



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

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**El-Arqan  
(Appellant)**

**v.**

**Commissioner-General**

Date: 29 March 2019

Registrar: Weicheng Lin

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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,<sup>1</sup> the UNRWA DT previously held that the CAF was not part of Mr. Ghatasheh's base

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 20

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-Arqa'n'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.

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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.<sup>2</sup> 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".<sup>3</sup> 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-Arqa'n'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.<sup>4</sup> Furthermore, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts.<sup>5</sup>

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<sup>2</sup> Chen v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-107, para. 21.

<sup>3</sup> 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.

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

<sup>5</sup> Islam v. Secretary-General of the United Nations,

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Judgment No. 2019-UNAT-911

**Judgment**

29. The case is remanded to the UNRWA DT.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> 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 29<sup>th</sup> day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar