



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Case No. 2010-077

Bertucci
(Respondent/Applicant)

v.

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

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Jean Courtial
Judge Sophia Adinyira
Judge Mark P. Painter
Judge Kamaljit Singh Garewal
Judge Rose Boyko
Judge Luis María Simón

Judgment No.: 2010-UNAT-062

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: François Lorient

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The main issue in the proposed appeal of a series of rulings made by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) is whether the Appeals Tribunal has jurisdiction to receive interlocutory appeals, that is, appeals against rulings made

privilege. By Order No. 40 (NY/2010) of 3 March 2010, Judge Adams ordered the Secretary-General to produce to the UNDT by close of business Friday, 5 March 2010, the following categories of documents: documents considered by the Selection Committee; the records of the deliberations of the Selection Committee; and any communication by it to the Secretary-General together with the documents prepared by officials in the Executive Office of the Secretary-General (EOSG) relating to the appointment of the ASG/DESA.

6. On 7 March 2010, the Secretary-General filed a submission declining to produce the requested documents for the reasons set out in his previous submissions. On 8 March 2010, the first day of the hearing of Bertucci's application challenging his non-selection for the post

9. On 10 March 2010, the Secretary-General notified the UNDT that the officer referred to in Order No. 44 would not appear before the Dispute Tribunal. During the hearing, the Secretary-General submitted that the grounds

(2) Senior appointments by the Secretary-General are comparable to ministerial appointments by a Head of State and are thereby subject to an extremely narrow scope of judicial review;

(3) The UNDT erred on a question of fact and law in determining that senior appointments are no different from appointments of lower-level officials and that the scope of judicial inquiry should be the same;

(4) The UNDT exceeded its competence in seeking to review the consideration by the Secretary-General of factors which are appropriate and relevant to the evaluation of candidates for senior appointments;

(5) The UNDT erred as a matter of law in failing to recognize that documents of the EOSG relating to senior appointments are privileged and thereby not subject to disclosure to the UNDT; and that

(6) Those documents should be protected by a privilege analogous to executive privilege.

14. In the appeal against Order No. 42, the Secretary-General submits that the UNDT erred on a question of law

(1) In characterizing the Secretary-General's non-execution of Order No. 42 as "disobedience". Filing an appeal and declining to execute an order before it becomes executable or after an appeal has been filed is neither disobedience nor contempt;

(2) In finding that it has the authority to find and sanction contempt; and

(3) In prohibiting the Secretary-General's appearance before it in the case as a sanction for contempt. The Secretary-General argues that the UNDT erred in law in its apparent reliance on the authority of the International Military Tribunal in Nuremberg as precedent, and that the Order violated the

15. In the appeal against Order No. 43, the Secretary-General submits that
- (1) The UNDT erred on a question of law and exceeded its competence in prohibiting the Secretary-General's appearance during its examination of Bertucci's second application as a sanction for contempt in relation to Order No. 40; and
 - (2) Order No. 43 violated the Secretary-General's right to equality before the courts. It also violated the Secretary-General's right to an impartial tribunal.
16. In the appeal against Order Nos. 44 and 46, the Secretary-General repeats the arguments already stated above in detail. The Secretary-General requests that the Appeals Tribunal make a number of findings and vacate Order Nos. 40, 42, 43, 44 and 46 in their entirety.

Bertucci's Answer

17. Bertucci submits that the facts and procedural history, as presented by the Secretary-General in the appeals, are "intentionally inaccurate, incomplete and misleading". Bertucci submits that the appeals should be dismissed on the following grounds:

- (1) No judgment has been rendered within the meaning of Article 2(1) of the Statute of the Appeals Tribunal;
- (2) If it is considered that a judgment has been rendered by the UNDT, Bertucci submits that the issue is now time-barred. It is argued that the UNDT issued an Order on 17 September 2009 compelling disclosure of the documents and an appeal was not filed against that Order within the 45-day time-limit;
- (3) The appeals constitute an abuse of process. The Secretary-General, through his contemptuous behaviour, is undermining judicial independence;
- (4) Bertucci rejects the submissions that the Secretary-General should be considered as equivalent to a Head of State and that Assistant Secretaries-General and Under-Secretaries-General are equivalent to Ministers of State. In his view, the United Nations, as an employer, is a corporate body;

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20. The Statute of the Appeals Tribunal does not clarify whether the Appeals Tribunal may hear an appeal only from a final judgment of the UNDT on the merits, or whether an interlocutory decision made during the course of the UNDT proceedings may also be considered a judgment subject to appeal.

21. In *Tadonki (No.1)*,⁴ the Appeals Tribunal has emphasized that most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. In *Calvani*,⁵ the Appeals Tribunal held that an appeal by the Secretary-General from an interlocutory order of the UNDT for the production of a document was not receivable. It observed that the UNDT had discretionary authority in case management and the production of evidence in the interest of justice and that, should the UNDT have

party were able to appeal to the Appeals Tribunal if dissatisfied with an interlocutory decision made during the course of the proceedings. Therefore, generally, only appeals against final judgments are receivable.

24. Article 30 of the Appeals Tribunal's Rules provides that, subject to Article 7(4) of the Appeals Tribunal's Statute, the President or the panel hearing a case may shorten or extend a time limit fixed by the Rules or waive any rule when the interests of justice so require. Given that an appeal against an interlocutory decision is not usually receivable and in view of the impact of the orders on the conduct of the proceedings before the UNDT, the Appeals Tribunal considered that it was in the interests of justice to shorten the time and page limit for filing the appeals against interlocutory decisions. It ordered that an appeal, if any, be filed within 15 days and that the appeal and answer briefs be limited to five pages.

25. In the present case, the Appeals Tribunal sees no reason to depart from the general rule that only appeals against final judgments are receivable. Here, the UNDT has rendered final

Judgment

28. This Court holds that the interlocutory appeals are not receivable and dismisses the appeals.

29. Judge Boyko dissents for the reasons given and would allow the interlocutory appeals in part and remand the case for a new trial. Judge Boyko appends her dissenting opinion to the Judgment.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)	(Signed)	(Signed)
Judge Weinberg de Roca, Presiding	Judge Courtial	Judge Adinyira
(Signed)	(Signed)	(Signed)
Judge Painter	Judge Garewal	Judge Simón

Entered in the Register on this 17th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal

Dissenting Opinion of Judge Boyko

a) Interlocutory appeals may be brought on issues of privilege

1. Understandably, the Appeals Tribunal is loathe to entertain every type of interlocutory appeal where a party seeks to exclude evidence as this could result in a very inefficient judicial system. However, I would allow the interlocutory appeals in part, and order a new trial, on the grounds that executive privilege was claimed at trial, even if the Secretary-General did not bring a formal motion to exclude evidence on the grounds of privilege and the trial judge made no ruling on whether the documents that he ordered but the Secretary-General refused to produce were in fact privileged. The interlocutory orders made at trial that formed the subject of these appeals all relate directly or indirectly to the issue of privilege. Before the Appeals Tribunal, the Secretary-General sets out the legal basis that he relies on in advancing a claim of executive privilege; this issue should have been fully argued and ruled upon by the trial judge. I find that the trial judge erred in law because he did not first rule on the issue of whether the Secretary-General is legally entitled to the type

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c) Privilege may attach to information for various reasons. For example, executive privilege, or privilege accorded to certain professional relationships where the relationship between the parties demands protection, or public interest immunity to protect the functioning of the government organization.

7. Essentially the issue is whether the EOSG has the right to withhold information from the UNDT and the Appeals Tribunal on the grounds that it is or should be protected by executive privilege. Executive privilege generally pertains to communications which, if disclosed, would adversely affect the operations of the Organization. This would appear to be the nature of the communications in respect of which privilege is being asserted in this case.

8. The EOSG must have some freedom to ensure confidentiality in communications and good faith relations based on privacy with Heads of the Member States or their

Privileges and immunities are granted to officials in the interests 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 the 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. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

The preamble of this Convention states that the purpose of this convention is to ensure that the officials of the United Nations Organization shall enjoy in the territory of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

13. Senior appointments to the ASG level are subject to the same requirements for transparency and fairness in the manner of their appointments as are appointments to positions of lower levels. However the General Assembly in resolution 51/226, paragraph II. 5, adopted on 3 April 1997, clearly gives a large degree of discretion to the Secretary-General in senior level appointments, when it

[r]equests the Secretary-General to announce all vacancies so as to give equal opportunity to all qualified staff and to encourage mobility , it being understood that the discretionary power of the Secretary-General of appointment and promotion outside the established procedures should be limited to his Executive Office and the under-secretary-general and assistant secretary-general levels, as well as special envoys at all levels.

14. In some regards, Staff Regulation 45 (a) makes a distinction between the appointment of ASGs and USGs and the appointment of other staff:

Appointment of Under-Secretaries-General and of Assistant Secretaries-General shall

17. Procedurally, the trial judge should hold an in camera hearing. Documents alleged to be privileged may be sealed before being presented to the trial judge for his or her review and only be opened and resealed thereafter by a judge's order. Regardless of the ruling, the trial judge should seal the original motion material pending an interlocutory or final appeal to preserve the original material in a confidential manner for consideration by the Appeals Tribunal. If privilege is established on the balance of probabilities at trial, the privileged information is not admissible, unless privilege is waived by the party who claims privilege or is satisfied that a redacted version may be produced to the opposing party. To be admissible at trial, the material would have to be both probative and relevant. Subject to appeal, if ruled not to be privileged, the material filed may be given to the other party and may be admissible

20. In my view the trial judge erred in ordering the production of documents without first determining if the privilege claimed was established on a balance of probabilities. If privileged, the information cannot be ordered to be produced unless the Secretary-General has of 18 1(ev

f) Conclusion

25. For the reasons given and because the trial has already been concluded, I would allow the interlocutory appeals, in part, and remand the case for a new trial to determine whether any kind of privilege attaches to the impugned documents that were subject to the production order at trial.