



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

KOZUL-WRIGHT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Bettina Gerber, UNOG

Introduction

1. The Applicant, a senior staff member of the United Nations Conference on Trade and Development (“UNCTAD”), contests the decision to waive his diplomatic immunity with regard to a dispute over the lease of an apartment, as notified to him by memorandum dated 10 May 2016.

2. By way of remedies, he requests the rescission of the contested decision, as well as compensation in the amount of one-year’s net base pay for any consequential losses and for moral damages and costs for abuse of process by the Respondent.

Facts

3. The Applicant serves as Director, Division on Globalization and Development Strategies, UNCTAD, at the D-2 level. He enjoys diplomatic immunity according to art. V, Sec. 16 of the 1946 Agreement on Privileges and Immunities of the United Nations concluded between the Organization and the Swiss Confederation (“Host Country Agreement”).

4. On 12 February 2010, the Applicant and his then wife, who was also a senior official of UNCTAD enjoying the same kind of immunities, signed a lease agreement for an apartment in Geneva that they rented as their personal residence. This apartment was situated at approximately 30 minutes by car from their workplace, or about one hour at rush hours. The contract set the lease period at three years and 15 days—from 16 March 2010 to 31 March 2013—and the rent at CHF10,175 per month.

5. Prior to the expiration of the lease, the spouses decided to relocate to another apartment they found considerably closer to the United Nations premises, given that the then Applicant’s wife suffered from a neurological disorder and her doctor recommended reducing the time and stress of a lengthy commute. They provided the landlord with a three-month notice, according to a clause for early rescission that senior United Nations officials are entitled to have included in their

lease agreements, and advertised the apartment at their own expense with a view to identifying a replacement tenant. They found a potential tenant who expressed some interest in the apartment, but the landlord did not accept him for reasons that remain contentious: the Applicant holds that it was because this person (whilst not being an international civil servant) asked for a similar three-month rescission clause in his contract, which the landlord refused; the record of domestic judicial proceedings in connection with the lease in question, nonetheless, points rather to the fact that the landlord was never provided with documents proving the potential replacement tenant's solvency to take over the lease, and/or to the latter losing interest in the lease as it was due to expire in a little more than a year.

6. On 29 February 2012, the Applicant and his then wife left the apartment and ceased paying the rent. An alternative tenant—found by the landlord—eventually took over the apartment as of December 2012.

7. The real estate agency representing the landlord instituted legal proceedings against the couple, claiming the monthly rents accrued between March and November 2012. The matter was brought before the *Commission de conciliation en matière de baux et loyers* (“the Commission”), a Swiss domestic body created to seek amicable settlements in disputes regarding real estate rentals. However, the Commission determined on 2 October 2012 that the efforts for an amicable resolution had failed.

8. On 12 October 2012, the Permanent Mission of Switzerland to the United Nations Office and to other international organizations in Geneva (“Swiss Mission”) requested the lift of diplomatic immunity to allow proceedings before the Geneva courts against the Applicant and his then spouse.

9. By email of 18 October 2012, the Legal Liaison Office, Office of the Director-General, United Nations Office at Geneva (“UNOG”) forwarded to the Applicant and his then wife a letter from the Swiss Mission containing the request from the landlord's attorney to waive their immunity. In this email, the Senior Legal Adviser, UNOG, conveyed his recommendation to settle this private matter out of court, and requested to be informed about any measures to this end, failing

which he would have to forward the request to the Office of Legal Affairs (“OLA”), United Nations Headquarters, for decision.

10. On 26 October 2012, the Applicant and his then wife wrote to the Senior Legal Adviser, UNOG, that they did not consider the matter as private and requested the immunity not to be lifted, attaching an undated memorandum supporting their assertion. They also sent:

- a. A medical certificate from the Applicant’s wife’s neurologist, dated 23 October 2012, stating that her condition could aggravate as a result of driving a long distance under stressful circumstances, which made a reduction of her driving time between her domicile and her work advisable, and
- b. A second medical certificate by a Medical Doctor of the Medical Services Section, UNOG, dated 24 October 2012, supporting the same conclusions.

11. The Senior Legal Adviser, UNOG, replied, on 29 October 2012, that “from a strictly legal point of view, [he] did not share [the Applicant’s] analysis” and that, as per standard practice, he would have to transmit the request to OLA, together with the Applicant’s observations, which he did. By a further email of 30 October 2012, the Senior Legal Adviser clarified that his Office did not make its own recommendations on immunity waiver requests, and that, in accordance with the Agreement, “waivers must in general be granted by the UN, but special circumstances (such as those [the Applicant] describe) may be taken into consideration”.

12. By memorandum dated 12 November 2012, the Assistant Secretary-General (ASG”), OLA, informed the Senior Legal Adviser, UNOG, of the decision to waive the Applicant’s and his then wife’s immunity for the purposes of civil proceedings for the alleged non-payment of rent for an apartment in Geneva.

13. The Senior Legal Adviser, UNOG, informed the Swiss Mission of the decision to lift the immunities, by memorandum of 14 November 2012. He shared a copy of this memorandum with the Applicant on the same day.

14. On 14 December 2012, the Applicant emailed the ASG, OLA, asking for clarification on the lift of his and his wife's immunity.

15. The Applicant made a request for management evaluation of the decision to waive his diplomatic immunity on 10 January 2013, which the Management Evaluation Unit ("MEU") rejected as irreceivable *ratione materiae*. The Applicant did not further challenge this decision.

16. On 11 January 2013, the Senior Legal Adviser, UNOG, wrote to the Applicant with respect to his request for clarification to the ASG, OLA, stating that the Organization's established practice is to waive diplomatic immunity so that staff members may properly deal with their private legal obligations, such as those arising in the Applicant's case under a lease contract. The Senior Legal Adviser concluded that the waiver of immunity in the Applicant's instance was, therefore, consistent with such practice, and added that

[I]mmunity (diplomatic and functional) is conferred ... in the interests of the United Nations, and not for the personal benefit of UN officials. The Organization is obliged to respond to requests for the waiver of an official's immunity in accordance with its legal obligations to Member States.

17. By email of 21 January 2013, the Senior Legal Adviser, UNOG, forwarded to the Swiss Mission the Applicant's memorandum of 26 October 2012, as well as the medical certificate of the Medical Officer, UNOG, on his wife's state of health. On the same day, he sent to the Swiss Mission a summary of the procedure's standpoint and the Applicant's perspective. On 22 January 2013, he updated OLA on the status of the case.

18. On 19 May 2015, the Applicant's then wife ceased her service with UNCTAD, for health reasons (disability) further to the worsening of her neurological disorder.

19. By Judgment dated 15 October 2015, a Geneva court ruled against the Applicant and his then wife and ordered them to pay CHF90,450 plus 5% interest as of 1 December 2012. The Applicant and his former spouse did not appeal this Judgment.

20. On 23 October 2015, the Organization decided to lift the Applicant's immunity from legal process in the context of another claim for non-payment of rent by a different landlord.

21. On 8 April 2016, the landlord who had been awarded compensation by the Judgment of 15 October 2015 requested the Swiss Mission to seek from the United Nations the waiver of the Applicant's immunity with respect to the execution of said Judgment.

22. On 28 April 2016, the Swiss Mission requested the Senior Legal Adviser, UNOG, the lifting of the Applicant's immunity. The Senior Legal Adviser forwarded this request to OLA on 2 May 2016.

23. Having been informed of such request, the Applicant provided comments thereon to the ASG, OLA, on 3 May 2016, claiming that the legal proceedings in question were "frivolous and pursued merely to harass and extort money", and requested the rejection of his immunity being lifted.

24. By memorandum of 9 May 2016, the ASG, OLA, advised the Senior Legal Adviser, UNOG, that the Applicant's immunity should be lifted. A copy of this memorandum was shared with the Applicant on 10 May 2016 and, on the same day, the Swiss Mission was informed of the lifting of the Applicant's immunity for the execution of the Judgment in question.

25. On 17 June 2016, the Applicant requested management evaluation of the waiver of his diplomatic immunity as notified in the memorandum of the Senior Legal Adviser, UNOG, on 10 May 2016. This request was rejected as irreceivable, by letter dated 20 July 2016.

26. The present application was filed with the Tribunal on 14 October 2016. After moving for leave to limit his reply to issues of receivability, denied by Order No. 218 (GVA/2016) of 10 November 2016, the Respondent filed a full reply on 17 November 2016.

27. By Order No. 117 (GVA/2017) of 29 May 2017, the parties were invited to submit comments on whether they deemed an oral hearing necessary for the determination of the case and, alternatively, on their desire to file additional submissions. Both parties agreed to the case being adjudicated on the written submissions, and the Applicant requested leave to file additional comments on the Respondent's reply, which was granted by Order No. 123 (GVA/2017) of 9 June 2017. Accordingly, the Applicant filed additional comments on 19 June 2017.

Parties' submissions

28. The Applicant's principal contentions are:

- a. On receivability, MEU was wrong in holding that the contested decision did not affect the Applicant's contract of employment or terms of appointment. This view results from a confusion between diplomatic immunity and functional immunity, and between the Organization's own immunities and the contractually accorded immunities to staff. The latter are essential conditions of service, enshrined in the Charter and specifically incorporated to the Staff Regulations. While the Secretary-General has a discretionary power to waive staff privileges and immunities, this is not unfettered. Such a waiver must be based on sound reasoning with clearly articulated rationale;
- b. The former United Nations Administrative Tribunal ("UNAdT") and the Dispute and Appeals Tribunal found it appropriate to adjudicate on the merits cases concerning the entitlement to privileges and immunities;

c. The waiver of diplomatic immunity of senior staff members fulfils all the requirements to qualify as an administrative decision pursuant to the definition adopted in the internal justice system. Notably, it produces direct legal consequences affecting a staff member's terms and conditions of appointment. Diplomatic immunity derives from the Charter and from the Vienna Convention on Privileges and Immunities of the United Nations of 13 February 1946 ("Convention"). Waiving them amounts to the withholding of an important element of the contractual relationship, which can only be based on a competing interest of the Organization;

d. On the merits, the contested decision was arranged at the Swiss Mission's request without a reasoned analysis of the interest of the Organization in placing the Applicant in this difficult situation. While staff regulation 1.1(f) allows for a waiver when there is an abuse or risk of abuse of the immunity, no due diligence was conducted in this respect, in light of the countervailing evidence he adduced supporting his actions as reasonable, lawful and in the interest of the Organization;

e. An initial request in 2013 from the Swiss Mission was acted upon by UNOG even before receiving the Applicant's written objections. The Administration never acknowledged or responded to his concerns or gave a reasoned response taking into account the disabling condition that limited his former wife's mobility, and that her relocation was in line with advice from UNOG's Medical Service; this official involvement has been ignored. The same took place in 2016 as regards the execution of the Judgment. On this occasion, the Applicant's Counsel addressed a detailed explanation on his behalf, which was left with no response or further communication until the announcement of the decision. Hence, the Administration has twice merely acceded to the Swiss Government's requests, prompted, in turn, by the landlord's assertions, despite the prohibition for United Nations officials to seek or accept instruction from any government, under staff regulation 1.2(d);

f. The decision failed to take a number of critical factors into account, rendering it arbitrary and improper. The entire rationale for vacating the apartment was ignored. The decision of the spouses to vacate the apartment was not a personal one, but required in order to allow the Applicant's former wife to continue performing her official duties. Thanks to this relocation she was able to continue discharging her functions for three more years. The Convention on the Rights of Persons with Disabilities and its Optional Protocol reflect a duty of care towards persons who are impaired. Thus, there was a compelling interest in facilitating this arrangement, which is not outweighed by a clearly articulated competing interest;

g. The Applicant's former wife, who was also an employee of the Organization and tenant of the apartment, was never accused of failure to honour her private legal obligations. Further, no account was taken of the Applicant's good faith efforts to meet his obligations—notice of vacation, finding a replacement tenant—and the landlord's refusal to mitigate his losses. No evaluation was made of the landlord's claims. The very purpose of immunities is avoiding the use of the local legal process for improper purposes, whereas their summary waiver encourages the kind of nuisance lawsuit that the policy is designed to prevent;

h. The Organization has to ensure that a waiver of immunity is not granted arbitrarily and as a matter of routine. The Applicant's status was dismissed from the start as a routine matter and a purely private issue. The Applicant's immunity does not only pertain to his official acts on behalf of the Organization, but applies to private transactions as well, with the aim to ensure the independence of international civil servants and to exempt them from time consuming and opportunistic legal processes, similar to the abusive legal proceedings the Applicant has undergone. The Applicant undertook the action he did in the interest of the Organization, and not out of personal interest. By acquiescing to an influential government, such as Switzerland in this case, the Respondent has created a dangerous precedent, encouraging the misuse of local proceedings to take advantage of the Applicant's vulnerability as an international civil servant;

i. The Respondent's allusion to another instance of request—and granting—of the Applicant's immunity lifting is misleading. Prior to the Applicant's wife's separation from service, her and the Applicant lived in separate accommodations for over a year. She later left Switzerland without resolving the issues that gave rise to the dispute with the landlord. This issue with the rent is still under consideration in the final divorce proceedings; and

j. The Applicant was left to deal with the financial and emotional strain of the entire problem without support.

29. The Respondent's principal contentions are:

a. The decision to waive the Applicant's immunity for the purposes of the execution of the Judgment dated 15 October 2015, does not affect his employment contract or his terms of appointment. In consequence, this application is irreceivable *ratione materiae*. Privileges and immunities are not individual benefits under a staff member's contract of employment. They are beyond the Tribunal's jurisdiction;

b. Several relevant provisions stress that any privileges and immunities, from which the Applicant benefits, were granted in the interests of the Organization and for the exercise of its functions. Hence, the granting or lifting of immunities affects solely the relation between the Organization and the Member States—Switzerland in this case;

c. The United Nations must comply with its obligations vis-à-vis Member States under the relevant international instruments. In particular, the Convention and the Agreement set out not only the right but, indeed, the duty for the Secretary-General to waive immunity when it would impede the course of justice, as well as to cooperate with national authorities to facilitate the proper administration of justice;

d. Turning to the merits, the procedure to waive the immunity was properly followed. It is the standard practice that a plaintiff seeking to launch legal proceedings must first request waiver of the defendants' immunity through a duly justified request to the Swiss Mission, accompanied by supporting documents. Upon receipt of the request, the Swiss Mission transmits it to the Senior Legal Adviser, UNOG, and the latter to OLA, which presents the case to the Secretary-General for decision as to whether the waiver of immunity is warranted. In case a waiver is decided, OLA communicates it to the Senior Legal Adviser, UNOG, who informs the staff member concerned as well as the Swiss Mission. The Applicant's former landlord went through this process and he did so based on an executable Judgment;

e. As a matter of due process, the staff member in question must be afforded the opportunity to comment on the matter before the Secretary-General makes a final decision. The Applicant has been given ample opportunities to comment throughout the lengthy process that started in 2012. In particular, his attorney submitted comments on his behalf, which were analogous to those already submitted before the immunity from legal proceedings was lifted. The fact that OLA did not reply to his memorandum before making a decision is irrelevant;

f. The Secretary-General's discretionary power was properly exercised. It results clearly from all relevant rules and instruments that privileges and immunities are not granted for the personal benefit of the Organization's officials. They do not excuse staff members from observing the law of the State where they are based; accordingly, the Applicant was bound to obey Swiss law;

g. The Secretary-General's discretion to take this decision was significantly reduced. The Organization has an obligation to cooperate with the Member States' authorities to facilitate the proper administration of justice and to prevent abuses in connection with privileges and immunities. The Judgment of 15 October 2015 was executable and the matter of dispute

was purely private. The link the Applicant tries to create with his then wife's official functions, noting that Medical Services, UNOG, recommended the reduction of her commuting time between her office and apartment, is far-fetched. This recommendation cannot be construed as requesting the couple to unilaterally terminate a lease agreement that was not due to expire until over a year later and cease paying the rent;

h. The decision at issue was not taken "automatically". Several communications took place between the Senior Legal Officer, UNOG, and the Applicant—*inter alia* advising him on the best course of action and informing him about the process—as well as with the Swiss Mission and with OLA, with which there was constant collaboration and exchange of information, including to ensure that the 15 October 2015 Judgment was in itself a sufficient legal title for recovery of rent arrears. Moreover, all officials involved acted with utmost diligence and tried to avoid that the Applicant be condemned by an executable judgment to pay a significant sum of money. However, the Applicant remained convinced that he was protected by his diplomatic immunity. He entrusted his legal representation to a Geneva Tenants Association and did not appeal the Geneva court Judgment. It was the Applicant's choice to not be represented by a lawyer before the Swiss court as well as not to appeal the Judgment; and

i. The Administration considered all relevant circumstances and allegations of the Applicant.

Consideration

30. In the present case, the Applicant, a D-2 staff member, contests the decision taken by the Secretary-General to waive his immunity following a request from the Swiss judicial authorities. Consequently, this Tribunal has to analyse the following issues:

- a. Receivability;
- b. Proper exercise of discretion in lifting the Applicant's immunity;

- c. Respect of due process requirements; and
- d. Duty of care.

Receivability

31. The Respondent contends that the lifting of the Applicant's immunity for the purpose of executing a judgment by a national court does not constitute an appealable decision within the meaning of art. 2.1(a) of the Tribunal's Statute. Specifically, it is the Respondent's position that the aforesaid decision does not affect the Applicant's employment contract or terms of reference, because privileges and immunities are accorded to the Organization, hence, pertain to the relations between it and its Member States.

32. International organizations and their officials certainly enjoy functional immunities so they can undertake their work without undue interference by the states in which they operate.

33. Privileges and immunities of staff of an intergovernmental organization are not entitlements conceived for the employees' advantage. Whether they cover exclusively acts or omissions in the discharge of an employee's duties (functional), or whether they also extend to private transactions (diplomatic—generally reserved to the most senior staff), immunities are conferred with the finality of enabling the organization's agents to discharge their functions without undue pressure.¹ They are not personal prerogatives for the staff member, and must certainly not be seen and used as a *carte blanche* to default private commitments. In sum, as the Respondent rightly points out, privileges and immunities are only accorded to officials in the interests of the Organization and not for the benefit of the individual concerned.²

¹ See *Difference relation to Immunity from legal process of a special rapporteur of the Commission of Human Rights, Advisory Opinion, International Court of Justice Reports 1999*.

² Sec. 20 of the Convention of Privileges and Immunities of the United Nations of 13 February 1946.

34. The foregoing does not amount to say that immunities—and for the purposes of this case, immunity from legal proceedings and from execution—are not part of the terms of appointment of United Nations staff members. Indeed, art. 105 of the Charter disposes that:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. Representatives of the members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

35. Staff regulation 1.1(f) develops the same principle in the following terms:

The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations in the State in which they are located, nor do they furnish an excuse for non-performance of their private obligations.

36. In consonance, staff rule 1.2(b) provides:

Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts.

37. This obligation is reiterated in secs. 2.1 and 2.2 of Administrative Instruction ST/AI/2000/12 (Private Legal Obligations of Staff Members), and its sec. 2.3 complements as follows:

Pursuant to section 20 of the Convention of Privileges and Immunities of the United Nations (“the Convention”), the immunity granted to an official shall be waived in any case where, in the opinion of the Secretary-General, the immunity would impede the course of justice and its waiver will not prejudice the interests of the United Nations. In accordance with section 21 of the Convention, the United Nations has an obligation to cooperate at all times with the appropriate authorities of Member States to facilitate the proper administration of justice and to prevent the

occurrence of any abuse in connection with the privileges and immunities of the Organization.

38. Clearly, these provisions lay down the existence of immunities for the Organization's staff and set out their contours—which, relevantly, include the possibility for the Secretary-General to waive them. In view of this, it is patent that immunities have been incorporated into the terms of appointment of United Nations staff members—including at the highest level of the Organization's legal order and ever since its inception—thereby becoming part and parcel of their status and conditions of service.

39. Furthermore, a decision to waive the immunity of a given staff member has evident—potentially dramatic—effects on his or her legal situation. In the case at hand, such consequences are significant and extremely concrete. In this light, the Tribunal finds that the contested decision meets all the features of the definition of an administrative decision adopted by the Appeals Tribunal (following UNAdT Judgment No. 1157, *Andronov* (2003)), and notably the most cardinal of them, i.e., having “a direct impact on the terms of appointment or contract of employment of the individual staff member” (*Andati-Amwayi* 2010-UNAT-058 see also *Nguyen-Kropp & Postica* 2015-UNAT-509, *Wasserstrom* 2014-UNAT-457).

40. Consistent with this finding, both the Dispute and the Appeals Tribunal have declared themselves competent to enter into the merits of cases revolving around staff privileges and immunities matters (*Bekele* UNDT/2010/175, affirmed in *Bekele* 2012-UNAT-190), as have other sibling jurisdictions—including cases specifically on lifting of diplomatic immunity of staff (UNAdT Judgment No. 579, *Tarjouman* (1992); International Labour Organization Administrative Tribunal Judgments Nos. 933, 1543, 2190, and 2222).

41. For the above reasons, the Tribunal concludes that the instant application is receivable and will accordingly proceed to examine its merits.

Proper exercise of discretion in lifting the Applicant's immunity

42. Arts. 20 and 21 of the Convention set forth the legal framework of staff privileges and immunities in the United Nations as follows:

Article 20

Privileges and immunities are granted to officials in the interest of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

Article 21

[T]he United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

43. Furthermore, arts. 17 and 18 of the Agreement contain nearly identical provisions.

44. It follows that the decision to waive or maintain the immunity covering a staff member belongs to the Secretary-General, who essentially must weigh the need not to impede the course of justice and, the interests of the Organization that could be prejudiced by such a lifting of immunity. The latitude of the Secretary-General in making this determination, however, is expressly limited by a series of obligations incumbent on the Organization, namely, to facilitate the proper administration of justice and the observance of police regulations, as well as to prevent abuse of privileges and immunities. These are not just vague maxims of courtesy towards the host country, but legally-binding obligations for the United Nations.

45. Like for any discretionary decision, the Tribunal should not disturb the decision by the Secretary-General to lift immunities unless such discretionary power has been abused (*Sanwidi* 2010-UNAT-084). In the present case, there is

no indication of procedural flaw, bias or improper motivation, material error, arbitrariness, manifestly unreasonable results, or else consideration of improper or irrelevant factors or failure to take into account relevant ones.

46. Contrary to the Applicant's submission, it appears from the record that the involved bodies and officials conducted a careful examination of the facts, considerations and interests at stake, and issued a reasoned decision. The Applicant complains, in particular, that the medical condition of his then wife was not given appropriate weight. He goes as far as claiming that the matter was not a private one, since the motivation for his and his then spouse's move was to allow her to perform her duties in the Organization's service. He further invokes the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

47. This argument is misconceived. It is important to underline that, although diplomatic immunity indeed covers both official and private dealings, its *raison d'être* remains enabling the Organization's agents to discharge their functions in adequate conditions. The Secretary-General will naturally, and rightly so, bear in mind the connection or impact of a given incident with the staff member's official duties when considering whether or not to lift an agent's immunity.

48. The lease of an apartment for a staff member's personal accommodation is eminently a private matter. The move of the Applicant's then spouse was not for official purposes, and there are not the slightest indicia—nor does the Applicant argue so—that the proceedings that ensued in the dispute with their landlord were prompted, influenced or in any way related to their status as UNCTAD senior officials or to statements made or activities undertaken in this capacity.

49. The Tribunal does not call into question that the Applicant's and his then spouse's move may well have been aimed at preserving the health and well-being of the Applicant's then wife. This is an understandable and legitimate goal, but it does not mean—as the Applicant seems to imply—that because he had a legitimate reason to move, he was allowed to breach his commitments vis-à-vis third parties. Instead, by virtue of the lease contract he had signed, he ought to honour such obligations or to bring them to an end in conformity with the applicable law.

50. While the Applicant seems to believe that he went the extra mile to properly rescind his lease contract, it stands that, under Swiss law, a tenant wishing to leave a rented apartment before the agreed term must not merely look for a replacement tenant but actually identify a fully satisfactory one. As highly educated and capable individuals, the Applicant and his then spouse should have been aware of the scope of the commitments they undertook. In spite of this, they stopped paying the rent upon moving. In this context, it is not for the Tribunal to double-guess the appropriateness of the Swiss regime on leases. It shall solely observe that this is the law in force as applied to any tenant at the duty station and that the Applicant was bound to respect it. The fact that he enjoys diplomatic immunity does not place him above the law. If anything, as a senior official of the Organization, he has an enhanced responsibility to abide by it.

51. The Applicant submits that the Secretary-General should refrain from lifting a staff member's immunity unless this would seriously prejudice a compelling interest of the Organization. However, in the Tribunal's view, this would run counter to the United Nations' explicit undertaking to waive an official's immunity when it would impede the course of justice. It would also be at odds with its related duties to facilitate the administration of justice, secure the observance of police regulations and preventing any abuse of immunities.

52. In addition, whilst the Secretary-General is entitled to decline a request for immunity lifting if he considers that this would harm the interests of the United Nations, the Organization has no interest whatsoever in assisting one of its employees in hiding behind immunity to avoid being held accountable for breaching private obligations. All the more since, by doing so, the Organization would hinder its own position by undermining the trust of the host country. Ultimately, such an attitude would foreseeably bring the Organization and its staff into dispute. Besides, it would be extremely contradictory—not to say nonsensical—to prescribe its staff members' duty to comply with local laws and honour their private legal obligations (staff rule 1.2(b) and ST/AI/2000/12), only to later prevent the regular enforcement of domestic law by declining to lift a staff member's immunity when warranted.

53. Regarding the so-called “implication” of the Organization’s officials, it is disingenuous to suggest that the Administration carries some responsibility in his default of payment on the mere grounds that a doctor from its Medical Services recommended his wife to reduce her driving commuting time.

54. Lastly, the Applicant’s suggestion that the Organization bent to undue influence or instructions by the Swiss authorities, in violation of its independence, is entirely unfounded. The procedure in place to request and, if warranted, obtain a lifting of immunity is part of the normal relations between the United Nations and Switzerland as its host country. As such, this process is contemplated in the Convention and the Agreement. Therefore, the Administration acted lawfully in processing the request as per the established procedures and practice, and in examining it in light of the relevant factors and respective legal obligations.

55. In view of the foregoing, the Tribunal finds that the discretionary power of the Administration was properly exercised. There is nothing to suggest that the Secretary-General failed to take into account and ponder all relevant considerations in making the decision to lift the Applicant’s immunity, or that this waiver was unjustified, unreasonable or capricious.

Respect of due process requirements

56. The lifting of a staff member’s immunity implies a lengthy process, involving several actors within and outside the Organization.

57. It requires respect of due process rights and a fair treatment of the staff member, including the right to be informed about the existence of a request for a waiver of immunity and its basis, as well as the right to have legal counsel and to contradict the request by providing evidence and formulating objections.

58. In this case, it is documented that every step of the established procedure was followed meticulously and conducted correctly.

59. In the present case, the request for a waiver was not launched on dubious or weak grounds. Specifically, the waiver procedure regarding the immunity of execution was triggered on the basis of an executable judgment by a competent jurisdiction, and the Administration showed diligence in verifying that the judgment was a valid final title for execution.

60. In terms of due process, the critical question is whether the Organization afforded the Applicant a timely and meaningful opportunity to be heard before reaching the contested decision. After review of the file, the Tribunal is satisfied that it did.

61. UNOG kept the Applicant abreast of the unfolding of the procedure as it came along. Relevantly, he was invited to submit comments, firstly, during the process that led to the lifting of his immunity of legal proceedings and, subsequently, following the request to waive his immunity of execution. He seized these opportunities as he submitted written briefs with supporting documents, respectively, on 26 October 2012 and 3 May 2016, assisted each time by an attorney of his choice. Both of the Applicant's submissions were forwarded to OLA for its consideration together with the request by the Swiss Mission. The ASG, OLA, in his memorandum of 12 November 2012—lifting the immunity of proceedings for the same dispute— explicitly refers to the medical condition of the Applicant's former wife and her difficulties to travel to her workplace, which indicates that the decision-maker concretely took cognizance and account of his comments.

62. Although the Applicant regrets that OLA did not contact him directly when he sought clarification on 14 December 2012, the Tribunal notes that this did not deprive him of an appropriate chance to explain and defend his views in good time. Nor does the Tribunal agree that in informing the Swiss Mission and the Applicant of the two decisions to lift his immunity on the same day, UNOG violated in any manner his rights or damaged his position.

63. Accordingly, the Tribunal concludes that the decision-making process that brought about the impugned decision was not tainted by any vice of procedure, and that the Applicant's due process rights were upheld.

Duty of care

64. The relevant case law has recognised that the Organization has an obligation to act fairly and in good faith with its staff and a duty of care concerning its employees (*Pirnea* 2013-UNAT-311; *Allen* UNDT/2010/009; *McKay* UNDT/2012/018, confirmed in *McKay* 2013-UNAT-287). Since the Applicant repeatedly states that, further to the waiver of his immunity, he was exposed to abuse and alludes in various ways to the Organization not having protected and/or supported him, it is appropriate for the Tribunal to examine if the Administration upheld the above-mentioned duties vis-à-vis the Applicant.

65. In this regard, the record shows that the Applicant was promptly made aware of each of the requests for waiver of his immunity, and of each of the steps in their processing. The Senior Legal Adviser, UNOG, gave him advice, recommending him to settle the matter extra-judicially prior to lifting his immunity of process. As a matter of fact, he granted the Applicant a grace period to attempt an amicable settlement, before sending the request to OLA for decision by the Secretary-General. He also offered a detailed analysis of the Applicant's situation, notably in his email of 29 October 2012, so that he could fully understand the implications and risks. In particular, he made it clear that the practice of the Organization was to lift staff immunity for disputes concerning private matters when no particular interest of the Organization was under threat, and that the Applicant's case was viewed as a purely private matter. Therefore, the Applicant was given all relevant information to apprehend the likelihood of his immunity being waived.

66. Lastly, after his immunity from legal process was waived in January 2013—a decision that he did not contest before the Tribunal—especially given the line of reasoning clearly put forward for it, it could not come as a surprise for the Applicant that his immunity from execution was in turn waived too.

67. In summary, the Administration acted transparently and fairly towards the Applicant and in keeping with its duty of care towards him.

68. This contrasts with the Applicant's attitude during most of the four-year process. It seems that he did not keep looking for a new tenant once he vacated the apartment, despite reminders by the real estate agency. Furthermore, he did not take part in the domestic proceedings before the Geneva Court that issued the Judgment ordering him to pay over CHF100,000 and, once the ruling was rendered, he did not appeal it. This is extremely surprising given the discontent that he manifests in the present application.

69. The Applicant does not provide any explanation for what appears at least as considerably careless behavior on his part, that hardly comports with what is expected from a highly-ranked official of the United Nations. The thought that he would have forsaken this dispute simply because he was over-reliant on his immunity is concerning. At any rate, the Organization has no responsibility to make up for the Applicant's lack of diligence in his defense, and should not bear the consequences resulting from his forfeiture of procedural rights.

70. Lastly, the Tribunal finds no merit in the insinuation that the Organization treated the Applicant's then spouse more favourably than him. His then wife's immunity from legal process was lifted simultaneously to his. Both received the same treatment. By the time the request for waiver of immunity from execution was received and processed, the Applicant's former wife was no longer in the Organization's employment. As a result, she had ceased enjoying immunity, which could thus not be lifted. Hence, any contention to the effect that the Applicant was discriminated or personally targeted is groundless.

Conclusion

71. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 13th day of September 2017

Entered in the Register on this 13th day of September 2017

(Signed)

René M. Vargas M., Registrar, Geneva