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7. On 29 February 2012, Mr. Kozul-Wright 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.

8. The real estate agency representing the landlord instituted legal proceedings against Mr. and Mrs. Kozul-Wright, claiming the rent for the period March-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. The Commission determined on 2 October 2012 that the efforts for an amicable resolution had failed.

9. 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 Organization to lift diplomatic immunity to allow proceedings before the Geneva courts against Mr. and Mrs. Kozul-Wright.

10. By e-mail of 18 October 2012, the Legal Liaison Office, Office of the Director-General, United Nations Office at Geneva (UNOG) forwarded to Mr. Kozul-Wright a letter from the Swiss Mission in relation to the request from the landlord's attorney to waive their immunity. In this e-mail, the Senior Legal Adviser, UNOG, recommended that this "private matter" be settled out of court, failing which he would forward the request to the Office of Legal Affairs (OLA), United Nations Headquarters, for decision. On 26 October 2012, Mr. Kozul-Wright 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 relevant documentation including a medical certificate stating that Mrs. Kozul-Wright's 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. The Senior Legal Adviser, UNOG, replied, on 29 October 2012, indicating that he would transmit the request to OLA, which he did. By memorandum dated 12 November 2012, the Assistant Secretary-General (ASG), OLA, informed the Senior Legal Adviser, UNOG, of the decision to waive the immunity of Mr. and Mrs. Kozul-Wright for the purposes of civil proceedings for the alleged non-payment of rent for an apartment in Geneva. The Senior Legal Adviser, UNOG, informed the Swiss Mission of the decision to lift the immunities, by memorandum of 14 November 2012.

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16. On 17 June 2016, Mr. Kozul-Wright requested management evaluation of the waiver of his diplomatic immunity as notified in the memorandum on 10 May 2016. This request was rejected as irreceivable by letter dated 20 July 2016.

17. On 14 October 2016, Mr. Kozul-Wright filed an application with the UNDT contesting the decision to waive his diplomatic immunity with regard to his dispute over the lease of the

taken account of all relevant considerations and had acted reasonably. It thus dismissed Mr. Kozul-Wright's application.

Submissions

The Secretary-General's Appeal

20. Even though the UNDT dismissed Mr. Kozul-Wright's application, the Secretary-General has filed an appeal contending that the UNDT erred in law and exceeded its competence by concluding that a decision to waive immunity falls within its jurisdiction. Although, as a general rule, a successful party is not permitted to appeal, in this case there are countervailing interests which may warrant an exception to the rule. An appeal by a successful party is receivable, if it has a negative impact on the situation of the affected party.

21. The Secretary-General submits that the UNDT's reliance on Article 105 of the Charter, Staff Regulation 1.1(f), Staff Rule 1.2(b) and Section 2.3 of ST/AI/2000/12 to conclude that the decision to waive immunity was an administrative decision is misplaced. The UNDT failed to take into account the nature of the decision to waive immunity and the legal framework under which such decision is made. The Staff Regulations, the Staff Rules and subsidiary administrative issuances do not confer any rights on staff members regarding immunities. A decision to waive immunity has no effect on the staff member's terms of appointment. There is no effect on the staff member's entitlements, status or conditions of employment with respect to his or her relationship to the Organization merely as a result of the waiver. Rather, a waiver of immunity simply means that a staff member will be obliged to meet his or her legal responsibilities under the legal processes of the relevant Member State.

22. Moreover, the UNDT erred in finding that the jurisprudence of the UNDT, the Appeals Tribunal, the former United Nations Administrative Tribunal (former Administrative Tribunal) and the Administrative Tribunal of the International Labour Organization (ILOAT) was consistent with its conclusion that the decision to waive immunity is a contestable administrative decision.

23. The UNDT's assertion of jurisdiction to review decisions to waive immunity, the Secretary-General maintains, will destabilize the framework of legitimate expectations and assigned responsibilities under the Convention, as mirrored in the host country agreements concluded with the governments of the States where the United Nations is based. If allowed

to stand, the UNDT's decision on receivability, affirming a competence to review the decisions to waive immunity, will undermine the Secretary-General's authority to execute his obligations under the Convention and host country agreements. This will impact negatively on the Secretary-General and his obligation to cooperate with Member States to facilitate the administration of justice in the course of national judicial proceedings.

24. The Convention and the Host Country Agreement specifically provide that the Secretary-General has not only the right but the duty to waive immunity where specified conditions are satisfied. They further provide that the United Nations shall co-operate, at all times, with the appropriate authorities 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 fa

Mr. Kozul-Wright's Answer

28. Mr. Kozul-Wright submits that the Secretary- General's appeal is not receivable because he has not established a compelling reason to make an exception to the general rule that a party

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not affect the private nature of the underlying rental dispute. Moreover, the record in the present case does not support the assertions of misrepresentation in the Judgment.

37. Secondly, contrary to Mr. Kozul-Wright's contention, there was no requirement for the medical service to be consulted in the context of the decision to waive immunity. Furthermore, the Organization fully considered Mr. Kozul-Wright's arguments regarding Mrs. Kozul-Wright's medical condition as is evidenced in the memorandum by the ASG, OLA on the waiver of immunity for the purposes of the proceedings before the Geneva court.

38. Mr. Kozul-Wright has failed to establish that the decision to waive immunity should be rescinded and that he should be awarded compensation. Mr. Kozul-Wright has neither demonstrated that the UNDT failed to exercise the jurisdiction vested in it, nor has he demonstrated that the UNDT erred in law or fact resulting in a manifestly unreasonable decision. He has also failed to provide any evidence of harm; thus, his request does not satisfy the statutory requirements for an award of compensation.

39. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety. He also renews his request that the Appeals Tribunal reverse the UNDT's conclusion that Mr. Kozul-Wright's application was receivable, vacate the UNDT Judgment and dismiss his application in its entirety on that basis.

Considerations

40. Before considering the merits of the arguments on the receivability, it is necessary as a preliminary matter to determine if the appeal of

Secretary-General, however, appealed against a discrete issue (namely that the UNDT did not have jurisdiction to make certain observations recorded in its judgment) and sought their redaction. The Appeals Tribunal held that although the Secretary-General was “the beneficiary” of the judgment in his favour on the receivability issue, he was entitled to appeal regarding the objectionable observations since there were two factors which distinguished the appeal from the finding in *Sefraoui*.

42. Firstly, the observations were made in circumstances where the Secretary-General had specifically limited his reply to the application to the issue of receivability and had sought and obtained leave, in terms of Article 19 of the UNDT Rules of Procedure, to have receivability considered as a preliminary issue and had reserved the right to file a further submission addressing the merits of the claim. Secondly, the UNDT effectively embarked on a consideration of the merits of the application and purported to make findings of fact and analyzed those factual findings against the then applicable Staff Rules.

43. This Tribunal has subsequently provided further clarification of the principles on which a successful party may file an appeal in *Saffir and Ginivan*.⁵ Before an appeal may be allowed, the judgment of the UNDT must entail a concrete and final decision which generates “the harm that constitutes the condition sine qua non of any appeal”⁶ The Appeals Tribunal held:⁷

... It is not enough to claim that the grievance comes from the reasoning of the judgment, from all or part of its motivation or from the rejection of certain or all...
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practical fulfillment of his duty to co-operate with Member States to facilitate the administration of justice in the course of national judicial proceedings. The receivability ruling impacts negatively upon his authority to execute his obligations under the Convention. If his decisions on waiver of immunity are subject to an overriding review power by the internal justice system, the Secretary-General will not be able to assure Member States of the finality of his decision until the internal justice proceedings are finalized with the result that the national judicial proceedings will be delayed and disrupted. The negative implications of the UNDT ruling for the Secretary-General, in his view, are of such an order as to justify allowing him to appeal the ruling, despite his success on the merits.

45. Article 2(1) of the Appeals Tribunal Statute provides for appeals against judgments in which it is, *inter alia*, asserted that the UNDT has exceeded its jurisdiction or competence or has erred on a question of law. In this appeal, the Secretary-General raises both grounds of appeal alleging that the UNDT erred on a question of law and exceeded its competence in finding that it had jurisdiction *ratione materiae*. In *Ngoma-Mabiala*, the Secretary-General was allowed to appeal because the UNDT had erred in law and exceeded its jurisdiction in commenting upon the merits of the case although it had dismissed the application as not receivable. The present appeal is similar because the UNDT may have erred in law or exceeded its jurisdiction or competence by receiving the application when it might not be receivable *ratione materiae*. We therefore receive the Secretary-General's appeal and address the claim that Mr. Kozul-Wright's application was improperly received *ratione materiae*.

46. In terms of Article 2(1)(a) of the UNDT Statute, the UNDT shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General as the Chief Administrative Officer of the United Nations to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

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.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

48. Sections 20 and 21 of the Convention provide as follows:

SECTION 20. 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.

SECTION 21. The United Nations shall cooperate 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.

49. In addition, Section 30 of the Convention provides:

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disposed of on that limited jurisdictional basis. The inquiry is whether the UNDT erred and

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Judgment No. 2018-UNAT-843