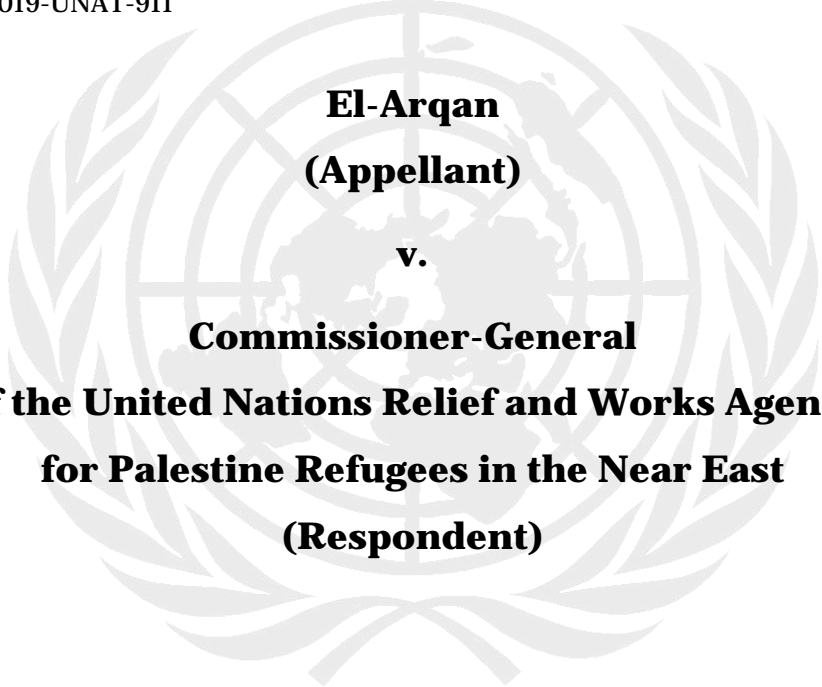




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-911



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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Deborah Thomas-Felix Judge John Raymond Murphy
Case No.:	2018-1205
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Appellant:	Amer Abu-Khalaf, LOSA
Counsel for Respondent:	Rachel Evers

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/050, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively) on 20 September 2018, in the case of *El-Arqan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Hassan El-Arqan filed the appeal on 31 October 2018, and the Commissioner-General filed an answer on 7 January 2019.

Facts and Procedure

2. Effective 12 January 1997, Mr. El-Arqan was employed by the Agency on a fixed-term appointment as Typist, Grade 6, Step 8, at the Gaza Field Office (GFO). At the time relevant to his application before the UNRWA DT Mr. El-Arqan held the post of Assistant Personnel Officer, Grade 14, at the Headquarters Gaza (HQG).

3. On 23 May 2017, the Director of Human Resources issued Circular No. A/3/2017 entitled “May Payroll for OPT Staff” informing staff members that the Commissioner-General had approved an allowance of 3.5 per cent, namely the Occupied Palestinian Territory (OPT) Allowance, to categories of staff working in the West Bank Field Office (WBFO), in the GFO and at the HQG with retroactive effect from 1 January 2017.

4. On 4 July 2017, Mr. El-Arqan submitted a request for review of the decision not to subject the OPT Allowance to the Currency Adjustment Factor (CAF). The CAF is an artificial exchange rate which is applied to protect the amount received in local currency by staff members while converting their salaries from United States Dollars (USD) or Jordanian Dinars (JD).

5. On 27 August 2017, Mr. El-Arqan filed his application before the UNRWA DT. By Order No. 068 (UNRWA/DT/2018), dated 10 April 2018 (Order No. 068), the UNRWA DT ordered the Commissioner-General to inform the UNRWA DT whether the CAF had been previously applied to any allowance such as the Dependency Allowance, Special Occupational Allowance, etc. On 3 August 2018, the Commissioner-General submitted his response to Order No. 068, which was transmitted to Mr. El-Arqan on the same day.

6. In its Judgment, the UNRWA DT dismissed Mr. El-Arqan's application on the ground that he had failed to establish any rule or policy requiring that the CAF must be applied to the OPT Allowance. The Commissioner-General had argued that the CAF was to be applied to *salaries* and the OPT Allowance was an *allowance* and not part of salary. In reaching its decision, the UNRWA DT noted that Transmittal Memorandum No. 109 (TM 109), dated 21 June 2007, which introduced the CAF, provided that the CAF would be applicable to "net take home pay" and that "take home pay" is understood as the final sum indicated on the pay slip. Per *Ghatasheh*,¹ the UNRWA DT previously held that the CAF was not part of Mr. Ghatasheh's base salary as TM 109 established the CAF as a temporary currency adjustment distinct from the adjustment to the base salary. The UNRWA DT further noted that since April 2015, the CAF had not been applied to the OPT and that Area Staff Circular No. A/04/2014 was a corrective measure after the CAF was incorrectly being disbursed with an allowance. The UNRWA DT found that the Agency introduced the CAF to protect the amount received by staff members in local currency while converting their salaries from USD or JD. As the OPT Allowance was paid in local currency, it had no currency exposure and there was no reason to apply the CAF to the OPT Allowance.

Submissions

Mr. El-Arqan's Appeal

7. Mr. El-Arqan requests the Appeals Tribunal to reverse the UNRWA DT's Judgment and reinstate the application of the CAF to the OPT Allowance. He submits that the Commissioner-General misled the UNRWA DT in its reply to Order No. 068, wherein he indicated that the Jerusalem Allowance was excluded from the CAF application since it was already paid in a local currency and thus had no currency exposure. This is correct only as relates to the Jerusalem Allowance, but the Jerusalem allowance was not the OPT allowance which was paid in Gaza; these are two different allowances paid in different currencies. The OPT allowance was paid in USD, not in local currency, and therefore should be under the scope of the CAF. Otherwise the purpose of the CAF is undermined. Mr. El-Arqan's pay slip proves that the OPT Allowance was paid in US Dollars. The UNRWA DT thus ignored the evidence and erred in fact in blindly adopting the Commissioner-General's erroneous submission.

¹ *Ghatasheh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2011/012.

8. In addition, Mr. El-Arqan argues that the UNRWA DT erred in applying Area Staff Circular No. A/04/2014 which was addressed to the Jerusalem Allowance but not the OPT Allowance and was therefore not relevant to his case. Mr. El-Arqan further argues that the UNRWA DT erred in law in its reliance upon the *Ghatasheh* Judgment which examined the application of the CAF to retirement benefits, which are indeed not within the scope of the CAF. The issue before the UNRWA DT concerned the application of the CAF to the OPT Allowance, which is different from retirement benefits since the OPT Allowance is part of the monthly salary.

9. Lastly, Mr. El-Arqan argues that Black's Law Dictionary describes "take home pay" as the net amount of a pay check. The UNRWA DT confirmed "take home pay could also be understood as the final sum indicated on the pay slip". Since the OPT Allowance is included in the final salary as any other allowance such as dependency, special occupation, or special profession allowances, it is unlawfully excluded by the Agency from the CAF as all the other allowances fall under the CAF. Thus, in conclusion, the UNRWA DT failed to identify the differences between the Jerusalem Allowance and the OPT Allowance, erroneously applied Area Staff Circular No. A/04/2014 and erred in fact since the OPT Allowance in Gaza is paid in US Dollars, involving currency conversion.

The Commissioner-General's Answer

10. The Commissioner-General requests the Appeals Tribunal to dismiss the appeal in its entirety. The Commissioner-General submits that the UNRWA DT did not err in its conclusion that there was no reason to apply the CAF to the OPT Allowance. Judicial review of an administrative decision requires the Appeals Tribunal to examine whether the Administration reached its decision in a reasonable and fair, legally, and procedurally correct manner.

11. The Commissioner-General notes that the crux of Mr. El-Arqan's appeal is that the UNRWA DT erred in its application of Area Staff Circular No. A/04/2014. In response, the Commissioner-General recalls the Appeals Tribunal's jurisprudence indicating that a judgment may contain errors of law or fact, even with regard to the analysis of the Tribunal's own jurisdiction or competence and yet still may not constitute an appealable error. Thus, the Commissioner-General argues that Mr. El-Arqan has failed to demonstrate a reversible error of law or fact that would lead to a different outcome and therefore the UNRWA DT's conclusion remains unassailed.

12. The Commissioner-General also submits that, even assuming *arguendo*, the UNRWA DT misapplied Area Staff Circular No. A/04/2014, Mr. El-Arqan still has not identified a rule or policy requiring that the CAF be applied to the OPT Allowance. The TM 109, which introduced the CAF, is the policy instrument governing the CAF and it indicated that the CAF is applied to net take home pay. Mr. El-Arqan contends that since the OPT Allowance was included in his pay slip it was unlawfully excluded from the application of the CAF. However, mere inclusion in the payslip does not automatically mean that the allowance is subject to the CAF. For instance, the Providence Fund was included in the pay slip but it was not subject to the CAF.

13. The Commissioner-General submits that the issue for consideration is whether the UNRWA DT was correct in finding that there was no reason to apply the CAF to the OPT Allowance and this calls for interpretation of TM 109, paragraph 1(b), which states the CAF “will be applicable to net take home pay”. Mr. El-Arqan’s case is that the OPT Allowance is part of his “net take home pay”. However, the UNRWA DT correctly considered its previous Judgment in *Ghatasheh*, in which it was held that the CAF was not part of base salary. It is not part of Mr. El-Arqan’s contractual salary and he never had a right to the application of the CAF to the OPT Allowance. He only had an expectation that the Agency would exercise its discretion to apply the CAF to the OPT Allowance. The Agency exercised its discretion and did not apply the CAF to the OPT Allowance to all staff in Gaza. The rationale of *Ghatasheh* is applicable to this matter as it held that the CAF was not part of base salary and as such the non-application of the CAF to the OPT Allowance was reasonable.

14. In conclusion, Mr. El-Arqan failed to show any reversible error. His request for reinstatement of the CAF to the OPT Allowance is untenable at law. The TM 109 states that the application of the CAF is exceptional and temporary and its application is a discretionary decision by the Agency for which the UNRWA DT may not substitute itself for the Administration. The reasonableness of the decision is placed in sharp focus by the Agency’s financial crisis.

Considerations

The UNRWA DT's finding that the OPT Allowance was paid in local currency and the application of Area Staff Circular No. A/04/2014

15. We find that the UNRWA DT committed an error of fact in stating that the OPT Allowance was paid in local currency. In this matter, the Commissioner-General has not misled the UNRWA DT. By Order No. 068, dated 10 April 2018, the UNRWA DT ordered the Commissioner-General to inform the UNRWA DT whether the CAF had been previously applied to any allowance. On 3 August 2018, the Commissioner-General submitted his response stating that the "CAF has been applied to *inter alia* the following allowances: Dependency Allowance (Spouse), Dependency Allowance (Child), Special Occupational Allowance (SOA), Senior Professional Allowance (SPOA) and Supplementary Allowance" but not to the Jerusalem Allowance as it is paid in local currency. As Mr. El-Arqan, in his application, requests the CAF to be applied not to the Jerusalem Allowance, but to the OPT Allowance and this allowance, as becomes clear from Mr. El-Arqan's pay slip, was paid in US Dollars, the UNRWA DT had no reason to think that the Jerusalem Allowance was identical to the OPT Allowance. This error of fact led the UNRWA DT to commit an error of law in stating that Area Staff Circular No. A/04/2014 was applicable. Area Staff Circular No. A/04/2014 reads:

It has come to light that Jerusalem Allowance (JA) is being incorrectly disbursed with the Currency Adjustment Factor (CAF) applied to it. Given the subject allowance is paid in NIS (the local currency in West Bank) and is not subject to any currency fluctuations, CAF should not be applied.

As a corrective measure, effective 1 June 2014, staff members of UNRWA West Bank Field Office and Headquarters who are in receipt of Jerusalem Allowance, will no longer receive the CAF previously applied to this allowance.

16. Clearly, Area Staff Circular No. A/04/2014 is only applicable to the Jerusalem Allowance and not to the OPT Allowance, which is paid in US Dollars.

The UNRWA DT's finding that no rule or policy requires the CAF be applied to the OPT Allowance.

17. The UNRWA DT's error of fact would not, however, lead to a manifestly unreasonable decision and its error of law would be inconsequential if its second line of reasoning supported the dismissal of Mr. El-Arqan's application. The outcome of the UNRWA DT would still be correct if, indeed, there is no rule or policy requiring the application of the CAF to the OPT Allowance.

18. We agree with the UNRWA DT that there is no rule requiring the application of the CAF to the OPT Allowance. The application of the CAF is guided by TM 109 and Transmittal Memorandum No. 113 (TM 113). TM 109, dated 21 June 2007, reads:

West Bank, Gaza, and Headquarters Gaza Currency Adjustment Factor

1. With effect from 1 June 2007 and until further notice a Currency Adjustment Factor (CAF) will be introduced to the salaries in the West Bank and Gaza as follows:

(a) The amount of NIS obtained from converting the US Dollar or JD amount will be protected by applying an artificial exchange rate reflecting the mid-point between the base rate [the US/NIS exchange rate as of the last salary survey] and the market rate established on the 10th day of each month;

(b) the Currency Adjustment Factor will be applicable to net take home pay.

(c) The Currency Adjustment Factor does not apply to Provident Fund and other benefits.

2. The CAF is an exceptional and temporary measure to be applied until further notice.

[...]

19. TM 113, dated 26 November 2007, with the subject title: "Changes to Staff Salary Scale- Gaza and Headquarters Gaza" reads as follows:

1- On the basis of a comprehensive review of Area Staff Salaries and benefits in West Bank and Gaza, Area Staff salaries, in Gaza and Headquarters Gaza, are updated, effective September 2007, to reflect the following changes:

- a. Increase of 7% of base salaries for Grades 1 to 12;
- b. Increase of 12% of base salaries for Grades 13;
- c. Increase of 10% of base salaries for Grades 14 to 20;
- d. The annual increments for grades 1 to 7 has been increased to 2% and that for grades 12 to 20 has been increased to 2.4%;
- e. In addition, the 1% SOA will also be incorporated in the base salaries of grades 1 to 11;
- f. An exchange rate adjustment will not be applicable to net take home pay as per the following formula: net take home pay x 4.26 (base exchange rate)/ exchange rate on the 10th of the month. The exchange rate adjustment does not apply to the Provident Fund and other benefits.

20. Following these guidelines, the CAF must be submitted to “salaries” and “net take home pay”. However, the OPT Allowance is not part of Mr. El-Arqan’s salary or net take home pay. Under UNRWA’s legal framework, only the dependency allowance can be viewed as part of a staff member’s salary or net take home pay requiring the application of the CAF.

21. Staff Rule 103.8(1) states in part that: “Salaries and related allowances shall normally be paid monthly in arrears [...]”. Staff Rule 103.1 states, in pertinent part:

The salaries payable to staff members in accordance with their respective grades, qualifications and duty stations shall be those set out in Appendix 1 to these rules:

Appendix 1-D	Salary Scale - West Bank
Appendix 1-D-1	Occupational Health Salary Scale – West Bank
Appendix 1-E	Salary Scale – Gaza
Appendix 1-E-1	Occupational Health Salary Scale – Gaza

Appendix 1-D/E effective 2015 (Salary Scale Gaza and West Bank) mentions base salary, dependency allowance (spouse) and dependency allowance (children) but no other allowances.

22. It follows that other allowances related to the salaries of UNRWA staff members cannot be regarded as net take home pay; consequently, TM 109 and TM 113 do not require application of the CAF to these allowances.

23. On the other hand, as allowances are not benefits, the Commissioner-General is not prevented from applying the CAF. Rather, it lies within the Commissioner-General's discretion to decide whether to apply the CAF to allowances, and, following his response to UNRWA DT's Order No. 068, he does apply it to a number of allowances.

The Commissioner-General's Exercise of Discretion

24. The Commissioner-General's discretion, however, is not unfettered, and it may not be exercised in an arbitrary, capricious, or illegal manner.² As we stated in *Abdullah*, "the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law".³ In the instant matter, the Commissioner-General has not proffered any reason for his decision not to apply the CAF to the OPT Allowance, despite applying it to several other allowances. He merely asserts his discretion, stating in his answer to Mr. El-Arqan's appeal, that "the application of [the] CAF is a discretionary administrative decision and the Tribunal may not substitute itself for the [A]dministration with regard to when to apply [the] CAF". While the Commissioner-General has alluded to UNRWA's financial constraints, he has not expressly provided this as a reason for his decision not to apply the CAF to the OPT Allowance. Noting that the Commissioner-General applies the CAF to several other allowances, this Tribunal, without knowing an articulated reason for his decision, is unable to assess whether such a decision is arbitrary, capricious, or unlawful.

25. Without an explanation or reasoning for his decision, the Appeals Tribunal is deprived of the ability to perform a judicial review of the decision and is therefore unable to assess whether the Commissioner-General exercised his discretion in an arbitrary, capricious, or illegal manner. This Tribunal has long held that stated reasons for a decision are essential for the Tribunal to exercise its judicial review of administrative decisions.⁴ Furthermore, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts.⁵

² *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107, para. 21.

³ *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 60.

⁴ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, paras. 35 and 36.

⁵ *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115.

26. As we stated in *Obdeijn*:⁶

[...] the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

27. Thus, it is inherently the power of this Tribunal to require the Commissioner-General to proffer reasons for his exercise of discretion not to apply the CAF to the OPT Allowance.

Remand

28. Since the UNRWA DT erred in law and fact, as we have detailed above, this Tribunal finds it appropriate to remand this case to the UNRWA DT pursuant to Article 2(3) of the Appeals Tribunal's Statute so that the UNRWA DT may review the Commissioner-General's reasons for his decision not to apply the CAF to the OPT Allowance and determine whether his decision constitutes a lawful exercise of his discretion.

⁶ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para 36.

Judgment

29. The case is remanded to the UNRWA DT.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Murphy

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar