



File number: SA-06-HJ

Before: Higher Judge for Staff Appeals
Judge Charles L. Smith III

Date: 28 August 2019 (confidential version issued 5 August 2019)
August 2019

Language: English

Classification: Public

Decision on the Admissibility of the Appeal

Appellant:

[REDACTED]

Respondent:

The Registrar, Fidelma Donlon

THE HIGHER JUDGE FOR STAFF APPEALS of the Specialist Chambers, acting pursuant to Staff Rule 84(h) of the Staff Rules of the Specialist Chambers and Specialist Prosecutor's Office ("Staff Rules")¹ and Rules 20(5), 21, 22(3), (4) and 29(3) of the Rules of Procedure for Staff Appeals ("Staff Appeals Procedure"),² issues this decision on the admissibility of the appeal of Mr [REDACTED] ("Appellant").³

I. PROCEDURAL BACKGROUND

1. On 8 May 2019, the Appellant filed a confidential appeal⁴ against the decision of the Registrar dated 24 April 2019 ("Registrar's Decision" or "24 April 2019 Review Decision"),⁵ regarding the status of the Appellant's employment with the Kosovo Specialist Chambers ("First Appeal").

2. On 5 July 2019, the Judge for Staff Appeals, Judge Thomas Laker, issued a confidential version of the decision on the First Appeal, in which he found "that the Appellant has failed to demonstrate that the Registrar, in reaching the [24 April 2019 Review Decision], acted in a manner set forth in rule 10(1) of the Staff Appeals Procedure", and accordingly, dismissed the First Appeal, "including the relief sought therein" ("Impugned Decision").⁶

3. On 17 July 2019, the Appellant filed an appeal against the Impugned Decision ("Second Appeal"),⁷ which was communicated to the President on 18 July 2019.

4. On 22 July 2019, the President issued the "Decision Assigning a Higher Judge for

¹ KSC-RI-01-v.1.1.1, 7 February 2018.

² KSC-RI-02-v1.0, 11 September 2017.

³ SA-06-HJ/F001, Appeal Before the Higher Judge for Staff Appeals, 17 July 2019 (confidential) and its confidential annexes (A01-A05).

⁴ SA-06-HJ/F001/A04, Appeal of Mr [REDACTED] Against the Decision of the Registrar Dated 24 April 2019, 8 May 2019 (confidential).

⁵ F001/A03, Registrar's Review of an Administrative Decision, 24 April 2019 (confidential)

⁶ F001/A05, para. 52. A public redacted version of this decision was issued on 8 July 2019.

⁷ F001 and its confidential annexes (A01-A05).

Staff Appeals”,⁸ in which, *inter alia*, she assigned “Judge Charles L. Smith III to serve as the Higher Judge for Staff Appeals in File No. SA-06-HJ”.⁹

II. APPLICABLE LAW

5. Rule 84(h) and (i) of the Staff Rules reads:

(h) Decisions made by a Staff Appeal Judge shall become final unless they are appealed within fourteen days to the Higher Judge for Staff Appeals. Such appeals shall be limited to a manifest error of law causing a miscarriage of justice.

(i) Decisions of Higher Judge for staff Appeals [...] shall be binding on the Specialist Chambers and the Specialist Prosecutor’s Office”.

6. Rule 20(5) of the Staff Appeals Procedure stipulates: “[t]he Decision on the Appeal shall become final, unless it is appealed within fourteen (14) days to the Higher Judge for Staff Appeals in accordance with Chapter 3”.

7. Rule 21 of the Staff Appeals Procedure stipulates:

(1) An Appealing Party may appeal a Decision on the Appeal rendered pursuant to Rule 20.

(2) The Second Appeal shall be in writing and shall include:

(i) where applicable, the name and contact details of the Appellant and his or her present or former status with the Specialist Chambers or the Specialist Prosecutor’s Office;

(ii) where applicable, the initial Decision of the Registrar and the request for review filed in this respect by the Appellant in accordance with Staff Rule 84(a);

(iii) the Decision of the Registrar or the Disciplinary Decision contested before the Judge for Staff Appeals, as applicable;

(iv) the submissions and material filed by the Parties before the Judge for Staff Appeals;

(v) the contested Decision on the Appeal;

(vi) the arguments of the Appealing Party regarding the alleged manifest error of law causing a miscarriage of justice, as specified in Rule 22(3);

(vii) the relief sought; and

(viii) where applicable, the name and contact details of any person representing the Appellant, if any, in accordance with Rule 9.

8. Rule 22(3)-(4) of the Staff Appeals Procedure stipulates:

(3) The Decision on the Appeal may be appealed only on the grounds of a manifest error of law causing a miscarriage of justice.

⁸ F002.

⁹ F002, p. 3.

(4) If the Higher Judge for Staff Appeals considers that the Appealing Party does not identify the alleged manifest error of law causing a miscarriage of justice, he or she shall summarily dismiss the Second Appeal within fourteen (14) days of his or her assignment pursuant to Rule 23(1). The Appealing Party shall be notified of the summary dismissal forthwith, including the reasons thereof.

III. APPELLANT'S SUBMISSION

9. For the sake of judicial economy, this section will be confined to a summary of the Appellant's arguments in the Second Appeal. The Higher Judge for Staff Appeals shall refer to other submissions and annexes only to the extent necessary for judicial reasoning.

10. The Appellant premises his Second Appeal on two main lines of arguments. The first relates to the applicable law and the approach to its interpretation, while the second focuses on alleged violations of his rights to a fair hearing before the Judge for Staff Appeals.

11. In substantiating the first part of his Second Appeal, the Appellant refers to Rule 84(h) of the Staff Rules and Rule 22(3) of the Staff Appeals Procedure as the applicable law in this case.¹⁰ However, the Appellant "protest[s] that the applicable test sets an excessively high, narrowly categorised and deficient basis for an appeal to be brought forward, and that any doubt as to the applicable standard and interpretation of the law to which the Appellant must establish their appeal should be exercised in their favour".¹¹

12. According to the Appellant, the applicable standard of "manifest error of law causing a miscarriage of justice" is also "inconsistent with the general due process principles and international administrative law of other comparable institutions".¹² The narrow scope of this standard and its confinement to "errors of law", "does not,

¹⁰ F001, para. 7.

¹¹ F001, para. 8.

¹² F001, para. 9.

at least on the face of it, allow for any appeal at all should the first instance judge make an error of fact”, the Appellant argues.¹³ This is so even if such a factual error is deemed manifest and causing a miscarriage of justice, the Appellant adds.¹⁴ Referring to the competence requirements for an appeal as reflected in the statutes of the United Nations Appeals Tribunal as well as the International Labour Organisation Administrative Tribunal, the Appellant argues that none of these judicial organs set the bar as high as “under the KSC [Kosovo Specialist Chambers] system”.¹⁵

13. In developing the second part of the Second Appeal, the Appellant portrays the development of his case pointing out the termination of his contract on 19 February 2019 and its “rescission” by the Registrar on 27 March 2019.¹⁶ The Appellant explains that he has suffered from these events, particularly after the Registrar issued a “Review Decision” [24 April 2019 Review Decision] denying his request for review the termination decision of 19 February 2019.¹⁷ The Appellant also expresses disapproval of the content of the 24 April 2019 Review Decision, which in the relevant part stated, “[a]s a result of the rescission, the Termination Decision has no effect and has no impact on the rights and obligations deriving from the contract of employment [...] [and that the] request for review [...] dated 19 February 2019 is therefore respectfully denied”.¹⁸

14. On the other hand, the Appellant advances a set of arguments most of which revolve around the manner in which the Judge for Staff Appeals addressed the First Appeal resulting in its dismissal. The Appellant complains of “scant reasoning and analysis, to the extent many of the [...] points cannot be shown to have been

¹³ F001, para. 9.

¹⁴ F001, para. 9.

¹⁵ F001, paras 10-11.

¹⁶ F001, paras 13-15.

¹⁷ F001, paras 15-16 ; F001/A03.

¹⁸ F001, para. 15; F001/A03, p. 3.

considered”.¹⁹ Quoting paragraph 36 of the Impugned Decision, the Appellant argues that the Judge for Staff Appeals committed a “serious error of law” because it “it caused him to exclude from consideration precisely the relevant material that he needed to evaluate the issue of mootness”.²⁰ Being guided by the jurisprudence of the United Nations Administrative Tribunal and the United Nations Dispute Tribunal, the Appellant claims, “the purpose behind mootness is to avoid wasted and repeated hearings [...] [and that] [i]t is not beyond the realms of possibility that a favourable decision for the Appellant in the instant case, had the real merits ever been considered, may have caused the Registrar to reverse her thinking on the termination based upon nationality”.²¹

15. Referring to paragraph 46 of the Impugned Decision, the Appellant further claims that the Judge for Staff Appeals erred “as there has not been ‘a full restoration of the Appellant’s contractual situation’”.²² The Appellant further argues that refusing to consider “any post Termination and Review Decisions [as mentioned] in paragraph 36 [of the Impugned Decision]”, makes it remarkable to reach the conclusion referred to in 46 namely that there has been “a full restoration of the Appellant’s contractual situation”.²³

16. According to the Appellant, the Judge for Staff Appeals also manifestly erred in law when he decided that the Appellant’s review “had lost its subject”, given that “[t]he review was and remains a valid and legitimate concern, namely is this policy involving terminations and shortened contracts for UK staff lawful?”.²⁴ For the

¹⁹ F001, para. 20.

²⁰ F001, paras 18, 22-23.

²¹ F001, paras 24-26.

²² F001, para. 28 ; Impugned Decision, para. 46.

²³ F001, para. 28.

²⁴ F001, para. 27.

Appellant, the main goal was to “establish the illegality of the decision and prevent it from being used again”.²⁵

17. In this respect, the Appellant claims an additional error resulting from an alleged unlawful termination decision which continued for several days and thus caused “prejudice and moral harm”.²⁶ Finally, the Appellant further complains of lack of legal assistance during the review process, which caused him confusion at earlier stages regarding the different concepts involved and the right path to follow.²⁷

18. Having set out the foregoing arguments, the Appellant seeks the following relief:

33. [...] [A] decision that the matter was wrongly decided as moot and the decision of Judge Laker be rescinded.

34. [...] [T]he remittal of his case to be fully and properly considered on the merits in a just and fair manner by a new first instance Judge drawn from the Second Staff Appeals Roster due to a lack of confidence in Judge Laker. This preserves the Appellant’s right to appeal against the new Judge’s Decision which would be lost under paragraph 26 below.

35. In the absence of the remedy at paragraph 34, the Appellant invites the Higher Judge to modify the decision of Judge Laker and rule upon the merits of his case.

36. [...] [R]equests moral damages and legal costs for the harm caused by the unlawful decision-making process.²⁸

IV. ADMISSIBILITY OF THE APPEAL

19. At the outset, the Higher Judge for Staff Appeals wishes to point out that for the sake of granting the relief sought by the Appellant, the Second Appeal must first pass the admissibility test set out in Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure. This is a *conditio sine qua non*.

20. According to Rule 84(h) of the Staff Rules, “[d]ecisions made by a Staff Appeal Judge shall become final unless they are appealed within fourteen days to the Higher

²⁵ F001, para. 29; Impugned Decision, para. 47.

²⁶ F001, para. 31.

²⁷ F001, para. 30.

²⁸ F001, paras 33-36.

Judge for Staff Appeals. Such appeals shall be limited to *a manifest error of law causing a miscarriage of justice*" (emphasis added). Similarly, Rule 22(3) of the Staff Appeals Procedure reads: "[t]he Decision on the Appeal may be appealed only on the grounds of *a manifest error of law causing a miscarriage of justice*" (emphasis added). Paragraph 4 of the same provision stipulates: "[i]f the Higher Judge for Staff Appeals considers that the Appealing Party does not identify the alleged manifest error of law *causing a miscarriage of justice*, he or she shall summarily dismiss the Second Appeal [...]" (emphasis added).

21. Thus, for this Second Appeal to be admissible, the Appellant must identify one or more manifest error(s) of law causing a miscarriage of justice. The legal test is cumulative in the sense that the mere identification of an error of law is not sufficient. Rather, the Appellant is called upon to identify a *manifest* error of law, which causes a *miscarriage of justice*. The alleged errors must be sufficiently substantiated by the Appellant.

22. The KSC statutory documents neither define "manifest error" nor "miscarriage of justice". However, a plain meaning of "manifest" suggests that the alleged error identified should be "clear, obvious [or] unquestionable".²⁹ As to "miscarriage of justice", the term is broad and used depending on the context in which it is applied.³⁰ However, in a recent decision issued by the International Criminal Court in the context of passing a ruling regarding compensation, Trial Chamber II, after having conducted a comparative domestic and international analysis concerning the notion, it concluded that "miscarriage of justice" denotes "a clear violation of the applicant's fundamental rights and must have caused serious harm [...]. [T]herefore not every error committed in the course of the proceedings is automatically considered a 'grave

²⁹ J. Law (ed.), *A Dictionary of Law*, 9th ed., (Oxford, Oxford University Press), 2018, p. 802.

³⁰ See, *inter alia*, ICTR, *Protais Zigiranyirazo v. The Prosecutor*, "Decision on Protais Zigiranyirazo's Motion for Damages", 18 June 2012, ICTR-2001-01-073, para. 21; ECtHR, Chamber, *Granger v. The United Kingdom*, 28 March 1990, Application No. 11932/86, para. 26; Grand Chamber, *Allen v. The United Kingdom*, 12 July 2013, Application No. 25424/09, paras 118,129-133.

and manifest' miscarriage of justice".³¹ This is equally valid for the interpretation of the notion of "miscarriage of justice" within the meaning of Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure.

23. In this regard, the Higher Judge for Staff Appeals recalls that the Appellant disputes the mere existence and application of this admissibility standard, suggesting that errors of fact should be captured by errors of law in accordance with the applicable standard set out in Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure.³²

24. This argument put forward by the Appellant is unsustainable. There must be a distinction between *lex lata* (the law as it exists or currently in force) and *de lege ferenda* (what the law should be). This means that the Higher Judge for Staff Appeals is duty bound to apply the existing legal framework regulating the operation of the KSC, in this case the legal standard reflected in Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure.

25. The Appellant correctly observes that identifying a manifest error of law causing miscarriage of justice imposes a higher burden of proof on his part. Satisfying this standard requires examination of whether the alleged error claimed by the Appellant first, qualifies as manifest error of law, and if the answer is in the affirmative, whether such manifest legal error causes miscarriage of justice.

26. Upon review of the Appellant's submission as detailed in section III above, it is clear that the arguments revolve around a core alleged legal error, namely whether the Judge for Staff Appeals manifestly erred causing a miscarriage of justice in assuming that the appeal against the Registrar's Decision dated 24 April 2019 had "lost

³¹ ICC, Trial Chamber II, *Prosecutor v. Mathieu Ngudjolo*, "Decision on the 'Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome'", 16 December 2015, ICC-01/04-02/12-301-tENG, paras 37-45.

³² F001, para. 9.

its subject”,³³ considering that the Registrar had rescinded the Termination Decision dated 19 February 2019.

27. Whether or not a decision is valid or ceases to have any effects is a legal question that falls, in principle, under the ambit of Rule 84(h) of the Staff Rules and Rule 22(3) of the Staff Appeals Procedure. However, as elaborated above, the legal error, on the part of the Judge for Staff Appeals, must be manifest causing a miscarriage of justice.

28. In this respect, the Higher Judge for Staff Appeals is not convinced that the findings of the Judge for Staff Appeals in the Impugned Decision amount to a manifest error of law causing a miscarriage of justice. With the rescission of the “Termination Decision” by the Registrar on 27 March 2019 and the continuation of the contract of employment of the Appellant as clear from the 24 April 2019 Review Decision, the object of controversy, namely the “Termination Decision”, no longer existed. There is no prejudice to the Appellant. The position of the Appellant in the present appeal is markedly different from *Kallon*, to which the Appellant refers extensively. Whereas in the latter the contested decisions for the staff member of the United Nations continued to stand and had not been rescinded or suspended,³⁴ in the present case, the Appellant’s contractual situation was fully restored. Accordingly, the Higher Judge for Staff Appeals does not find a manifest error of law causing a miscarriage of justice.

29. Notably, what the Appellant actually seeks to appeal is the “policy involving terminations and shortened contracts for UK staff”.³⁵ However, this appeal is not the appropriate avenue to discuss policy approaches endorsed by the Registrar.

³³ F001, para. 27.

³⁴ United Nations Appeals Tribunal, *Kallon v Secretary-General of the United Nations*, Judgment, 31 March 2017, 2017-UNAT-742, para 16.

³⁵ F001, para. 27.

30. Finally, the Higher Judge for Staff Appeals wishes to address two further allegations that the Appellant advances in the context of his main argument. The first allegation pertains to the “scant reasoning and analysis of the issues” by the Judge for Staff Appeals.³⁶ The Higher Judge for Staff Appeals notes that the Appellant does not further identify with specificity which findings the Judge for Staff Appeals did not sufficiently substantiate. Failure to substantiate the errors in the Impugned Decision compels the Higher Judge for Staff Appeals to dismiss the argument without analysing its substance for the purposes of this admissibility decision. In any event, from the content of the Second Appeal, it is clear that the Appellant was in a position to understand and challenge the findings in the Impugned Decision. Thus, the Appellant’s complaint concerning the lack of legal assistance, in this context, lacks any merit.

31. The second allegation pertains to the claim that the Judge for Staff Appeals disregarded relevant evidence.³⁷ It is worth recalling that the consideration of evidence amounts to a procedural error rather than an error of law as it pertains to the process of reaching the contested decision. Be that as it may, the Appellant fails to submit with precision which evidence the Judge for Staff Appeal excluded or ignored.

32. In view of the foregoing, the Appellant failed to identify a manifest error of law causing a miscarriage of justice. The Higher Judge for Staff Appeals cannot but render the Second Appeal inadmissible, requiring its summary dismissal. It follows that the alternative requests in the relief sought can no longer be addressed.

33. Finally, according to Rule 29(3) of the Staff Appeals Procedure, “[f]inal Decisions shall, to the extent possible, be public and may only be redacted where this is deemed necessary by the Judge, *proprio motu* or upon request by the Appellant for the purpose

³⁶ F001, paras 20-21.

³⁷ F001, para. 18.

of the protection of his or her identity, or by the Registrar [...]. A public redacted version of any Final Decision shall be available to the Specialist Chambers and the Specialist Prosecutor's Office Staff [...]" . Considering the significance of the principle of publicity of the proceedings, the Higher Judge for Staff Appeals deems it necessary that a public redacted version of the present decision is available to the "Specialist Chambers and the Specialist Prosecutor's Office Staff". Since the present decision refers to confidential information from the relevant filings, the Higher Judge for Staff Appeals considers it necessary to receive redaction proposals, if any, from the Appellant and the Registrar before issuing a public redacted version of the present decision.

FOR THESE REASONS, THE HIGHER JUDGE FOR STAFF APPEALS

- a) **decides** that the Second Appeal is inadmissible;
- b) **summarily** dismisses the Second Appeal in its entirety; and
- c) **orders** the Appellant and the Registrar to submit redaction proposals to the present decision, if any, no later than Monday, 19 August 2019.



**Judge Charles L. Smith III,
Higher Judge for Staff Appeals**

Dated this Wednesday, 28 August 2019
At The Hague, The Netherlands