



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

---

Judgment No. 2020-UNAT-1047

**Orabi Ahmad Orabi  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

---

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Jean-François Neven
Case No.:	2020-1355
Date:	30 October 2020
Registrar:	Weicheng Lin

---

Counsel for Mr. Orabi:	Amer Abu-Khalaf, LOSA
Counsel for Commissioner-General:	Rachel Evers

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA” or “Agency”, respectively) appeals the decision of the UNRWA Dispute Tribunal (the “UNRWA DT”) in Judgment No. UNRWA/DT/2019/070 (the “Second DT Judgment”), rescinding the decision not to transfer the Applicant, O.A. Orabi (the “Applicant”) to the post of Clerk “B” in the North Lebanon area and ordering the Agency to take a new decision with respect to the transfer request.
2. For reasons set out below, we dismiss the appeal.

**Facts and Procedure**

3. The UNRWA Dispute Tribunal made the following findings in its judgments which we rely upon.
4. On 8 August 2014, the Applicant was employed by the Agency on a fixed-term appointment as Health Centre Clerk, Grade 7, Step 1, at Wavel Camp Health Centre, Beqaa Area, Lebanon Field Office (LFO).
5. On 28 September 2016, he submitted a request for transfer to the post of Clerk “B” in the North Lebanon Area. In the section of the transfer form that allows for inclusion of “Personal or humanitarian reasons for the above request”, he wrote in the form “Residential & Humanitarian Reasons (downgrading)”. No other statement is provided as personal or humanitarian reasons.
6. By letter dated 28 September 2016, the Human Resources Services Officer (HRSO) informed the Applicant that his request would be considered, together with other applicants’ requests once such post became available. The Applicant became aware subsequently of another staff member being transferred.
7. By e-mail to the Deputy Director of UNRWA Affairs, Lebanon (D/DUA/L) dated 14 March 2017, the Applicant questioned why another staff member had been transferred despite the fact that he was the one with more seniority. On 15 March 2017, the Chief, Field Health Programme (C/FHP) responded that “the seniority for transfer purposes is

determined based on the entry of duty (“EOD”) date of the continuous fixed-term appointment with UNRWA”.<sup>1</sup>

8. By e-mail to the C/FHP dated 15 March 2017, the Applicant also questioned why he had not been informed that another staff member had been transferred to the post he had requested. The C/FHP forwarded this e-mail to the Head, Field Human Resources Office (H/FHRO) on the same day.

9. On 15 March 2017, the Applicant sought management review of the decision not to transfer him to the post of Clerk “B” in the North Lebanon Area. In this request, he stated that he had five dependents, that his house in Nahr al-Bared Camp had been destroyed, and that, as his duty station was considerably distant to his residence, he incurred additional expenses of more than USD 200 per month for rent, transportation etc.

10. By e-mail dated 16 March 2017, the H/FHRO responded to the Applicant that, in the case of a transfer, only the transferred staff member is informed about his or her new conditions of service.

11. By letter dated 1 May 2017, the Director of UNRWA Affairs, Lebanon (DUA/L) affirmed the impugned decision. The letter specified that the longstanding practice for transfer approvals applied by the LFO was to determine the “more senior staff” by the EOD date of the staff member. Humanitarian or personal reasons were neither discussed nor mentioned in this letter.

12. On 30 May 2017, the Applicant filed an application with the UNRWA Dispute Tribunal. In his application, he claimed, *inter alia*, that he had submitted to the Agency several humanitarian and personal reasons to support his transfer request, which, he argued, were more compelling than those of the transferred candidate.

13. By Judgment No. UNRWA/DT/2018/026 dated 22 April 2018 (the “First DT Judgment”), the UNRWA DT dismissed the application on the merits. The UNRWA DT noted that the Applicant and the transferred staff member had both submitted transfer requests for personal and humanitarian reasons. The Agency decided to grant the transfer request of the transferred staff member because of her seniority, her EOD date

---

<sup>1</sup> Impugned Judgment, para. 5.

being 1 August 2014 while the Applicant's EOD date was 8 August 2014. The UNRWA DT concluded that the Agency had correctly applied Field Technical Instruction No. 01/2016 (Lateral Transfers Initiated at the Request of Staff, Lebanon Field Office) (FTI 01/2016) and dismissed the application.

14. On 10 May 2018, the Applicant appealed the First DT Judgment to the United Nations Appeals Tribunal (the "Appeals Tribunal"). In Judgment No. 2018-UNAT-884 dated 26 October 2018 (the "Appeals Tribunal Judgment"), the Appeals Tribunal held that the UNRWA DT did not give careful and fair consideration to the Applicant's argument that a staff member with less compelling humanitarian reasons had been transferred to the post in question without balancing of the opposing interests. It held that the complaint made by the Applicant "on this issue" required factual findings in order to ascertain whether the claim was meritorious or not. As this was not done, the Appeals Tribunal vacated the First DT Judgment and remanded the case back on the "discrete issue" of whether the Agency, in exercising its discretionary authority to determine the transfer requests, fulfilled its obligation to balance, in compliance with the foregoing legal instrument and in the best interest of the Agency, along with the seniority criterion, the conflicting interests arising from the compelling humanitarian or personal reasons for the transfer, presented by the requesting staff members, and provided a reasoned and sound basis of its final choice.

15. In the Second DT Judgment, the UNRWA Dispute Tribunal held that the Agency had clearly failed to fulfil its obligation to balance the conflicting interests arising from the humanitarian or personal reasons for the transfer requests of the concerned staff members and that the Applicant's personal and humanitarian reasons had not been taken into consideration by the Agency. Therefore, the UNRWA Dispute Tribunal concluded that the impugned decision was unlawful, ordered it be rescinded and a new decision be taken with respect to the Applicant's transfer request, by balancing the differing interests of the concerned staff members, along with considering the seniority criterion and the best interests of the Agency. The UNRWA DT declined the Applicant's request for compensation.

## **Submissions**

### **The Commissioner General's Appeal**

16. The Commissioner-General submits that the UNRWA Dispute Tribunal erred on a question of law and fact resulting in a manifestly unreasonable decision when it concluded that the impugned decision was unlawful and had to be rescinded.

17. The Commissioner-General disputes the UNRWA Dispute Tribunal's conclusion that the Applicant's personal and humanitarian circumstances had not been taken into consideration by the Agency. In particular, they submit that the "Transfer Request Form" dated 28 September 2016 wherein the Applicant failed to articulate his personal and humanitarian reasons to be considered by the Agency. These humanitarian reasons were set out by the Applicant for the first time in his e-mail of 8 March 2017 and his request for decision review. However, at the time the impugned decision was rendered, the Agency had no ability to review any humanitarian reasons as none had been provided. As a result, the Agency properly exercised its discretionary authority in determining the transfer requests.

18. The Commissioner-General argues that the UNRWA Dispute Tribunal's consideration of facts presented *post facto* is inconsistent with its jurisdiction of judicial review in examining how the decision-maker reached the impugned decision.

### **The Applicant's Answer**

19. The Applicant submits that the decision and conclusions of the Appeals Tribunal in the Appeals Tribunal Judgment are final and binding. Therefore, the Commissioner-General is estopped from using the same argument that the Appeals Tribunal previously considered in that Judgment.

20. Also, the Applicant argues that the Agency failed in its duty of care to diligently look into his transfer request as required by the Appeals Tribunal in its Judgment.

21. Therefore, he submits that the UNRWA Dispute Tribunal did not err as a matter of fact or law and requests dismissal of the appeal.

### Considerations

22. The Commissioner General argues that the UNRWA DT erred on a question of law and fact resulting in a manifestly unreasonable decision when it concluded that the impugned decision was unlawful for failure to take into account the Applicant's personal and humanitarian reasons. However, the Applicant submits this issue has already been adjudicated by the Appeals Tribunal in the Appeals Tribunal Judgment

23. We disagree. In the Appeals Tribunal Judgment, the Appeals Tribunal did *not* adjudicate whether the Agency's rejection of the Applicant's transfer request was unlawful for failure of the Agency to give proper weight to or even any consideration at all to his humanitarian reasons. It remanded the question of whether the Agency failed to consider the Applicant's humanitarian reasons for the UNRWA DT's determination. In the Appeals Tribunal Judgment, it clearly states there is one discrete issue on remand:<sup>2</sup>

[T]he discrete issue of whether the Administration, in exercising its discretionary authority to determine the transfer requests, fulfilled its obligation to balance, in compliance with the foregoing legal instrument and in the best interest of the Agency, along with the seniority criterion, the conflicting interests arising from the compelling humanitarian or personal reasons for the transfer, presented by the requesting staff members, and provided a reasoned and sound basis of its final choice, is hereby remanded to the UNRWA DT for consideration.

24. Following the Second DT Judgment wherein the UNRWA DT determined that the personal humanitarian reasons had not been considered by the Agency, the question remains whether the UNRWA DT erred in law or fact with this finding.

25. The Commissioner-General argues that the UNRWA DT erred in finding the Agency should have considered humanitarian grounds because the Applicant had not presented humanitarian grounds at the time that he made his request. As he did not present these grounds, the Agency says it did not have to consider such and therefore, the rejection of his transfer was not unlawful.

---

<sup>2</sup> *Ibid.*, para. 36.

26. In the Appeals Tribunal Judgment at paragraphs 34 and 35, the Appeals Tribunal addressed briefly whether the Applicant presented humanitarian grounds with his request, stating:<sup>3</sup>

In the present case, the Appeals Tribunal holds that the *UNRWA DT did not* give careful and fair consideration to Mr. Orabi's above mentioned argument that a staff member with less compelling humanitarian reasons had been transferred to the post in question without any balancing of the opposing interests. In fact, the UNRWA DT did not embark on an analysis of Mr. Orabi's said argument. Effectively, Mr. Orabi's argument appears to have been rejected under cover of paragraph 20 of the impugned UNRWA DT Judgment which rejected in a generic manner his challenge to the impugned administrative decision in this regard. *The first instance Judge did not even make a separate passing reference to this aspect of Mr. Orabi's claim in this paragraph or elsewhere. He just noted that "[b]oth the Applicant and the transferred staff member submitted requests for transfer for personal and humanitarian reasons. The Agency decided to grant the request of the transferred staff member because of her seniority."*

However, the complaint made by Mr. Orabi on this issue *required factual findings in order to ascertain whether the claim was meritorious or not.* As this was not done, we are remanding this discrete issue to the UNRWA DT, pursuant to Article[s] 2(e) and (4)(b) of our Statute. (emphasis added)

27. What the UNRWA DT attempted in the Second DT Judgment was to address the issue of whether the Agency failed to consider the Applicant's humanitarian reasons, however, it appears to not have delved into a fact-finding effort to establish whether the Applicant had actually set forth humanitarian grounds as part of his request. The parties disputed this in their contentions before the UNRWA DT as noted in paragraphs 18 to 20 of that Judgment.

28. Nevertheless, the UNRWA DT, at paragraph 25, concluded that the Agency used "seniority" as the determining factor when reviewing the transfer request "without any reference to or mention of the humanitarian and personal reasons the Applicant had raised, at least, in his request for decision review dated 15 March 2017. It follows that the Administration clearly failed to fulfill its obligation to balance the conflicting interests arising from the humanitarian or personal reasons for the transfer of the concerned staff members".

---

<sup>3</sup> Emphasis added.

29. At paragraph 26, the UNRWA DT further concludes:<sup>4</sup>

As it is clear that the Applicant's personal and humanitarian reasons had not been taken into consideration at all by the Agency, the Tribunal therefore concludes that the impugned decision was unlawful and must be rescinded. The Agency's complete failure to exercise its discretion at the time of the impugned decision cannot be later rectified by presenting reasons for the decision to the Tribunal. *Therefore the contentions of the Respondent are rejected.*

It is not clear if the UNRWA DT determined that the Applicant's contention that "[h]e consistently stated his personal and humanitarian reasons in all of his exchanges regarding his transfer requests"<sup>5</sup> was credible over the Commissioner-General's contention that the Applicant "failed to raise his humanitarian reasons on his transfer requests".<sup>6</sup> The UNRWA DT does not provide any analysis of the factual underpinnings of such a factual determination, but does suggest it adopts the Applicant's contention over the Commissioner-General's in making the factual finding that the humanitarian grounds were provided but unlawfully not considered in the impugned decision.

30. This factual determination and legal reasoning was part of the scope of the remand and what the Appeals Tribunal in its Judgment ordered the UNRWA DT to determine and establish. It is not a factual determination that the Appeals Tribunal already made prior to remand but was the rationale for the remand. It was for the UNRWA DT to establish the facts of whether the Applicant provided humanitarian reasons and if so, whether they were considered by the Agency in the impugned decision.

31. We find that the UNRWA DT did not commit any error when it concluded that the Agency had failed to consider the Applicant's personal and humanitarian reasons in the impugned decision. In the section of the transfer request form that allows for inclusion of "Personal or humanitarian reasons for the above request", the Applicant wrote "Residential & Humanitarian Reasons (downgrading)". Although no further explanation was provided of this in the form, it is a very generic reference to personal or humanitarian reasons. In addition, he undisputedly provided detailed reasons in his request for decision review.

---

<sup>4</sup> Emphasis added.

<sup>5</sup> Impugned Judgment, para. 18 ii).

<sup>6</sup> *Ibid.*, para. 20 i).



32. Once faced with the Applicant's reasons (whether the generic reference in the transfer request form or the more detailed reasons in the decision review request), the Agency should have considered them and explained their consideration of these reasons in their exercise of discretion. In the letter dated 1 May 2017, the DUA/L specified that the longstanding practice for transfer approvals applied by the LFO was to determine the "more senior staff" by the EOD date of the staff member but made no mention of humanitarian or personal reasons and why the Agency did not or could not have considered the Applicant's reasons. It is noted that the Agency had the humanitarian and personal reasons of the successful candidate in her transfer request.

33. As stated by *Ogorodnikov*:<sup>7</sup>

In *Sanwidi* and more recently in *Cobarrubias* the Appeals Tribunal clearly enunciated that:

... The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:

[w]hen 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.

34. The Commissioner-General has consistently argued that the Agency could not have considered the personal and humanitarian reasons as none were provided. But as we have found, they were provided twice: in the transfer request and in the decision review request. Certainly, the personal and humanitarian reasons of the successful candidate were provided. The Commissioner-General's argument assumes that the Agency did not consider these reasons. Indeed, in their letter, the DUA/L only referenced the seniority factor in their consideration and no mention was made of the personal and humanitarian reasons of the successful candidate and of the Applicant (as articulated generically in the transfer request or as provided in his request for decision review). At minimum, the DUA/L should have provided an explanation as to how these reasons were considered in the impugned decision.

---

<sup>7</sup> *Ogorodnikov v Secretary-General of the United Nations*, Judgment No. 2015-UNAT-549, para. 30 (internal footnote omitted).

35. Therefore, the UNRWA DT correctly concluded that relevant matters (personal and humanitarian reasons of the candidates which we have found above were before the Agency) had been ignored in the exercise of the Commissioner-General's discretion. As such, the Agency clearly failed to fulfil its obligation to balance the relevant conflicting interests arising from the humanitarian or personal reasons of the concerned staff members.

36. As the role of the UNRWA DT is not to substitute its own decision for that of the Commissioner-General, the only recourse for the UNRWA DT was to correctly find the decision unlawful, rescind the impugned decision, and order the Agency to take a new decision with respect to the transfer request properly considering the differing interests of the concerned staff members, along with considering the seniority consideration and the best interests of the Agency.

**Judgment**

37. We dismiss the appeal and affirm the UNWRA DT's Judgment No. UNRWA/DT/2019/070.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2020.

*(Signed)*

Judge Sandhu, Presiding  
Vancouver, Canada

*(Signed)*

Judge Murphy  
Cape Town, South Africa

*(Signed)*

Judge Neven  
Brussels, Belgium

Entered in the Register on this 2<sup>nd</sup> day of December 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar