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

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Case No. 2021-1560

**Elmira Ela Banaj**

**(Appellant)**

**v.**

**Secretary-General of the United Nations**

**(Respondent)**

**ORDER No. 424 (2021)**

1. On 26 March 2021, the United Nations Dispute Tribunal (UNDT) in Geneva issued Judgment No. UNDT/2021/030 in the case of *Banaj v. Secretary-General of the United Nations*, dismissing Ms. Banaj's application challenging a decision of the United Nations Office on Drugs and Crime (UNODC) taken on 29 October 2018 to temporarily reassign her functions as Head of UNODC in Albania. She maintains that the decision was in effect an illegal disciplinary measure imposing the sanction of demotion on her.
2. On 25 May 2021, Ms. Banaj (Appellant) represented by Counsel, filed an appeal against the UNDT Judgment with the United Nations Appeals Tribunal (Appeals Tribunal). On 27 July 2021, the Secretary-General (Respondent) filed his answer.
3. On 17 August 2021, the Appellant submitted a motion for submission additional documentary evidence, namely, new Terms of Reference (ToRs) she had received from the United Nations Development Programme (UNDP) on 19 July 2021; and the e-mail communicating these ToRs to the Appellant.
4. The Appellant is a staff member of the UNDP, although her service is with UNODC. She contends that the new ToRs are relevant to her appeal because they confirm that only the UNDP had the requisite competence to reassign or alter her functions and consequently the reassignment decision of 29 October 2018 by the UNODC was unlawful as it lacked the requisite authority. The revised ToRs reflect a change in the Appellant's

functions in line with the UNODC decision of 29 October 2018, and thus would appear to have been specifically issued to implement the sanction of demotion. Hence, the Appellant contends, the new ToRs are relevant evidence for the purpose of determining the legality of the contested decision. She argues that the legality of the contested decision must be reviewed in accordance with the UNDP's Legal Framework for Addressing Non-Compliance with UN Standards of Conduct. She submits accordingly that the evidence she requests to be admitted is relevant to the facts and legal premise of her case.

5. On 30 August 2021, the Secretary-General filed his comments requesting the Appeals Tribunal to dismiss the motion on the ground that the additional documents are not relevant to the case. He maintains that the Appellant has failed to show that admission of these documents is warranted by exceptional circumstances as required by the Statute. She has failed to demonstrate how the documents would likely establish facts in the pending matter or be in the interest of justice. Her request, therefore, in his view, does not meet the requirements of Article 2(5) of UNAT's Statute.

6. Article 2(5) of UNAT's Statute provides that in exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. The evidence, however, shall not include evidence that was known to either party and should have been present at the level of the UNDT.

7. The Appellant received the revised ToRs on 19 July 2021 subsequent to the date she filed her appeal with the Appeals Tribunal. Thus, it is evidence that was not known to her and could not have been presented at the UNDT, as contemplated in Article 2(5) of the UNAT Statute, and self-evidently could not have been filed with her appeal.

8. The essential question, therefore, is whether the Appeals Tribunal exceptionally should receive the additional three-page document, the amended ToRs, and the e-mail sending them to the Appellant, in the interests of justice and the efficient and expeditious resolution of the proceedings.

9. The Appellant’s argument that the ToRs indicate that only the UNDP had authority to alter her ToRs and that the UNODC acted illegally in doing so is not fleshed out in detail in her motion but appears to rest on the proposition that the *ex post facto* amendment to give effect to the UNODC decision is proof of that fact. There may or may not be merit in that argument, but it is certainly one that requires ventilation and determination on appeal. If the UNODC had no authority to take the decision of 29 October 2018, then the Appellant may well prevail on appeal. The issuing of new ToRs by the UNDP, rather than by the UNODC, reasonably brings into question the issue of authority and the Appellant should be afforded a full opportunity to explore it in argument on a proper factual basis. As the ToRs were issued after the judgment of the UNDT and the filing of the appeal, exceptional circumstances exist for the admission of the documentary evidence in the interests of justice.

10. The Secretary-General has requested an opportunity to supplement his answer in the event of this Tribunal granting the Appellant’s motion. That is only fair. In fact, both parties should be afforded an opportunity to file additional submissions dealing exclusively with the new evidence, its nature, content, and its implications for the legality of the UNODC decision of 29 October 2018. This order provides an appropriate opportunity for both parties to deal with the matter.

**IT IS HEREBY ORDERED** that Ms. Banaj’s motion for submission of additional documentary evidence is **GRANTED**. The Appellant is directed to file any additional submissions she may wish to make regarding the new evidence within 5 days of this order. The Respondent may file comments to the Appellant’s additional submissions within 5 days of receiving them.

Original and Authoritative Version: English

Dated this 20<sup>th</sup> day of September 2021  
in Cape Town, South Africa.

(Signed)  
Judge John Raymond Murphy,  
Presiding

Entered in the Register on this 20<sup>th</sup> day  
of September 2021 in New York, United States.

(Signed)  
Weicheng Lin, Registrar