EL MADHOUN

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 Mohamed El Madhoun (the “Applicant”), a staff member at the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the “Respondent”), against the decision of the Agency not to include the Applicant’s dependents on his United Nations Laissez-Passer (“UNLP”).

2. The Applicant filed an appeal with the UNRWA Dispute Tribunal (the “Tribunal”) on 17 March 2011. Given the administrative difficulties and delay in establishing the Tribunal, and the need to manage the huge backlog of cases in an orderly manner, it was considered that it would be in the interests of justice to grant the Respondent an extension of time to file a reply in this case.

3. The Respondent filed its first Reply, regarding the receivability of the appeal, on 3 September 2012 and its second Reply, on the merits, on 11 September 2012.

Facts

4. On 1 September 2002 the Applicant commenced employment with the Respondent in Gaza as an Analyst Programmer on a two-year fixed-term appointment at grade 4A, step 1. Following a series of renewals, the Applicant’s fixed term appointment was extended from 1 September 2010 until 31 August 2013.

5. On 8 August 2010 the Respondent offered the Applicant a promotion and transfer to the post of Systems Analyst, grade 15, at the Enterprise Resources Planning, Administrative Support Department at the Respondent’s headquarters in Amman, Jordan (“UNRWA HQ”).

6. By letter dated 3 October 2010 the Respondent advised the Applicant of his entitlements in connection with the proposed transfer and change of duty station. The letter included the following statement:
This is a local post and conveys no entitlement of an expatriate nature such as travel, installation grant, area leave, etc. You will not, therefore, be considered an expatriate Area staff member recruited in Amman.

The Applicant signed a statement at the foot of the letter reading “I accept this offer of Transfer & Promotion as provided in this letter” and dated his signature 5 October 2010.

7. By email to the UNRWA HQ Human Resources Officer dated 6 October 2010 the Applicant stated:

I refer to the attached offer and our telecom yesterday and since I am requested to move to HQ Amman at the soonest, I think we need to add my dependents to my UNLP in order to facilitate their entry to Jordan and later on their residence permits.

In this regard, I am copying travel officers in HQ Amman and HQ Gaza to advice [sic] about the necessary documents.

8. By email dated 11 October 2010 an Assistant Travel and Visa Officer at UNRWA HQ submitted a request to the Applicant in the following terms:

Kindly arrange to provide me with the following documents for family addition purposes:

The attached application should be filled from your side, attaching clear hard photos to your family.

Copy from your national passport as well as your family.

The UNLP not photo from it. [emphasis in original]

Upon receiving the needed documents I will go ahead immediately.

9. By email dated 21 October 2010 the Applicant made a request to the UNRWA HQ Travel and Visa Officer in the following terms: “please proceed with the inclusion of my dependents in my UNLP”.

10. By email dated 9 November 2010 to the UNRWA HQ Travel and Visa Officer the Applicant enquired about the status of the inclusion of his family members in his UNLP, attaching copies of their passports.

11. By email dated 9 November 2010 the Head, General Services Section (“H/GSS”) advised the Applicant that since he was locally recruited, his
dependents could not be included in his UNLP, pursuant to paragraph 35 of the United Nations Guide to the Issuance of United Nations Travel Documents.

12. By email to the H/GSS dated 10 November 2010 the Applicant stated that he was “shocked” by the response, detailing various relocation arrangements he had undertaken in reliance, it appears, on the email dated 11 October 2010 referred to in paragraph 8 above. The Applicant also cited paragraph 6 of the UNLP application, stating that his dependents were eligible to be added to his UNLP in accordance with his job offer and the associated change in duty station, and referred to the past practice of the Agency.

13. By email to the Applicant dated 10 November 2010 the H/GSS reiterated her response, as follows:

As I mentioned below, the process of the issuance of UN travel documents is guided by the UN Guide to the issuance of UN travel documents. The application is only a supporting document and is in line with para 3 of the UN Guide and refers to internationally recruited staff members. [emphasis in original]

14. By email dated 14 December 2010 to the Human Resources & Administrative Officer, Enterprise Resource Planning, the Applicant wrote:

[...] you are kindly requested to refer to the previous approval dated on 11th Oct. 2010 (Email attached) to include my dependents in the UNLP, as their addition would facilitate their travel without any need for a visa which was not issued yet.

The Applicant then noted the various arrangements that he needed to make in order to facilitate the transfer of his family to Jordan, before concluding:

In this regard, it would be highly appreciated if you consider the approval of adding my dependents to my UNLP to facilitate their entry to Jordan without waiting for the visa.

15. By email to the Applicant dated 16 December 2010 the Head, Area Personnel Section noted that inclusion of the Applicant’s family in his UNLP would not be a guarantee for departure from Gaza or entry to Amman and that a bona-fide residence permit for Jordan should be issued before the Applicant’s family could be settled in Amman.
16. By email dated 16 December 2010 in response to the email from the Head, Area Personnel Section, the Applicant stated:

Kindly note that, regardless whether it is a guarantee for entry to Jordan or not, it is one of my entitlements to include my dependents in the UNLP as a non-Jordanian citizen […]

The Applicant then referred to paragraph 6 of the UNLP application, his job offer, and previous instances in which relocated area staff members had their dependents included in their UNLPs.

17. By email to the Director of Human Resources dated 22 December 2010 the Applicant requested a review and approval of his request to include his family in his UNLP.

18. By email dated 11 January 2011 the Chief, Personnel Services Division responded to the Applicant on behalf of the Director of Human Resources, as follows:

It is outside of the Administration’s control to have your dependents added to your UNLP as UNRWA does not issue the UNLP. UNRWA has communicated with the UN Office in Geneva Visa Subunit, which is responsible for adding dependants to UNLPs, regarding this matter. Unfortunately, although they continue to look for ways to make an exception, they cite paragraph 35 on page 9 of the 2006 Guide to Issuance of UN Travel Documents, “Dependents of locally recruited officials and of consultants employed by Specialized Agencies or on W.A.E. basis cannot be included in the Laissez-Passer,” as the controlling rule impeding the addition of your dependants to your UNLP. Although the Agency is changing your duty station, you continue to be categorized as a locally recruited official and not as an international staff member. International staff members are staff members whose post is funded by the UN Secretariat.

You mention four Agency staff members whose dependants, you believe, were added to their UNLPs. Please note that these staff members were recruited under the Agency’s expatriate status, which is different than your recruitment situation. We have changed our rules and regulations to conform to the 2006 Guide to Issuance of UN Travel Documents. All of the staff members you mentioned had their dependants added prior to the issuance of the 2006 Guide to the Issuance of UN Travel Documents. Area Personnel Directive A4 Part IV on Expatriate Status paragraph 46
states that:

Staff members will have a UNLP for official travel. UNRWA will not be able to include family members in the UNLP. A family certificate can be issued but family members must undertake all travel with their national passports or travel documents.

19. On 17 March 2011 the Applicant filed an appeal with the UNRWA Dispute Tribunal.

20. On 3 September 2012 the Respondent filed a Reply and annexes in which it submitted that the application was not receivable because no appealable discretionary administrative decision had been made by the Agency. The Reply and annexes were forwarded to the Applicant on the same day.

21. By Order No. 037 dated 4 September 2012 the Tribunal considered that it was not appropriate, in this case, to deal with the receivability of the claim as a preliminary issue and ordered the Respondent to file a reply on the substantive merits of the case and to:

   (i) Define the following terms together with a reference to the relevant Regulation, Rules, Resolution or other issuances:

       - Internationally recruited staff;
       - Locally recruited staff;
       - Expatriate Area Staff Members.

   (ii) Explain the basis upon which it has been decided that a transfer on promotion from Gaza to Amman is properly to be regarded as a local recruitment.

   (iii) State whether the Respondent accepts that by a communication, dated 11 October 2010, the Applicant received written confirmation that his dependents would be included on his UNLP.

   (iv) If yes, to provide a copy of the same and to explain when, why, by whom and for what reason there was a change to the effect that this was not to be the case.

   (v) If there was no such communication as alleged by the Applicant, the Respondent is to state the proper meaning to be attached to the email, dated 11 October 2010, from Rana ZOU’BE to the Applicant.

   (vi) Provide a signed copy of the Applicant’s acceptance of the transfer and promotion as provided for in the letter dated 16 December 2010.
(vii) State whether it is the Respondent’s case that apart from the individuals mentioned in Annex 11 to the Reply there has been no case comparable to the Applicant’s whereby their dependents were added to the UNLP.

(viii) State if there has been a strict application of the 2006 Guide to the Issuance of United Nations Travel Documents so that in no case comparable to the Applicant’s has the Agency included dependents in the UNLP. If there were any special circumstances to state what they were.

22. On 11 September 2012 the Respondent filed its Reply on the merits of the case. The Reply and annexes were forwarded to the Applicant.

23. By Order No. 042 dated 12 September 2012 the Applicant was ordered to provide any facts, arguments or submissions in response to the Respondent’s Reply on or before 19 September 2012.

24. By email to the Tribunal Registrar dated 20 September 2012 the Applicant submitted his further arguments in response to the Respondent’s Reply.

**Applicant’s contentions**

25. The Applicant contends that:

(i) According to the job offer he received, the travel of his dependents was authorized and would be paid for by the Agency. Therefore, in accordance with paragraph 6 of the UNLP application, he was entitled to have his dependents added to his UNLP.

(ii) The Agency’s long-standing practice and procedures are to include the dependents of relocated area staff members on their UNLPs.

(iii) He is not a locally-recruited staff member; he is a non-citizen, expatriate staff member.

(iv) The criterion for determining whether to include dependents on a UNLP is whether or not the staff member is a citizen of the duty station. The distinction between area staff and international staff is irrelevant.

26. The Applicant requests the Tribunal to order the Respondent to include his dependents on his UNLP.
Respondent’s contentions

27. The Respondent contends that:

(i) The application is not receivable because no appealable discretionary administrative decision was made; and

(ii) The decision was correct and properly effected.

28. The Respondent requests the Tribunal to dismiss the application.

The Law

29. The relevant legal and policy framework is set out below.

30. The Statute of the Tribunal, as set out in Area Staff Regulation 11.3, provides in Article 2:

1. The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Commissioner-General as the Chief Executive Officer of UNRWA:

   (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

   (b) To appeal an administrative decision imposing a disciplinary sanction.

31. What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision, Andati-Amwayi 2010-UNAT-058 (para. 19). The United Nations Dispute Tribunal has identified an administrative decision as “a unilateral act by the Administration of a conclusive and individual nature,” Hocking, Jarvis, McIntyre UNDT/2009/077 (para. 44), while also noting that “an administrative decision can only be considered as such if - inter alia - it has direct legal consequences (effects) on an individual’s rights and obligations,” Planas UNDT/2009/086 (para. 14).
32. The preamble to the UNRWA Area Staff Regulations states in the ‘Applicability’ section:

Area staff members are those persons who have been designated as such in their letters of appointment.

33. Paragraph 1 of Area Staff Rule 107.9 defines a change of a staff member’s official duty station as follows:

For the purposes of these rules, a change of official duty station shall take place when a staff member who has been appointed to serve in a particular country for an indefinite period or for a fixed period exceeding six months is transferred to a post in another country for an indefinite period or for a fixed period exceeding six months.

34. Area Staff Personnel Directive A/4/Part IV/Rev.8 provides:

**Procedure for approving Expatriate Status**

9. Expatriate status can only be conferred as a result of approval by the DHR for a post to be advertised by means of a vacancy notice which will be circulated by the Agency with the stated intention of attracting candidates from outside the country of the duty station.

* * *

12. When expatriate status is conferred upon a candidate, an offer of appointment/transfer will be made confirming the granting of expatriate status and detailing the relevant entitlements.

**Considerations**

35. Whether a staff member’s dependants may be included on the UNLP is to be considered in accordance with paragraph 35 of the Guide to the Issuance of United Nations Travel Documents which provides:

An official’s dependents are generally not included in a Laissez-Passer. Only when travel of the entire family is authorized or paid for by the United Nations or Specialized Agency, i.e. home leave, change of duty station, etc., can the names and photographs of dependent family members be included. Dependents of locally recruited officials and of consultants employed by Specialized Agencies or on a W.A.E. basis can not be included in the Laissez-Passer.
36. Paragraph 6 of the instructions accompanying the application for issuance or renewal of a United Nations Laissez-Passer, referred to repeatedly by the Applicant in his correspondence with the Agency and submissions in this case, is almost identical to the above provision, with the exception of the final sentence, which is excluded. The omission of the final sentence of the above paragraph from paragraph 6 of the instructions may need to be reconsidered in the interests of all staff members who may find themselves in a similar position as the Applicant. This omission together with the email dated 11 October 2010, referred to in paragraph 8 of this judgment, seems to have misled the Applicant into believing that he was denied a benefit to which he was properly entitled.

37. The Tribunal was concerned at the categorisation of the Applicant as a locally recruited official when he clearly was not recruited in Amman nor was he a citizen of Jordan. In response to Order No. 037 the Respondent explained that not every transfer on promotion from Gaza to Amman will be regarded as local recruitment. However, in the Applicant’s case his transfer on promotion resulted in a change of official duty station pursuant to Area Staff Rule 107.9.

38. The Applicant’s entitlements upon transfer were clearly set out as indicated at paragraph 6 above in that he was being appointed to a local post which did not entitle him to the benefits of an expatriate nature. The terms of the appointment included the clear statement that he was to be “considered as a locally recruited staff member…subject to the local terms and conditions of Area staff based at HQ (Amman) with no additional benefits to your status.” The Applicant signed his acceptance of the offer on these terms.

39. Although it is understandable that the Applicant should believe that he was entitled to include his dependants on the UNLP, he has to overcome the contention that he signed the acceptance of the offer of the transfer in full knowledge that it would not entitle him to the benefits of expatriate status. The Tribunal accepts the Respondent’s contention that the proper construction to be placed on the email dated 11 October 2010 from the Assistant Travel & Visa Officer is that she was merely requesting information from the Applicant. She was a junior member of staff conducting a routine enquiry. She was not authorized to
and nor did she herself have authority to determine questions of eligibility or entitlement to include dependants on a UNLP.

40. It is clear that once the Agency classified this post as one of local recruitment without any of the benefits of expatriate status the rules regarding the issuance of UNLPs came into play. UNLPs are issued by the United Nations office in Geneva. The decision was made in accordance with the provisions of paragraph 35 of the Guide to the Issuance of United Nations Travel Documents. The Agency did not have the authority to direct the Geneva office of the UN to include the Applicant’s dependants on his UNLP. In essence the Agency did not have discretionary authority to decide this matter. There was no appealable administrative decision. Furthermore, there was no breach of contract in that the Applicant accepted the offer in the full knowledge that he would not be entitled to the benefits of expatriate status.

41. In regard to the categorization of particular posts, from which certain consequences follow, the Applicant is reminded that the Tribunal has no jurisdiction to enact new regulations, rules or administrative issuances. The Tribunal cannot substitute itself for the Administration or change the working conditions provided in an applicant’s Letter of Appointment. The classification of posts is a policy prerogative of the Agency. Absent extraneous factors and/or maladministration the Tribunal is unable to interfere.
Judgment

42. The Application is dismissed.

(Signed)

Judge Goolam Meeran
Dated this 26th day of September 2012

Entered in the Register on this 26th day of September 2012

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman