administration of justice, a party seeking review of an UNDT decision must do more than simply reargue their case; rather, they must demonstrate error in the impugned judgment.²⁸

39. Under that framework of review, we address BK's argument that the UNDT erred because UNHCR's decision was based on an IME Report which was tainted by a conflict of interest.

40. As a preliminary matter, we address the UNDT's determination that UNHCR was within its rights to have requested an IME in the first place. The Staff Regulations impose upon the Secretary-General the responsibility to ensure "that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them".²⁹ The Staff Rules make clear that a staff member may be required to medically demonstrate, including through an independent medical examination, that they are medically able to perform their functions.³⁰

41. The UNDT found, based on the evidence before it, that BK's records presented "clear evidence of health concerns" warranting an IME.³¹ BK consented to the IME and did not challenge those records before the UNDT nor on appeal. In short, he does not even suggest error in the decision to seek an IME based on the circumstances. Rather, he contends that the specific physician selected had an impermissible conflict of interest.

42. BK's argument regarding a conflict of interest rests primarily on the ground that Dr. H was employed by an NGO which receives some of its funding from UNHCR. This financial relationship, he argues, rendered it improper for Dr. H to conduct the IME, and likewise improper for UNHCR to rely on Dr. H's IME Report.

43. The legal basis for this contention is ST/AI/2019/1, which in Section 1.3 defines a "conflict of interest" in the IME context as "any instance in which [a] medical practitioner's professional or personal relationships (...) may impair or reasonably give the appearance of impairing the practitioner's impartiality and independence". That Section specifies three relationships that

²⁷ UNAT Statute, Article 2(1); *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-711, para. 20.

²⁸ *Krioutchkov* Judgment, *op. cit.*, para. 20.

²⁹ Staff Regulation 1.2(c), ST/SGB/2018/1/Rev.2.

³⁰ Staff Rule 4.19(a)-(b), and 6.2(g), ST/SGB/2018/1/Rev.2.

³¹ Impugned Judgment, para. 43.

would create an impermissible conflict of interest and therefore bar a physician from acting as an independent medical practitioner: “[f]ormer employees of a United Nations organization, regular treating physicians and members of the same medical office as regular treating physicians of the staff member”.³²

44. However, this provision is not applicable to UNHCR, which has not subscribed to ST/AI/2019/1.³³ UNHCR’s decision to exclude itself and its staff members from these important protections is surprising. We observe, however, that even if it were applicable to the UNHCR staff members or taken as a model of just practice, ST/AI/2019/1 would not have rendered the IME improper. Dr. H was not a former UNHCR employee, nor was she BK’s regular treating physician or a member of the same medical office as BK’s regular treating physician. Dr. H’s tenuous relationship to UNHCR, based on its status as a donor to the NGO for which Dr. H worked, would not fall within the ambit of ST/AI/2019/1, nor would it impair or give the appearance of impairing Dr. H’s impartiality and independence.

45. Leaving aside the applicability of ST/AI/2019/1, we also find no basis on which to overturn the UNDT’s determination that there was no evidence of bias or conflict of interest in either the IME request, the selection of Dr. H as the physician to perform the IME, or the conduct of the IME in this instance.³⁴ BK concededly had a medical condition requiring attention which impacted his ability to return to work, and he consented to the IME. UNHCR and BK were not in an adversarial relationship, such as a dispute over a medical claim against the Organization. There is simply nothing in the overall context or evidentiary record which would support a claim that the IME was unreliable due to a conflict of interest.

46. On appeal, BK also asserts that Dr. H made certain statements during the medical examination, to the effect that Dr. H’s prognosis was influenced by a desire to meet UNHCR’s “expectations” of when BK would be able to return to work. Had BK presented testimony and successfully developed this argument before the UNDT, there may have been grounds to find that an improper conflict of interest rendered the IME Report objectionable. This argument was not presented to the UNDT, however, and thus will not be considered for the first time on appeal.³⁵

³² ST/AI/2019/1, Section 1.3.

³³ Impugned Judgment, para. 55.

³⁴ *Ibid.*, paras. 54, 57-62.

³⁵ *Koffi Gilles Wilfried Amani v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1301, para. 61.

47. Having determined that the decision to conduct the IME was appropriate, and that there are no valid challenges to either the selection of Dr. H to perform the IME, or to the results of the IME, we next turn to the question of whether the UNDT correctly upheld UNHCR's action based on its review of the IME Report, namely the decision to reduce BK's SAL.

48. SAL is the length of time a staff member serves in a position at a given duty station. UNHCR Administrative Instructions establish a standard length of service based on the operational environment of the duty station. For example, a high-risk duty station eligible for danger pay has the shortest SAL, whereas a Headquarters assignment has the longest SAL.³⁶

49. As the name connotes, an SAL is a "standard", which may be adjusted based on individual circumstances. UNHCR may adjust a staff member's SAL based on his or her medical condition or a "wellbeing risk".³⁷

50. The IME Report determined that BK required an extended sick leave and follow-up assessment in order to protect his wellbeing, which led the D/DHR, in turn, to approve the SAL reduction. BK points to no evidence in the record, nor does he argue, that this action based on that IME Report was itself irrational, arbitrary, or disproportionate.

51. In the absence of any error regarding the decision to conduct the IME, the selection of the physician to conduct the IME, or the decision of UNHCR to reduce BK's SAL based on the IME Report, we find no basis to reverse the impugned Judgment as to any of these core issues.

52. In the impugned Judgment, the UNDT also concluded that BK was not entitled to any relief because he had acted unfairly to the Organization.³⁸ On appeal, BK contends that this finding was erroneous and defends his conduct during the period after he left his duty station.

53. The doctrine of "unclean hands" serves to bar a claimant from relief, which may otherwise be available, when they have contributed to the circumstances they challenge—a claimant "will not [be] allow[ed] to profit from his own wrong".³⁹ That doctrine is inapplicable to the present case. The contested decision—reduction of BK's SAL—was not a punitive measure based on alleged misconduct by BK, but was an administrative decision based on the IME which addressed

³⁶ UNHCR/AI/2017/7/Rev.2 (Recruitment and Assignments), para. 46.

³⁷ *Ibid.*, para. 66. See also UNHCR AI/2022/03 (Medical Clearances and Fitness to Work), paras. 7 and 10.

³⁸ Impugned Judgment, para. 72.

³⁹ *Kauf v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-934, para. 33.

BK's medical needs and concern for his wellbeing. There is no cause to blame BK for his medical condition and, while his conduct after leaving his duty station raised legitimate questions for management to address, the doctrine of "unclean hands" does not apply here, particularly where BK is not otherwise entitled to the relief he seeks.

Judgment

54. BK's appeal is dismissed, and Judgment No. UNDT/2024/015 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 21st day of March 2025 in Nairobi, Kenya.

(Signed)

Judge Ziadé, Presiding

(Signed)

Judge Forbang

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 28th day of April 2025 in New York, United States.

(Signed)

Juliet E. Johnson,
Registrar