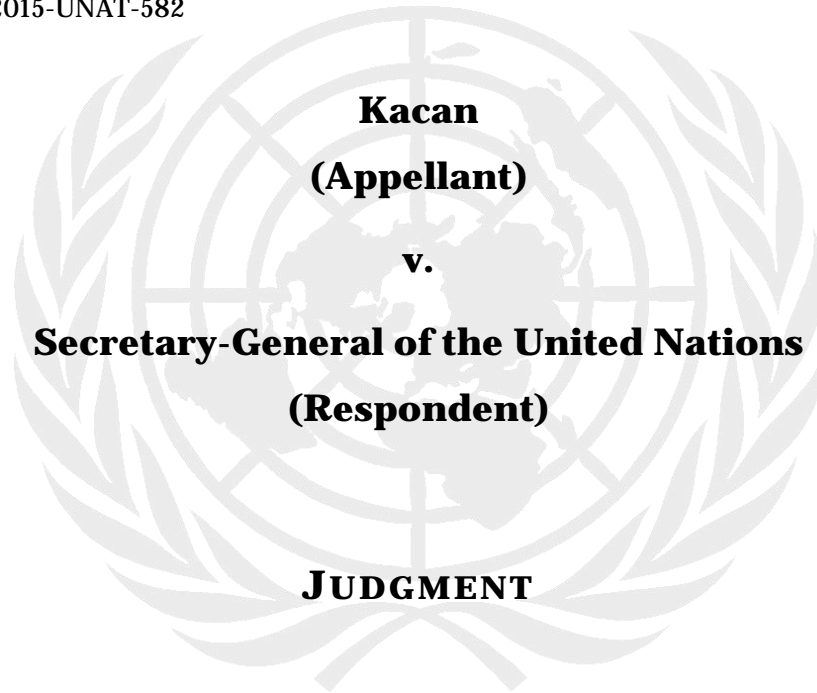




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2015-UNAT-582



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**Before:** Judge Richard Lussick, Presiding  
Judge Deborah Thomas-Felix  
Judge Luis María Simón

**Case No.:** 2014-677

**Date:** 30 October 2015

**Registrar:** Weicheng Lin

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**Counsel for Mr. Kacan:** Self-represented

**Counsel for Secretary-General:** Stéphanie Cartier

**JUDGE RICHARD LUSSICK, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has received an appeal from Mr. Mahmut Kacan against Judgment No. UNDT/2014/116, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 19 September 2014 in the case of *Kacan v. Secretary-General of the United Nations*. Mr. Kacan appealed on 18 November 2014, and the Secretary-General answered on 20 January 2015.

**Facts and Procedure**

2. The facts as found by the Dispute Tribunal read as follows:<sup>1</sup>

... The Applicant first joined [the United Nations High Commissioner for Refugees (UNHCR)] in March 2001, as an Individual Contractor, on the basis of a letter of understanding, which was renewed several times. Following a competitive recruitment procedure, he entered the service of UNHCR on 18 September 2007, as a Protection Associate at the G-6 level in the Field Office in Van, Turkey, under a one[-]year fixed-term appointment (“FTA”). His FTA was subsequently renewed on a yearly basis, until its expiration on 31 December 2011.

... From 1 to 10 May 2011, a standard inspection of UNHCR operation[s] in Turkey was conducted by the [Inspector General’s Office (IGO)].

... Van was hit by an earthquake on 23 October 2011, which greatly damaged the city. As a consequence, nearly all UNHCR staff members in service at the Field Office, Van, were evacuated, while a small team, including the Applicant, stayed. After the city of Van was struck by another earthquake on 9 November 2011, the remaining UNHCR staff, with the exception of a few volunteers—including the Applicant—left Van. Following a strong aftershock which occurred on 15 November 2011, all UNHCR staff members, including the Applicant, were evacuated.

... By email of 23 November 2011 to the Division of Human Resources Management (“DHRM”), the UNHCR Representative, Turkey, referred to the difficult conditions in Van after the earthquake and noted that UNHCR would not return to full operation at this stage. She further stressed that in view of the change in the operational needs at the respective duty station, they were considering not renewing beyond 31 December 2011 the FTAs of several staff members—namely those of the Applicant and of two other staff members from the Field Office, Van, UNHCR, plus one United Nations Volunteer (“UNV”). She further requested that until 31 December 2011, these staff member[s] be placed on special leave with full pay (“SLWFP”). DHRM approved her request by email of 25 November 2011.

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<sup>1</sup> Impugned Judgment, paras. 10-19.

... Only three staff members from the Field Office, Van, were maintained and stationed in Ankara pending the determination of the reopening of the UNHCR Field Office, Van, namely one international staff member (P-3), plus one GL-4 and one GL-3 staff member with indefinite appointments. All the other UNHCR staff members of the Field Office, Van, including the Applicant, were placed on SLWFP until their appointments were not renewed beyond 31 December 2011.

... By email of 28 November 2011, the IGO Report Standard Inspection Turkey, dated "October 2011", was sent to all UNHCR staff in Turkey. In the email, it was noted that the IGO mission had not yet taken into account the crisis in Van and that this might be considered when the Office reports back to the IGO on the implementation of the report.

... In its report, the IGO stated that "[r]esolving the Kurdish problem, which has blocked economic development in the south-east of the country, is arguably the most pressing political issue". In several parts, the report stresses that the constructive relationship and confidence the UNHCR Representation enjoys with the Turkish authorities shall be fostered, since it might contribute to speed up the progress in the relevant national legislation and national capacity building. With respect to the Field Office, Van, the report notes that "[t]here appeared to be ... a need for the adoption of measures to avoid the politicization of the largely-Kurdish local staff—or the perception thereof, by the local authorities and the population of concern" and recommends, *inter alia*, that:

9. The representation should review the functions and staffing of the Office in Van, in line with the reassessment of the role and responsibilities of the [Field Office ("FO")]. The more sensitive protection functions such as registration and [refugee status determination ("RSD")] should be removed from FO Van and taken over by [Branch Office ("BO")] Ankara, in order to avoid any claims or perceptions of political bias while the monitoring and outreach role should be strengthened.

... On 30 November 2011, the Applicant was informed that his FTA would not be renewed beyond 31 December 2011.

... By email of 2 December 2011 addressed to the UNHCR Office in Ankara, the Applicant requested to be provided with the reason for his non-renewal. The following day, he received a response to his email, stressing that the decision did not constitute a termination of his appointment, but rather a non-renewal; he was however not provided with a reason for the decision.

... On 9 December 2011, a meeting took place between the Applicant, the UNHCR Representative and Deputy Representative and the Associate Administrative Programme Officer, during which the Applicant was informed that the functions of the Field Office, Van, would be changed and that in view of the inoperability of the

Field Office, Van, after the earthquake and lack of budget, UNHCR Headquarters was not willing to extend the Applicant's and his colleagues' contracts.

3. Not having received a response to his request for management evaluation, on 8 June 2012, Mr. Kacan appealed to the Dispute Tribunal contesting the decision not to renew his fixed-term appointment beyond 31 December 2011. In Judgment No. UNDT/2013/025, the Dispute Tribunal dismissed Mr. Kacan's application in its entirety. Mr. Kacan appealed that UNDT Judgment to the Appeals Tribunal. In Judgment No. 2014-UNAT-426, the Appeals Tribunal found that, by not allowing Mr. Kacan to call a witness without any explanation, the UNDT had committed an error of procedure such as to affect the decision of the case. It therefore remanded the case to a different judge of the UNDT for a determination of the facts, including the merits of Mr. Kacan's application, after having heard the evidence of his witness.

4. In Judgment No. UNDT/2014/116 under appeal, the Dispute Tribunal found that the decision not to renew Mr. Kacan's fixed-term appointment was based on the operational realities faced by the Van Field Office, and was justified in view of the temporary closure of the office. It further found that such a decision was not motivated by improper motives or discriminatory. The Dispute Tribunal heard the witness called by Mr. Kacan, but did not find the evidence provided by the witness relating to an exchange between the Head of the Aliens Police and the IGO capable of supporting Mr. Kacan's allegation that the decision not to extend his FTA was based on improper motives and discriminatory. It therefore concluded that the non-renewal decision constituted a legitimate exercise of discretion on the part of the Administration and dismissed Mr. Kacan's application.

### **Submissions**

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

5. Contrary to the Dispute Tribunal's finding, Mr. Kacan had a reasonable and legitimate expectation of renewal of his service, which was created by the five renewals of his contract, the nature of his duties and responsibilities as a protection staff, and the evidence that he submitted to the Dispute Tribunal.

6. All indicators, evidence and chronological events clearly demonstrate that his fixed-term appointment was not renewed on the basis of "discriminatory and improper motives, in particular [his] Kurdish ethnicity". Legally, he has the right not to be treated less favourably than

a comparable international staff member or suffer any other disadvantage as a result of the acts or omissions of the Administration.

7. The Dispute Tribunal committed an error in procedure. It failed to consider his written and oral evidence. It also failed to give sufficient value to his witness' statements.

8. Mr. Kacan requests that this Tribunal find that the non-renewal of his fixed-term appointment was unlawful and vacate the UNDT Judgment. Furthermore, he requests that the Appeals Tribunal award him one year's net base salary for material damages and order a review of his pension entitlement, the payment of USD 100,000 for moral damages and the issuance of a written apology by UNHCR.

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

9. The Dispute Tribunal correctly concluded that the decision not to renew Mr. Kacan's appointment was legitimate and supported by the facts, since it was based on the operational realities resulting from a series of serious earthquakes, which necessitated the temporary closure of the Van Field Office and rendered Mr. Kacan's services unnecessary. Mr. Kacan's argument that the real reason for his non-renewal was the recommendation on staffing made by the IGO, which had been implemented within the Van Field Office, is not sustainable, as the IGO's standard inspection final report was not implemented when Mr. Kacan was informed of the non-renewal decision.

10. The Dispute Tribunal correctly concluded that Mr. Kacan failed to establish that the decision not to renew his appointment was improperly motivated or discriminatory on the basis of his Kurdish ethnicity. The Secretary-General notes the UNDT's determination that the oral testimony given by Mr. Kacan's witness was insufficient to establish an oral or written exchange of the nature asserted by Mr. Kacan between the Head of the Aliens Police in Van and the IGO, and that even assuming the existence of such an exchange, there would have been no causal link between such alleged attempted influence and the non-renewal decision.

11. The Dispute Tribunal correctly concluded that Mr. Kacan failed to establish any express promise made to him regarding his contract renewal. Mr. Kacan asserted the existence of such an express promise without providing any evidence to substantiate it.

12. The Respondent requests that this Tribunal dismiss the appeal in its entirety and affirm the impugned Judgment.

### **Considerations**

13. Mr. Kacan maintains that the non-renewal of his fixed-term appointment “is prima faci[e] unlawful” and that the UNDT erred in finding: (i) that there was no express promise to renew his appointment; and (ii) that the decision not to renew was not improperly motivated or discriminatory.

*Was there an express promise to renew Mr. Kacan’s appointment?*

14. Mr. Kacan submits that “[m]y total work experience with the UNHCR and the previous renewal of my fixed-term contract demonstrates that I had a reasonable and legitimate expectation because there had been a practice in the workplace of renewal”.<sup>2</sup> “The other factors which create reasonable expectations are the nature of my duties and responsibilities as a protection staff who have law background [sic] and of course functions of my duty station as field office to give me reasonable notice that the contract will be renew [sic].”<sup>3</sup> Mr. Kacan also submits that his interest in continuing in the post gives rise to an expectation of renewal.<sup>4</sup>

15. Mr. Kacan further claims that he submitted written evidence to the UNDT that he “had a reasonable and legitimate expectation which [was] created by the management”, but that “[t]he Tribunal did not examine my evidence which contains some correspondence between me and other colleagues in UNHCR Ankara Branch Office during my compensation leave [that] took place between 22 November and 6 December 2011”.<sup>5</sup>

16. Mr. Kacan’s claim to an expectancy of renewal was decided by the UNDT as follows:<sup>6</sup>

... The Tribunal recalls the longstanding and consistent jurisprudence of the Appeals Tribunal according to which a FTA does not carry any expectation of renewal or of conversion to another type of appointment (*Pirnea* 2013-UNAT-311) and that if based on legitimate reasons, supported by the facts, the decision not to renew a FTA

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<sup>2</sup> Appeal, para. 13

<sup>3</sup> Appeal, para. 15.

<sup>4</sup> Appeal, para. 19.

<sup>5</sup> Appeal, paras. 17, 18.

<sup>6</sup> Impugned Judgment, paras. 24-25.

may be legal (*Islam*, 2011-UNAT-115). To determine the lawfulness of a non-renewal decision, the Dispute Tribunal must assess whether the Administration abused its discretion, whether the decision was based on discriminatory or other improper considerations, or whether the Administration made an express promise creating an expectancy that an Applicant's appointment be renewed (*Abdalla* 2011-UNAT-138; *Ahmed* 2011-UNAT-153). In a recent judgement, the Appeals Tribunal further stressed that to create an expectancy of renewal such express promise by the Administration has to be "at least ... in writing" (*Igbinedion* 2014-UNAT-411). The Tribunal has consistently held that the burden of proof of showing that the non-renewal decision was arbitrary or tainted by improper motives lies with the Applicant (*Jennings* 2011-UNAT-184).

With respect to the Applicant's argument that in view of his years of service and since after the earthquake, UNHCR kept him in service for 20 days, he had an expectancy of renewal, the Tribunal did not find anything on file amounting to an express promise to the Applicant that his FTA would be renewed, under the standards reiterated by the Appeals Tribunal in *Igbinedion* 2014-UNAT-411. This argument of the Applicant must therefore fail.

17. Mr. Kacan submits that the UNDT's decision was flawed in that the UNDT "failed to exercise its jurisdiction; that it erred on fundamental questions of law (interpretation of law) and/or fact (related to evidentiary issues) resulting in a manifestly unreasonable decision; and that it erred in procedure such as to affect the decision of the case".<sup>7</sup>

18. In support of his argument that the UNDT erred in law, Mr. Kacan mentions several decisions of the Appeals Tribunal. However, he does not demonstrate how these decisions in any way contradict the UNDT's application of the pertinent law. We find that the UNDT's interpretation of the relevant jurisprudence was correct and that it did not commit any error in law. We reject Mr. Kacan's submission to the contrary.

19. Mr. Kacan also alleges that the UNDT committed a factual error in not examining his written evidence. However, it is clear from the UNDT's decision that it took care to examine the evidence before it in order to ascertain if in fact an express promise of renewal had been made to Mr. Kacan. It was unable to find any such evidence. Moreover, Mr. Kacan's submissions regarding his work experience, duties and responsibilities, functions of his duty station and his interest in a renewal have no merit. There is no legal authority that such

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<sup>7</sup> Appeal, para. 10.

considerations are grounds for an expectancy of renewal. Nor are past renewals of an appointment a basis for expectancy of renewal.<sup>8</sup>

20. We are satisfied that the UNDT's decision was correctly based on the applicable law and the available evidence. Mr. Kacan has failed to establish that the Dispute Tribunal committed any error, whether of law, fact or procedure, in concluding that he had not produced any evidence capable of amounting to a promise of renewal.

*Was the decision not to renew Mr. Kacan's appointment improperly motivated or discriminatory?*

21. Mr. Kacan complained to the Dispute Tribunal that the real reason for the non-renewal of his contract was his Kurdish ethnicity, as could be deduced from the IGO Report which contained discriminatory recommendations on staff members of Kurdish origin. Mr. Kacan further complained that after the earthquake, other staff members of the Field Office, Van, were reassigned to other functions within UNHCR, Turkey. One staff member who had received a non-renewal memorandum was subsequently given a temporary appointment and the rest of the staff were relocated to the UNHCR Office in Ankara. But UNHCR never offered him any vacant position or discussed any alternative job opportunities with him following the earthquake.

22. Mr. Kacan submits that he called a witness to give oral evidence but that the UNDT "did not give sufficient value to witness statements".<sup>9</sup>

23. The Dispute Tribunal found that the evidence of Mr. Kacan's witness was "merely a description of what the Head, Aliens Police, Van, [the "Head"] had told her".<sup>10</sup> The UNDT noted that the witness said that the Head, Aliens Police, Van, had told her that Mr. Kacan was a [Kurdistan Workers' Party (PKK)] militant terrorist and that he had told, and even written to, the IGO that if Mr. Kacan stayed in service "he would make sure that the [Field] Office had to close".<sup>11</sup> The UNDT did not accept this evidence as proof that the Head did in fact contact the IGO. The witness admitted that no written statement had been shown to her. Also, the Secretary-General tendered a statement from the IGO that no such written

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<sup>8</sup> *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503, para. 42; *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

<sup>9</sup> Impugned Judgment, para. 24.

<sup>10</sup> *Ibid.*, para. 27.

<sup>11</sup> *Ibid.*



communication had been received from the Head. Further, the UNDT held that even if such a communication had existed, the witness's evidence did not prove that there was a causal link to the non-renewal of Mr. Kacan's FTA.

24. The UNDT concluded:<sup>12</sup>

On the contrary, the Tribunal finds that the chronology of events, and the circumstances faced by the UNHCR operations in Van following the various earthquakes that occurred between October and November 2011, leaves no reasonable doubt that the temporary closure of the Field Office, Van, was an appropriate and comprehensible reaction. As a consequence, the services of the Applicant and of other staff members of the Field Office, Van, were no longer needed, for an indeterminable period. Therefore, UNHCR could legitimately decide to let [ ... ] expire the contracts of staff member's [sic] whose services were no longer required under the circumstances.

25. The Dispute Tribunal has broad discretion under Article 18(1) of its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. This Tribunal is mindful that the Judge hearing the case has an appreciation of all the issues for determination and the evidence before it.<sup>13</sup> We are satisfied that the UNDT's conclusion is consistent with the evidence. Mr. Kacan has not put forward any persuasive grounds to warrant interference by this Tribunal.

26. We also find that Mr. Kacan has not established any error in the UNDT's determination that the fact that other staff members remained in service does not have an impact on the legality of the non-renewal of Mr. Kacan's FTA. Those staff members had a different status from that of Mr. Kacan; two had indefinite appointments while one was an international recruit. Also, one staff member who remained in service, and another staff member who was temporarily re-employed, were both of Kurdish origin, facts which were inconsistent with Mr. Kacan's allegation that he was discriminated against because of his Kurdish ethnicity.

27. We do not find any error in the UNDT's finding that Mr. Kacan had failed to establish that the decision not to renew his FTA was tainted by improper motives and discriminatory. Rather, such a decision was a legitimate exercise of the Administration's discretion,

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<sup>12</sup> *Ibid.*, para. 29.

<sup>13</sup> *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

based on the operational realities faced by the Field Office, Van, and was justified in view of the temporary closure of the Office, which, *de facto*, rendered Mr. Kacan's services unnecessary.<sup>14</sup>

28. For the foregoing reasons, the appeal fails.

**Judgment**

29. The appeal is dismissed and the Judgment of the UNDT is affirmed.

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<sup>14</sup> Impugned Judgment, para. 32.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2015 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Thomas-Felix

*(Signed)*

Judge Simón

Entered in the Register on this 18<sup>th</sup> day of December 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar