



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

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Judgment No. 2019-UNAT-945

**Peker  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Sabine Knierim, Presiding Judge Martha Halfeld Judge Deborah Thomas-Felix
Case No.:	2019-1223
Date:	28 June 2019
Registrar:	Weicheng Lin

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Counsel for Mr. Peker:	Mohamed Abdou, OSLA
Counsel for Secretary-General:	Amy Wood

**JUDGE SABINE KNIERIM, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/110, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 19 November 2018, in the case of *Peker v. Secretary-General of the United Nations*. Mr. Bulent Peker filed the appeal on 17 January 2019, and the Secretary-General filed his answer on 18 March 2019.

**Facts and Procedure**

2. Mr. Peker incurred medical expenses while serving as a locally-recruited Refugee Status Determination Officer with the United Nations High Commissioner for Refugees (UNHCR) in Ankara, Turkey under a fixed-term appointment. In preparation for annual leave travel to Greece, he obtained an attestation from the Administration, which was addressed to the Greek Authorities, stating that he intended to travel to Greece from 9 to 14 August 2015 and that he was “fully covered by [the] United Nations Medical Insurance Plan (MIP) against all possible medical expenses that may occur during travel to and in any country”.

3. In November 2015, while on annual leave in Switzerland, Mr. Peker was hospitalized on an emergency basis and incurred CHF 31,006.60 in medical expenses. The UNHCR office in Ankara settled those expenses on his behalf in January and March 2016, by charging an expense account pending the processing of the expenses under the MIP. They contacted the American Hospital, a private health institution in Ankara, and determined that the estimated cost of similar treatments in Turkey was TRY 52,860.30 and that the reimbursable amount under the MIP was TRY 48,288.38 (USD 16,608.49).<sup>1</sup> The MIP Management Committee considered Mr. Peker’s case under the MIP’s hardship provision and concluded that the MIP did not provide worldwide coverage and that the reimbursement had to be based on the reasonable and customary cost at the staff member’s duty station.

4. By memorandum dated 31 August 2016 to the Director of the Division of Human Resources Management (DHRM) and the Controller and Director of the Division of Financial and Administrative Management (DFAM), the Chairperson of the MIP Management Committee

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<sup>1</sup> The exchange rate around January- March 2016 between US Dollar and Turkish Lira was around 1 : 3, while the exchange rate around the same time period between US Dollar and Swiss Franc was 1 : 1.

explained that the “MIP is priced and designed for local use only and, as per its rules, does not provide worldwide coverage. Therefore, medical expenses incurred outside the subscriber’s country should normally be reimbursed based on the reasonable and customary cost at the duty station.” He further explained that the difference between the actual medical expenses and the certified amount (representing the reasonable and customary cost at the duty station) was not taken into consideration in calculating the out-of-pocket amount. Thus, Mr. Peker was not eligible for additional payment under the MIP hardship or stop-loss provisions. Accordingly, the Chairperson of the MIP Management Committee recommended that the request for payment under the MIP hardship provision be rejected. The Director, DHRM, and the Controller and Director, DFAM, approved the MIP Management Committee’s recommendation.

5. By e-mail of 21 November 2016, Mr. Peker was notified of the decision to recover from him USD 14,707.15 following the recommendation by the MIP Management Committee that no exception be made to consider the total medical costs that he had incurred. Mr. Peker requested a timely management evaluation, to which he did not receive a response, and subsequently filed a timely application before the UNDT.

6. Mr. Peker filed a motion before the UNDT and requested disclosure of the following documents: (i) all communications between the hospital in Switzerland and UNHCR; (ii) an English translation of Annex 1 of the Secretary-General’s reply to his application; (iii) all communications between the MIP Management Committee and UNHCR on his case; and (iv) any document relevant to the calculation of “reasonable and customary expenses”.

7. By way of Order No. 180 (GVA/2018), dated 26 October 2018, the UNDT denied Mr. Peker’s motion on the grounds that the documents were not relevant. Thereafter, the UNDT held a hearing on the merits, where it heard testimony of Mr. Lorenzo Pasquali, former Chairman of the MIP Management Committee, UNHCR, and Ms. Karen Madeleine Farkas, former Director, DHRM, UNHCR. The UNDT had initially scheduled to hear Ms. Lynda Ryan, former Controller and Director, DFAM, but after having heard the two first witnesses, it was agreed that her testimony was not necessary.

8. The UNDT dismissed Mr. Peker’s application. The UNDT indicated that the conditions for reimbursement and the extent of coverage were governed by the MIP Rules, and that the role of the UNDT was, therefore, to assess whether UNHCR had committed any error, in law or in fact, in the interpretation and application of the MIP Rules. In this regard, the UNDT found that the

Administration had accurately applied the MIP Rules, which clearly set forth the threshold for reimbursement, the concept of “reasonable and customary” expenses, and the methodology to assess expenses. The Director, DHRM and the Controller and Director, DFAM were bound to apply these rules without room for discretion. In turn, the UNDT found that Mr. Peker had failed to demonstrate any discernible error in the interpretation or application of the MIP Rules.

9. In addition, the UNDT held that the Administration was correct to not apply the stop-loss provision of Section 6.25 of the MIP Rules because applying the provision would have removed the limitation of the coverage to those reasonable and customary expenses incurred at the duty station and instead would have expanded the coverage worldwide. Worldwide coverage was entirely contrary to the explicit terms of the MIP Rules.

10. The UNDT also rejected Mr. Peker’s argument that apart from the MIP Rules, UNHCR had an obligation to reimburse him for the total amount of medical expenses incurred in Switzerland on account of the attestation he had received from the Human Resources Officer at UNHCR’s Ankara office. The attestation, which had been issued to the Greek Embassy, stated “[w]e also would like to certify that Mr. Peker is fully covered by [the] United Nations Medical Insurance Plan (MIP) against all possible medical expenses that may occur during travel to and in any country”. The UNDT held that the governing law was the MIP Rules and that an attestation by a Human Resources Officer to facilitate a visa for private travel had no legal authority to derogate from the MIP rules. The attestation had been provided at Mr. Peker’s request to reassure a country that he was covered by a health insurance plan for purposes of obtaining a visa. It did not contain any express promise or representation towards Mr. Peker about the extent of his coverage. The UNDT found that, given the context, it could have been construed as an undertaking from UNHCR towards the Greek authorities with specific dates, but, not for Mr. Peker’s travel to Switzerland. The expenses were not incurred in Greece and UNHCR settled all of Mr. Peker’s medical expenses in Switzerland on his behalf. The attestation did not relieve Mr. Peker of his obligation to apprise himself of the MIP Rules, which had been readily available on the UNHCR Intranet, and which had indicated very clearly that local staff members were generally covered for the medical expenses incurred at their duty station. Information about the limitations to coverage for medical expenses incurred out of the duty station, while on private business, was readily available to Mr. Peker. Based on the foregoing, the UNDT held that the attestation was not a binding promise obliging UNHCR to pay for Mr. Peker’s medical expenses that fell outside of the scope and limits of the MIP.

## Submissions

### Mr. Peker's Appeal

11. Mr. Peker requests the Appeals Tribunal to vacate the UNDT's Judgment and rescind the contested decision. In the alternative, he requests the case be remanded to the UNDT for a *de novo* determination following disclosure of all relevant materials.

12. Mr. Peker argues that the UNDT erred in procedure and law in denying his motion of 22 October 2018, wherein he requested disclosure of an English translation of Annex 1 to the Respondent's reply, and all documents relevant to the calculation of "reasonable and customary expenses". The UNDT's Order of 26 October 2018 rejected his requests for disclosure on the basis that the documents were not relevant to the disposal of the case since Mr. Peker had not challenged in his application the amount that had been established as reasonable for the reimbursement under the MIP. The UNDT refused to order the disclosure of the English translation on the ground that it "concern[ed] the establishment of the reasonable costs to be reimbursed under the MIP" and that "issue [wa]s not in dispute". Mr. Peker argues that while the disclosures were rejected on grounds that the calculation of expenses was not relevant to the case, the issue was ultimately extensively addressed in the Judgment as one of the three main issues for adjudication. The UNDT did not have all of the relevant information to conclude that there was no error in the Administration's calculation. It was, therefore, unreasonable for the UNDT to state that he "did not point out any specific error that would show that the basis of the calculation was incorrect", yet deny his requests for disclosure of all relevant documents. This deprived him of the ability to identify the errors. Furthermore, the two witnesses called at trial had not been involved in the calculation process and could not, therefore, provide a detailed account of how reasonable expenses had been determined in his case. Mr. Peker cites to *Staedtler*,<sup>2</sup> which he asserts is analogous to his situation, wherein the Appeals Tribunal found that denying requests for disclosure while making adverse findings against the requesting party amounted to a serious error.

13. The limited documentary evidence available revealed clear problems with the calculation of the expenses. Mr. Peker notes in his appeal an e-mail of 29 December 2015, wherein the administering office wrote that "the operation costs of about 27.000-28.000 TRY including

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<sup>2</sup> *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 33. See also *Charles v. Secretary General of the United Nations*, Judgment No. 2013-UNAT-283, para. 20.

accommodation for one night and the hospital informed us that the normal period of stay for this kind of operations is usually one night but we are not sure about the specifications regarding Bulent's case". The administering office admitted to uncertainties concerning the amount of reasonable expenses and, therefore, the UNDT should have sought clarification on this.

14. The UNDT further erred in fact when it found that Mr. Peker only raised a concern about the way the amount of reasonable and customary expenses was established at the hearing. He had actually raised concerns well before the hearing as proven by his request for disclosure. Mr. Peker did not raise the issue in his application because he had no access to any information regarding the calculation of the expenses and it only became relevant upon receipt of the Secretary-General's reply, which had illuminated inconsistencies in the calculation. While the MIP Management Committee memorandum indicated that multiple hospitals had been consulted, the only document emanating from the administering office revealed that only one hospital had been contacted. These inconsistencies warranted further disclosure to properly establish the facts. The UNDT likewise erred in law and procedure in requiring Mr. Peker to make specific factual submissions prior to receiving such disclosures.

15. In addition, the UNDT failed to give weight to the obvious flaws in the decision-making process including the administering office's admissions that there were uncertainties with the calculation of the expenses. This revealed that the decision to recover USD 14,707.15 from Mr. Peker had not been subjected to adequate scrutiny. MIP Rule 5.5 required field offices to give special attention to claims exceeding an amount equivalent to twice the MIP reference salary, as in Mr. Peker's case, and the Administration should give particular emphasis to the monitoring of such claims. The Administration failed in its duties and the UNDT failed to take into account these considerations. It was unreasonable for the UNDT to determine that a pattern of cost could be determined by one single quote.

16. Lastly, the UNDT erred in law in finding that the Administration had not made a written promise and that the attestation did not create legitimate expectations upon which Mr. Peker could rely. The UNDT ignored its own jurisprudence on the doctrine of legitimate expectations set forth in *Nwuke*, which stated "[a] person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to

receive such treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past practice.”<sup>3</sup>

17. The Appeals Tribunal has held that the notion of legitimate expectations is to allow staff members to seek remedy independent from established rules if the promise is based on an “express and concrete decision, promise, or commitment” that contributes to “raising the staff member’s expectations”.<sup>4</sup> In the case of *Ahmed<sup>5</sup> and Abdalla*,<sup>6</sup> the Appeals Tribunal held that a promise should be express and a legitimate expectation must not be based on mere verbal assertions, but on a firm commitment. In Mr. Peker’s case, the Administration’s promise was unequivocal and in writing representing a firm commitment. The statement he relied on was a formal attestation provided to a Member State and clearly stated that he was covered by the MIP against “all possible medical expenses that may occur during travel to and in any country”.

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

18. The Secretary-General requests the Appeals Tribunal to affirm the Judgment and dismiss the appeal in its entirety. In the alternative, if the Appeals Tribunal finds an error of law or procedure regarding the production of evidence, a remand of the case to the UNDT would be the proper remedy.

19. The Secretary-General argues that Mr. Peker has failed to identify any reversible error by the UNDT. The UNDT did not make a reversible error when it denied Mr. Peker’s disclosure request. The Appeals Tribunal has held that the UNDT has broad discretion with respect to case management and the discretion to order or not order the disclosure of certain documents is within the UNDT’s competence, including the admissibility of evidence and the weight to be attached to such evidence. Furthermore, Mr. Peker has the burden to establish that the evidence, if admitted, would have led to a different finding of fact and changed the outcome of the case. Mr. Peker has not explained how the requested documents would have affected the outcome of the case.

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<sup>3</sup> *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2013/UNDT/157, para. 167.

<sup>4</sup> *Khalaf v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-678, para. 32.

<sup>5</sup> *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

<sup>6</sup> *Abdalla v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-138.

20. The Secretary-General argues that the evidence on record demonstrated that to determine “reasonable and customary” cost of care in accordance with the MIP Rules, the UNHCR office in Ankara had contacted a renowned health care institution, namely, the American Hospital in Istanbul. UNHCR then based its determination of reasonable and customary expenses on the estimate of prevailing charges for the type and nature of medical care that was provided to Mr. Peker, had it been provided by the American Hospital. Mr. Peker has not shown that the American Hospital was not a valid institution to base the calculation on what would be customary and reasonable expenses in Turkey. Mr. Peker also has not shown that they based the determination on inaccurate information.

21. The Secretary-General also argues that Mr. Peker has failed to establish that the UNDT erred in finding that the attestation did not create a legitimate expectation that any and all medical costs incurred by Mr. Peker would be covered in full. Rule 6.4 of the MIP Rules clearly states that any expenses incurred outside of the duty station will be adjusted to reflect the reasonable and customary cost level of the duty station to which the staff member is assigned. The exceptions to this are set out in Rule 6.3 as follows: (i) exceptions incurred for emergency medical care during official mission travel; (ii) approved medical evacuation in the authorized location for the evacuation; and (iii) medical care received in an approved regional area of care. The MIP Rules do not provide discretionary power to make exceptions. None of these exceptions were triggered by Mr. Peker’s situation. Mr. Peker was not entitled to coverage for expenses incurred for medical care that he received while outside of the country of his duty station and on annual leave, which were in excess of the “customary and reasonable” cost level for the same medical care had it been provided in Turkey. The attestation did not create an exception under the MIP Rules and ignorance of the law is no excuse. He has failed to identify any errors of fact or law that would demonstrate that the UNDT failed in its conclusion that he did not have a legitimate expectation that his medical costs incurred outside of the duty station and while on annual leave would be covered in full.

### **Considerations**

22. The Appeals Tribunal is prevented from undertaking a proper review in this case due to the fact that the audio recording of the oral hearing before the UNDT contains only the final submissions of both counsels but not the testimony of the two witnesses and Mr. Peker. The case must therefore be remanded to the UNDT for a *de novo* determination.

23. In addition, we find that the UNDT erred in rejecting Mr. Peker's request for documents related to the calculation of reasonable and customary expenses. The UNDT rejected the disclosure of these documents on grounds that they were not relevant. However, the issue of whether the Administration properly calculated "reasonable and customary" expenses was a central issue in contention and was addressed extensively by the UNDT in its Judgment. As the calculation of reasonable and customary expenses is a critical issue in this case, we remand the matter to the UNDT for a *de novo* determination, which shall include the disclosure of these requested documents and all relevant materials, that is the communication between the Hôpital de la Tour in Geneva and UNHCR, an English translation of Annex 1 of the Respondent's reply and any other documents relevant to the calculation of reasonable and customary expenses in Mr. Peker's case.

**Judgment**

24. The case is remanded to the UNDT.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of June 2019 in New York, United States.

*(Signed)*

Judge Knierim, Presiding

*(Signed)*

Judge Halfeld

*(Signed)*

Judge Thomas-Felix

Entered in the Register on this 22<sup>nd</sup> day of August 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar