



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

Judgment No. 2017-UNAT-779

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Rosalyn Chapman Judge Dimitrios Raikos
Case No.:	2017-1060
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Abu Hweidi *et al.*:

Amer Abu-Khalaf, LOSA

Counsel for Commissioner-General:

Rachel Evers

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2016/035, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively) in Amman on 28 November 2016, in the case of *Abu Hweidi et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Fayeq Abu Hweidi *et al.* filed the appeal on 3 February 2017. The Commissioner-General filed the answer on 7 April 2017.

Facts and Procedure

2. The following facts are taken from the UNRWA DT Judgment:¹

.... These are applications filed by Fayeq Abu Hweidi, Samih Al Araj, Jamal Marshood, Nabil Mahfouth, Hisham Hammad, Ja'far Titi, Mohd Ghanem, Mohd Suboh, Nabil Mansour, Mohammad Abu Farah, Adel Zawawi, Alaa' Badawi, Abdel Fattah Masheikh and Amani Shehadeh (the "Applicants") contesting the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the "Respondent"), not to select them for some or all of the following posts in the Education Programme: (i) Assessment Coordinator, (ii) Professional Development and Curriculum Coordinator and (iii) School Quality Assurance Coordinator.

... By Judgment *Abu Hweidi et al.* UNRWA/DT/2016/024, dated 4 September 2016 ..., the UNRWA Dispute Tribunal ... stated that the cases are consolidated and that the applications are receivable as they are not filed prematurely. Furthermore, the Respondent was ordered to file a reply on the merits. The [UNRWA Dispute] Tribunal had omitted to rule on the subject of receivability regarding Applicant Samih Al Araj. By this Judgment on the merits, this issue will be addressed.

...

... By Judgment [UNRWA/DT/2016/024], the [UNRWA Dispute] Tribunal described the facts in the present case. In this Judgment, only relevant facts are recalled.

... By email dated 16 April 2014, a Clerk of the West Bank Education Programme internally circulated, for Education Specialists only, a vacancy notice for 18 available Coordinator posts:

- i) Four posts for an Assessment Coordinator ("AC") - one in Nablus, one in Hebron and two in Jerusalem;

¹ Impugned Judgment, paras. 1-16.

- ii) Nine posts for a School Quality Assurance Coordinator (“SQAC”) - three in Nablus, three in Hebron and three in Jerusalem; and
- iii) Five posts for a Professional Development and Curriculum Coordinator (“PDCC”) - all located at the Education Science Faculty in Ramallah.

... The Agency received a total of 60 applications, including the applications of the Applicants in the present case. Twenty-one applications were received for the posts of SQAC, 22 applications were received for the posts of AC, and 17 applications were received for the posts of PDCC.

... A Senior Management Team held a meeting on 1 May 2014. The recruitment for the three Units was discussed and some conclusions were adopted. Particularly, it was said that “[t]here is no guarantee therefore that Education Specialists will be successful in their application [*sic*], but initially recruitment will be restricted to the current Education Specialists”. All of the Applicants were Education Specialists.

... From 25 August to 27 August 2014, the Applicants were interviewed by a properly constituted Interview Panel (“the Panel”), comprised of the Chief, Field Education Programme (“CFEP”), the Deputy Director of UNRWA Operations, West Bank (“D/DUO/WB”) as Chairperson, Deputy Chief, Field Education Programme (“D/CFEP”), and a Recruitment Staff Development Officer. Following the interviews, the Panel identified suitable candidates for only six of the 18 available posts. According to the recruitment reports produced together with the Respondent’s reply, the Applicants in the present case were all identified as “not suitable”.

... On 30 October 2014, the Agency circulated, both internally as well as externally, vacancy announcements for the 12 remaining posts. The vacancy for Assessment Coordinator in Nablus was advertised by oversight, as a suitable candidate had been identified previously. The Agency received 374 applications.

... None of the Applicants participated in the second round. Applicants Mohammad Abu Farah, Mohd Suboh, Ja’far Titi, Alaa’ Badawi, Hisham Hammad and Samih Al Araj indicate[d] not having applied for the second round. Applicants Fayeq Abu Hweidi, Adel Zawawi, Amani Shehadeh, Nabil Mahfouth and Nabil Mansour d[id] not give any indications as to whether they applied for the second round. Applicant Jamal Marshood indicates that he applied for the second round but he was not invited to compete. Applicants Mohd Ghanem and Abdel Fattah Masheikh initially applied for the second round but indicate[d] that they decided not to continue.

... On 21, 26 and 27 January 2015, the Applicants requested decision review of the decisions not to appoint them to the posts for which they had applied.

... By letters dated 25 and 26 February 2015, the Director of UNRWA Operations in the West Bank, responded to the Applicants’ requests for decision review and stated that “[t]he recruitment process with respect to the Coordinator positions is ongoing. Therefore, no final decision has been taken with respect to your candidacy”.

... In April and May 2015, the Agency informed the successful candidates from the first and second round recruitment processes of their selection to the posts.

... Between 21 and 24 May 2015, the Applicants filed their applications with the [UNRWA Dispute] Tribunal. Between 24 May and 7 June 2015, the applications were transmitted to the Respondent.

... On 17 August 2016, according to the Respondent, 11 of the 18 Coordinator posts had been filled.

... On 3, 9 and 11 September 2015, the Respondent filed his replies contending that the applications were not receivable.

... By Judgment [UNRWA/DT/2016/024], the [UNRWA Dispute] Tribunal decided that the cases were consolidated and that the applications were receivable. The Respondent was given leave to submit his reply on the merits within 30 days of the date of the Judgment.

3. The UNRWA DT rendered its Judgment on 28 November 2016, dismissing the applications in their entirety. Initially, the UNRWA DT found that Mr. Al Araj had no standing to contest the decision not to select him and therefore his application was not receivable. On the merits of the other applications, the UNRWA DT found that (i) there was no merit to the claim of alleged bias of one of the panel members; (ii) the interview was conducted in accordance with UNRWA Area Staff Personnel Directive A/4 Part.II/Rev.7; and (iii) the prohibitive condition for one post requiring that the successful candidate reside in Ramallah did not mean that only Ramallah residents could apply, and the condition was justified due to travel restrictions.

Submissions

Mr. Abu Hweidi *et al.*'s Appeal

4. Mr. Abu Hweidi *et al.* submit that the UNRWA DT erred in fact and in law when assessing the evidence before it and coming to the conclusion that Mr. Abu Hweidi *et al.*'s candidatures were given full and fair consideration during the interview and evaluation process and that the Agency followed the required procedure. In particular, the UNRWA DT failed to consider that one of the members of the interview panel, the Chief, CFEP, was biased as he was determined to select only a limited number of Education Specialists for the posts, which resulted in a "clear abuse of power and procedure". The successful candidates had been trained by Mr. Abu Hweidi *et al.* and were thus much less experienced. Moreover, the fact that

Mr. Abu Hweidi *et al.* were offered to work in the positions in question while the latter were being filled shows that Mr. Abu Hweidi *et al.* were actually suitable for the posts.

5. Mr. Abu Hweidi *et al.* further maintain that the UNRWA DT erred in fact and in law with regard to the interview process. The UNRWA Dispute Tribunal “ignored” evidence suggesting that the applicants had been asked different - and thus non-standardised - questions during their interviews in violation of paragraph 22 of UNRWA Area Staff Personnel Directive A/4 Part.II/Rev.7, and the UNRWA DT failed to order the Commissioner-General to provide further evidence in that regard. Moreover, the UNRWA DT merely presumed that the selection panel had been provided with translations into English of the candidates’ answers while there was no evidence to that effect. Mr. Abu Hweidi *et al.* also claim to fulfil all the requirements for the posts and to have the same command of the English language as the selected candidates, which is why basing their non-selection *inter alia* on the candidates’ different levels of English showed “clear discrimination”. In addition, in accordance with paragraph 22 of UNRWA Area Staff Personnel Directive A/4 Part.II/Rev.7, the candidates’ evaluation should not have been solely based on interviews but also on references and performance appraisals as well as their respective work experience and academic qualifications.

6. Furthermore, the UNRWA DT failed to consider that the newly-created positions were intended as career opportunities for all Education Specialists who, therefore, should have been given priority in both rounds of selection and external candidates should not have been permitted to apply. Since not all positions were filled after the first round and there were still suitable candidates, namely Mr. Abu Hweidi *et al.*, they should have been placed in the posts in accordance with paragraphs 45 and 46 of UNRWA Area Staff Personnel Directive A/4 Part.II/Rev.7. The UNRWA DT also failed to take into account that the requirement to reside in Ramallah was taken out in the second round, which resulted in unfair treatment of those staff members who had decided not to apply in the first round due to this requirement.

7. Based on the foregoing, Mr. Abu Hweidi *et al.* request that the Appeals Tribunal (i) “reverse” the UNRWA DT Judgment, (ii) “rescind” the Agency’s decision not to appoint Mr. Abu Hweidi *et al.* to the available posts and possibly promote them to those posts through re-assessment of their applications, (iii) compensate Mr. Abu Hweidi *et al.* for the material damages and the consequential financial loss incurred due to the unfair process, and,

(iv) compensate Mr. Abu Hweidi *et al.* for moral damages incurred due to stress, anxiety and discrimination.

The Commissioner-General's Answer

8. The Commissioner-General submits that the UNRWA DT Judgment was, as a matter of law, fact and procedure, free of error. The UNRWA DT dismissed the applications in a reasoned and thorough Judgment addressing the assertions put forward by Mr. Abu Hweidi *et al.* who now merely disagree with the UNRWA DT's findings and attempt to re-argue their case.

9. The Commissioner-General further maintains that the UNRWA DT did not err in fact and in law when assessing the evidence and concluding that Mr. Abu Hweidi *et al.*'s candidatures were given full and fair consideration. In support of the allegation of bias against one of the panel members, Mr. Abu Hweidi *et al.* rely on a statement contained in a document which was not part of the case record before the UNRWA DT and they have not requested leave to have it admitted pursuant to Article 10(1) of the Appeals Tribunal Rules of Procedure. In any case, the UNRWA DT adequately addressed this allegation in its Judgment. It also enjoys broad discretion to decide that it had sufficient information to reach its decision without holding an oral hearing.

10. Furthermore, Mr. Abu Hweidi *et al.* display a misconception of the Agency's selection process when they suggest that they should have been found suitable on their academic background and work experience alone regardless of their performance in the interviews. In fact, in the selection process, academic credentials and work experience are taken into consideration when determining whether candidates meet the minimum requirements for a vacancy and whether to invite them to an interview; they do not, however, guarantee selection for a post. During the interviews, Mr. Abu Hweidi *et al.* were assessed against the same relevant criteria as other candidates and found unsuitable. The decision not to select them was based on their own performance during a proper, fair and transparent recruitment process and was not tainted by bias, improper motives or procedural flaws.

11. Moreover, the UNRWA DT did not err in fact and in law when it did not order the Commissioner-General to provide the questions and answers and the grading system used during the interview. Mr. Abu Hweidi *et al.*'s mere allegation that the candidates were asked different interview questions does not constitute proof of any procedural flaw and they fail to recognize their own duty to provide convincing evidence in support of their allegations.

12. The Commissioner-General further submits that Mr. Abu Hweidi *et al.* merely re-argue their case when asserting, through a range of statements, that they should have been considered “priority” candidates and “the most suitable for the posts advertised”. The selection process for the posts was conducted on a competitive basis, in accordance with the Agency’s regulatory framework. The fact that Education Specialists were given priority in the first recruitment round does not mean that the principle of competitive recruitment was abandoned.

13. Finally, the remedies sought by Mr. Abu Hweidi *et al.* have no legal basis. The impugned Judgment being free of error of fact, law and procedure, there is no legal basis for “reversing” the Judgment, nor for considering an award of compensation for material or moral damages.

14. Based on the foregoing, the Commissioner-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

15. After having consolidated the cases and having found all but one of the applications receivable by Judgment UNRWA/DT/2016/024, the UNRWA Dispute Tribunal dismissed the fourteen applications, setting aside the various grounds of Mr. Abu Hweidi *et al.*’s complaints.

16. Mr. Abu Hweidi *et al.* filed their appeal, stating that there were errors of law, fact and procedure in the selection exercise, causing harm to their professional development and career progression.

17. Annexed to their appeal are three affidavits, which had not been produced before the UNRWA Dispute Tribunal. Mr. Abu Hweidi *et al.* did not request leave to submit the affidavits as additional evidence, as required by Article 10 of the Appeals Tribunal Rules of Procedure, which provides:

Article 10

Additional documentary evidence, including written testimony

1. A party may seek to submit to the Appeals Tribunal, with an appeal or an answer, documentary evidence, including written testimony, in addition to that contained in the written record. In exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with such additional documentary evidence, it may receive the additional evidence from a party. On its own volition, the Tribunal may order the production of evidence if it is in the

interest of justice and the efficient and expeditious resolution of the case, provided that the Appeals Tribunal shall not receive additional written evidence if it was known to the party seeking to submit the evidence and should have been presented to the Dispute Tribunal.

2. In all other cases where additional findings of fact are needed, the Appeals Tribunal may remand the case to the Dispute Tribunal for further fact-finding. Where the Appeals Tribunal remands a case to the Dispute Tribunal, it may order that the case be considered by a different judge of the Dispute Tribunal.

18. The affidavits seem, however, to compensate for the absence of a hearing of witnesses before the UNRWA DT which had been requested by Mr. Abu Hweidi *et al.*² The UNRWA DT's decision not to hold an oral hearing was a shortcoming of the procedure, since the parties had not agreed to the case being decided on the papers and the facts needed to be established by witnesses and/or further documentary evidence, as they were related to the disputed issue of a possible bias against Mr. Abu Hweidi *et al.*, and hence could have had an impact on the outcome of the case.³

19. Article 9 of the UNRWA DT Statute states:

1. The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.

2. The Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.

20. In turn, the UNRWA DT Rules of Procedure provide:

Article 11 Hearing

1. The Judge hearing a case may hold oral hearings.

...

Article 12 Oral evidence at oral hearings

1. The parties may call witnesses and experts to testify. ...

² Current Area Staff Union Chairman at West Bank (2016-present), Mr. Jamal Abdullah, and former Area Staff Union Chairman at West Bank (2013-2016), Dr. Shaker Al-Risheq, are both cited by name in the initial application before the UNRWA DT: "This statement was witnessed by the Chairperson of the Teachers' Union [sic] in the West Bank Mr Jamal Abdullah" and "[w]e request the testimony of Dr. Shaker Al Risheq the Chairperson of the Staff Union in the West Bank in this regard".

³ The Appeals Tribunal notes that the affidavits are all dated 26 January 2017, that is after the publication of the impugned Judgment on the merits, which was rendered on 28 November 2016.

...

Article 13 Evidence

1. The [UNRWA Dispute] Tribunal shall determine the admissibility of any evidence.
2. The [UNRWA Dispute] Tribunal may order production of evidence from either party at any time and may require any person to disclose any document or provide information that appears to the [UNRWA Dispute] Tribunal to be necessary for a fair and expeditious disposal of the proceedings.
3. A party wishing to submit evidence which is in the possession of the opposing party, or of any other entity may, in the initial application or at any stage of the proceedings, request the [UNRWA Dispute] Tribunal to order the production of the evidence.

...

Article 14 Case management

The [UNRWA Dispute] Tribunal may, at any time, either on an application of a party or of its own initiative make any order or give any direction which appears to the judge to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties.

21. Although broad discretion in case management is afforded to the trial judge, there are some facts which are so essential that they need to be established in the interest of justice, particularly when they are related to core aspects of the dispute. The trial judge's discretion is therefore not unfettered and is subject to review on a case-by-case basis.⁴

22. One of these essential factual issues in this case is the allegation of bias against the Chief, CFEP. Mr. Abu Hweidi *et al.* contend that there was a predetermined intent to exclude most of them (all Appellants are Education Specialists) from the selection exercise for the Coordinator posts. The Chief, CFEP, is alleged to have said in a meeting before the selection started that only a few Education Specialists would be selected in the first round. Also, he was reported to have said that a second round would be organized, which would be open not only to Education Specialists, but also to other internal and external candidates.

⁴ The Appeals Tribunal has already acknowledged the existence of the right to be heard, although in a distinguishable case (*Bastet v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-511, para. 43). In the present case, as stated above, there had been no written submissions by the parties agreeing that the case was to be decided on the papers. Besides, the affidavits only came to the records as an annex of the appeal and, therefore, were not taken into account by the UNRWA Dispute Tribunal. Mr. Abu Hweidi *et al.* were therefore not afforded the opportunity to have their case fully heard by the UNRWA Dispute Tribunal.

23. Mr. Abu Hweidi *et al.* contend that this demonstrates that had the Chief, CFEP, not been determined to hinder them, he would not have been able to know in advance that not all the posts would be filled in the first round of the selection exercise.

24. The UNRWA DT rejected that contention of bias, for the following reasoning:⁵

... The [UNRWA Dispute] Tribunal cannot accept such an argument. Eighteen vacancies were advertised for the three Coordinator posts in the various locations in the West Bank. Sixty Education specialists had applied. As the recruitment was a competitive process, it is realistic to conclude that not all of the posts could be filled by suitable candidates. On the contrary, the [UNRWA Dispute] Tribunal finds that the Applicants cannot complain about the Agency giving them priority by organising a first selection process for Education Specialists only.

25. There is no dispute that the Education Specialists were the only ones allowed to participate in the first round of the selection process. What is in contention is whether the UNRWA Dispute Tribunal erred in procedure when it dismissed the claim of bias finding that it was “realistic” to conclude that not all of the posts could be filled by suitable candidates. The UNRWA DT based its conclusion on a mere inference although there was an explicit request for production of evidence in this regard by Mr. Abu Hweidi *et al.* who were not afforded the opportunity to produce this evidence.

26. The UNRWA DT’s inference might not have prevailed, if the UNRWA DT had assessed the requested evidence, or if it had held an oral hearing, as was requested from the beginning and expressly authorised by Articles 11 and 14 of the Rules of Procedure of the UNRWA Dispute Tribunal.

27. Furthermore, Mr. Abu Hweidi *et al.* raised the fact that the interview panel was also biased because it “was influenced by the Chief[, CFEP,] who did not intend for them to succeed in the interview process”. The Chief, CFEP, was one of the Panel Members (as mentioned in the annex filed with the Respondent’s answer before the UNRWA DT).

28. Given the gravity of the allegation and its possible bearing on the outcome of the selection process, the UNRWA DT should have engaged in a thorough examination of the facts, rather than drawing an inference. Under the circumstances of the case, the inference drawn by the UNRWA DT was not reasonable.

⁵ Impugned Judgment, para. 35.

29. Mr. Abu Hweidi *et al.* also contend that the interview questions posed to the candidates were not identical, in contravention of paragraph 22 of UNRWA Area Staff Personnel Directive A/4 Part.II/Rev.7 which states, in relevant part, as follows:

The interview panel for each vacancy is responsible for: [p]reparing standardised interview questions to be addressed to all candidates in advance of the interview, ensuring that these questions are gender neutral and do not result in unfair treatment of any candidate

30. The UNRWA DT found in this regard that “there has been no evidence submitted that would show that the Panel did not apply the principle of ‘preparing standardised interview questions to be addressed to all candidates in advance of the interview...’”.⁶

31. However, Mr. Abu Hweidi *et al.* had requested that the UNRWA DT order the Commissioner-General to produce this evidence, as allowed for by Article 13 of the UNRWA DT Rules of Procedure.⁷ But their request was denied.⁸ Had this evidence been produced as requested – given the fact that only the Respondent had access to that documentation – the UNRWA DT’s decision would have been more fact-based – and might have been different.

32. Another fact that was not sufficiently established before the UNRWA DT is whether or not the answers given in Arabic were translated. The UNRWA DT erred when it dismissed Mr. Abu Hweidi *et al.*’s contentions in this regard, by doing so mainly on the basis of hypothetical reasoning rather than established facts:⁹

... Some Applicants raise the point that not all of the candidates’ answers in Arabic were translated into English for the D/DUO/WB. Even assuming that some answers in Arabic were not immediately translated in English for the D/DUO/WB, this does not mean that the D/DUO/WB could not have been informed later, during the Panel’s deliberation of the content of the Arabic answers. In addition, the Applicants did not submit any evidence to support these contentions.

⁶ Impugned Judgment, para. 46.

⁷ With regard to the question of whether any of the Applicants applied in the second recruitment round, we note that the UNRWA DT carefully ordered production of evidence by the Respondent (*Abu Hweidi et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Order No. 089 (UNRWA/DT/2016)).

⁸ Para. 22 of the answer to the appeal, which contends that it was the Appellants’ responsibility to provide this evidence, which they, however, do not possess.

⁹ Impugned Judgment, para. 44.

33. Lastly, the UNRWA DT should have established whether keeping the results of the first round confidential had an impact on Mr. Abu Hweidi *et al.*'s participation in the second round and whether this could imply harm to their entitlement to preference, as established by UNRWA Area Staff Personnel Directive A/4 Part. II/Rev. 7:¹⁰

... The paramount consideration for selection will be the necessity to secure the highest standards of efficiency, competence, and integrity. Where multiple candidates are equally qualified *preference for selection should normally be given to internal candidates*, Palestine refugees, and candidates of the under-represented gender.

34. In view of the foregoing, it does not appear to have been an adequate fact-finding exercise by the UNRWA DT, which would enable us to review whether or not the administrative decision was lawful. Hence, the UNRWA DT's determination that there was no bias/prejudice/unlawfulness and that there was fair and adequate consideration is not supported by the facts.

35. Due process requires that both parties be given an opportunity to present their case, produce evidence and file submissions and/or motions. The full and fair consideration during a candidacy and a competence-based interview may be crucial for the result of a selection and, as a consequence, could have affected the outcome of the application before the UNRWA DT. As we have stated in *Chhikara*:¹¹

... In the present case, Mr. Chhikara was not selected because of a recommendation made in a flawed and inherently unreliable [Interview Assessment Report (IAR)]. The recommendation resulted in the impugned selection decision, which was tainted by procedural errors and was unlawful. There was thus a direct link between the irregularities and his non-selection.

36. Here, the fact-finding exercise before the UNRWA DT was incomplete, in clear error of procedure and violation of due process such as to affect the decision of the case. This results in the impugned Judgment being annulled and the cases remanded for a hearing *de novo* before a different Judge, pursuant to Article 2(4)(b) of the Statute of the Appeals Tribunal.

37. It is thus not necessary to address the merits of the appeal.

¹⁰ Area Staff Personnel Directive A/4 Part. II/Rev. 7, para. 66 (emphasis added).

¹¹ *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723, para. 48.

Judgment

38. The appeal is granted. Judgment No. UNRWA/DT/2016/035 is vacated and the cases are remanded for a hearing *de novo* before a different UNRWA DT Judge and adjudication on the merits.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Raikos

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar