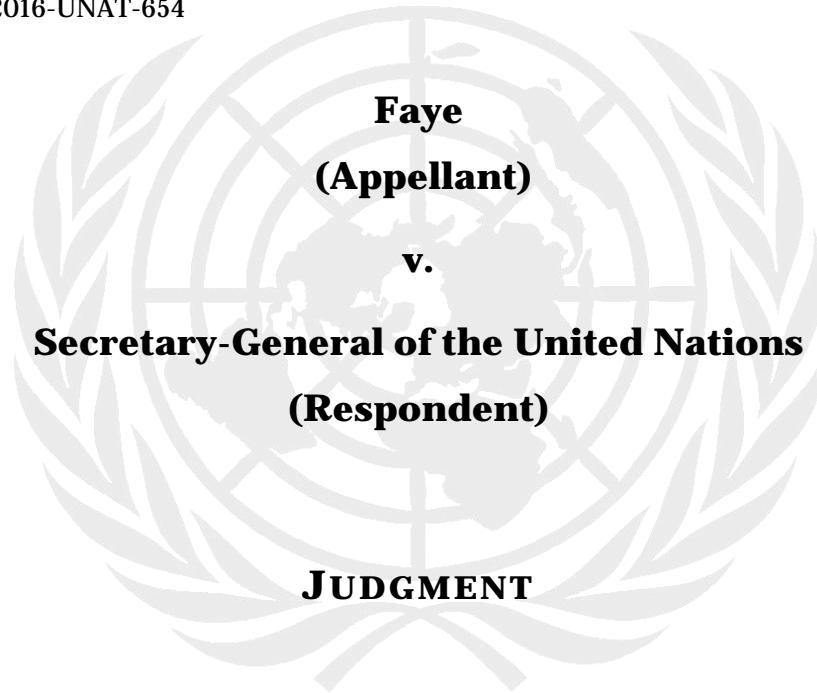




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-654



**Faye
(Appellant)**

v.

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

JUDGMENT

| | |
|------------|------------------------------------------------------------------------------------------|
| Before: | Judge Richard Lussick, Presiding Judge Sophia Adinyira Judge Inés Weinberg de Roca |
| Case No.: | 2015-861 |
| Date: | 30 June 2016 |
| Registrar: | Weicheng Lin |

| | |
|--------------------------------|------------------|
| Counsel for Mr. Faye: | Self-represented |
| Counsel for Secretary-General: | Simon Thomas |

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/077, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 2 September 2015, in the case of *Faye v. Secretary-General of the United Nations*. Mr. Ibrahima Faye filed his appeal on 12 October 2015, which was sent to the Secretary-General on 16 October 2015. The Secretary-General filed his answer on 15 December 2015.

Facts and Procedure

2. The Dispute Tribunal made the following factual findings, which are undisputed:¹

... The Applicant is a Benefits Assistant at the GS-5 level at the United Nations Joint Staff Pension Fund (“UNJSPF”) and a staff representative. He contests the decision by the Chief Executive Officer (“CEO”) of the UNJSPF to submit budget estimates for the 2016-2017 biennium to the UNJSPF Board on 2 June 2015 without engaging in consultation with staff representatives. He contends that his rights were violated because he was not accorded the opportunity of being consulted in the process of formulating the budget estimates.

... The Applicant requests that the Tribunal order the CEO of the UNJSPF to withdraw the 2016-17 budget estimates dated 2 June 2015. He also requests that the Tribunal order the Budget Committee of the UNJSPF Board not to consider the budget estimates until the required consultation has taken place. Finally, he requests appropriate compensation for the stress, pain, and suffering and the time and energy associated with the filing of the application.

3. On 7 July 2015, by its Order No. 134 (NY/2015), the UNDT “required [Mr. Faye] to file a submission addressing the receivability contentions raised by the Respondent”,² who submitted that Mr. Faye’s application was not receivable *ratione materiae* (because the contested decision did not fall within the Tribunal’s jurisdiction) and *ratione personae* (because the Applicant lacked legal standing).³

¹ Impugned Judgment, paras. 1-2.

² Order No. 134 (UNDT/NY/2015), para. 5.

³ Impugned Judgment, para. 3.

4. On 22 July 2015, the UNDT held a case management discussion (CMD) to discuss the factual and legal issues arising in the two cases Mr. Faye had before the UNDT, Case Nos. UNDT/NY/2015/033 (the present appeal) and UNDT/NY/2014/087 (also appealed). At the CMD, the UNDT “strongly advised [Mr. Faye] to consider the issues of law raised by the Respondent ... [and] to then consider whether he was in a position to advance any persuasive arguments regarding the jurisdiction of the Tribunal to consider his claims”.⁴ Mr. Faye stated that he wished to continue with his claim.

5. Following the CMD, the UNDT issued the same day Order No. 160 (NY/2015), by which Mr. Faye was granted leave to file a final submission, which he did on 27 July 2015. In the Order, the UNDT summarized the advice given to Mr. Faye, including the possibility of being faced with an order of costs under Article 10(6) of the Statute of the Dispute Tribunal (UNDT Statute) if “he is unable to present an effective challenge to the legal contentions of the Respondent”.⁵

6. On 2 September 2015, the Dispute Tribunal rendered its Judgment, dismissing Mr. Faye’s application. The UNDT determined that Mr. Faye’s request for management evaluation submitted on 26 May 2015 was submitted before the contested decision of 2 June 2015, and thus his request for management evaluation “contested a different decision to the decision contested in his application”.⁶ Accordingly, pursuant to Staff Rule 11.2(a) and Article 8(1)(c) of the UNDT Statute, his application to the UNDT was not receivable.

7. The UNDT noted that:⁷

On a strict interpretation of the Statute, this application can be dismissed, without more, because the decision contested in the request for management evaluation does not match the decision contested in the application. However, even if the Tribunal were to take a generous view and consider that the request for management evaluation and the application are both contesting a general failure to consult with staff representatives prior to submitting the 2016-2017 budget estimates, the application is not receivable for other reasons detailed below.

⁴ *Ibid.*, para. 5.

⁵ Order No. 160 (UNDT/NY/2015), paras. 2-3.

⁶ Impugned Judgment, para. 11.

⁷ *Ibid.*, para. 12.

8. The UNDT determined that Mr. Faye's application was also not receivable on the grounds that he "does not have standing to challenge a decision affecting his right to consultation as a staff representative".⁸ In reaching its decision, the UNDT took note of the fact that the General Assembly considered and rejected a proposal to grant staff associations standing to bring applications before the UNDT and that the proposed articles were not included in the UNDT Statute. The UNDT also found that Mr. Faye's arguments were "in effect an attempt to enforce rights which the General Assembly specifically considered and decided not to confer upon staff associations and those acting in the capacity of staff association representatives".⁹

9. The UNDT also concluded that Mr. Faye's application was not receivable on the grounds that the contested decision was not an administrative decision subject to judicial review. It found that Mr. Faye "ha[d] not identified the direct legal consequences that the submission of the budget estimates had on his welfare and conditions of employment".¹⁰ Having found the application not receivable, the UNDT did not consider the merits.

10. The UNDT ordered costs against Mr. Faye in the amount of USD 500, having found that Mr. Faye had manifestly abused the process. The UNDT explained its reasons, noting that it had advised Mr. Faye during the CMD that he may face an order for costs against him pursuant to Article 10(6) of the UNDT Statute if he was unable to present an effective challenge to the legal contentions regarding receivability raised by the Respondent. Finding "nothing in [Mr. Faye's] additional submissions ... to persuade the [UNDT] that there is any merit in his application ..., [t]he [UNDT] finds that [Mr. Faye] has manifestly abused the proceedings by his persistence in advancing a legally unsustainable contention, despite guidance offered".¹¹

⁸ *Ibid.*, para. 13.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 15.

¹¹ *Ibid.*, para. 24.

Submissions

Mr. Faye's Appeal

11. The Dispute Tribunal erred on a question of fact, resulting in a manifestly unreasonable decision. Mr. Faye fully complied with Order No. 134 (NY/2015) and replied to each one of the Respondent's arguments on both receivability and merits. Mr. Faye sets forth that analysis in detail again in his appeal to the Appeals Tribunal.

12. Mr. Faye submits the UNDT has jurisdiction over his applications, as they allege violation or non-observance by the Administration of his rights under his term of appointment and contract of employment. He also contends he has standing because the UNDT Statute "recognize[s] the right of individual staff members to bring claims related to their official capacity as staff representatives insofar as these relate to their own rights and conditions of service".¹² He claims the UNDT and the Respondent "confus[e] the role of the Staff Union as a legal entity with the official function of the [Appellant] as a staff representative and the [Appellant's] standing to assert rights that pertain to his official functions".¹³

13. The Dispute Tribunal also failed to exercise jurisdiction vested in it. Mr. Faye fully complied with the separate Order No. 160 (NY/2015) and again distinguished his case from the precedents cited by the Respondent covering receivability as well as the merits. Pursuant to Articles 8(1) and 8(2) of the Staff Rules, the Secretary-General's Bulletins ST/SGB/172 (Staff management relations) and ST/SGB/274 (Procedures and terms of reference of the staff management consultation machinery), the Administration had the obligation to consult staff prior to submitting the budget. The proposed UNJSPF budget for the biennium impacts, *inter alia*, on staff welfare and work conditions and, as such, requires proper consultation. The CEO's decision to not hold consultations on the budget prior to its submission was a violation of his rights under those provisions and was an administrative decision which, moreover, "directly impacted [him] in his multi-faceted capacities (staff member, staff representative, benefit[s] assistant ... and also investor ... as part of the owner of the Fund assets)".¹⁴

¹² *Ibid.*, page 4.

¹³ *Ibid.*, page 5.

¹⁴ *Ibid.*

14. The Dispute Tribunal further committed an error of procedure such as to affect the decision of the case in awarding costs against Mr. Faye. The Dispute Tribunal manifestly abused its power granted under Article 10(6) of its Statute. As the UNDT did not reach a decision on the merits of the case, it therefore could not “reasonably conclude that cost should be awarded against [him] for filing an appeal lacking in merits”.¹⁵

15. The UNDT failed to demonstrate how Mr. Faye’s submissions in response to the Respondent’s legal contentions were unsuccessful. Furthermore, the UNDT did not provide any persuasive arguments to illustrate how his application was a frivolous filing nor how there was clearly and unmistakably a wrong or improper use of the proceedings of the court, especially as Mr. Faye complied with the UNDT’s orders issued during the proceedings.

16. Mr. Faye’s persistence in seeking justice for what he perceived to be a breach of his contractual rights should not be construed as an abuse of proceedings. If indeed his application had been lacking in merits or was clearly non receivable, it would have been disposed of at the initial stage of the proceedings.

17. Mr. Faye requests the Appeals Tribunal to vacate the order of costs against him in the amount of USD 500. He also seeks a ruling on the merits of his application as “he is not satisfied with the UNDT Judgment on Receivability which resulted in [it] not considering the merits”.¹⁶

The Secretary-General’s Answer

18. The Dispute Tribunal did not make any errors when it concluded that Mr. Faye’s application was not receivable. First, the UNDT correctly found that Mr. Faye had failed to request management evaluation of the contested decision when it concluded his request for management evaluation, filed before the contested decision of 2 June 2015, was clearly related to a different decision. As Mr. Faye did not request management evaluation of the contested decision, the UNDT was correct to conclude his application was not receivable.

19. In addition, the Dispute Tribunal correctly determined that Mr. Faye did not have standing to challenge a decision in his capacity as a staff representative. The Dispute Tribunal has consistently held that a staff member must have individual standing to challenge an

¹⁵ *Ibid.*

¹⁶ *Ibid.*, page 2.

administrative decision, and cannot do so in capacity as a staff representative. The UNDT Statute does not provide for filing of applications by staff representatives or a staff association in the name of, or on behalf of, the collective interests of staff members. In his application, Mr. Faye stated “the lack of consultation with [him] in his staff representative role” and throughout his application stated what he alleged were the failures of UNJSPF management to conduct “consultations” with the UNJSPF staff. Therefore, Mr. Faye requested the Dispute Tribunal adjudicate on a matter which was not brought in an individual capacity, as required by Articles 2 and 3 of the UNDT Statute.

20. The UNDT also correctly concluded that the contested decision was not an administrative decision subject to judicial review. It correctly found that the contested decision did not have any direct legal consequences for Mr. Faye’s terms and conditions of employment. It is established jurisprudence that an action that does not have direct legal consequences cannot be an administrative decision capable of challenge before the Tribunals. It also correctly determined that the contested decision was not an administrative decision on the grounds that, as is established jurisprudence, a budgetary proposal does not affect a staff member’s terms of appointment, as it is an act preceding an administrative decision that would produce direct legal consequences. Mr. Faye submits that he is individually affected by “consultations on the budget estimates”, which is contrary to established jurisprudence. Mr. Faye has no individual right to be consulted, as he is not individually affected by the budget estimates and therefore he holds no “stake” in the submission of the budget to the UNJSPF Board. Any right that Mr. Faye may have related to a budgetary decision, which might ultimately arise, can only exist after the taking of an administrative decision that specifically affects him, which is not the case in the present appeal. Furthermore, Mr. Faye has not on appeal indicated any direct effect upon his terms of appointment.

21. The Dispute Tribunal did not err in finding that Mr. Faye had manifestly abused the proceedings by his persistence in advancing a legally unsustainable contention, despite guidance offered at the CMD on the applicable legal principles. It also did not err in ordering costs. The UNDT correctly exercised its discretionary authority in this regard. Mr. Faye was made aware of the weakness of his case and was presented with an opportunity to consider withdrawing his application. Mr. Faye nonetheless advanced his case with no reasonable arguments. Mr. Faye’s arguments challenging the costs ordered against him are inconsistent with Article 10(6) of the UNDT Statute and established jurisprudence; they are also misguided.

22. The Dispute Tribunal's order of costs against the Appellant is consistent with General Assembly resolution 67/241, which recognizes "the importance of effective measures against the filing of frivolous applications" and "encourages the judges to make full use of those measures currently available to them".¹⁷ The filing of frivolous applications causes delays in justice for staff members with legitimate claims and causes the Organization to expend efforts to defend itself against such cases.

23. Furthermore, Mr. Faye's current appeal fails to advance any legal argument which might reasonably support a finding that the UNDT erred in the Judgment, which is further evidence of his ongoing abuse of the proceedings.

24. The Secretary-General requests that the UNDT Judgment be affirmed and the appeal be dismissed. However, should the Appeals Tribunal determine that the UNDT erred in concluding that Mr. Faye's application was not receivable, the Respondent requests that the case be remanded to the UNDT to be adjudicated on the merits.

Considerations

25. The UNDT rejected Mr. Faye's application on the following three grounds:

1. Mr. Faye failed to request management evaluation of the contested decision.
2. Mr. Faye did not have standing to challenge a decision affecting his rights as a staff representative.
3. The contested decision did not have direct legal consequences affecting him.

Mr. Faye failed to request management evaluation of the contested decision

26. The decision contested before the UNDT by Mr. Faye was the decision by the CEO of the UNJSPF to submit budget estimates for the 2016-2017 biennium to the UNJSPF Board on 2 June 2015 without consultation with staff members.

27. Mr. Faye's request for management evaluation on 26 May 2015, which predated the contested decision, was a request for management evaluation of the failure by UNJSPF management to comply with the Assistant Secretary-General for the Office of Human Resources

¹⁷ General Assembly resolution 67/241, of 24 December 2012, para. 42.

Management (ASG/OHRM)'s directive dated 10 February 2015 in regard to consultation with staff representatives.

28. The UNDT decided as follows:¹⁸

... The application states that [Mr. Faye] requested management evaluation of the 2 June decision by the request dated 26 May 2015.

... The Tribunal finds that the Applicant relies on a request for management evaluation that contested a different decision to the decision contested in his application. Indeed, the request for management evaluation that he relies upon was submitted prior to the date of the decision contested in his application.

... On a strict interpretation of the Statute, this application can be dismissed, without more, because the decision contested in the request for management evaluation does not match the decision contested in the application.

29. Mr. Faye argues that the UNDT is “confusing the nature of both the Applicant’s Management Evaluation Request and the contested decision”. We disagree. The UNDT made no error in distinguishing the two issues. The earlier management evaluation request contested the UNJSPF’s non-compliance with a directive to consult with Staff Representatives. The later application to the UNDT contested a specific decision to submit the budget estimates to the UNJSPF Board without consultation.

30. The UNDT made no error in holding that Mr. Faye’s application could be dismissed by reason of the contested decision not having been submitted for management evaluation. In reaching that decision, the UNDT was cognizant of Article 8(1)(c) of its Statute, which provides that an application shall be receivable if an applicant has previously submitted the contested decision for management evaluation, where required. The UNDT also noted that Staff Rule 11(2)(a) requires a staff member to submit a request for management evaluation prior to filing an application challenging an administrative decision.

31. Moreover, it is settled case law that requesting management evaluation is a mandatory first step in the appeal process. Staff Rule 11.2 is unambiguous and requires that the request for management evaluation must be submitted *before* an application is filed before the Dispute Tribunal. A staff member must be familiar with the Staff Rules and understand his

¹⁸ Impugned Judgment, paras. 10-11.

or her obligation to act in conformance with those rules. This means that a request for management evaluation must be submitted *prior to* bringing an application before the Dispute Tribunal.¹⁹ The Appeals Tribunal has noted many times that the requirement for management evaluation assures that there is an opportunity to quickly resolve a staff member's complaint or dispute without the need for judicial intervention.²⁰

32. We hold that the UNDT did not err in fact or in law in finding that Mr. Faye did not request management evaluation of the disputed decision of 2 June 2015 to submit budget estimates without engaging in consultation with staff representatives, and that his application was therefore not receivable.

33. That decision was sufficient to dispose of the case, although the UNDT then proceeded to consider other reasons why Mr. Faye's application was not receivable.

Mr. Faye did not have standing to challenge a decision affecting his rights as a staff representative

34. The UNDT concluded that Mr. Faye "does not have standing to challenge a decision affecting his right to consultation as a staff representative".²¹

35. We hold that the UNDT was correct in finding Mr. Faye's application to be not receivable for that reason.

36. There is no statutory provision or other law which gives the UNDT jurisdiction to entertain an application by a staff representative on behalf of staff members. The only recognition given to a staff association in the UNDT Statute is in Article 2(3), which gives the UNDT discretion to permit or deny leave to an application to file a friend-of-the-court (*amicus curiae*) brief by a staff association. However, one of the essential characteristics of a friend-of-the-court is that he or she is someone who is not a party to the case.

¹⁹ *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-566, paras. 32-33; *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, para. 17; *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, paras. 20-22.

²⁰ *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, para. 17, citing *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 22 (citing *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345 and *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311).

²¹ Impugned Judgment, para. 13.

37. The UNDT noted in its decision that Mr. Faye complained in his application that “he should have been consulted about the budget estimates *in his capacity as a staff representative*”.²² Mr. Faye claims in his appeal that: “While the Statute of the [Dispute] Tribunal does not recognize the standing of staff association[s] to bring suit on behalf of their membership, it does recognize the right of individual staff members to bring claims related to their official capacity as staff representatives insofar as these relate to their own right and conditions of service”.

38. The UNDT then considered the relationship of the disputed decision to Mr. Faye’s terms and conditions of service.

The contested decision did not have direct legal consequences affecting Mr. Faye

39. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and by the Appeals Tribunal.²³ In *Andronov*, the former Administrative Tribunal stated:²⁴

... There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

40. In the seminal case of *Andati-Amwayi*, the Appeals Tribunal defined what constitutes an administrative decision susceptible to challenge as follows:²⁵

... What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes

²² *Ibid.*

²³ *Reid v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-563, para. 32.

²⁴ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para V.

²⁵ *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, paras. 17-19.

a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

... In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objects, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

41. In short, as held by this Tribunal in *Lee*, the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment.²⁶ That is to say, the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

42. The UNDT, in citing the applicable law, correctly found that "the submission of the 2016-2017 UNJSPF budget estimates did not have direct legal consequences on the Applicant's terms and conditions of appointment".²⁷ Accordingly, the Dispute Tribunal found that the contested decision was not an administrative decision subject to judicial review.

43. We find that Mr. Faye has not demonstrated any error of law or fact committed by the UNDT in arriving at its Judgment that his application was not receivable.

44. There is one last matter that we should mention. In his Appeal Form, Mr. Faye states: "The Applicant is not satisfied with UNDT Judgement on Receivability which resulted in UNDT not considering the Application on merits and requests a ruling on the merits of the Application". For Mr. Faye's benefit, we state the obvious, that the UNDT, having ruled his application to be not receivable, did not have jurisdiction to rule on the merits.

²⁶ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49, citing *Andronov* and *Andati-Amwayi*.

²⁷ Impugned Judgment, para. 17.

Costs

45. Pursuant to Article 10(6) of its Statute, the UNDT may award costs against a party where it determines that the party has manifestly abused the proceedings before it.

46. The UNDT noted that it had advised Mr. Faye at the CMD held on 22 July 2015 that he may be faced with an order for costs under Article 10(6) of the UNDT Statute if he wished to proceed with his claim and was unable to present an effective challenge to the legal contentions of the Respondent.²⁸ It found that there was “nothing in [his] additional submissions dated 27 July 2015 to persuade [it] that there is any merit in his application”.²⁹

47. For those reasons, the UNDT found that Mr. Faye “has manifestly abused the proceedings by his persistence in advancing a legally unsustainable contention, despite guidance offered at the CMD on the applicable legal principles settled by the Appeals Tribunal”.³⁰ The UNDT consequently ordered costs of USD 500 against Mr. Faye.

48. In appealing the order for costs, Mr. Faye argues that his application was not frivolous, and that his persistence in seeking justice for what he perceived to be a breach of his contractual rights should not be construed as an abuse of proceedings.

49. We find merit to Mr. Faye’s arguments. Notwithstanding the advice given to him by the UNDT, it is obvious from his submissions to the UNDT that he believed that he could present an effective challenge. Moreover, there was no jurisprudence dealing directly with the right of a staff representative to bring an application. He was therefore entitled to his day in court and to have his cause adjudicated. In our view, he did not manifestly abuse the proceedings merely by proceeding with his application.

50. We therefore find that the UNDT’s order for costs was not justified and must be set aside.

²⁸ *Ibid.*, para. 19.

²⁹ *Ibid.*, para. 24.

³⁰ *Ibid.*

Judgment

51. The UNDT Judgment No. UNDT/2015/077 finding Mr. Faye's application not receivable is affirmed. However, the appeal is allowed in part to the extent that the UNDT's order for costs against Mr. Faye is vacated.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar