



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

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Judgment No. 2022-UNAT-1240

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

**JUDGMENT**

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Before:	Judge John Raymond Murphy, Presiding Judge Martha Halfeld Judge Dimitrios Raikos
Case No.:	2021-1601
Date of Decision:	1 July 2022
Date of Publication:	13 July 2022
Registrar:	Weicheng Lin

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Counsel for Appellant:	Mohammad Mustafa Abdullah
Counsel for Respondent:	Ana Peyró Llopis

**JUDGE JOHN RAYMOND MURPHY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal against Judgment No. UNRWA/DT/2021/015, rendered by the United Nations Relief and Works Agency for Palestine Refugees in the Near East Dispute Tribunal (UNRWA DT) on 30 March 2021, which dismissed the application of Ms. Aysha Al Rifai, a former staff member of UNRWA. Ms. Al Rifai contested the decisions to separate her from service with termination indemnity and to close the investigation into her complaints.

2. For the reasons set out below, the appeal is upheld, Judgment No. UNRWA/DT/2021/015 is reversed, and the case is remanded to the UNRWA DT for determination *de novo* and *ab initio* by another judge.

**Facts and Procedure**

3. Ms. Al Rifai was employed by UNRWA (the Agency) from 1 October 2006 on a fixed-term appointment as Deputy Dean at the Ramallah Women Training Centre (RWTC), West Bank Field Office (WBFO). At the time of her application to the UNRWA DT, she held the post of RWTC Principal.

4. On 21 December 2016, the Director of UNRWA Operations, West Bank (DUO/WB) referred to the Department of Internal Oversight Services (DIOS) several complaints of abuse of authority, harassment and misuse of RWTC resources against certain RWTC senior staff members, including Ms. Al Rifai. The DIOS initiated an investigation into the aforementioned allegations in January 2017. Ms. Al Rifai was placed on administrative leave with pay on 23 February 2017 pending the investigation and until the completion of the disciplinary process, if any.

5. By e-mail to the DUO/WB dated 11 April 2017, Ms. Al Rifai submitted a complaint against several staff members. She submitted further complaints of prohibited conduct against several staff members, including a DIOS investigator, on 13 May 2017 and 21 July 2017.

6. The DIOS issued its Investigation Report (the IR) with respect to the allegations against Ms. Al Rifai on 5 September 2017. In the IR, the DIOS determined amongst other things that there was sufficient evidence to conclude that Ms. Al Rifai had misled MS into

submitting a malicious complaint of sexual harassment against IS. On 9 October 2017, the DUO/WB wrote to Ms. Al Rifai informing her of the findings of DIOS in the IR and provided her with an opportunity to respond. She responded on 19 and 28 November 2017. Almost a year later, on 13 September 2018, the DUO/WB imposed on Ms Al Rifai the disciplinary measure of separation from service with termination indemnity (the first contested decision). She was separated from the Agency on the same day.

7. The DIOS released its Preliminary Assessment Report (PAR) regarding the various complaints made by Ms. Al Rifai on 11 September 2017. The DIOS concluded that some of allegations made by Ms. Al Rifai were substantiated but the misconduct in question was of minor gravity and did not warrant the undertaking of a full investigation. One year later, on 13 September 2018, the DUO/WB informed Ms. Al Rifai that some of her allegations were substantiated and that he had decided to take managerial actions vis-à-vis the concerned staff members (the second contested decision).

8. On 8 October 2018, Ms. Al Rifai submitted to the Deputy Commissioner-General a request for decision review of the two contested decisions. When the matter was not resolved to her satisfaction, she filed an application with the UNRWA DT on 5 February 2019.

9. In the period between March 2019 and December 2020, the UNRWA DT issued several interlocutory orders in response to motions filed by both parties. On 31 December 2020, the UNRWA DT issued a Notice of Hearing convoking the parties to a hearing on 22 February 2021, and ordered the parties to confirm their attendance and propose witnesses by 18 January 2021.

10. On 18 January 2021, Ms. Al Rifai filed a motion for an extension of time to respond to the Notice of Hearing. On 19 January 2021, the UNRWA DT denied Ms. Al Rafai's motion for an extension of time and ordered the parties to submit their responses to the Notice of Hearing no later than the close of business on 21 January 2021.

11. On 28 January 2021, Ms. Al Rifai requested the UNRWA DT to postpone the hearing and to be afforded an opportunity to submit further information. She also submitted her list of proposed witnesses to be heard during the hearing and made several requests regarding the PAR. On 8 February 2021, the UNRWA DT: i) denied Ms. Al Rifai's request for the postponement of the hearing; ii) informed the parties that the hearing would be

conducted online, via Microsoft Teams; and iii) and gave ancillary relief and directions in relation to evidence that would be submitted.

12. By e-mail to the Registry dated 15 February 2021, Ms. Al Rifai indicated that, on 21 February 2021, she would be filing a motion for the recusal of the Judge. On 21 February 2021 at 10.21 p.m. Amman time, Ms. Al Rifai filed a motion for the recusal of the Judge.

13. Article 4(7) of the UNRWA DT Statute provides *inter alia* that a party may request recusal on the basis that the Judge has, or appears to have, a conflict of interest. Where a party requests such recusal, the decision shall be taken by the UNRWA Internal Justice Committee (the IJC). Article 23 of the Area Staff Regulations regulates motions for the recusal of an UNRWA DT judge. It provides that a party may make a reasoned request for the recusal of a judge, on the grounds of a conflict of interest as defined in Article 22, through the Registrar to the IJC who, after seeking comments from the judge, shall decide on the request and shall inform the party of the decision in writing. In terms of Article 22, a “conflict of interest” means any factor which may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case - *inter alia* in circumstances which would make it appear to a reasonable and impartial observer that the judge’s participation in adjudication of the matter would be inappropriate.

14. Pursuant to Article 23, the Registry transmitted the recusal motion to the IJC on 22 February 2021.

15. Despite the UNRWA DT being aware of the recusal application, it proceeded with the hearing on 22 February 2021. Neither Ms. Al Rifai nor her representative attended the hearing. The UNRWA DT heard one witness, namely, Mr. Shalabi, and received oral submissions from the Commissioner-General.

16. On 16 March 2021, the IJC dismissed the motion for the recusal of the Judge.

17. The UNRWA DT handed down its judgment on 30 March 2021 in which it dismissed the application, ordered Ms. Al Rifai to pay USD 500 in costs and referred various persons, including Ms. Al Rafai’s representative, for possible action to enforce accountability.

18. For reasons which will become apparent, there is no need to fully consider the reasoning of the UNRWA DT in relation to the merits of the contested decisions.

19. The following paragraphs of the judgment are of importance:

78. On the eve of the hearing, at 10.21 p.m., the Applicant filed a motion for the recusal of the Judge in charge of the present case. The next morning, the Tribunal decided to proceed with the scheduled hearing, as the Applicant's motion would only bar the Tribunal from issuing its Judgment before the IJC's decision about the Applicant's motion for the recusal of the Judge. At the beginning of the hearing, the Tribunal phoned the Applicant's representative and he indicated that he did not want to take part in the hearing.

79. Consequently, it has not been possible to assess the Applicant's credibility by way of taking her oral testimony. The Tribunal recalls that it possesses no means to enforce the participation of the parties to a hearing; however, it notes that an unwilling party has to bear the consequences resulting from such behaviour. Thus, the Tribunal holds that the Applicant was given every opportunity to participate in the hearing on an equal footing with the Respondent, and therefore her due process rights were thoroughly observed....

142. The Tribunal cannot accept the manner in which the Applicant submitted her motion for the recusal of the Judge. The Tribunal informed the parties as early as 31 December 2020 that it would be conducting an oral hearing on 22 February 2021. By submitting her motion for the recusal on the eve of the hearing, the Applicant was attempting to render the conduct of a hearing impossible and to *de facto* ensure the Judge's recusal from the case, as his term with the Tribunal ends on 31 March 2021.

143. The Tribunal has no doubt that the Applicant's conduct during the proceedings constitutes an unacceptable and manifest abuse of proceedings. First, the Tribunal stresses that the parties are obliged to comply with the Tribunal's orders....

### **Submissions**

#### **Ms. Al Rifai's Appeal**

20. Ms. Al Rifai submits that the UNRWA DT erred in referring her representative for possible action to enforce accountability, awarding costs against her, convoking a hearing notwithstanding the pending recusal application and in concluding that there was clear and convincing evidence in support of the alleged misconduct.

21. The issue of the pending recusal application is most relevant. Ms. Al Rifai submits that the convening of the hearing on 22 February 2021 was illegal and fundamentally flawed, and that when the UNRWA DT went ahead with the hearing despite the pending recusal application, it exceeded its substantive and/or procedural mandate.

22. Ms. Al Rifai takes issue with the claim by the UNRWA DT that by submitting her motion for the recusal on the evening of the hearing, she was attempting to render the conduct of a hearing impossible and to *de facto* ensure the Judge's recusal from the case, as his term ended on 31 March 2021. She contends that the statement was "based on malice and unbridled conjecture unsupported by evidence".

23. Moreover, she submits that whenever the recusal of a judge is sought in terms of Article 23, the judge is obliged to defer to the competent party (the ICJ) and to await its decision before proceeding with the matter.

24. Ms. Al Rifai requested the judgment of the UNRWA DT to be reversed and substituted with an order granting her compensation, or alternatively to remand the matter to the UNRWA DT to be heard by a different judge.

### **The Commissioner-General's Answer**

25. The Commissioner-General denies that the UNRWA DT erred in referring the representative of Ms. Al Rifai for possible action to enforce accountability, awarding costs against her, convoking a hearing notwithstanding the pending recusal application and in concluding that there was clear and convincing evidence in support of the alleged misconduct.

26. With regard to the pending recusal motion, the Commissioner-General adopted the same line of reasoning as the UNRWA DT. He maintained that the motion would only bar the UNRWA DT from issuing its judgment before the IJC's decision and Ms. Al Rifai was attempting to render the conduct of a hearing impossible and to *de facto* ensure the Judge's recusal from the case as his term was to end on 31 March 2021. The decision to proceed was accordingly reasonable in the circumstances. The procedural history immediately prior to the filing of the motion points to the conclusion that the request for recusal was ill-motivated. To allow such "belated" motions for recusal would stifle administration of justice as litigants

unhappy with interlocutory decisions would merely file motions for recusal with a view to getting rid of the Presiding Judge.

27. The Commissioner-General requested the appeal to be dismissed.

### **Considerations**

28. An allegation of judicial bias is a serious matter. It is a fundamental principle of the rule of law that judicial and quasi-judicial decision-makers ought to be impartial. The rule against bias rests on the common-sense view that the proper administration of justice depends on there being confidence and faith in the administrative and judicial process. This requires that justice not only be done but be seen to be done. Thus, there is no need to prove actual bias; it is enough for the purposes of recusal for there to be a reasonable apprehension of bias.

29. An allegation of bias in judicial proceedings brings into question both the legal authority of the judge and the moral legitimacy of his or her continuing to conduct the proceedings. In some jurisdictions, the judge whose authority and impartiality has been challenged determines the application, and in others, such as in this instance, the application for recusal is considered by an independent body – the IJC.

30. The simple issue arising in this appeal is whether it was appropriate and correct for the judge to have proceeded with the application for review of the contested decisions while the motion for recusal was pending. The straightforward answer is that it was not.

31. An application for recusal can be brought at any time in the proceedings and is usually a difficult strategic choice for the party making the challenge. Such an application is made, typically, at the moment the party loses confidence in the judge. Its timing will depend on the circumstances. The categorization of Ms. Al Rifai's motion as "belated" is therefore unconvincing and inconsequential. The tactical choice in the course of litigation was hers.

32. Once a challenge to the judge's partiality is made, his or her authority is rendered ambiguous. The legality of the judge continuing with the trial or application of the merits of the dispute is brought into question by the motion for recusal. It therefore stands to reason that the legal and moral ambiguity of the judge's authority must then be immediately and summarily determined before the matter can proceed.

33. Ordinarily, it will be procedurally unfair to insist that the matter proceed despite a pending ripe motion for recusal. In the first place, the contesting party's participation in the ongoing proceedings, despite her challenge to the judge's authority remaining undecided, could be construed as a waiver and a submission to jurisdiction. But even were the contesting party to participate in the continuing proceedings under protest, the pending challenge to the judge's authority will hang ripe over the courtroom, casting a shadow, and possibly putting the contesting party at something of a tactical advantage. Until the matter of partiality is authoritatively decided and pronounced upon, the legal and moral legitimacy of the judge remains in question.

34. Ms. Al Rifai's election to withdraw and not participate until the preliminary issue was decided was accordingly a reasonable and legitimate response in the circumstances, whatever the merits of the recusal application or, for that matter, the application for the review of the contested decisions.

35. Moreover, to proceed as the UNRWA DT did, by continuing to hear the matter in the absence of Ms. Al Rifai, and then reserving judgment until the green light was given by the IJC risked creating a perception on the part of the applicant that the application for recusal might not be assessed properly. However, there is no evidence or reason to believe that the IJC acted unfairly in any way. It should also be stated in passing that there is also no cogent evidence of actual bias on the part of the judge. But that is not the immediate issue. The issue before us is not whether the judge was biased, rather it is the narrower question of procedural fairness.

36. The contention that Ms. Al Rifai filed the recusal motion tactically to delay the proceedings until the judge's term of office had expired is speculative and not supported by any convincing evidence. As it turned out, the IJC made its ruling on 16 March 2021, two weeks before the expiry of the judge's term of office, suggesting that a postponement of the hearing was practically feasible. But, in any event, the exigencies of the judge's schedule cannot override the fundamental procedural right of a party to have her challenge to the legality of the proceedings determined prior to a determination of the merits of her claim.

37. In the final analysis, the UNRWA DT committed an error of procedure, as contemplated in Article 2(1)(d) of the Statute of the UNAT. The error was consequential in that it denied Ms. Al Rifai the opportunity to fully present her case to the UNRWA DT and to cross-examine



adverse testimony. There has not been a full and fair trial of the issues, and hence the procedural error was such as to affect the decision of the case.

38. The appeal must accordingly succeed on this ground alone and the judgment of the UNRWA DT falls to be reversed.

39. The appropriate remedy is for the matter to be remanded to the UNRWA DT in terms of Article 2(3) of the Statute of the UNAT for determination *de novo* and *ab initio* by another judge.

**Judgment**

40. The appeal is upheld, Judgment No. UNRWA/DT/2021/015 is reversed, and the case is remanded to the UNRWA DT for determination *de novo* and *ab initio* by another judge.

Original and Authoritative Version: English

Decision dated this 1<sup>st</sup> day of July 2022.

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Halfeld

*(Signed)*

Judge Raikos

Judgment published and entered into the Registry on this 13<sup>th</sup> day of July 2022 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar