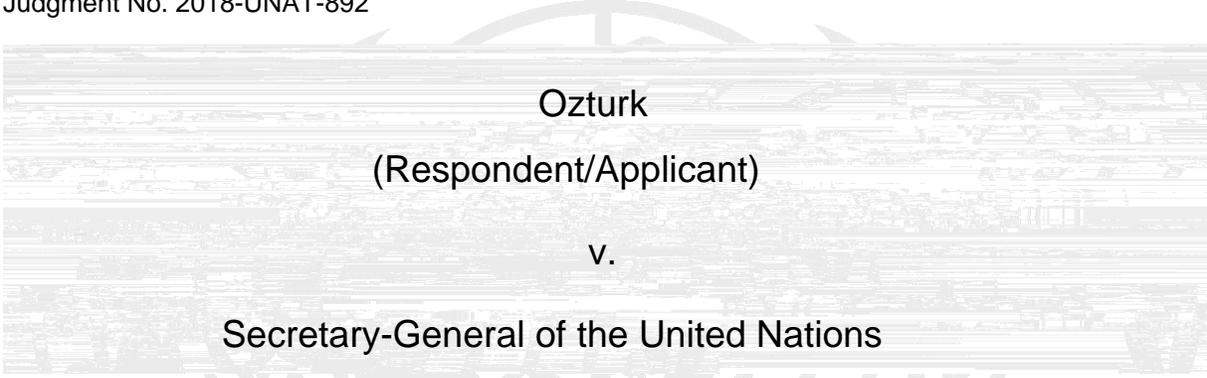




UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Judgment No. 2018-UNAT-892



Ozturk  
(Respondent/Applicant)

v.

Secretary-General of the United Nations



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Counsel for Mr. Ozturk: Not represented

Counsel for Secretary-General: Rupa Mitra

JUDGE DIMITRIOS R

until the mother kidnapped El. to Belgium and he had to seek Interpol's intervention, which found El. and brought her back to Kazakhstan.

... On 29 March 2012, the Legal Support Office, United Nations Development Programme, forwarded to UNMIK a copy of the [above-mentioned] Kazakh Court order of [17 August] 2005 (...), together with a request of El.'s mother to have 25% of his salary paid to her as alimony for El..

... After seeking advice from the Department of Field Support/Field Personnel Division, in Headquarters, the Chief Civilian Personnel Officer ("CCPO"), UNMIK, informed the Applicant, by letter of 7 August 2012, about the child support claim, and requested him to submit proof of compliance within 30 calendar days. The letter specified that should the Applicant wish to contest the order, he was required to provide a new order of a competent court setting aside, vacating or staying pending appeal [of] the

... On 2 March 2013, the Applicant's lawyer filed a complaint with the Chairman of the Almaty City Court, Kazakhstan, asking, *inter alia*, that the period for an appeal of the court order of 17 August



purpose of United Nations child dependency benefits. The UNDT found that the second part of his application was moot as the contested decision had been rescinded and Mr. Ozturk had been receiving a dependency allowance for his daughter El. retroactively, effective 1 August 2014. Regarding the first part of his application, the UNDT found that it was receivable *ratione materiae* to the extent that Mr. Ozturk was not contesting the February 2013 decision but rather the 25 November 2015 decision, which the UNDT considered was a new decision taken upon review in light of the 17 June 2015 Kosovo court order and thus new developments, against which Mr. Ozturk had submitted a timely request for management evaluation.

5. On the merits, the UNDT ruled that the decision to deduct 25 per cent of his salary was unlawful. It held that the Administration was incorrect in assuming that it had no discretion regarding the amount to be garnished from the staff member's salary. The Administration had discretionary authority under Staff Rule 3.18(c)(iii) and Section 2.1 of Secretary-General's Bulletin ST/SGB/1999/4 (Family and child support obligations of staff members) in determining the amount to be deducted on the basis of the Kazakh court order. The UNDT considered that the Administration had failed to lawfully exercise its discretion by taking into account all relevant considerations including whether the relevant national court proceedings had been conducted *in absentia* and whether other national court orders had granted alimonies to the concerned staff member's other family members. The UNDT found, for instance that the Administration in its decision of 25 November 2015 had failed to consider the impact of the Kosovo court order "which referred to the alimonies to be paid to [Mr. Ozturk's] then three minor children by equal share".<sup>2</sup> The UNDT further found "[w]ithout substituting itself to the Secretary-General (...) that a monthly deduction of 25 % (...) appears unreasonable, in light, *inter alia*, of the amount of child dependency allowance paid to the mother by the [United Nations] in Kazakhstan (USD 27) and of the fact that [Mr. Ozturk] had, at the time of the contested decision, two—and since 21 February 2017 three—other minor children".<sup>3</sup>

6. By way of remedy, the UNDT rescinded the decision of 25 November 2015 to deduct 25 per cent from Mr. Ozturk's salary and ordered reimbursement of the amounts deducted from this date onwards minus the child allowance paid to Mr. Ozturk for El. as of that date. The UNDT further held that the Organization had to determine anew, in a legal exercise of its discretion

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<sup>2</sup> *Ibid.*, para. 70.

<sup>3</sup> *Ibid.*, para. 73.

taking all relevant matters into account, the amount (or the percentage) to be deducted from Mr. Ozturk's salary in favour of EI. from 25 November 2015 onwards.

### Submissions

#### The Secretary-General's Appeal

7. The Secretary-General submits that the UNDT erred on a question of law in concluding that the Secretary-General had acted unlawfully by honouring a valid family support order issued by a national court.

8. First, the UNDT erred on a question of law in concluding that Staff Rule 3.18(c) required the Administration to consider in every case whether a deviation from valid family support orders is warranted. While the UNDT was correct in its interpretation that the use of the word "may" in Staff Rule 3.18(c) showed the Secretary-General's discretion to authorize deductions to satisfy the indebtedness of staff members to third parties, the Secretary-General has exercised this discretion in the specific case of family support obligations by promulgating ST/SGB/1999/4. The framework contained therein has to be interpreted in light of the reference in its preamble to Staff Rule 1.2(b), which stipulates a strict obligation for staff members to honour their private legal obligations and local court orders, and of Article 2(7) of the United Nations Charter which prevents the Organization from second-guessing valid national court orders. The Organization's intention to voluntarily act in full accord with family support orders becomes clear from the use

the “extreme cases” in which this might be justifiable in light of the Appeals Tribunal jurisprudence in *Benamar*.<sup>4</sup>

9. Second, the UNDT incorrectly drew a parallel between the policy of the United Nations Secretariat and that of the United Nations Joint Staff Pension Fund (UNJSPF) and erred in referring to the Appeals Tribunal jurisprudence on the UNJSPF as relevant precedent. The UNJSPF is not part of the Secretariat but is an inter-agency entity that operates under its own regulations and policies. The UNJSPF’s legal framework is significantly different from the one applicable to this case. In particular, Article 45 of the UNJSPF Regulations does not state anywhere that the UNJSPF “will” make deductions from the participant’s benefits “in respect of the amounts ordered” by national courts, as ST/SGB/1999/4 does, but even stipulates that only “a portion” will be remitted. In addition, according to the UNJSPF, the 50 per cent cap applied under Article 45 of the UNJSPF Regulations is applied “as a matter of policy” which has no bearing on how the Secretary-General decides to exercise his discretion under the Secretariat’s legal framework.

10. The Secretary-General further asserts that the UNDT erred as a matter of law in its interpretation of the Kosovo court order. Contrary to the UNDT’s interpretation, the Kosovo court did not order that Mr. Ozturk pay the same amount for all his children but rather that he pay his son’s mother the same amount of child support as he paid for all his children but no more than 1/3 of his monthly income. The Kosovo court was aware of the previous order. In addition, Mr. Ozturk should not be heard complaining about the deductions after he had voluntarily agreed to pay alimony and then had waived his right to appeal the judgment.

11. Finally, the Secretary-General argues that the UNDT erred in ordering remedies, including rescission of the contested decision. The UNDT failed to address the aspect that the basis for the child benefit allowance would be eviscerated with the contested decision having been rescinded as the benefit was accorded only based on the 25 per cent deductions. Moreover, in view of the above submissions, there was no basis for any of the remedies awarded.

12. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, save for the UNDT’s finding that Mr. Ozturk’s claim regarding the decision not to list El. as his dependent child was moot.

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<sup>4</sup> *Benamar v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-797, para. 44.



(...)

## Section 2

### Procedures when staff members fail to comply with family support court orders

2.1 Under staff rule 103.18 (b) (iii), the Secretary-General may authorize deductions from staff members' salaries, wages and other emoluments for indebtedness to third parties. Family support court orders create indebtedness to third parties, such as the staff member's spouse, former spouse and/or dependent children.

2.2 To ensure effective relief when staff members fail to comply with family support court orders, the Organization will voluntarily take the following actions when it receives a family support court order against a staff member which is final and which is not being honoured by the staff member:

(a) The staff member will be requested to comply with the order immediately and to submit proof of compliance to the Organization within 30 calendar days from the date of receipt of the request from the Organization;

(b) If the staff member does not submit the proof of compliance within 30 days, the Organization will commence deductions from the staff member's United Nations emoluments in respect of the amounts ordered;

(c) The amounts deducted will then be paid to the spouse, former spouse or the dependent child(ren), in accordance with the order.

2.3 For the purpose of the present bulletin, a family support court order will be deemed final if the only action left in regard of that court order would be to have the order executed. If the staff member concerned contests the order, he or she must submit a new order of a competent court, setting aside or vacating the original order or staying the original order pending appeal, or proof that he or she has otherwise amicably resolved the matter with his or her spouse or former spouse. Until such evidence is submitted, the Organization will honour the original court order.

16. When it comes to the discretionary authority of the Administration, the Administration is under an obligation to exercise it lawfully according to the purpose of the authorizing statute and within the existing statutory limits. The Administration has not validly exercised its discretion if it has addressed a particular administrative matter in the same way it always has without any additional considerations or has operated under the erroneous belief that it was fettered to make a specific choice, to the exclusion of all other choices amongst the various courses of action open to it. In these situations the Administration has, illegally, not engaged in

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[6] Current Staff Rule 3.18(c)(iii).

a balancing exercise of the competing interests, by considering all aspects relevant for the exercise of its discretion, in order to select the proper course of action.

17. The Appeals Tribunal has held that as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion.<sup>7</sup>

18. Nevertheless, a discretionary administrative decision can be challenged on the grounds that the Administration has not acted fairly, justly or transparently.<sup>8</sup> The

21.

26. As the Appeals Tribunal held in *Benamar*:<sup>13</sup>

... [A]lthough a decision of a national court may be subject to criticism by both parties (and also by a third party), it must be obeyed if and to the extent that it is enforceable. Consequently, the parties should generally comply with an executable judicial decision; otherwise they would be taking justice into their own hands, which is not acceptable according to general principles based on the rule of law.

(...)

... (...) The Organization's internal justice system does not have jurisdiction over civil cases concerning the private or personal life of its staff members, much less to reconsider or ignore a judicial decision by a national court, which is immediately enforceable, albeit subject to appeal. Although this is an international tribunal, it does not have a jurisdictional function over the Member States of the Organization, nor over their nationals. Both the Dispute Tribunal and the Appeals Tribunal are administrative and internal courts, designed to deal with administrative decisions

29. The starting point in interpreting Secretary-General's Bulletin ST/SGB/1999/4 are the principles of interpretation set out by the Appeals Tribunal in the case of *Scott*.<sup>14</sup>

... The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its





Administration to consider anew all factors or criteria; <sup>19</sup> it is not for the Dispute Tribunal and the Appeals Tribunal to exercise the discretion accorded to the Administration.

41. Clearly then, once the UNDT had decided to rescind the Administration's decision of 25 November 2015 for the above reasons, the only proper course for it to take, since the issue was about the failure of the Administration to determine the amounts to be deducted from Mr. Ozturk's salary in view of the family support court orders of the Kazakh and Kosovo courts, was to order the Administration to exercise the discretion granted to it on this issue.

42. In this respect, the UNDT held as follows:<sup>20</sup>

... [I]n light of its finding that the decision of 25 November 2015 to deduct 25% from the Applicant's salary on the basis of the Kazakh court order was illegal, said decision has to be rescinded. As a consequence of the rescission, the Applicant will have to be reimbursed the amounts deducted from him from 25 November 2015

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of its reasons or the facts and law supporting its Judgment is not a basis for overturning the Judgment. We therefore uphold the conclusions of the UNDT on those issues.

45. This conclusion renders it unnecessary to examine the other grounds of appeal advanced by the Secretary-General that the UNDT erred in law in drawing parallels and relying on Appeals Tribunal precedent regarding the UNJSPF legal framework, and in pronouncing itself on the soundness of the Kazakhstan court order. They are not decisive for the outcome of the present case.

46. Accordingly, the Secretary-General's appeal is dismissed.

Judgment

47. The appeal is dismissed and Judgment No. UNDT/2018/055 is hereby affirmed.

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