



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

Judgment No. 2018-UNAT-849

**Kule Kongba
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge John Murphy Judge Martha Halfeld
Case No.:	2018-1137
Date:	29 June 2018
Registrar:	Weicheng Lin

Counsel for Mr. Kule Kongba:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/081, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 17 October 2017, in the case of *Kule Kongba v. Secretary-General of the United Nations*. Mr. Jean René Kule Kongba filed the appeal on 16 December 2017, and the Secretary-General filed his answer on 27 March 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... On 1 July 2004, the Applicant was engaged by the United Nations Development Programme (UNDP) for six months to perform duties as a Communications Specialist for [the United Nations Population Fund (UNFPA)] in Brazzaville, [the Republic of Congo (RoC)], on a Special Service Agreement (SSA) contract.

... On 1 January 2005, his SSA contract was extended for five months until 31 May 2005.

... Between July 2005 and September 2005, the Applicant took a break from service.

... On 26 September 2005, the Applicant was re-engaged by UNDP as a Communications Assistant for UNFPA on a series of Service Contracts (SC) which were renewed annually until 31 December 2010.

... On 8 November 2010, UNFPA posted a Vacancy Announcement (VA) for the position of Communications and Advocacy Officer at the NO-B grade, in Brazzaville, RoC. The deadline for submitting applications was 19 November 2010. The VA specified a list of eligibility requirements which included:

- a. university degree at the Baccalaureate (BAC) level + 5 [Masters] in journalism, communications or sufficient professional experience;
- b. at least five years of professional experience in communications[;] and (...)
- c. to be of Congolese nationality.

... On 16 November 2010, the Applicant applied for the vacancy.

... Between 30 November 2010 and 2 December 2010, the Applicant's submission for the VA was reviewed by an *ad hoc* committee which preselected him for the position on 3 December 2010. He interviewed for the post on

¹ Impugned Judgment, paras. 5-25 (internal footnotes omitted).

16 December 2010, where he scored second out of the three shortlisted candidates. The *ad hoc* committee designated the Applicant as its preferred choice for the advertised post since he was an internal candidate.

... On 11 January 2011, Mr. David Lawson, UNFPA Resident Coordinator, informed the Applicant that he had been selected for the position at the NO-B grade, step 1, effective 1 April 2011, on a one[-]year fixed-term appointment.

... On 13 January 2011, Ms. Odile Ambrose, UNDP Human Resources Manager in Brazzaville commenced the Applicant's onboarding process and on 5 May 2011, he was issued with a Letter of Appointment (LOA) by Mr. Lamin Manneh, UNDP Resident Coordinator, which he signed on the same day. The Applicant continued to serve on his fixed-term appointment which was renewed annually.

... On 14 March 2015, the Applicant suffered a heart attack. Thereafter, he underwent a series of medical checks at the University Hospital Center in Brazzaville, as a result of which he was advised that he travel to Pretoria, South Africa, for further medical treatment. Mr. Victor Kaya-Mandzila, UNFPA Officer-in-Charge of Operations in Brazzaville, scheduled the Applicant's appointment for 5 May 2015.

... Between 22 April 2015 and 11 May 2015, the Applicant and the UNFPA Administration exchanged emails in relation to travel arrangements to Pretoria. Accordingly, the Applicant provided the UNFPA Administration with his residency card which then dispatched a *Note Verbale* to the South African embassy in Brazzaville so that the Applicant could be issued with a visa.

... On 12 May 2015, Ms. Barbara Laurenceau, UNFPA Resident Representative in Brazzaville, sent an email to Ms. Holly White, UNFPA Human Resources Strategic Partner, in which she noted the difficulty in obtaining a visa for the Applicant because it had emerged that he was not a citizen of the RoC but of the Democratic Republic of Congo (DRC). The communication reads in part:

In the course of preparation for his evacuation, I realized that he is actually not a citizen of Congo but of DRC. The immediate consequence is that it becomes quite complicated to obtain a visa for him to RSA and forced us to cancel several times the med appointment in RSA. I wanted to get your advice: what is the policy for [National Professional Officer (NPO)], can a non-national be NPO?

... In a memorandum dated 30 October 2015 to Mr. Mabingue Ngom, UNFPA Regional Director for West and Central Africa, Ms. Laurenceau requested that he recommend the approach to be taken in relation to the Applicant's appointment which was to expire on 31 December 2015.

... On 13 November 2015, Ms. White requested the Applicant to provide his RoC permanent residency card by 30 November 2015. On the same day, the Applicant responded that he was originally from the DRC and that he had been a permanent resident of the RoC since May 2011.

... In an email dated 16 November 2015 to Ms. White, Ms. Laurenceau stated that in her opinion the Applicant's status as a permanent resident in RoC did not amount to citizenship.

... In a letter dated 30 November 2015, Mr. Michael Emery, UNFPA Director for Human Resources, informed the Applicant that his fixed-term appointment which was to expire on 31 December 2015 would not be renewed. The letter in part reads:

With reference to the upcoming expiration of your fixed[-]term appointment on 31 December 2015, this is to inform you that your appointment will not be renewed beyond that date because you don't have the nationality required to work as UNFPA National Programme Officer in Congo, Brazzaville, according to Staff Rule 4.4 (b).

... On 1 December 2015, the Applicant wrote to Mr. Emery and acknowledged receipt of the letter dated 30 November 2015. In the correspondence, the Applicant agreed to abide by the Organization's Rules and Regulations. In addition, he stated that he did not want the non-renewal of his appointment to bear adverse consequences on him.

... On 10 December 2015, the Applicant again wrote to Mr. Emery and accepted that the decision not to renew his appointment was informed by the fact that he did not possess the required nationality for the post. He also expressed disapproval at the UNFPA Administration for renewing his appointment four times before they rendered it non-renewable on 30 November 2015.

... On 31 December 2015, the Applicant separated from the Organization.

... On 14 January 2016, the Applicant requested management evaluation of the decision not to renew his appointment.

... On 26 February 2016, the Applicant received the management evaluation outcome upholding the contested decision. The UNFPA Administration admitted that it erred in selecting him for the position and renewing his appointment on multiple occasions. It reiterated, however, that his appointment could not be renewed because he was not eligible to serve as a NO-B as per the Rules and Regulations of the Organization.

3. On 10 May 2016, Mr. Kule Kongba filed an application with the UNDT contesting the decision dated 30 November 2015 not to renew his appointment as well as underpayment of his salary between 1 July 2004 and 31 May 2005. The Secretary-General replied on 18 July 2016,

asserting that in the part related to the underpayment, the application was not receivable *ratione personae* and *ratione temporis*, and in the remaining part it was unsubstantiated.

4. On 17 October 2017, the UNDT issued its Judgment dismissing the application in its entirety. The UNDT found that it had no jurisdiction over Mr. Kule Kongba's claim of underpayment between 1 July 2004 and 31 March 2005 since during that period, Mr. Kule Kongba was not a staff member, but rather employed on an SSA. Moreover, any challenges of decisions dating back to 2004-2005 were time-barred. Mr. Kule Kongba's application regarding underpayment in 2004-2005 was therefore not receivable.

5. Turning to Mr. Kule Kongba's contention that the non-renewal of his fixed-term appointment was unlawful, the UNDT noted that Mr. Kule Kongba did not fulfil the eligibility criteria for the position he occupied since he lacked RoC nationality and that the Administration had admitted its error in selecting, appointing and renewing Mr. Kule Kongba's fixed-term appointment for the NO-B post on that ground.

6. The UNDT held that the fact that Mr. Kule Kongba never concealed his nationality from UNFPA had no bearing on the case and that the Administration had a duty to remedy the consequences of an unlawful decision, balancing the interests of the Organization and those of the concerned staff member. The Administration was required to consider different courses of action and could only terminate the appointment of a staff member if any other means to correct the unlawful decision were manifestly impossible owing to the nature and gravity of the irregularity. The fact that an unlawful situation had been overlooked or tolerated in the past did not justify continuing it.

7. The UNDT found that the nationality requirement for the NO-B post resulted from the Staff Rules and could not be waived and that any legitimate expectation on the part of Mr. Kule Kongba could not extend beyond the duration of his fixed-term appointment. The UNDT concluded that the non-renewal of Mr. Kule Kongba's appointment was legitimate and appropriate and thus lawful.

8. Since the UNDT found that the impugned decision had been lawfully taken and the Administration's unlawful action only benefitted Mr. Kule Kongba, the UNDT rejected his claim for compensation.

Submissions

Mr. Kule Kongba's Appeal

9. Mr. Kule Kongba contends that the UNDT was “solely concerned with protecting the organization from the errors and oversights of UNDP and UNFPA officials, with no concern for the damages [he] suffered”. He submits that the contested administrative decision and the UNDT Judgment were both not impartial because they were “merely attempts to hide behind the rules and regulations of the United Nations” instead of repairing the injustice done to him. Mr. Kule Kongba also asserts that the UNDT Judgment ignored the context in which he worked and that he was harassed when he worked at UNFPA, especially during his last two years at UNFPA.

10. Mr. Kule Kongba further confirms all his claims, arguments and supporting documents he presented before the UNDT and reiterates his claim for compensation in the amount of 300,000,000 CFA Francs. He also requests that all documents be provided to him in French.

The Secretary-General's Answer

11. The UNDT correctly concluded that Mr. Kule Kongba's claim regarding alleged underpayments was not receivable. In 2004-2005, Mr. Kule Kongba's services were retained under SSAs, which did not confer him the status of a staff member. Since he was not a staff member at the time, the UNDT had no jurisdiction over any claims relating to that period of service. His challenge of underpayments for services he provided under SSAs were therefore irreceivable *ratione personae*. Moreover, pursuant to Article 8(4) of the UNDT Statute, an application shall not be receivable, if filed more than three years after an applicant's receipt of the contested administrative decision. Mr. Kule Kongba's claim of underpayment for services he provided in 2004 and 2005 was therefore also irreceivable *ratione temporis*.

12. The UNDT correctly concluded that the non-renewal decision was lawful. Mr. Kule Kongba did not fulfil the eligibility criteria for the position he occupied between 2011 and 2015, since he did not have the nationality of the RoC. His selection, appointment and renewal to the position was an administrative error, which the UNFPA Administration corrected in 2015 by not renewing his fixed-term appointment. The Appeals Tribunal has consistently held that the Administration has a duty to rectify its own errors and where the

Administration commits an irregularity in the recruitment procedure, it falls to it to take such measures as are appropriate to correct the staff member's situation. It is only where such correction is manifestly impossible to effect owing to the nature or gravity of the irregularity that the Administration may terminate a staff member's appointment.

13. In the present case, for a person to be eligible for a position at the NO-B grade, he or she must have the nationality of the country in which the office is located. This requirement is set out in Staff Rule 4.4(b) and cannot be waived. Selecting and appointing a person who did not possess the nationality of the RoC for a position at the grade of NO-B in Brazzaville, RoC is, therefore, an irregularity which the Administration could only correct by not extending Mr. Kule Kongba's fixed-term appointment. Furthermore, as held by the UNDT and in accordance with Staff Rule 4.13(c), a fixed-term appointment does not carry any expectancy of renewal.

14. The UNDT correctly denied an award of compensation. The burden of proving improper motives, such as abuse of authority or harassment, in not renewing a fixed-term appointment rests with the person making the allegation. In the present case, Mr. Kule Kongba claimed compensation for the harm he was allegedly subjected to, by way of underpayment of salary, alleged harassment orchestrated by the Representative, UNFPA, RoC, work-related health problems, and the non-renewal of his appointment. It is clear from the record that the non-renewal decision was based solely on the fact that Mr. Kule Kongba did not satisfy the eligibility requirements and that the Administration corrected an error that it had committed in selecting, appointing and renewing him to a position for which he was not eligible. Mr. Kule Kongba has not provided any evidence that the non-renewal decision was improperly motivated.

15. Mr. Kule Kongba has failed to show any error by the UNDT warranting the reversal of the Judgment. Mr. Kule Kongba does not identify any errors or excess or failure of jurisdiction and merely refers to the claims, arguments and documents he presented before the UNDT. It is, however, not sufficient for an appellant to state that he or she disagrees with the outcome of the case or repeat the arguments submitted before the UNDT. Mr. Kule Kongba has failed to satisfy the requirements of Article 2(1) of the Appeals Tribunal Statute. His appeal is therefore not receivable.

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

Considerations

17. At the outset, we point out that the only part of the Dispute Tribunal Judgment challenged by Mr. Kule Kongba is its finding that the administrative decision not to renew his fixed-term appointment was lawful. Mr. Kule Kongba does not specifically contest the UNDT's holding that his claim regarding the alleged underpayments for services rendered in 2004-2005 was not receivable.

18. Our Statute provides in Article 2(1) that the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in which it is asserted that the Dispute Tribunal has: (a) exceeded its jurisdiction or competence; (b) failed to exercise the jurisdiction vested in it; (c) erred on a question of law; (d) committed an error of procedure, such as to affect the decision of the case; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision.

19. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.²

20. On appeal, Mr. Kule Kongba appears to be restating the claims which he made before the UNDT. He has not identified any of the above grounds in his appeal and has failed to demonstrate that the UNDT committed any error of fact or law in arriving at its decision.

21. Moreover, we have reviewed the UNDT's Judgment and find that Mr. Kule Kongba's case was fully and fairly considered; we can find no error of law or fact in its decision.

² *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15 and citations therein; *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

22. In specific, the UNDT properly reviewed the contested decision in accordance with the applicable law. It noted that Staff Rule 4.4(b) of the Organization's Staff Regulations and Rules in relation to staff members in posts subject to local recruitment specifically provides: National Professional Officers shall be of the nationality of the country where the office concerned is located.³ The UNDT also referred to the VA for the NO-B position in which the eligibility criteria were articulated.⁴

23. Applying these provisions to the undisputed facts of the present case, demonstrating that Mr. Kule Kongba did not satisfy the eligibility criteria because he lacked RoC nationality - he was a DRC national, both at birth and at the time of his application - and that his appointment and subsequent renewal up until 31 December 2015 were an oversight, the UNDT engaged in an exercise of balancing the valid interests on the part of the Administration and Mr. Kule Kongba. Finally, the UNDT concluded that "[i]n the totality of the circumstances, the Administration's decision to discontinue the Applicant's employment on the mark of expiration of his current appointment was legitimate and appropriate. In conclusion, the Tribunal finds and holds that the non-renewal of the Applicant's fixed-term appointment was lawful."⁵

24. In the first place, we note that the subject of this litigation and correspondingly the appeal is the lawfulness of the Administration's decision dated 30 November 2015 not to renew Mr. Kule Kongba's fixed-term appointment beyond its expiration on 31 December 2015. This case is not about an administrative decision to discontinue Mr. Kule Kongba's employment. In these circumstances, the UNDT should not have engaged in a balancing of the interests involved and should have instead reviewed the legality of the non-renewal.

25. We recall the well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.⁶ Even the renewal of the appointment of a staff member on successive contracts does not, in and

³ Impugned Judgment, para. 35.

⁴ The VA specified a list of eligibility requirements which included: "a. university degree at the Baccalaureate (BAC) level + 5 [Masters] in journalism, communications or sufficient professional experience; b. at least five years of professional experience in communications[;] and (...) c. to be of Congolese nationality."

⁵ Impugned Judgment, para. 41.

⁶ *Muwambi v. Secretary General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25; *Ncube v. Secretary General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 33.

of itself, give grounds for an expectancy of renewal, unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended. The jurisprudence requires this promise at least to be in writing.⁷

26. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive.⁸ The staff member has the burden of proving such factors played a role in the administrative decision.⁹

27. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.¹⁰

28. In the case at bar, the challenged administrative decision not to renew Mr. Kule Kongba's fixed-term appointment was predicated on his not meeting the nationality requirement for positions at the NO-B grade as set out in Staff Rule 4.4(b) and the relevant VA, which, as the UNDT correctly pointed out, cannot be waived.¹¹ Therefore, contrary to Mr. Kule Kongba's assertions, we hold that the lack of the nationality requirement on his part constitutes a valid reason proffered by the Administration for not renewing his fixed-term appointment.

⁷ *Igbinedion v. Secretary General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

⁸ *Pirnea v. Secretary General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32, citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201 and *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

⁹ *Pirnea v. Secretary General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Assad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

¹⁰ *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹¹ Impugned Judgment, para. 41.

29. Besides, in the present case, the fact that the Administration had granted, lawfully or not, Mr. Kule Kongba successive contract extensions does not give grounds for an expectancy of renewal, unless the Administration had made him an express promise in writing, which is not the case here.

30. Further, we wish to also emphasize that in instances where the eligibility criteria have been wrongly applied, the Administration has a duty, and is entitled, to rectify its own error.¹² In *Cranfield*, a staff member's fixed-term contract was converted to an indefinite contract retroactively. The Administration claimed it made a mistake and notified the staff member. The Appeals Tribunal held that the Administration was entitled to correct erroneous decisions and stated *inter alia*:¹³

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

31. Consequently, the fact that Mr. Kule Kongba was unlawfully appointed in the past and his fixed-term appointment was extended on several occasions by the Administration does not entail that this unlawful situation, which was overlooked or tolerated, justifies continuing it. Much more so in the present case, where it comes to concluding a new contract of employment, and not to discontinuing an existing one before its expiration. Nor do the principles of good faith or of protection of legitimate expectations demand, under the aforesaid circumstances, that the Administration exercise its discretion to make right the erroneous decisions of the past in the direction of taking a decision to renew Mr. Kule Kongba's appointment. On the contrary, as stated earlier in this Judgment, the Administration has made its choice and took the lawful decision not to renew Mr. Kule Kongba's appointment on the ground that he did not fulfil the specific nationality requirement.

¹² *Cicek v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-636, para. 32, citing *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

¹³ *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

32. Moreover, the UNDT examined whether the contested decision stemmed from undue pressure, harassment or abuse of authority, as contended by Mr. Kule Kongba and concluded that Mr. Kule Kongba had not provided any evidence to support his allegation. In that regard, the UNDT was of the view, with which we agree, that “[i]n the prevailing circumstances, the Tribunal has no basis to assume that the non-renewal of the Applicant’s fixed-term appointment was caused by extraneous factors and not by the fact that [Mr. Kule Kongba] did not possess the required nationality for the position”.¹⁴

33. For all these reasons, the Appeals Tribunal finds that the UNDT did not make errors of law and fact when it concluded, though with a different reasoning to ours, as to the subject of this litigation, that the non-renewal of Mr. Kule Kongba’s appointment was lawful.

34. Our conclusion that the UNDT did not make any errors of law or fact in dismissing Mr. Kule Kongba’s challenge of the decision not to renew his fixed-termed appointment precludes the Appeals Tribunal from awarding compensation. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal stated before, “compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member’s rights or administrative wrongdoing in need of repair”.¹⁵

35. Accordingly, the appeal fails.

¹⁴ Impugned Judgment, para. 44.

¹⁵ *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420, para. 20; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 23.

Judgment

36. The appeal is dismissed and Judgment No. UNDT/2017/081 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar