JIBARA

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Anna Segall
Introduction

1. This is an application by Raed Abdulla Jibara (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to terminate his appointment in the interest of the Agency.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (“JAB”) was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the JAB has been submitted to the Commissioner-General.

Facts

4. Effective 1 September 1993, the Applicant was engaged by the Agency as a Cleaner at Qalqilia Hospital, West Bank on a temporary indefinite appointment. Effective 1 May 1994, the Applicant was transferred to the post of Guard “B” with no change in grade and step.

5. Following an incident in which a fourteen-year-old boy was accidentally killed by the nephew of the Applicant, a reconciliation committee made up of family members of the Applicant and of family members of the deceased signed an agreement on 26 June 2009 by which the weapons involved in the fatal accident would be stored temporarily in the house of the Applicant.
6. On 30 June 2009, the Applicant was arrested by the Israeli Defence Forces (the “IDF”) for possession of weapons.

7. By letter dated 2 July 2009 to the Israeli Ministry of Defence, the Director of UNRWA Operations, West Bank (the “DUO/WB”) inquired about the charges against the Applicant and requested that the Agency be given access to all the requisite information regarding the reasons for the detention as well as access to the Applicant so that it could apprise itself of the grounds for the detention and “whether the charge(s), if any, … arise(s) from his official duties, and whether the facts constitute sufficient reason for applying disciplinary or other measures against him”.

8. By facsimile dated 28 July 2009, the Israeli Ministry of Defence transmitted to the DUO/WB the charge sheet, the verdict dated 22 July 2009 (a single offence related to the possession of weapons) and the sentence (four month imprisonment) of an Israeli Military Court.

9. After three months and fifteen days of imprisonment, the Applicant was released on 15 October 2009.

10. By Inter Office Memorandum (“IOM”) dated 5 November 2009, the Officer in Charge of the Legal Department in the West Bank Field Office wrote to the DUO/WB, after conducting an in-person interview with the Applicant:

7. When questioned about the compatibility of his conduct with the obligations incumbent upon him by reason of his employment with the Agency, [the Applicant] told the Legal Office that he did not consider his behavior to have triggered any potential contravention of his obligation as a staff member of the Agency. He explained his conduct by saying that he was subject to heavy societal pressure when ordered by the Governor and other officials of the PA to place the weapons in his house … Furthermore, this arrangement was a precondition for the reconciliation between the two parties. [The Applicant] contended that he was under stress and he highlighted that he did not want to withdraw his support to his family whose only concern was to finalize the reconciliation as soon as possible.
11. By memorandum dated 5 November 2009, the DUO/WB informed the Commissioner-General about the facts of the case and recommended that the Applicant’s employment be terminated in the interest of the Agency. In relevant part, the letter indicated the following:

2. Mr. Jibarah was arrested on 30 June 2009 by the IDF and indicted for illegal possession of weapons on 16 July 2009. On 22 July 2009 he was convicted and sentenced for the above mentioned offence by way of a plea bargain to 4 months imprisonment by the Israeli Military Court of Samaria.

3. The “Agency Policy in respect of Staff who are arrested, detained or brought to trial,” dated 1 February 1984, (PER/GEN/1(A)) states that: “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. The FOD concerned shall make a recommendation to the Commissioner-General taking into account the interests of the Agency and the facts of the case”. In light of the facts presented in the attached IOM, it is recommended that Mr. Jibarah’s employment be terminated in the interests [sic] of the Agency.

12. On 12 November 2009 the Commissioner-General concurred with the DUO/WB’s recommendation to terminate the Applicant in the interest of the Agency.

13. By letter dated 2 December 2009, the Applicant was informed by the DUO/WB that his case had been reviewed, that he had contravened his obligations under Area Staff Regulations and Rules by holding weapons and that in application of the Agency’s policy in respect of staff who are arrested, detained or brought to trial, it was decided to terminate his service in the interest of the Agency, effective 4 December 2009.

14. By letter dated 10 December 2009 to the DUO/WB, the Applicant explained, inter alia, that the Israeli Military Court which sentenced him lacked jurisdiction over occupied Palestinian territories (“oPt”) according to international law, that he was arrested illegally in his home located in area A
under the jurisdiction of the Palestinian National Authority (“PNA”), that the weapons were legal as they belonged to his brother, a military officer of the PNA, and to his bodyguards and that the weapons were stored in his house at the request of the reconciliation committee in agreement with the PNA and the Governor of the town of Qalqilia.

15. On 18 December 2009, the Applicant requested a decision review, which the Agency did not respond to.

16. Effective 31 December 2009, the Applicant’s employment was terminated by the Agency.

17. On 19 January 2010, the Applicant filed his appeal.

**Applicant’s contentions**

18. The Applicant contends that:

   (i) he has always complied with the Agency’s Regulations and Rules and he did not consider his behaviour to have triggered any potential contravention of his obligations as a staff member of the Agency;

   (ii) the weapons seized by the IDF were legal weapons as they belong to the PNA, more specifically to his brother who is an officer in the PNA and to his bodyguards, and were left at his home at the request of the reconciliation committee and the Governor of the town of Qalqilia following a tragic accident involving his nephew (son of said brother, who accidentally shot someone with his father’s weapon);

   (iii) he did not use the weapons, or carry them outside his home;

   (iv) an Israeli Court which sentenced him is the court of an occupying power and as such, international law and the United Nations do not recognise judgments rendered by courts of an occupying power;

   (v) if one was to follow the judgments of the Israeli courts, all Palestinians living in the oPt would be terrorists and criminals;

   (vi) his imprisonment by the Israeli authorities was only two weeks longer than the three month period set forth in PER/GEN/1(A) (the “Detained Staff Policy”).

The Applicant requests that the Tribunal order the Agency to rescind the Respondent’s decision to terminate him and to reinstate him to his post.
Respondent’s contentsions

19. The Respondent contends that:

   (i) the termination of the Applicant’s employment was properly
effected; and
   (ii) the remedies sought by the Applicant have no legal basis.

Case Management Hearing

20. On 4 June 2012, the Tribunal held a case management hearing at the
UNRWA West Bank Field Office in Ramallah, specifically to ask the parties
if they had any new and relevant evidence to submit in this case. Nothing new
was brought forward, and the Applicant merely reiterated his contentions.

Considerations

Was the Respondent’s decision to terminate the Applicant’s employment in the
interest of the Agency properly made?

21. It is important to look at the legal and administrative framework
applicable in the case at bar.

22. Area Staff Regulation 1.4 provides in relevant part that:

   Staff members shall conduct themselves at all times in a
   manner befitting their status as employees of the Agency. They
   shall not engage in any activity that is incompatible with the
   proper discharge of their duties with the Agency.

23. Area Staff Regulation 9.1 provides that:

   The Commissioner-General may at any time terminate the
   appointment of any staff member if, in his opinion, such
   action would be in the interest of the Agency.

24. The Agency’s Detained Staff Policy provides in relevant part the
following:

   Trial and Conviction of Staff
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.
The FOD concerned shall make a recommendation to the
Commissioner-General taking into account the interests of the
Agency and the facts of the case.

25. In the case at bar, after reviewing the documents supplied by the Israeli
Ministry of Defence as well as conducting an interview with the Applicant, the
Agency terminated the Applicant’s service in the interest of the Agency, under
Staff Regulation 9.1. The Tribunal notes, however, that while Regulation 9.1
is typically invoked in light of misconduct and therefore coupled with
Regulation 10.2 or Rule 110.1, both found in Chapter X on Disciplinary
Measures, such is not the case here. The Tribunal takes guidance from the
United Nations Appeals Tribunal in Haniya Judgment No. 2010-UNAT-024
which states:

…where a termination of service is connected to any type of
investigation of a staff member’s possible misconduct, it must
be reviewed as a disciplinary measure, because that is what it
in reality is.

26. Accordingly, while recognising that disciplinary matters are within the
broad discretionary authority of the Commissioner-General, when reviewing a
decision to terminate a staff member’s employment, the United Nations
Appeals Tribunal will consider: (i) whether the facts on which the sanction is
based have been established; (ii) whether the established facts qualify as
misconduct; and (iii) whether the sanction imposed is proportionate to the
offence, Haniya.

Have the facts on which the sanction is based been established?

27. In the present case, both parties have agreed that: the Applicant was
arrested by the IDF for possession of weapons, he was tried in an Israeli
Military Court and sentenced to a four month imprisonment, of which he
served three months and fifteen days.
28. However, one very crucial fact is in dispute in regard to the legality of the weapons found in the Applicant’s home. The DUO/WB in her 5 November memorandum to the Commissioner-General stated, “[The Applicant] was arrested … and indicted for illegal possession of weapons…”. The Tribunal notes that in the Israeli Military Court’s charge sheet and verdict, there is no mention of illegal weapons, rather simple possession of weapons.

29. Moreover, the Tribunal is of the opinion that the Respondent erroneously considered the weapons to be illegal and failed to take into account the fact that the weapons which the Applicant had been requested to store were legally obtained and legally belonged to a military officer of the PNA, i.e. the brother of the Applicant, and to his bodyguards, as supported by the evidence in the file (emphasis added).

30. While the Tribunal notes that it would have been prudent of the Applicant to have first inquired whether the storage of such weapons was in fact contrary to the Agency’s regulatory framework, nevertheless, the Tribunal is of the opinion that the Applicant did not engage in any unsuitable activity which would have violated the standards expected of an UNRWA staff member (see Regulation 1.4) - as the guns were legally in his possession. Additionally, it is worth mentioning that the Respondent is not challenging the Applicant’s statement that he did not use the weapons stored or ever intended to use them.

31. Moreover, the Tribunal finds that the Respondent did not take into consideration the facts and circumstances of the case which reasonably establish that the Applicant was not at fault, when he was lawfully in possession of the said weapons and the victim of an illegal search and detention by an occupying force.

*Do the facts qualify as misconduct?*

32. The Agency’s Detained Staff Policy offers the Respondent the opportunity to assess the circumstances particular to a staff member. Indeed, in the case of staff members having received a prison sentence of three months
or more, the Detained Staff Policy makes an exception and stipulates specifically “… unless the facts of the case are such that the Agency considers that the staff member has not been at fault. The FOD concerned shall make a recommendation to the Commissioner-General taking into account the interests of the Agency and the facts of the case” (emphasis added).

33. While the Respondent’s argument about the validity of the Detained Staff Policy with regards to the Agency’s relation with staff, donors, host governments and the United Nations does not explain what the Respondent meant by “very negative repercussions with the host government and with donors”, however, the Tribunal will attempt to guess what was meant. It is reasonable to say that in the case at bar, there would be no negative repercussions with the host government because the host government in this case is the PNA and the town of Qalqilia, both of which requested the Applicant to store the weapons until the family dispute was settled. Actually both the PNA and the town of Qalqilia later sent the Agency letters in support of the Applicant explaining that the weapons were legal and requested the Agency to reconsider the decision to terminate his service. As for the donors and the United Nations in general, it is reasonable to say that they would object to illegal arrest, illegal detention and illegal imprisonment, as explained in the following paragraph and which brings us to another substantive issue.

34. Indeed, the Tribunal notes that the town where the Applicant resides, i.e. Qalqilia, and where he was arrested is located in Area A of the oPt. According to the Oslo Accords signed by Israel and the PNA, Area A is under the jurisdiction of the PNA, i.e. the PNA has both administrative and security control over that Area. In other words, the IDF had no legal authority to arrest the Applicant at his place of residence, detain him, subject him to an Israeli Military Court or sentence him. In applying the Detained Staff Policy to the Applicant, the Agency is reneging on the Oslo Accords and legitimizing a non-existing Israeli jurisdiction over Area A of the oPt. It is reasonable to say that this would have “very negative repercussions” with the donors and with the United Nations. The Tribunal finds that in the case at bar, the Field Office Director and the DUO/WB did not give proper consideration to the facts of the
case as noted above and arbitrarily recommended the termination of the Applicant’s employment. Given that the Applicant’s arrest, detention and imprisonment are illegal, therefore in the Tribunal’s opinion, the Respondent erred when applying the Detained Staff Policy to the Applicant.

35. It is of course not for the Tribunal to interfere in the development of the Agency’s administrative issuances or policies. However, it may be time for the Agency to review the Detained Staff Policy which dates back to 1984, i.e. prior to the Oslo Accords. Palestinian residents in the West Bank, be it Area A, B or C, are subject to extra judicial and arbitrary arrests/detentions and are denied due process by the Israeli authorities, as confirmed by Amnesty International, Human Rights Watch and Israeli organizations such as B’Tselem, to mention a few. Cases where some of the arrested Palestinian residents are staff members will happen inevitably at one point in time, just as in the case at bar.

36. While the Tribunal notes that judgments of national courts are not binding on the Tribunal as held by the former United Nations Administrative Tribunal Judgment No. 1451, the Respondent nevertheless, chose to take into consideration the sentence of four months’ imprisonment issued by an Israeli Military Court yet failed to look at mitigating factors in favour of the Applicant as mentioned in the Israeli Military Court Judgment. Indeed, the Israeli Military Court’s verdict, more specifically the portion titled “Prosecutor Summation”, reads in relevant part as follows:

First, this offense was committed in the absence of any membership in a prohibited association, but rather as a result of particular family circumstances…. Weapons were held in the Defendant’s home due to a dispute between families and in no way for security reasons,… The Military Prosecution believes that the element of a heavy fine in this arrangement constitutes, in the circumstances of the matter, an element of the sentence, which balances the contention of actual imprisonment and is suitable when the offense was not committed for breaches of security and was not directed at the State of Israel, the citizens thereof or soldiers thereof (emphasis added).
37. The Tribunal is left wondering why the Respondent, whom the Applicant served loyally and proudly for sixteen years, did not assess the Applicant’s circumstances or take into consideration mitigating factors, as did the Israeli Military Court.

38. Suffice it to recall the facts of the case as supported by the evidence:

(i) the weapons were legally owned and obtained by the Applicant’s brother;

(ii) the Applicant was under considerable pressure to comply with the request of the reconciliation committee, the Governor of Qalqilia and the PNA to store the weapons for a limited period of time until the dispute between the Applicant’s brother and the family of the deceased was settled;

(iii) the Applicant never used the weapons and never moved them out of his home.

39. Accordingly, the Tribunal finds the Applicant was not involved in any activity that is incompatible with the proper discharge of his duties with the Agency, as provided by Area Staff Regulation 1.4. Indeed, as evidenced by the record:

(i) the weapons stored in the Applicant’s home were legally obtained and owned by the PNA, the official authority governing the West Bank and more specifically the area of residence of the Applicant;

(ii) the weapons stored were temporarily kept by the Applicant at his home due to a dispute between families and in no way for security reasons.

Was the sanction proportionate to the offence?

40. Given that the Applicant was in legal possession of the weapons stored, the Tribunal finds no misconduct has occurred on the part of the Applicant. Moreover, in light of the fact that the arrest, detention and sentencing of the Applicant by the IDF and an Israeli Military Court are illegal, as per international law, the application of the Agency’s Detained Staff Policy is incorrect. With respect to the Commissioner-General’s discretionary authority, the Tribunal holds that the decision to terminate the Applicant’s
service is incorrect and therefore disproportionate. The United Nations Appeals Tribunal in *Doleh*, 2010-UNAT-025 held:

…but we strongly feel that the decision is, on the facts of the case, disproportionate. An innocuous act of indiscretion shall leave a huge impact on the reputation and livelihood of [Appellant], if the decision is not reversed.

*Other Issues*

41. Finally, the Tribunal would like to point out paragraph 4 of the Respondent’s Reply, which reads as follows:

On 25 July 2001 the Applicant was detained by Israel Defence Forces on suspicion of trading in illegal weapons. The Applicant was released on 26 August 2001. During his detention no formal charges were brought against him and there was no evidence of wrongdoing on his part.

At the case management hearing, the Tribunal asked the Respondent if there was any reason why this information had been included in his Reply. The Respondent stated that technically, there is no reason. Considering that: (i) this information pre-dates by eight years the events related to the present application; (ii) no formal charges were brought against the Applicant; and (iii) there was no evidence of wrongdoing on the part of the Applicant, one can reasonably conclude that the Respondent’s intent was to give a negative picture of the Applicant, thus showing prejudice and bias against him.

42. Given all the above, the Tribunal finds that the Respondent’s decision was not properly made, that the established facts do not legally support the disciplinary measure against the Applicant, and that the sanction was disproportionate.

*Relief*

43. The Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached (*Frohler* 2011-UNAT-141, *Appellant* 2011-UNAT-143, *Kaddoura* 2011-UNAT-151).
44. For the reasons stated above, and duly noting the jurisprudence of the United Nations Appeals Tribunal in *Doleh* 2010-UNAT-025, the Tribunal sets aside the decision of the Respondent and orders the Applicant to be re-instated in his post.

45. The Respondent may elect to pay, as an alternative to the specific performance ordered, compensation equivalent to two years’ net base salary. This sum shall be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US prime rate applicable as at that date shall apply. If the sum is not paid within the 60 day period, an additional five per cent shall be added to the US prime rate until the date of payment.

**Conclusion**

46. The application is allowed.

(Signed)  
Judge Bana Barazi  
Dated this 14th day of June 2012

Entered in the Register on this 14th day of June 2012

(Signed)  
Laurie McNabb, Registrar, UNRWA DT, Amman