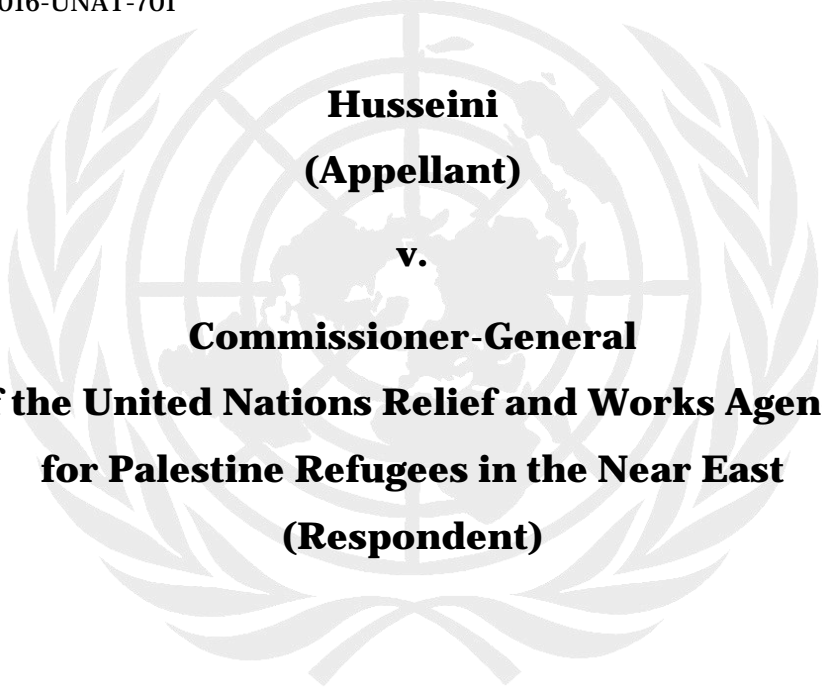




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-701



**Husseini
(Appellant)**
v.
**Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Respondent)**

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Richard Lussick Judge Martha Halfeld
Case No.:	2016-932
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Mr. Husseini:	Amer Abu-Khalaf, LOSA
Counsel for Commissioner-General:	Lance Bartholomeusz

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Mutaz Ibrahim Husseini of Judgment No. UNRWA/DT/2016/015, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or Dispute Tribunal and UNRWA or Agency, respectively) in Amman on 25 April 2016, in the case of *Husseini v. Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Husseini filed his appeal on 17 May 2016, and the Commissioner-General of UNRWA filed his answer on 15 July 2016.

Facts and Procedure

2. The Appellant was appointed as an Area staff member to the post of Field Administrative Services Officer in the West Bank Field Office (WBFO) on a fixed-term appointment at Grade 14 with effect from 17 October 2007. His appointment was converted to an “A” category Temporary Indefinite Appointment on 9 July 2014. On various occasions between 2009 and 2014, the Appellant was appointed temporarily as the Officer-in-Charge of the General Services Office (OiC, GSO) during the absences of the Field General Services Officer (FGSO). During these appointments he received additional remuneration in the form of an Acting Appointment Allowance (AAA).

3. The present dispute relates to a claim for payment of an AAA for the period 15 December 2014 through 20 January 2015, when the Appellant again acted as the OiC, GSO during the absence of the FGSO. After completion of the acting appointment, on 21 January 2015, the Appellant addressed an e-mail to the FGSO requesting to be paid an AAA for the period from 15 December 2014 to 20 January 2015. The FGSO authorized the request the same day. However, on 3 February 2015, the Human Resources Services Officer (HRSO) addressed an e-mail to the Appellant informing him that he had authorized the AAA payment only for the period from 14 January to 20 January 2015. Upon Mr. Husseini’s request, the HRSO clarified that the Appellant was entitled to an “AAA from day 31 onwards and none for the first 30 days” in accordance with UNRWA Area Staff Circular (ASC) No. A/04/2010 dated 22 December 2010 titled “Interim measure to provide an Acting Appointment Allowance to Area staff temporarily acting in International professional posts”. The preamble to the ASC explains that “[a]s a normal part of their customary work and without additional compensation, staff members are expected from time to time to temporarily assume the duties and

responsibilities of higher level posts". It provides specifically for the payment of an AAA "[w]hen an Area staff member is required to serve in a post in the International professional category" and "assumes higher duties and responsibilities", but expressly stipulates that such payment will be "according to the following arrangements". The relevant provisions of the ASC are clauses 1 and 6 thereof which read:

1. Without prejudice to the principle that promotion shall be the normal means of recognizing increased responsibilities and demonstrated ability, an Area staff member temporarily assuming the duties and responsibilities of an International professional post for a period of exceeding one month, may, in exceptional cases, be granted an AAA from the beginning of the second month of assignment in the International professional post.

...

6. The amount of the AAA shall be in the form of a monthly lump sum payment in accordance with the schedule set out below. Fractional periods shall be paid in accordance with Staff Rule 103.8.

4. The ASC is clear that an AAA is only payable from the beginning of the second month of assignment in the International professional post and permits for fractional payments. Thus, in the opinion of the HRSO, the Appellant was entitled to a fractional payment for the seven days after the commencement of the second month of assignment; that is for the period from 14 January 2015 to 20 January 2015.

5. The Appellant contended that his entitlement to an AAA was governed not by the ASC but by a later instrument, namely Area Personnel Directive (APD) No. A/3/Rev.1/Amend.5, Part XI titled "Special Allowances" which came into effect almost two years after the ASC, on 1 October 2012. The relevant part of this instrument reads:

1. PURPOSE

The purpose of this part of the directive is to establish discretionary allowances, to set out the conditions governing payment of such allowances, and to establish the authorities for approving such allowances.

2. ACTING APPOINTMENT ALLOWANCE

2.1 An Acting Appointment Allowance may be authorized for a staff member who has assumed higher level duties and responsibilities for a period of one month (30 consecutive calendar days) or more.

This provision is identical in its terms to that contained in APD No. A/3 of 1 January 1992. The purpose of the amendment of the APD in 2012 was to introduce an “Additional Assignment Allowance – Parallel Education & Development Programmes”, and had no bearing or altering effect in relation to the AAA provided for in paragraph 2.

6. On 13 February 2015, the Appellant submitted a written request for decision review challenging the decision not to pay him an AAA for the entire period in which he acted as the OiC, GSO. The Director of UNRWA Operations, West Bank (DUO/WB) by letter dated 13 March 2015 affirmed the contested decision. The Appellant filed an application with the UNRWA DT in May 2015 in which he argued that he had in the past when acting as OiC, GSO always received an AAA and that he was entitled to an AAA under APD No. A/3. He, an Area staff member, had acted as OiC, GSO (an International post) on five occasions subsequent to the issuance of the ASC and had received an AAA, despite the provisions of the ASC. He disputed the position of the Agency that APD No. A/3 only applies to an Area staff member acting in another Area staff post. He moreover contended that APD No. A/3 had impliedly repealed or abrogated the ASC. He therefore asked for rescission of the administrative decision not to pay him for the entire period he acted as OiC, GSO and for payment of the AAA for the full period from 15 December 2014 to 20 January 2015.

7. The Commissioner-General contends firstly that the ASC is clear and provides specifically and explicitly that an Area staff member who temporarily assumes the duties and responsibilities of an International professional post for a time period exceeding one month may, in exceptional cases, be granted an AAA “from the beginning of the second month of assignment in the International professional post”; and, secondly, that APD No. A/3 applies only to Area staff posts and not to international posts. Hence, in the Commissioner-General’s view, there is no conflict between the APD and the ASC. As regards the fact that the Appellant had been paid an AAA in the past, despite the provisions of the ASC, the Respondent submitted that such did not give him any right to an AAA, as the payment had been made mistakenly and was thus an administrative error which the Agency was entitled to correct.

8. The UNRWA DT dismissed the Appellant’s application and found that the ASC governed the situation. It rejected the Appellant’s assertion that APD No. A/3 had impliedly repealed the ASC. It furthermore applied the legal maxim *lex specialis derogat legi generali*, which provides that whenever two or more norms deal with the same subject matter a later more general law will not override or alter the provisions of an earlier specific law, unless that

intention is clearly manifest. APD No. A/3 issued in 2012 applied to all Area staff members who assumed higher level duties and responsibilities, and was of general application. However, the ASC, issued earlier, in 2010, was introduced specifically (as appears from the clear terms of its title) to provide an AAA to Area staff temporarily acting in International professional posts and therefore applied to all Area staff members serving in such posts. The UNRWA DT accordingly concluded that the issuance of the general APD could not have implicitly abrogated the specific ASC. Consequently, under the ASC, the Appellant could only be granted an AAA after the first month of assuming the duties and responsibilities of the International professional post, that is, from 14 to 20 January 2015. That the Agency had on previous occasions paid the Appellant an AAA from the first day that he had acted as OiC, GSO, in the opinion of the UNRWA DT, did not alter the outcome of the case. Assuming that this was true, it was an administrative error and the Agency was entitled, in fact obliged, to correct its error as soon as it was discovered. It accordingly dismissed Mr. Hussein's application.

Submissions

Mr. Hussein's Appeal

9. Mr. Hussein contends that the UNRWA DT erred in fact and law by finding that the ASC was the applicable administrative issuance in the case. The ASC, he argues, is not a "regulation"; rather it is an "announcement" based on the previous Personnel Directive on remuneration, which did not include a provision for an AAA. The APD was amended in 2012 and did not refer to or recognize the ASC. Therefore, the ASC was implicitly abolished by the APD. Further, the APD is of general application and applies to all Area staff members who perform the duties and responsibilities of a post at a higher grade, whether international or national. The Agency has also recognized in internal correspondence that the ASC ought to be amended.

10. Mr. Hussein argues further that the UNRWA DT erred *de jure* and *de facto* by concluding that the Agency's practice with regard to the payment of the AAA to him on previous occasions was not relevant. Even if the ASC was applicable, he had previously acted as OiC, GSO on several occasions for a total period in excess of one month and had been paid an AAA for the entire period. The Agency's practice led him reasonably to believe that the APD governed the situation, and he had "accepted to take on the Acting posts" on that basis. He maintains that a prevailing practice operating to the advantage of employees can reasonably give rise to an inherent right to benefit from the practice. The Agency's custom and practice to apply the APD to him had

introduced an implied term into his contract of employment. Having previously applied the APD to him, the Agency is precluded from changing its interpretation of the applicable law to its benefit by applying the ASC. It was therefore, in his view, “an abuse of power and unjust” for the Agency to now apply the ASC. The Agency’s previous decisions to award him an AAA from the first day that he acted in the International professional post were accordingly not erroneous.

11. Mr. Hussein thus contends that the UNRWA DT erred by finding that the Agency was entitled to correct its administrative error and requests this Tribunal to vacate its Judgment and to award him an AAA in accordance with the APD and the usual practice of the Agency.

The Commissioner-General’s Answer

12. The Commissioner-General maintains that the UNRWA DT correctly found that the ASC was the applicable administrative issuance. It properly determined that the APD issued in 2012 did not abrogate the specific ASC issued in 2010 and that the ASC remained part of UNRWA’s regulatory framework. The ASC clearly indicates that it was promulgated to address instances where Area staff members assume higher level duties and responsibilities of a post in the International professional category. By contrast, the APD is meant to apply generally to instances where Area staff members assume higher level duties and responsibilities in an Area staff post. The UNRWA DT accordingly did not err.

13. The Commissioner-General argues further that the UNRWA DT correctly found that the Agency was not bound by its prior practice with regard to the payment of an AAA to the Appellant. The Agency was required to apply the correct administrative issuance and to correct any errors in this regard. The Agency’s previous errors do not give rise to an acquired right under the contract of employment to have the APD continue to apply to grant the Appellant an entitlement to an AAA.

14. The Commissioner-General accordingly requests the appeal to be dismissed.

Considerations

15. This appeal raises a question regarding the status of the ASC and APD as administrative issuances. UNRWA Organization Directive No. 1 of 15 July 1987 titled “Publication of Instruments Governing Agency Administration and Operations” (Organization Directive No. 1) establishes a standard classification of publications (administrative issuances) governing the

administration of the Agency and its operations. Such issuances are regarded as part of the terms of the contract of employment. “Organization directives are promulgated ... to govern the organization of the Agency and to prescribe the powers and duties of its principal officers.”¹ Circular Notices are issued as required “to convey information and advice, or instructions of a temporary nature”.² In terms of Section 13 of UNRWA’s Organization Directive No. 1, “[t]he temporary waiver or amendment of a Rule, Organization Directive, or Instruction, in whole or in part, may also be authorized and conveyed by circular notice”. While circulars may be lower in the contractual hierarchy to the staff regulations and directives, they are of equal standing as legal instruments potentially introducing or establishing implied terms of the contract. In nature and in practical terms they are employment policy guidelines and thus differ from provisions that might be regarded strictly as terms or conditions of employment agreed *ab initio*. Both the ASC and APD bestow discretion on the Agency to pay an AAA. Thus clause 1 of the ASC provides that the staff member “may, in exceptional cases, be granted an AAA” and clause 2.1 of the APD states that “an [AAA] may be authorized for a staff member”. The issuances thus bestow discretionary powers which must be exercised reasonably, fairly and flexibly in accordance with their internal substantive legal requirements. A staff member thus has no contractual right to receive an AAA. He or she, however, does have an expectation that the Agency will exercise its discretion to grant an AAA properly.

16. Given that the relevant entitlements in the two instruments are essentially the same, but vary in their scope of application and extent of entitlement, one may conclude that both kinds of issuance can in certain circumstances hold equal status in the hierarchy of employment terms and conditions. That being the case, it would be possible for the later instrument, the APD, to amend or repeal the earlier instrument, the ASC in accordance with the principle *lex posterior derogat legi priori*. Although the APD of 2012 did not alter the provisions of the APD of 1992 governing the AAA, Mr. Hussein persisted with his submission that the APD of 2012 impliedly repealed the ASC.

17. The APD of 2012 makes no express reference to the ASC. Thus, the question to be answered is whether it impliedly repealed the ASC. The UNRWA DT held it did not and relied for its conclusion upon the principle of *lex specialis derogat legi generali*.

¹ Organization Directive No. 1, Section 9.

² *Ibid.*, Section 13.

18. The general rules of statutory interpretation teach that the language of a legal instrument should be construed so as to be consistent, so far as possible, with every other unrepealed legal instrument made by the same lawmaking body. The lawmaker is presumed to intend to alter the existing law in a minimal way and to be acting consistently with itself. Where there are two existing provisions which seem to clash, but which can be interpreted to give full force and effect to each, then such an interpretation should be adopted rather than one which will partly undermine the effect of one of them. This is most especially the approach where there has been no express reference to the earlier instrument by the later one. The provisions of every enactment must be construed as far as possible in accordance with the terms of every other extant instrument which it does not in express terms modify or repeal. Accordingly, an interpretation of apparently conflicting provisions which involves the implied repeal of the earlier by the later ought not to be adopted unless it is inevitable. Any reasonable construction which avoids that result is more likely to be in consonance with the real intention.

19. A proper reading of the Judgment of the UNRWA DT indicates that it followed this line of reasoning aimed at systemically harmonizing the two instruments. As mentioned, it founded its conclusion on the principle *lex specialis derogat legi generali* which is of similar effect. When the lawmaker has directed his or her attention to a distinct topic of special application and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Where general words in a later instrument are capable of reasonable and sensible interpretation and application without extending them to the subject matter of the earlier instrument, that earlier special legislation should not be held to be impliedly or indirectly altered merely by force of the general scope of the later instrument in the absence of a clear intention to the contrary. As the UNRWA DT rightly stated, the principle that special law has priority over general law is justified by the fact that such special law, being more concrete, generally takes into account the particular features of the context in which it is to be applied, whereas applicable general law often does not.

20. The two instruments, the ASC and the APD, are easily reconcilable. The ASC deals with the specific situation where an Area staff member acts in an International professional post, while the ADP deals with all other cases of acting appointments. There is no manifest intention or inevitable construction that the Agency intended to abrogate the specific policy in the ASC. In the premises, the UNRWA DT was correct in its finding that the ASC had not been implicitly abrogated by the APD and that it accordingly still applied as the UNRWA instrument

that specifically governed the situation where an Area staff member acted in an International professional post. The Agency exercised its discretion in terms of the ASC and was constrained by it only to grant an AAA in exceptional circumstances and only after the staff member continued to act in the post after the expiry of one month.

21. The question remaining is whether the UNRWA DT erred by finding that the Agency was entitled to correct the errors it made on previous occasions with regard to the payment of an AAA to the Appellant; or was it bound to continue making the erroneous payments on the basis of its past practice? The arguments advanced by the Appellant on this score are akin to a claim founded on the principle of estoppel. He essentially argues that the Agency is precluded or estopped from denying his entitlement to an AAA because he relied on the representation arising from past practice that he would be paid an AAA as a matter of course whenever he acted as OiC, GSO, and thus he had acted thereon to his prejudice.

22. The main obstacle in the way of accepting the Appellant's argument is that acceptance of it would bestow discretionary powers upon the Agency to pay an AAA beyond the scope of that conferred by the policy. A mistaken exercise of a discretionary power to confer a benefit in exceptional circumstances would rarely give rise to a right to a benefit in the ordinary course. To permit the Agency to hold out incorrectly that it is empowered to grant an AAA beyond the limits of the policy in the ASC would compel it to arrogate a discretionary power to itself which it does not legally possess. If the grant of an AAA as a matter of right is unauthorized by the policy, the application of estoppel would have the effect of ratifying decisions that the Agency is not allowed to make. That would undermine the principle of legality. It would render the policy and its specific parameters nugatory.

23. The interests of administrative justice accordingly require that the Agency should retain the discretion to correct erroneous decisions taken under the policy. To deny it such an authority on a quasi-estoppel basis would be contrary to both the interests of staff members and the Organization. How the discretion to correct or reverse a prevailing practice or specific decision should be exercised will necessarily depend on the circumstances of any given case.³ In the circumstances of this case, the Agency has acted appropriately to reverse a practice which is not permitted by the prevailing policy as expressed in the ASC; and the UNRWA DT hence did not err in its finding that the Agency was permitted to remedy its administrative error. The Appellant never

³ *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

had a right to an AAA; he only had an expectation that the Agency would exercise its discretion to grant him an AAA fairly, properly and in accordance with the legal provisions of the policy.

Judgment

24. The appeal is accordingly dismissed and Judgment No. UNRWA/DT/2016/015 is affirmed.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

(Signed)

(Signed)

Judge Murphy, Presiding

Judge Lussick

Judge Halfeld

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar