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

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Case No. 2023-1854

**Surendra Bista**

**(Appellant)**

**v.**

**Secretary-General of the United Nations**

**(Respondent)**

**Order No. 552 (2024)**

1. On 14 August 2023, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment No. UNDT/2023/085 (impugned Judgment) in the case of *Bista v. Secretary-General of the United Nations*, in which it dismissed the application contesting a disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity for serious misconduct, consisting of Mr. Surendra Bista's (Appellant) failure to disclose in his 2015 and 2018 United Nations job applications that his half-brother, Mr. SRB, was working for the United Nations.

2. On 12 September 2023, Mr. Bista filed an appeal of the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal), to which the Secretary-General filed an answer on 24 November 2023.

3. On 26 January 2024, Mr. Bista filed a motion for production of evidence, entitled "Motion for the production of documents and witness testimony by the Respondent" (Motion). He requests the Appeals Tribunal to order that:

(a) the Secretary-General produce the complete employment history of Mr. SRB, including all the engagements with the United Nations, whether as a United Nations volunteer (UNV) or a staff member (employment history);

(b) Mr. SRB be required to provide a statement from him to the Appeals Tribunal as to the extent of his own knowledge and discussions with the Appellant; and

(c) Mr. SRB be required to be available to the Appeals Tribunal for examination by the Appellant's Counsel on his knowledge of the following:

- (i) the Appellant's the state of mind and knowledge, specifically whether the Appellant had or should have had the required knowledge of Mr. SRB's status with the United Nations Secretariat; and
- (ii) filial relationships in Nepal.

4. Mr. Bista submits that he was recently informed that Mr. SRB was engaged as a UNV by the United Nations Mission in Nepal (UNMIN), originally mandated under United Nations Security Council resolution 1740 from 1997 until it ceased operations on 15 January 2011. Mr. Bista states that while he previously understood that Mr. SRB joined the United Nations Secretariat as a staff member in September 2011, it now appears that Mr. SRB was engaged as a UNV with UNMIN well before that date and possibly as far back as 2010. Mr. Bista argues that Mr. SRB's statement is required to elucidate the extent of their conversations and knowledge of each other's employment with the United Nations Secretariat.

5. On 8 February 2024, the Secretary-General filed a response to the Motion. The Secretary-General requests the Appeals Tribunal to dismiss the Motion in its entirety.

6. The Secretary-General contends that the UNAT's role is not to be the instance of first impression for evidence that could have been produced before the UNDT.<sup>1</sup> The Secretary-General argues that the additional evidence is not new, and its existence was not unknown to Mr. Bista when the case was adjudicated before the UNDT. The Secretary-General submits that, because he had the opportunity to request all of the additional evidence at the trial stage before the UNDT and did not, the Motion fails to meet the legal threshold for the admission of additional evidence.

7. The Secretary-General asserts that, furthermore, Mr. Bista failed to address, let alone show, that the admission of the additional evidence on appeal is warranted by exceptional circumstances, would likely establish facts in the instant case, and be in the interest of justice and the efficient and expeditious resolution of the proceedings.<sup>2</sup> The Secretary-General

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<sup>1</sup> The Secretary-General cites *Symeonides v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-977, para. 26.

<sup>2</sup> The Secretary-General cites UNAT Order No. 151 (2013), paras. 5-6, in the case of *Branche v. Secretary-General of the United Nations*; UNAT Order No. 320 (2018), para. 8, in the case of *Harris v. Secretary-General of the United Nations*; and *Mbok v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-824, para. 37.

submits that the Appellant has not shown the relevance of the additional evidence: namely, it is not relevant whether Mr. SRB had been employed by the United Nations prior to September 2011, since it is undisputed that Mr. SRB was a United Nations staff member when the Appellant applied for United Nations jobs in 2015 and 2018, and it is well-settled in UNAT jurisprudence that the Administration did not have the burden to establish the Appellant's actual knowledge of Mr. SRB's employment with the United Nations.

8. As to the legal framework governing the receipt of additional evidence, Article 2(5) of the UNAT Statute provides:

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. Where this is not the case, or where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written evidence, it shall remand the case to the Dispute Tribunal. The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

9. Further, Article 10(1) of the UNAT Rules of Procedure specifies:

(...) On its own volition, the Tribunal may order the production of evidence if it is in the interest of justice and the efficient and expeditious resolution of the case, provided that the Appeals Tribunal shall not receive additional written evidence if it was known to the party seeking to submit the evidence and should have been presented to the Dispute Tribunal.

10. Therefore, the Appeals Tribunal may admit additional documentary evidence, in terms of Article 2(5) of the UNAT Statute and Article 10(1) of the UNAT Rules of Procedure where an appellant shows: i) exceptional circumstances; and ii) that it will be in the interest of justice and the efficient and expeditious resolution of the proceedings to receive the additional evidence; and, iii) that the evidence was not known to either party and should not have been presented at the Dispute Tribunal level.<sup>3</sup>

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<sup>3</sup> UNAT Order 442 (2022), para. 7, in the case of *Hazem El-Mussader v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*.

11. I find that in the present case, Mr. Bista’s motion for the production of evidence does not meet the criteria set out in the UNAT Statute and Rules of Procedure.

12. Regarding Mr. Bista’s request for the production of Mr. SRB’s employment history with the United Nations, he has not demonstrated exceptional circumstances warranting the admission of the additional evidence on appeal. Furthermore, it does not appear that determining that Mr. SRB had been engaged by the Organization before 2012 could assist in establishing the extent of conversations between them and Mr. Bista’s knowledge of Mr. SRB’s employment with the United Nations Secretariat.<sup>4</sup> There is nothing in Mr. Bista’s Motion to substantiate the possibility of such inference. Therefore, Mr. Bista has not demonstrated that any relevant fact is likely to be established with that evidence and that it would be in the interest of justice and the efficient and expeditious resolution of the proceedings to receive the additional evidence.

13. Turning to the next item, I note that the type of evidence in the form of a written statement from Mr. SRB sought to be produced, does not enable the Appeals Tribunal to grant the motion in the respective part. It appears that Mr. Bista does not refer to any existing document but seeks an Order compelling Mr. SRB to provide written testimony. While the Appeals Tribunal may, under the criteria set out in the Statute and Rules of Procedure, receive from a party an existing document consisting of statements of an established or potential witness and created for the purpose of presenting the additional written testimony to the Appeals Tribunal, it has previously held that it will not direct the creation of a document:<sup>5</sup>

(...) [W]hile an existing relevant document may be required to be produced and available in proceedings, this does not extend to an order for the creation of an otherwise non-existent document for the purposes of the proceeding. The existence of a particular document (and if so its contents), or its non-existence may be a relevant consideration in proceedings, but otherwise what a party wishes to know and to disclose to a tribunal must be the subject of questioning of a witness or witnesses at a hearing and submission to the tribunal. Put succinctly, the UNAT will not direct the creation of a document that did not exist at a material time in

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<sup>4</sup> The Secretary-General maintains that Mr. SRB “has been working for the United Nations since 2012” (answer brief, para. 4). Mr. Bista believes that his lack of knowledge, at the material time, of Mr. SRB’s employment with the United Nations Secretariat is relevant to the appeal.

<sup>5</sup> UNAT Order No. 509 (2023), para. 4, in the case of *Louis Savadogo v. Registrar of the International Tribunal for the Law of the Sea*.

the exercise of its jurisdiction to ensure that relevant and admissible evidential material is available.

14. In a similar vein, Mr. Bista's request for Mr. SRB's oral testimony before the Appeals Tribunal cannot be granted. As stated above, Article 2(5) of the UNAT Statute and Article 10(2) of the UNAT Rules of Procedure provide that, where a decision cannot be taken without oral testimony or other forms of non-written evidence, the Appeals Tribunal shall remand the case to the Dispute Tribunal for fact-finding. This Order will not prevent the Appeals Tribunal from doing so in its Judgment, should it hold that oral testimony is necessary. On oral hearing before the Appeals Tribunal, if any, is limited to arguments by the parties.<sup>6</sup> A request for Mr. SRB's oral testimony should have been presented at the UNDT level.

**IT IS HEREBY ORDERED** that Mr. Bista's 26 January 2024 Motion for the production of evidence is **DENIED**.

Original and Authoritative Version: English

Decision dated this 23<sup>rd</sup> day of February 2024  
in Beijing, China.

*(Signed)*  
Judge Gao Xiaoli,  
President

Order published and entered in the Register on this  
23<sup>rd</sup> day of January 2024 in New York, United States.

*(Signed)*  
Juliet E. Johnson,  
Registrar

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<sup>6</sup> See UNAT Order No. 66 (2011) in the case of *Leboeuf et al. v. Secretary-General of the United Nations*.