



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

Judgment No. 2013-UNAT-326

Jibara
(Respondent/Appellant on Cross-Appeal/Applicant)
v.
Commissioner-General
of the United Nations Relief and Works Agency for
Palestine Refugees in the Near East
(Appellant/Respondent on Cross-Appeal/Respondent)

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Mary Faherty Judge Sophia Adinyira
Case No.:	2012-355
Date:	21 June 2013
Registrar:	Weicheng Lin

Counsel for Mr. Jibara:	Hala Abu-Hijleh Ghada A. Yasin
Counsel for Commissioner-General:	Anna Segall

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency) against Judgment No. UNRWA/DT/2012/025, rendered by the UNRWA Dispute Tribunal (UNRWA DT) on 14 June 2012 in the case of *Jibara v. Commissioner-General of UNRWA*. The Commissioner-General appealed on 30 July 2012. Mr. Raed Jibara cross-appealed on 13 August 2012. He answered the Commissioner-General's appeal on 20 September 2012. On 19 October 2012, the Commissioner-General answered Mr. Jibara's cross-appeal.

Facts and Procedure

2. Mr. Jibara joined UNRWA in September 1993 as a cleaner at Qalqilia Hospital, West Bank, and eight months later, he was appointed as a guard.

3. In either late 2008 or early 2009, an incident took place at the home of Mr. Jibara's brother, during which the latter's son, Mr. Jibara's nephew, accidentally shot and killed a 14-year-old boy with his father's gun. Mr. Jibara's brother had a weapons permit. A reconciliation committee made up of Mr. Jibara's family members and the deceased's family members was set up. It reached an agreement on 26 June 2009, by which the weapons would be removed from Mr. Jibara's brother's home and temporarily stored in Mr. Jibara's house. Mr. Jibara did not have a weapons permit, but acted with the approval of the Palestinian National Authority (PNA) and the government of the Town of Qalqilia.

4. In the early morning of 30 June 2009, the Israel Defense Forces (IDF) raided and searched Mr. Jibara's house and seized weapons and firearms. The IDF arrested Mr. Jibara for possession of weapons. On 22 July 2009, he was convicted of a single offence of weapons possession and, on 28 July, was given a reduced sentence of four months imprisonment by the Israeli Military Court of Samaria. Mr. Jibara was also sentenced to a fine of NIS 10,000 or 10 months imprisonment in lieu thereof and six months suspended sentence for a period of four years. Mr. Jibara was so sentenced after having reached a plea bargain with the prosecutor and having admitted to being guilty of a single offence related to the possession of weapons. Mr. Jibara was released on 15 October 2009.

5. The UNRWA Administration conducted an in-person interview with Mr. Jibara after his release.

6. Effective 4 December 2009, Mr. Jibara's contract with UNRWA was terminated "in the interest of the Agency". This decision was taken in light of Mr. Jibara's conviction and imprisonment and pursuant to the "Agency Policy in respect of Staff who are arrested, detained or brought to trial" dated 1 February 1984 (Detained staff policy), which reads in part:

If a staff member is brought to trial and convicted and a prison sentence of three months or more is imposed, his appointment will normally then be terminated in the interests [of] the Agency unless the facts of the case are such that the Agency considers that the staff member has not been at fault.

7. Mr. Jibara appealed. In Judgment No. UNRWA/DT/2012/025, the UNRWA DT set aside the decision to terminate Mr. Jabara's service and ordered his reinstatement or, as an alternative, compensation in the amount equivalent to two years' net base salary. The UNRWA DT concluded that the weapons found in Mr. Jibara's house were legally in his possession, and that he was not at fault, but was a victim of an illegal search and detention by the Israeli occupying force. Contrary to the Agency's arguments, the UNRWA DT did not believe that there would be any negative repercussions with the host government because the host government in question was the PNA and the Town of Qalqilia, both of which asked Mr. Jibara to store the weapons until the family dispute was settled and, moreover, had written to the Agency in support of Mr. Jibara and requested that the Agency reconsider the decision to terminate Mr. Jibara's service. The UNRWA DT also surmised that the Agency's relations with the donors and the United Nations would not suffer if it decided to reinstate Mr. Jibara because "they would object to [his] illegal arrest, illegal detention and illegal imprisonment". The UNRWA DT was of the view that in applying the Detained staff policy to Mr. Jibara, the Agency reneged on the Oslo Accords and legitimized non-existent Israeli jurisdiction over Area A, where Mr. Jibara was residing under the administrative and security control of the PNA.

Submissions

The Commissioner-General's Appeal

8. The UNRWA DT erred in law by finding that the Detained staff policy did not apply in Mr. Jibara's case. The Agency's Detained staff policy was upheld by the former Administrative Tribunal. It was reasonable for the UNRWA Administration to accept the jurisdictional competence of the Israeli Military Court. The UNRWA Administration was bound to apply the Detained staff policy.

9. The UNRWA DT erred in fact by finding that the guns were legally in Mr. Jibara's possession. As Mr. Jibara admitted to the Israeli Military Court during his detention and the UNRWA Administration after his release that he possessed weapons without evidence of holding any permit to do so, the determination of his fault should have been made with reference to the UNRWA Area Staff Regulations and Rules and administrative issuances, rather than to local laws.

10. The jurisprudence of the Appeals Tribunal and the former Administrative Tribunal is clear that it is for the General Assembly or the executive head of the employing entity, the UNRWA Commissioner-General in the present case, and not the tribunals, to legislate on personnel matters. Similarly, it is not the role of the United Nations tribunals to take a political position on personnel matters.

Mr. Jibara's Answer

11. The UNRWA DT correctly found that the Detained staff policy did not apply to Mr. Jibara. Even if it was applicable, the Detained staff policy was arbitrarily implemented, which invalidates the "at fault" finding.

12. The UNRWA DT did not err in fact when it found that the guns were legally in Mr. Jibara's possession.

Mr. Jibara's Cross-Appeal

13. The UNRWA DT erred in law when it failed to recognize the exceptional circumstances of his case (his illegal arrest by Israel and illegal termination by UNRWA) and to compensate him for the loss of his base pay. Mr. Jibara seeks compensation equivalent to a total of two years and

six months' net base salary for loss of salary, earnings and entitlements between the date of his termination and the date of the UNWRA DT Judgment.

UNRWA's Answer to Cross-Appeal

14. The UNRWA DT did not fail to exercise its jurisdiction or err in law in its decision not to award compensation for loss of income or enhanced compensation.

15. The Commissioner-General requests that the Appeals Tribunal reject the cross-appeal in its entirety.

Considerations

16. When reviewing a sanction imposed by the Administration, the Tribunal will examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.¹

17. In the present case, both parties agreed on the facts on which Mr. Jibara's separation from service was based.

18. The UNRWA Commissioner-General terminated Mr. Jibara's appointment after he had been sentenced to four months imprisonment and a fine for weapons possession.

19. This sentence was the result of a confession and a plea agreement.

20. Mr. Jibara contested the decision to terminate his appointment after serving his sentence, arguing that the weapons were his brother's, and that he had never engaged in any unsuitable activity which would have violated the standards expected of an UNRWA staff member as the guns were legally in his possession.

21. The UNRWA DT agreed with Mr. Jibara and ordered his re-instatement, finding that the impugned decision was not properly made, that the established facts did not legally support the disciplinary measure taken, and that the sanction was disproportionate.

¹ *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024.

22. The UNRWA Commissioner-General appealed the Judgment, maintaining that the UNRWA DT erred in law.

23. The former Administrative Tribunal held in *Wiedl*:

The Tribunal is aware that, one of the principles of international law is that "... A nation has the right to proscribe any conduct taking place within its borders as criminal whether committed by a citizen, resident alien or non-resident alien." Hence, since due process was accorded to the Applicant, the Secretary-General was entitled to take into consideration, if he wished, the action of the Israeli courts, but, as indicated above, irrespective of what the Austrian Court or the Israeli Court decided, it would not have prevented the Respondent from taking action under staff regulation 10.2 if he considered such action justified in the light of all the facts available to him. If, in coming to his present decision, i.e., to dismiss the Applicant, he took into account, among other factors, evidence available in the Israeli Court, he was entitled to do so. He could take action, even in the absence of a court proceeding, if he was convinced, in good faith and after due process, that summary dismissal of the Applicant was called for.²

24. The UNRWA DT lacks jurisdiction to decide the scope of the Oslo Accords signed by Israel and the PNA or the legality of the detention and imprisonment.

25. In the instant case, Mr. Jibara was arrested by the Israel Defense Forces for possession of weapons on 30 June 2009.

26. He was convicted as a result of a plea bargain.

27. The amended charge sheet as part of the plea bargain states that Mr. Jibara "held firearms, ammunition, a bomb, a hand grenade or other explosive or detonating device without a permit from the military commander or anyone on behalf thereof". It continues:

Commencing five months prior to the arrest ... until the date of arrest ... [Mr. Jibara] held ... [i]n a bag concealed under an armchair, a Remington 552 gun with a diameter of 0.22mm ... in a space between the ceiling and the attic, a bag ... containing some 340 bullets for a Kalatchnikov rifle, 50 bullets 9mm in size; 140 bullets 0.22mm in size; and 36 bullets for a hunting rifle ... [i]n a sink close to the washroom two 0.22mm FN handguns ..., each with an empty magazine as well as an additional empty magazine.

² Former Administrative Tribunal Judgment No. 436, *Wiedl* (1988), para. VI (internal citation omitted.)

28. Mr. Jibara understood and admitted to the contents of the amended charge sheet.

29. The Agency's Detained staff policy reads that "[i]f a staff member is brought to trial and convicted and a prison sentence of three months or more is imposed, his appointment will normally then be terminated in the interests [of] the Agency unless the facts of the case are such that the Agency considers that the staff member has not been at fault".

30. In the instant case, the Agency decided to terminate Mr. Jibara's appointment.

31. "When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General."³

32. "The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration."⁴

33. "Having established misconduct and the seriousness of the incident, the Appeals Tribunal cannot review the level of sanction imposed. Such a decision, which falls within the remit of the Commissioner-General, can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness, which has not been established."⁵

Judgment

34. The UNRWA DT Judgment is vacated.

³ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-84, para. 40.

⁴ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

⁵ *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 35.

Original and Authoritative Version: English

Done in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

21 June 2013

(Signed)

Judge Faherty

28 June 2013

(Signed)

Judge Adinyira

21 June 2013

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar