



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

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Judgment No. 2022-UNAT-1282

**Olexandr Maruschak  
(Respondent/Applicant)**

**v.**

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

**Judgment**

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Before:	Judge Graeme Colgan, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2021-1613
Date of Decision:	28 October 2022
Date of Publication:	7 December 2022
Registrar:	Juliet Johnson

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Counsel for Mr. Maruschak:	Self-represented
Counsel for Secretary-General:	Jay Pozenel Kathryn Alford Susanne Malmström

**JUDGE GRAEME COLGAN, PRESIDING.**

1. The Secretary-General of the United Nations appeals before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) against the “Order on Case Management and Miscellaneous Motions” of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued, in proceedings before it, on 26 August 2021 under Order No. 174 (NBI/2021). For the reasons set out below we allow the appeal in part and reverse, in part, the UNDT’s Order, and dismiss the balance of the appeal.

**Facts and Procedure**

2. In 2019, Olexandr Maruschak filed with the UNDT a challenge to his separation from service for misconduct. After the filing of the Secretary-General’s reply, Mr. Maruschak filed an amended application accompanied by a number of documents purporting to evidence his claimed losses. The Appellant became suspicious about the veracity of some of these documents and investigated their origins. He concluded that they were forgeries and otherwise contained misleading and deceitful information about Mr. Maruschak. The Respondent then sought to withdraw the documents from the Dispute Tribunal’s file.

3. Among a number of motions filed by the parties and addressed by the UNDT was one by the Secretary-General seeking to have Mr. Maruschak’s proceedings dismissed, effectively by summary judgment in reliance on what he said were these forgeries and deceitful conduct by Mr. Maruschak. The Respondent tendered an innocent explanation for what he said was the mistaken filing by him of these documents which was behind his request to withdraw them. In addition to seeking the summary dismissal of Mr. Maruschak’s proceedings, the Secretary-General sought costs against him of USD 15,758.67.

4. In its Order on Case Management and Miscellaneous Motions against which this is an appeal, the UNDT dismissed both these motions of the Secretary-General. Its grounds for doing so were that Mr. Maruschak had, at his own instigation, withdrawn the impugned documents before the motion to dismiss his proceedings was filed and in circumstances in which the Secretary-General could not assert prejudice. The UNDT reasoned that it had not relied on the impugned documents in its decision-making.

5. The UNDT ordered the expungement from its case record of Mr. Maruschak's submissions and, significantly for this appeal, what were described as Annexes 22-27 which were the documents alleged to have been forgeries and otherwise fraudulent. The UNDT made a number of trial-preparation orders which are not in issue in this appeal. The motion for an order for costs was dismissed, if for no other reason, because the Secretary-General had not been successful.
6. On 27 September 2021, the Secretary-General filed an appeal, and on 26 October 2021, Mr. Maruschak filed his answer.

### **Submissions**

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

7. The Secretary-General's first argument is that the appeal is receivable. He says that the circumstances of Mr. Maruschak's conduct in the course of his litigation in the UNDT should make the appeal receivable despite it not being against a final judgment of the UNDT or one alleging that it was decided beyond its jurisdiction. The argument advanced is that by allowing the case to proceed to trial and not determining that Mr. Maruschak had so abused the process that he was not entitled to continue further with it, the UNDT failed to exercise its jurisdiction properly. The Secretary-General emphasises what he describes as the "fundamental integrity of the proceedings and the judicial process" over which he asserts the Dispute Tribunal has inherent authority in matters of process abuse. The Appellant submits that the UNDT should not be permitted to allow the proceedings to continue after a deliberate attempt to mislead the Tribunal and to defraud the Organisation by making false and excessive claims for compensation. The UNDT took no action and failed to determine whether the documents submitted to it by Mr. Maruschak were forgeries and otherwise fraudulent. Rather, the UNDT allowed these documents to be erased by expunging them from the record. These are said to constitute grounds to allow an appeal from a decision that is not a final judgment of the UNDT.

8. The Secretary-General's second argument is that the UNDT erred in law by acknowledging the gravity of his allegations but taking no action on them and allowing Mr. Maruschak to withdraw his documents from the UNDT's file. He says that this was not the innocent act claimed by Mr. Maruschak as tends to have been confirmed by Mr. Maruschak's counsel withdrawing from the case when alerted to the Secretary-General's opinion. The Secretary-General asserts that the

level of the Respondent's abuse of the process is so significant that Mr. Maruschak has lost all credibility so that his case should not be allowed to continue.

9. The Appellant asks that UNAT find the appeal receivable and review it on an expedited basis. He seeks the overturning of the UNDT's Order, in part, the dismissal by summary judgment of the Respondent's case and the awarding of costs of USD 30,000 against Mr. Maruschak for his conduct of the UNDT proceedings.

### **Mr. Maruschak's Answer**

10. First, he says that the UNDT's Order is not a "judgment" and is thus not appealable.

11. Second, Mr. Maruschak asserts his non-employee status (following his severance) and says that the Secretary-General breached his rights to information (including medical information) privacy by his investigation of the impugned documents including without the consent of the UNDT which was seized of his case. He challenges the admissibility in the UNDT of the evidence that the Secretary-General claims to have established forgery and fraud.

12. Next, the Respondent asserts a more general illegality attaching to the Secretary-General's investigation including by use of such unofficial sources as the Internet and his failure or refusal to seek this information from Ukrainian military sources through proper diplomatic channels.

13. Mr. Maruschak seeks a direction that there be an investigation of the allegations against him entirely independent of the Administration.

### **Considerations**

#### *Receivability of the appeal*

14. The first question for decision is whether the Secretary-General's appeal is even receivable. That arises because it is an appeal against what is termed and appears to be an interlocutory procedural order or direction made by the UNDT. Whether this appeal is receivable turns on the relevant provisions of the Statute of the Appeals Tribunal (the Statute) and case law that has developed when similar issues have arisen.

15. Article 2 of the Statute refers to the UNAT's competence to pass judgment on an appeal "against a judgment rendered by" the UNDT. Whether a decision (to use a neutral word) of the UNDT constitutes a "judgment" does not depend on the UNDT's description of that decision, although the label given is often indicative of the status of the decision. In this case it was an "Order on Case Management and Miscellaneous Motions". It is notable that the title of the decision appears to address two distinct types of decision, orders for case management and other motions. It is that latter category of motion with which this appeal is concerned. Ultimately, however, it will be the real nature and substance of the UNDT's decision which will determine whether it, or any part of it, was a "judgment", and thus amenable to appeal.

16. This Tribunal's jurisprudence interpreting and applying Article 2 is that, with narrow and rare exceptions, this makes non-receivable appeals against interlocutory orders or directions. That exception (Judge-made law) is where the UNDT purports to make an order for which it has no jurisdiction or acts in clear excess of jurisdiction that it does have. In other cases, dissatisfied recipients of interlocutory orders 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". The intention of this rule is to minimise judicial intervention and to expedite the progress of cases through the United Nations' Internal Justice system.

17. We consider that there is another, albeit narrow and rare, category of UNDT decision which amounts to a "judgment" and is therefore appealable. Where, in practice, an error by the UNDT is effectively irremediable by 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, such a decision will be appealable. These are stringent tests, and cases in which such appeals will be allowed will be rare and exceptional.

18. In respect of part of the appeal now before us, that test is met. In other respects, it is not met. We will deal first with that part of the appeal where that test of receivability is not met by the Appellant.

*Appeal against refusal of summary judgment*

19. The UNDT's decision rejecting the Secretary-General's motion for summary judgment dismissing Mr. Maruschak's case finally, and for costs, was not one taken by the Dispute Tribunal in excess, or in the absence, of its jurisdiction. The UNDT is empowered to make such orders. Nor

is its decision effectively irremediable: if it was wrong, it is open to the Secretary-General to seek again to persuade the UNDT to dismiss Mr. Maruschak's case and to award costs against him. And there will be a second, appellate, opportunity to achieve that result if the Secretary-General is still unsuccessful.

20. Had the UNDT allowed the Secretary-General's motion to dismiss Mr. Maruschak's case, in effect granting the Appellant summary judgment against the Respondent, that would have amounted to a final judgment of the matter in the UNDT and would thus have been appealable. But the converse outcome which occurred brings about a different result as we have just outlined. That means that this aspect of the appeal is unreceivable.

*Appeal against document expungement order*

21. We turn now to what we conclude is the receivable part of the appeal, relating to the UNDT's Order for expungement of the impugned documents from its case file. This is receivable because, unless the documents are preserved for use at trial, they may be lost with the consequence that the Secretary-General will be unfairly disadvantaged in being unable to use them to establish his allegations of forgery and fraud as he is entitled to as we have outlined above. So, the UNDT's Order is, in this respect, effectively irremediable. Further, this would be a manifestly unreasonable consequence of the Order for the Secretary-General. The circumstances are so rare and exceptional that it is just to allow this element of the Order to be appealed.

22. We consider that the UNDT did err when it directed that the impugned documents filed by Mr. Maruschak be expunged from its file. Those documents filed by Mr. Maruschak will be relevant, if not to Mr. Maruschak's case before the UNDT, then to the Secretary-General's case in opposition to Mr. Maruschak's claims and, for the Secretary-General's defense to the remedies claimed by Mr. Maruschak, and particularly in cross-examination of him. If the Secretary-General is successful in persuading the UNDT that these documents are forgeries perpetrated deliberately by Mr. Maruschak and/or that he has otherwise abused the judicial process, any resulting loss of his credibility and reputation may deprive Mr. Maruschak of remedies even if he establishes that his separation from service was wrongful.

23. The impugned documents should have been and should now be retained by the UNDT to be available for use at the substantive hearing if required by the Secretary-General. It is for the UNDT to recover them. If they have already been returned to Mr. Maruschak, then the Secretary-General may compel their re-production by Mr. Maruschak to the Dispute Tribunal.

24. For completeness and to address Mr. Maruschak's submissions about how his case should be dealt with henceforth, we state that it is the role of the UNDT itself, and not of any external agency as the Respondent proposes, to determine the Secretary-General's allegations, Mr. Maruschak's denials of them and his document and other evidence admissibility objections. The UNDT is seized of the case and is the master of its own procedures, subject only to appeals to the UNAT.

**Judgment**

25. The Secretary-General's appeal is granted in part. That part of the appeal challenging the Order set out at paragraph 11 of the UNDT's Case Management Order No. 174 (NBI/2021) which we conclude is receivable (directing the expungement of the documents filed by Mr. Maruschak) is reversed. The Secretary-General's appeal is otherwise dismissed as not receivable.

Original and Authoritative Version: English

Decision dated this 28<sup>th</sup> day of October 2022 in New York, United States.

*(Signed)*

Judge Colgan, Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Knierim

Judgment published and entered into the Register on this 7<sup>th</sup> day of December 2022 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar