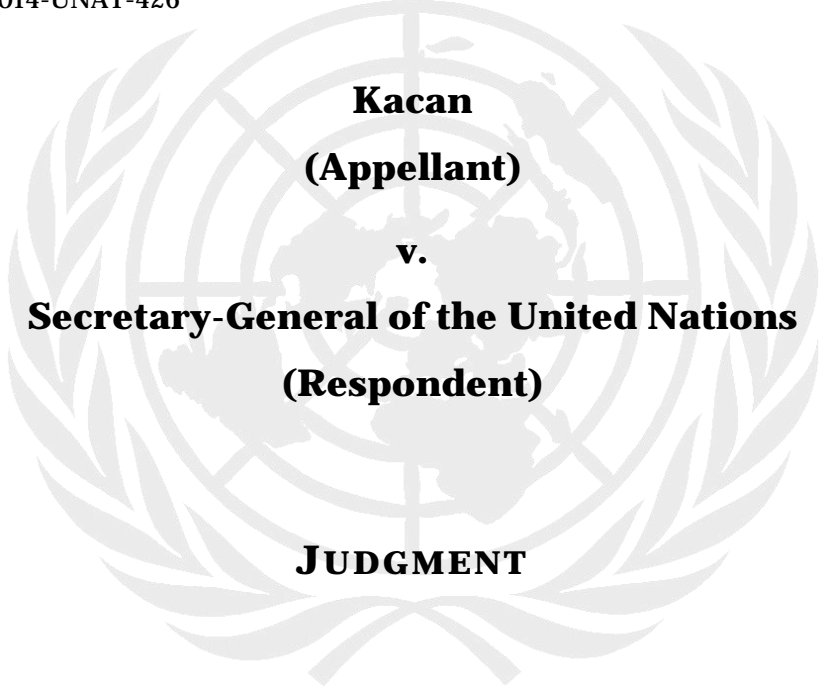




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-426



**Kacan  
(Appellant)**  
**v.**  
**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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**Before:** Judge Richard Lussick, Presiding  
Judge Mary Faherty  
Judge Luis María Simón

**Case No.:** 2013-480

**Date:** 2 April 2014

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Self-represented

**Counsel for Respondent:** Amy Wood

**JUDGE RICHARD LUSSICK, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Mahmut Kacan against Judgment No. UNDT/2013/025, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 19 February 2013 in the case of *Kacan v. Secretary-General of the United Nations*. Mr. Kacan appealed on 20 May 2013 and the Secretary-General answered on 22 July 2013.

**Facts and Procedure**

2. Mr. Kacan entered into the service of the Office of the United Nations High Commissioner for Refugees (UNHCR) on 18 September 2007 as a Protection Associate at the G-6 level in the UNHCR field office in Van, Turkey (Van Field Office). His fixed-term contract, which had previously been renewed on an annual basis by UNHCR, expired on 31 December 2011.

3. From 1 through 10 May 2011, the Office of the Inspector General of UNHCR conducted a “standard inspection of the UNHCR operation in Turkey”. As a result of the standard inspection, the Inspector General’s Office produced a “Final Report to the High Commissioner from the Inspector General” (the Final Report), dated October 2011. The Final Report made a number of recommendations related to “office structure and management”. One such recommendation was that a review be undertaken of the staffing structure as well as the level of presence in Turkey, and consideration be given to the removal of “sensitive protection functions” from the Van Field Office to the UNHCR office in Ankara. By e-mail dated 28 November 2011, all UNHCR staff members in Turkey received a copy of the Final Report.

4. On 23 October 2011, the city of Van was struck by an earthquake that greatly damaged the city and led to the evacuation of nearly all UNHCR staff members serving at the Van Field Office. A small team of staff members, including Mr. Kacan, remained in the city after the earthquake. Following another earthquake and aftershock, all remaining UNHCR staff members, including Mr. Kacan, were evacuated from the area and the Van Field Office was closed.

5. Only a minimum number of staff members from the Van Field Office were maintained: an international recruit at the P-3 level and one GL-4 and one GL-3, staff members with indefinite contracts. The reduced UNHCR team was stationed in Ankara pending the determination of the reopening of the UNHCR Van Field Office. All other UNHCR staff members

who had been serving in the Van Field Office, including Mr. Kacan, were placed on special leave with full pay and subsequently informed on 30 November 2011 that their appointments would not be extended beyond 31 December 2011.

6. On 27 January 2012, Mr. Kacan requested management evaluation of the decision not to renew his fixed-term appointment beyond 31 December 2011 and, on 8 June 2012, he filed an application with the UNDT. His principal argument for contesting the non-renewal decision was that, as suggested in the Final Report, it was taken because of his Kurdish origin.

7. On 19 February 2013, the UNDT issued Judgment No. UNDT/2013/025, dismissing Mr. Kacan's application. The UNDT found that Mr. Kacan had failed to satisfy the burden of proof required to demonstrate that the decision not to renew his fixed-term appointment was tainted by improper considerations or was otherwise unlawful. It found that the recommendations of the Final Report were rendered irrelevant as they were never implemented because the Van Field Office was closed due to damage caused by the earthquake. The non-renewal decision was thus solely an organizational measure that UNHCR was forced to take following the earthquake. The UNDT also rejected Mr. Kacan's argument that he was not treated in the same manner as the other staff members, finding that his situation was different from that of the staff members who continued to serve their posts.

8. Mr. Kacan appeals the UNDT Judgment.

### **Submissions**

#### **Mr. Kacan's Appeal**

9. Mr. Kacan claims that the evidence before the UNDT supported his contention that the Administration's decision not to renew his fixed-term appointment was discriminatory and based on improper motives, in particular his Kurdish ethnicity. The recommendation by the Inspector General's Office demonstrates that UNHCR planned to adopt a discriminatory policy of terminating the appointments of staff members of Kurdish origin at the urging of Turkish authorities. The UNDT erred in concluding that the recommendation may have been included in the report in order to reduce possible tensions between the local Turkish authorities and some Kurdish UNHCR staff members.

10. Mr. Kacan argues that the UNDT committed a procedural error in finding that he had not provided evidence that the contested decision was discriminatory when he had submitted a witness to give evidence. The UNDT did not call that witness and did not give him any explanation as to why it had failed to do so.

11. Mr. Kacan submits that he had a reasonable expectation of renewal for the following reasons: the nature of his duties; the renewal of his contract on five successive fixed-term contracts; after completing five years without a break in service, he was going to be eligible for an indefinite contract “as recognition of good performance, integrity and competency after prolonged years of dedicated service”; and because he remained dedicated to his work, putting himself at risk after the earthquake.

12. Mr. Kacan contends that the UNDT erred in fact in concluding that he was not treated in a discriminatory manner vis-à-vis other UNHCR staff members in Turkey. He contends that the relocation of international staff holding fixed-term appointments and local staff holding indefinite appointments is an arbitrary distinction which has negatively affected the rights of certain staff members or categories of them, such as himself, due to unlawful reasons and has thus become discriminatory. He has the right not to be treated less favourably than a comparable international category employee who holds a fixed-term contract and the UNDT thus erred on a question of law.

13. Mr. Kacan requests that the Appeals Tribunal vacate the UNDT Judgment; order compensation equal to one year’s net base salary for material damages suffered and a review of his pension entitlement at the United Nations Joint Staff Pension Fund. He further requests compensation in the amount of USD 100,000 for moral damages and a written apology from UNHCR.

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

14. The Secretary-General submits that the UNDT properly dismissed Mr. Kacan’s application because Mr. Kacan failed to demonstrate that the non-renewal decision was unlawful. The burden to demonstrate that the Administration abused its discretion in deciding not to renew a staff member’s appointment lies with the staff member contesting the decision. Since Mr. Kacan failed to offer sufficient evidence to support his claims that the non-renewal decision was unlawful, the UNDT was required to dismiss his application.

15. Mr. Kacan has failed to establish that the UNDT erred in finding that he had not produced sufficient evidence to support his claim that the non-renewal decision resulted from discriminatory motives relating to his Kurdish ethnicity. The alleged evidence of discriminatory intent is limited to bare assertions and speculation. The alleged evidence of discrimination cited by Mr. Kacan in his appeal was part of the record before the UNDT. Mr. Kacan merely reiterates his disagreement with the UNDT's assessment of the evidence.

16. Mr. Kacan has further failed to establish that the UNDT erred in dismissing his claim that the decision taken by UNHCR to relocate three Van-based staff members to the UNHCR Office in Ankara demonstrated improper bias against him. The UNDT found that the Secretary-General did not err in exercising his discretion in this respect and Mr. Kacan again only reiterates his arguments made at trial.

17. Mr. Kacan has failed to establish that the UNDT erred in law by not considering that an expectancy of renewal had been created. Unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be renewed or unless it abused its discretion or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful. In the present case, there is no evidence to substantiate Mr. Kacan's allegation that the decision not to renew his appointment was tainted by improper motives. The UNDT properly determined that the sole reason for Mr. Kacan's non-renewal was the indefinite closure of the Van Field Office. Furthermore, Mr. Kacan has not alleged, or presented any evidence, that an express promise of renewal was made by UNHCR. The UNDT therefore did not err in finding that no legitimate expectancy of renewal had been created.

18. Finally, the Secretary-General submits that Mr. Kacan's allegation that the UNDT erred on a question of procedure by failing to call a specific witness is unsustainable. The Secretary-General contends that the UNDT may decline to examine a witness if it does not deem it necessary and has discretionary authority in matters relating to case management and the production of evidence.

19. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

**Considerations**

20. The UNDT correctly held that the burden of proving that the grounds for non-renewal were unlawful lies with the staff member contesting the decision not to renew his or her contract.

21. The UNDT found that Mr. Kacan had not discharged his burden in this regard in that he had not provided evidence that the contested decision was discriminatory. Mr. Kacan protests that he had in fact requested the UNDT to call his witness on the issue but it had not done so and had not explained why it had not done so.

22. We note that Mr. Kacan had submitted a written request to the UNDT to “call a witness concerning my claim that non renewal of my appointment was based on discriminatory or improper motives, in particular my Kurdish ethnicity”.

23. The Secretary-General does not dispute that Mr. Kacan made a request to the UNDT for his witness to be called, nor that the UNDT gave no explanation for not doing so. Instead, the Secretary-General argues that Mr. Kacan “does not provide any detail as to what information the particular witness in question would testify to” and has thus failed to show that the UNDT exceeded its discretion in matters of case management. However, while no specifics of the proposed evidence are available, it is clear from Mr. Kacan’s written request filed with the UNDT that his witness would have given evidence in respect of his claim that the non-renewal of his contract was based on improper motives, which was the crux of his case.

24. There is no mention of any witness in the UNDT’s Judgment and we do not know whether Mr. Kacan’s application to present evidence from a witness was considered by the UNDT. However, it is clear that Mr. Kacan had a witness to support his case, that the witness was not called, and that no explanation was given by the UNDT for not calling the witness.

25. We hold that Mr. Kacan should have been given the opportunity to call his witness, or at least have been given an explanation as to why this could not be done. Due process required that Mr. Kacan be given a fair hearing with the opportunity to present his own case and to answer the case against him.<sup>1</sup>

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<sup>1</sup> *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-178.

26. We find that the UNDT committed “an error of procedure, such as to affect the decision of the case” under Article 2 (1)(d) of the Statute of the Appeals Tribunal by not allowing Mr. Kacan to call a witness.

27. The case is remanded to the UNDT before a different judge for a determination of the facts including the merits of the application after having heard the evidence of Mr. Kacan’s witness.

### **Judgment**

28. The appeal is allowed and the case is remanded to the UNDT before a different judge.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Faherty

*(Signed)*

Judge Simón

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar