



UNAKRT

United Nations Assistance to the Khmer Rouge Trials

THE UNITED NATIONS ADMINISTRATIVE JUDGE

Case N°: 002/28-11-2013-UNAJ

Before: Judge Rowan DOWNING

Greffier: Anne-Marie BURNS

Date: 13 December 2013

PUBLIC REDACTED VERSION

**DECISION ON APPEAL AGAINST ADMINISTRATIVE DECISION ON
RECONSIDERATION OF THE APPLICATION REQUESTING FUNDING FOR LEGAL
CONSULTANT'S FLIGHT TO THE OFFICE OF THE CO-LAWYER**

Co-Lawyer

[REDACTED]

UNAKRT Coordinator

[REDACTED]

**Head of the UNAKRT
Defence Support Section**

[REDACTED]

**Special Nominee for UNAKRT Defence
Support Section**

[REDACTED]

THE UNITED NATIONS ADMINISTRATIVE JUDGE (the “UNAJ”), upon appointment by the UNAKRT Coordinator on 28 November 2013, is seized of the “Appeal against ‘Administrative Decision on Reconsideration of the Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer’, rendered by Nominee, on 2 October 2013” (the “Appeal”),¹ filed by [REDACTED] (the “Co-Lawyer”).

I- INTRODUCTION

1. This Appeal concerns an administrative decision issued on 2 October 2013 by a Nominee acting on behalf of the Defence Support Section (the “Nominee” and the “DSS”, respectively) rejecting the Co-Lawyer’s application to reconsider a decision by the Head of the DSS denying the Co-Lawyer’s request for the flight of the Defence team’s Legal Consultant to his office in June 2013 to be authorised and funded under the ECCC Legal Assistance Scheme (the “Impugned Decision”).² The Impugned Decision follows a Decision on Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer issued by the UNAJ on 25 June 2013, setting aside the previous decision issued by the Head of the DSS in respect of the Co-Lawyer’s travel request and remitting the matter for reconsideration by an Officer other than the Chief of the DSS to be nominated by the UNAKRT Coordinator (the “Decision of 25 June”).³

a. Background

2. On 29 April 2013, the Co-Lawyer requested the Head of the DSS to authorise a flight for the Defence teams’s Legal Consultant from Phnom Penh to his office in Amsterdam in June 2013 (the “Travel Request”).⁴ The request was based on paragraph A.2 of the Guide to the Legal Assistance Scheme (the “Guide to the LAS”), which states:

¹ Appeal against “Administrative Decision on Reconsideration of the Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer”, rendered by Nominee, on 3 October 2013, dated 24 October 2013 and forwarded to the UNAJ by the UNAKRT Coordinator on 28 November 2013.

² Administrative Decision on the Reconsideration of the Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer, 2 October 2013 (the “Impugned Decision”).

³ Decision on Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer, 25 June 2013 (the “Decision of 25 June”).

⁴ Email from the Co-Lawyer to the Head of the DSS, 29 April 2013, filed by the Nominee on 3 December 2013 as Attachment 6b).

“*Travel to Cambodia*. Legal Consultants will be paid one flight at the beginning and end of their assignment. They are also entitled to one return flight every six months to the office of their Co-Lawyers upon prior authorisation.”⁵

3. The Travel Request was denied by the Head of the DSS on 30 April 2013.⁶ A subsequent request for reconsideration was rejected by the Head of the DSS on 3 May 2013.⁷ The Head of the DSS reiterated his response not to authorize the flight on 15 May 2013⁸ following a request by the Co-Lawyer “to explore on short notice the possibilities for an amicable solution”,⁹ pursuant to Section 11.1 of his contract with the United Nations (the “Legal Services Contract”) (altogether, the “DSS Decision”).
4. On 17 May 2013, the Co-Lawyer requested the UNAKRT Coordinator to appoint a United Nations Administrative Judge to hear the “non-fee dispute” between himself and the Head of the DSS in respect of the DSS Decision. On 21 May 2013, the undersigned was nominated as the UNAJ with the referral “to look into the admissibility or otherwise of the [Application], and if admissible to hear the [Application] and advise the [Coordinator of UNAKRT] of [the] findings”.¹⁰
5. On 25 June 2013, the UNAJ issued his Decision of 25 June, after having given the parties the opportunity to file the relevant documentation and submissions in respect of the matter. The UNAJ found that the Head of the DSS erred in the exercise of his discretion and disregarded basic principles of procedural fairness when deciding on the Travel Request, thereby invalidating the DSS Decision. The UNAJ further considered that the Head of the DSS “displayed, in this matter, at least, an appearance of prejudice and bias” and recommended his disqualification from rehearing the matter and that another officer

⁵ Guide to the ECCC Legal Assistance Scheme, adopted by the DSS, as amended on 1 February 2009.

⁶ Email from the Head of the DSS to the Co-Lawyer, 30 April 2013, filed by the Nominee on 3 December 2013 as Attachment 6b).

⁷ Email from the Head of the DSS to the Co-Lawyer, 3 May 2013, filed by the Nominee on 3 December 2013 as Attachment 6b).

⁸ Email from the Head of the DSS to the Co-Lawyer, 15 May 2013, filed by the Nominee on 3 December 2013 as Attachment 8b).

⁹ Email from the Co-Lawyer to the Head of the DSS, 8 May 2013, filed by the Nominee on 3 December 2013 as Attachment 8b).

¹⁰ Decision of 25 June, para. 4.

be nominated to decide anew on the Travel Request.¹¹ Specifically, the UNAJ directed the Nominee to be appointed to consider the Co-Lawyer's request *afresh* and decide, in accordance with the terms of the Legal Services Contract and the Guide to the LAS, whether the requested travel is "reasonable and necessary for the provision of legal advice to and representation of the [Co-Lawyer]'s client", taking into account "the applicable law, the relevant facts and material" and, if necessary, "mak[ing] thorough inquiries with all those concerned before reaching to a decision".¹²

6. On 24 July 2013, the Nominee was appointed by the UNAKRT Coordinator "to make an *a fresh* review and new decision or decisions in respect of the Travel Request", in "compliance with the directions of the UNAJ" set forth in the Decision of 25 June.
7. On 2 October 2013, the Nominee, after having requested the Co-Lawyer and the Head of the DSS to provide "documentation that was previously submitted to the UNAJ"¹³ and the Co-Lawyer to provide "the supporting documents for [the Travel Request]"¹⁴ and the monthly joint Action Plans submitted to the DSS for the months of April through to September 2013,¹⁵ issued the Impugned Decision, rejecting "the application requesting reconsideration of the funding for the Legal Consultant's flight to the office of the Co-Lawyer".¹⁶

b. The Appeal and Appointment of the UNAJ

8. On 30 October 2013, the Co-Lawyer requested the UNAKRT Coordinator "to appoint a United Nations Administrative Judge (UNAJ) to hear a 'non-fees dispute' as provided for in paragraph 11.1 of the Legal Services Contract [...] concern[ing] the refusal by the Nominee [...] to authorize the release of funds for the flight of the Defence team's Legal

¹¹ Decision of 25 June, paras 115-116.

¹² Decision of 25 June, paras 104 and 116 and Disposition.

¹³ Impugned Decision, para. 8.

¹⁴ Impugned Decision, para. 6.

¹⁵ Impugned Decision, para. 11.

¹⁶ Impugned Decision, Conclusion, p. 15.

Consultant to [his] office in Amsterdam in July 2013”¹⁷ and submitted the Appeal, dated 24 October 2013, to the Coordinator.

9. On 28 November 2013, the undersigned was appointed by the UNAKRT Coordinator to “look into the admissibility or otherwise” of the Appeal,¹⁸ which was forwarded to him. By his Appeal, the Co-Lawyer seeks the UNAJ to i) declare “the present dispute” admissible; ii) reverse the Impugned Decision and iii) “order the Head of the DSS to pay to the [Co-Lawyer] the expenses of the flight of the Legal Consultant to Amsterdam in July 2013”.¹⁹
10. On the same day, the UNAJ issued Directions setting out the procedural rules applying for the consideration of the Appeal and directing, *inter alia*, i) the Nominee to file the Impugned Decision and all files and documents relevant to the Appeal, in her possession or that of the DSS, by 3 December 2013; ii) the Co-Lawyer to file all authorities and evidence upon which he seeks to rely and advise whether or not he requests an oral hearing to be held prior to determination of the Appeal, by 5 December 2013; iii) the Nominee to file a reply to the Appeal, together with all authorities and evidence upon which she seeks to rely, by 9 December 2013 and iv) the Co-Lawyer, if so advised, to file a reply by 12 December 2013.²⁰
11. On 3 December 2013, the Nominee filed the Impugned Decision together with twenty documents that she used in her “Review of Administrative Claim”.²¹
12. On 5 December 2013, the Co-Lawyer indicated that he did not request an oral hearing on the Appeal and filed eight additional attachments.²²

¹⁷ Letter from the Co-Lawyer to the UNAKRT Coordinator entitled “Request for Appointment of United Nations Administrative Judge”, 30 October 2013, para. 1.

¹⁸ Letter from the UNAKRT Coordinator to the undersigned, 28 November 2013. *See also*, Letter from the undersigned to the UNAKRT Coordinator, 28 November 2013, accepting the appointment.

¹⁹ Appeal, “Requested Relief”, pp. 8-9.

²⁰ Directions for the Conduct of Proceedings, 28 November 2013.

²¹ DSS Nominee’s Documentation used in Review of Administrative Claim, dated 2 December 2013 but filed on 3 December 2013.

²² Response to United Nations Administrative Judge Directions concerning the Appeal against ‘Administrative Decision on Reconsideration of the Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer’, rendered by Nominee, on 2 October 2013, 5 December 2013.

13. On 9 December 2013, the Nominee similarly indicated that she did not request an oral hearing nor had “any additional pleadings to submit”.²³
14. On 9 December 2013, the UNAJ advised the parties that he will determine the Appeal on the basis of written submissions alone and that the pleadings were closed. The UNAJ hereby delivers his decision.

II- ADMISSIBILITY

15. The Co-Lawyer submits that this matter can be brought back before the UNAJ under the provisions in the Decision of 25 June that “liberty to apply is reserved”.²⁴ The Co-Lawyer also submits that the UNAJ has inherent jurisdiction to ensure compliance with his Decision of 25 June which, he alleges, has not been complied with by the Nominee.²⁵
16. It is recalled that the Impugned Decision concerns the reconsideration of the DSS Decision, finalised on 15 May 2013, rejecting a request by the Co-Lawyer for a travel of the Defence team’s Legal Consultant in June 2013 to be *authorised* and funded under the ECCC Legal Assistance Scheme. The reconsideration followed directions issued by the UNAJ in his Decision of 25 June, whereby the latter was similarly seized of an application by the Co-Lawyer to review the DSS Decision. The evidence now before the UNAJ reveals that the Legal Consultant took a flight from Phnom Penh to Amsterdam on 15 June 2013, from which he returned on 14 July 2013.²⁶ The fact of the travel having been commenced without the prior approval first being obtained was not disclosed to the UNAJ when he was seized of the Co-Lawyer’s application to review the DSS Decision and had not issued his decision, notwithstanding that this fact had significant impact on the very issue for consideration before the UNAJ. The Co-Lawyer should not have ignored his duty to inform the UNAJ of this change of circumstances.
17. The substratum of the Travel Request was for the authorisation of travel under paragraph 1(A) of the Guide to LAS, which is indeed a requirement for any travel to be funded

²³ Response to the Direction for the Conduct of Proceedings, 9 December 2013.

²⁴ Appeal, para. 3.

²⁵ Appeal, para. 4.

²⁶ See Flight Reservation Confirmation *and* email from the Legal Consultant to the Nominee, 30 July 2013, filed by the Nominee on 3 December 2013, Attachment 3 c) (the “Flight Reservation”).

under the ECCC Legal Assistance Scheme. The Legal Assistance Scheme, under which Defence Lawyers representing indigent defendants before the ECCC are remunerated by the United Nations for their professional services and related expenses, requires that expenses such as travel be justified and approved by the DSS prior to being undertaken. The obligation to obtain prior authorisation before a Legal Consultant undertakes travel to the office of a Co-Lawyer under the Legal Assistance Scheme is explicitly and clearly set out in paragraph A(2) of the Guide to LAS. Article 9.5 of the Legal Services Contract also provides most clearly for a similar “prior authorisation” in the case of travel request being made by a Co-Lawyer for himself. The authorisation is more than a mere formality given, *inter alia*, that travel under the Legal Assistance Scheme is not an entitlement but rather intrinsically linked with the need to accomplish specific tasks assessed as reasonable and necessary for the effective representation of a defendant before the ECCC. These tasks must similarly be detailed and approved beforehand, following the terms of the Legal Services Contract.²⁷ It is a basic principle of good governance and administration of funds by international organisations that expenses be justified by the claimant and approved by the organisation prior to being expended. This ensures that funds are only used for legitimate and properly authorised purposes, are appropriately budgeted and allocated and are spent in a transparent manner which is capable of proper audit. There cannot be any proper control on spending if expenses incurred are later claimed, notwithstanding that prior approval had not been given. Indeed, legal aid policies at other international tribunals similarly require justification and prior approval for travel undertaken by Defence Counsel or members of Defence teams.²⁸ Prior

²⁷ See Article 7.1 of the Legal Services Contract (stating that Defence Counsel shall submit to DSS for approval “a joint Action Plan outlining *in detail* the tasks to be completed in order to provide effective legal advice and representation to the Accused and allocating those tasks and the hours required to complete them to individual members of the defence team”); Article 9.2 of the Legal Services Contract (“Only tasks that were outlined in the proposed Action Plan [...] shall be compensated under this Contract, save that unforeseen, necessary and reasonable tasks will be paid if justified by the Contracting Co-Lawyer.”) and Article 9.3 of the Legal Services Contract. See also, along the same lines, Article 22 of the Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia (“A prior agreement may be concluded determining either the fee schedule or the method of establishing remuneration. In case of disagreement, the President may be designated as arbitrator (sic.) by the parties.”)

²⁸ See ICTY Defence Travel and DSA Policy, 1 January 2007 (as amended on 1 August 2011), Part II, Section A, paras 1 and 6; New Lump Sum System for the Remuneration of Defence Teams at ICTR, ADM09-0004/REV.1 (F), 2009, paras 57 and 60; STL Defence Travel and Allowances Policy, STL/PL/2011/02/Rev.1, 6 October 2011 (as amended on 4 April 2012), paras 21, 22 and 25; ICC Regulations of the Registry, ICC-BD/03-01-06 -Rev.1, 6 March 2006 (as amended on 25 September 2006), Regulation 134(4)).

authorisation to travel is also required as a general rule in the United Nations system as a whole.²⁹

18. Given that the Legal Consultant undertook the travel on 15 June 2013, the request for prior authorisation thereof became moot as of that day. Furthermore, the Co-Lawyer did not seek to apply for or assert a right to seek an interlocutory measure that would allow his Legal Consultant to undertake the travel and be reimbursed in case of the dispute being resolved in his favour. In the light of the foregoing, the Decision of 25 June was rendered moot by the travel having been commenced without prior approval before the decision was delivered. The Decision of 25 June and all that flowed from it was based upon a false premise.
19. A similar situation was repeated before the Nominee. Despite the travel having been undertaken and completed before the case was even assigned to the Nominee by the UNAKRT Coordinator, the Co-Lawyer did not seek to amend his request or file a new one to reflect the fact that he was no longer requesting authorisation for a prospective travel but was rather claiming reimbursement of expenses related to a travel that had already been undertaken.³⁰ Most surprisingly, the Co-Lawyer did not even file with the Nominee any document to justify the expense that has actually been incurred and the work that may have been done. The Co-Lawyer only filed a confirmation of a flight ticket reservation through the internet, dated 10 May 2013, under the name of the Legal Consultant, which contained no proof of payment. Moreover, the Co-Lawyer did not put forward any justification or explanation for his Legal Consultant having undertaken the travel without first obtaining prior authorisation.³¹

²⁹ See Staff Rules and Staff Regulations of the United Nations, ST/SGB/2013/3, 1 January 2013, Rule 7.4.

³⁰ Indeed, the Co-Lawyer did not file any submission to the Nominee. The sole reference to the fact that the trip has actually been undertaken can be found in the email sent by the Legal Consultant to the Nominee on 30 July 2013, to which the flight ticket reservation was attached.

³¹ For instance, the United Nations Administrative Tribunal found that, in the exceptional circumstances of the case at hand, a staff member who undertook an official trip without the authorisation of the United Nations could be reimbursed of the expenses incurred on the basis of the principle of unjust enrichment, given that the staff member showed that he acted in good faith and that his travel benefited the organisation. See United Nations Administrative Tribunal, Judgement No. 638, Case No. 709: TREGGI, 13 July 1994.

20. By now seeking *reimbursement* for a travel undertaken by the Legal Consultant without a prior authorisation, the Co-Lawyer is trying to bring before the UNAJ a dispute that is fundamentally different in nature than the one brought before and addressed by the Nominee in the Impugned Decision and that the UNAJ has been appointed to resolve under Article 11.1. of the Legal Services Contract. The dispute subject to the present review has crystallised with the Impugned Decision and it ill-behoves the Co-Lawyer, given his conduct in this case, to attempt, by a surreptitious recouching of the matter, to modify it in the course of these proceedings before the UNAJ, which are limited to a review of the decision considering a matter of prior approval of travel by the Legal Consultant. There is no issue of consideration of reimbursement validly brought before the UNAJ in these proceedings. The Co-Lawyer was under a fundamental professional duty to immediately inform the UNAJ and the Head of DSS of any change of circumstances or facts in respect of the matter prior to the Decision of 25 June which would have affected the review being then undertaken. Equally, he was under a duty to clearly advise the Nominee of the change of circumstances. He did not discharge this duty properly or at all. The Appeal is therefore not admissible under Article 11.1 of the Legal Services Contract.
21. Further, notwithstanding the findings above, the Appeal would also be found inadmissible, without entering into the merits of the Travel Request, on the basis that the Co-Lawyer requests *reimbursement of an expense* under the terms of his contract for which first, he does not set out the amount claimed and, second, he gives no indication nor is there any assertion being made that the Co-Lawyer has personally incurred the cost of the flight ticket of the Legal Consultant.

III- DISPOSITION

22. For the foregoing reasons, the UNAJ:

DECLARES the Appeal inadmissible.

Dated this 13th day of December 2013



Judge Rowan DOWNING



Greffier Anne-Marie BURNS