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Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

CONTENTS (*continued*)

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. Norway

EIDSIVATING HIGH COURT

APPEAL AGAINST THE JUDGEMENT OF THE OLSO CITY COURT: JUDGEMENT OF 30 SEPTEMBER 1991

Dismissal of an officer who served in the Norwegian UNIFIL force in Lebanon for undertaking journalistic work in the area in contravention of the order—Objective basis for barring the appellant from carrying out this work—Appellant's claim for compensation for wrongful dismissal—Duty of UNIFIL personnel to remain neutral in the conflict—Question of whether the appellant was obliged under international law to undertake the acts from which he was ordered to abstain—Validity of the decision of the Norwegian Ministry of Defence

JUDGEMENT

Terje Marøy undertook, by contract of September 1987, to serve in the Norwegian UNIFIL force in Lebanon. His period of service was to last from 15 October 1987 to 31 October 1988, and Marøy left for Lebanon immediately. On 1 February 1988, it was decided to repatriate him and he was sent home two days later.

By decision of 28 May 1988, the Akershus Defence District/Fourth Akershus Infantry Regiment dismissed Marøy from the post he held pursuant to the UNIFIL contract. His subsequent appeal was rejected by the Ministry of Defence by decision of 23 June 1988.

Terje Marøy instituted legal proceedings demanding that his dismissal be declared invalid, and he has demanded compensation and redress for wrongful dismissal. Failing that, he has demanded that he should at any rate receive salary for the period up to the delivery of the judgement.

The parties are essentially agreed on the facts of the case. The central events leading to Marøy's dismissal are as follows:

Following several visits to Gaza, Marøy submitted at the turn of the month November/December 1987 a reader's letter to the *Jerusalem Post* and sent two articles to *Dagbladet* (a Norwegian daily). It is not clear if the reader's letter was published. All three pieces attacked Israel for violations of human rights.

Following the outbreak of the Palestinian uprising, the *intifadah*, the UNIFIL headquarters issued an order barring UNIFIL personnel from visiting Gaza. Marøy applied for permission to go there as a journalist. UNIFIL headquarters, to which Marøy had sent the application, replied that they had no objection in regard to Marøy's post as journalist, but that Marøy first had to obtain permission from the commander of the Norwegian UNIFIL force.

Colonel Nils G. Fosland, Acting Commander of the Norwegian UNIFIL force, refused Marøy permission to travel to Gaza to undertake journalistic work. The circumstances are set out in a memorandum of 28 January 1988 from Colonel Fosland to the Norwegian UNIFIL commander, Colonel Strømmen:

"Report on Major Terje Marøy, UNIFIL headquarters, for failure to comply with orders

"1. In the absence of Colonel Wegger Strømmen in the period 13-24 January 1988, the undersigned acted as the Norwegian UNIFIL commander.

"2. On Wednesday 20 January I received a telephone call from Major Terje Marøy, UNFIL headquarters. He informed me of his wish to enter the refugee camps in the Gaza Strip in his off-duty time in order to carry out journalistic work and send reports to the press in Norway. He also informed me that he had obtained permission to do this from ACOS OPS, Colonel Peltier, but that the approval of the Norwegian UNIFIL commander was required for the journey to take place. I informed the Major that working as a journalist in the refugee camps in the Gaza Strip was NOT consistent with the duty of UNIFIL personnel to remain neutral in the conflict. The Major was therefore refused permission to undertake such a journey.

"3. On the evening of Saturday, 23 January 1988, I received a further call from Major Marøy informing me that he had undertaken the journey in keeping with his earlier statement. He had visited two refugee camps. He had done this because he disagreed with my decision, and because he was entitled to spend his off-duty time as he saw fit.

"4. I ordered Major Marøy to present himself to NORCO on Monday, 25 January 1988, to explain his position.

"5. With reference to BFN 52 - 2, annex B (a declaration to be signed by Norwegian United Nations personnel confirming their awareness of various rules of conduct), point 2 and point 3 *a*, I request that the case be investigated."

Marøy has denied that he had gone to Gaza after being refused permission to do so and has also denied that he had said that he had made the journey.

The meeting referred to in the memorandum was held on 28 January 1988. Colonel Strømmen upheld the order he had issued to Marøy. Marøy

was given 24 hours to think through the matter and thereafter wrote the following note addressed to Colonel Strømmen:

"I will not refrain from writing about Israel's occupation of Gaza, and the human rights violations committed there.

"I will in the near future, in a comparative report, view the Israeli conduct in the context of the Nazi conduct in Norway in 1940-1945.

"My position as described yesterday remains unchanged."

Marøy was then repatriated and subsequently dismissed. He has received salary throughout the period of his contract. While it is true that payment of salary was halted for a brief period, neither this fact, nor the grounds for it, have any bearing on the case.

On 31 August 1989, the Oslo City Court delivered judgement in the case with the following conclusion:

"1. Judgement is given in favour of the Norwegian State, represented by the Ministry of Defence.

"2. Costs are not awarded."

Terje Marøy has appealed against the judgement within the prescribed period and has submitted the following final claim:

1. That the decision of the Ministry of Defence of 23 June 1988 be declared wrongful and invalid.

2. That the Norwegian State, represented by the Ministry of Defence, pay compensation to Terje Marøy up to a maximum amount of NKr 342,000.

3. That the Norwegian State, represented by the Ministry of Defence, pay the costs of the case in both courts.

The Norwegian State, i.e., the Attorney-General in the person of Mr. Erik Møse, lawyer, has replied by submitting the following claim:

1. That the judgement of 31 August 1989 of the Oslo City Court be affirmed.

2. That the Norwegian State, represented by the Ministry of Defence, be awarded the costs of the case in the High Court.

The appeal hearing was held in the period 27-29 August 1991. The appellant appeared and explained his position. Five witnesses were examined, of which three were new to the City Court. The court record shows the documents produced in evidence. The details of the case are also evident from the judgement of the City Court and from the statement, reproduced below, of the High Court. Pursuant to the provisions of the Working Environment Act, four lay judges participated in the hearing.

The appellant, Terjé Marøy, asserts in essence the following:

A majority of the City Court has committed an error in its application of the law. Insufficient grounds are given for the dismissal. Moreover, the

Ministry of Defence has committed a procedural error. There are no material objections to the assessment of the evidence.

A minority of the City Court has arrived at a correct conclusion, and in the brief grounds explaining its conclusion it has alighted on the pivotal point in the case. Had Marøy received the information to which he was entitled, the question of dismissal would never have arisen. The very repatriation decision is encumbered with errors. During his off-duty visits to Gaza, Marøy had become aware that Israel had committed a series of human rights violations. He wished to report these violations and thereby contribute to putting a stop to them. He was uncertain how he should go about making such a report and sought information from his superiors. He received no information and therefore wrote two articles for *Dagbladet* and a reader's letter for the *Jerusalem Post*. The latter is unlikely to have been published.

Pursuant to the Fourth Geneva Convention with Additional Protocol, it was incumbent on Marøy to report the injustices, and he was entitled to guidance on how he should proceed. Marøy has cited article 144 of the Fourth Geneva Convention, and articles 85, 86 and 87, paragraphs 1 and 2, of Additional Protocol I. He has also cited section 11 of the Public Administration Act. Norwegian personnel in Lebanon are subject to Norwegian jurisdiction, and the rules of the Norwegian Public Administration Act therefore apply.

This has a bearing on the repatriation decision. Marøy was entitled to be informed that a repatriation decision is in practice irreversible. Had he been so informed, he would have prepared a statement to the repatriating officer, Colonel Strømmen, that was broader in scope and more complete.

True enough, Marøy was ordered not to go to Gaza, and he was also ordered not to write newspaper articles. It is doubtful whether Colonel Fosland, who issued these orders, was entitled to do so. Marøy went to Gaza in his off-duty time, and the newspaper articles were written in his off-duty time. In all events, Marøy would have proceeded differently had he been told that a repatriation decision was in practice irreversible. His main concern was to bring the human rights violations he had learned of to the attention of the appropriate authorities.

The decision to repatriate him is also unreasonable. It is not the intention that any and all breaches of duties and rules should result in repatriation. Moreover, what are to be deemed sufficient grounds for repatriation in a given case must be evaluated against the background of the prevailing repatriation practice. There is no doubt that a number of officers have committed breaches of discipline, some of them serious, without incurring repatriation. Cases of drunken driving are cited.

Moroever, IR4's dismissal decision is encumbered with procedural errors. Marøy was entitled to negotiate the matter before any decision was taken. True enough, a meeting was held, but this did not involve substantive negotiation. It was simply a meeting at which Marøy explained his view. No overtures were made.

The Ministry of Defence decision on the appeal is also encumbered with procedural errors. It is clear from the Ministry's decision that the Ministry's choice of emphasis differed from that of IR4. The Ministry has attached crucial importance to Marøy's acts in the period 20-29 January 1989. Had Marøy been told this in advance he could have drawn attention to circumstances which would have made the Ministry realize that he had done nothing in this period to warrant dismissal.

Thus it is not correct that Marøy had been in Gaza against orders. Lieutenant-Colonel Fosland's memorandum is incorrect in this respect. Rather, Marøy's desire to go to Gaza and report his experiences to newspapers was rooted in a wish to prompt a dialogue on how he could bring the injustices to the attention of the pertinent authorities.

The injustices were of such a nature that they overshadow all other aspects of the case. It was absolutely necessary to bring to light these injustices so that they could be brought to an end. Protection of lives was at issue, including the lives of women and children.

The dismissal has had major financial repercussions for Terje Marøy. As a result of his dismissal he was out of work up to 27 August 1990. Given the currently very tight labour market, it is very difficult for dismissed employees to obtain employment. He is therefore entitled to receive salary for his period of unemployment. He is in receipt of salary for the period to 31 October 1988. In addition to salary he claims compensation for injury to his reputation and other harm of a non-economic nature. These items combined constitute the sum of his claim.

Under any circumstances he is entitled to receive salary covering the duration of the case, as provided in section 19 of the Civil Service Act. This claim is limited to the period in which he was out of work.

Counsel for the respondent, i.e. the Norwegian State represented by the Ministry of Defence, has essentially taken his stand on the judgement of the City Court which is considered to be correct in its conclusion and essentially in its grounds. The advocate calls attention above all to the following:

The case concerns the Ministry of Defence decision of 23 June 1988, i.e., neither the decision to repatriate Marøy nor IR4's decision to dismiss him.

The repatriation decision is a United Nations decision whose validity cannot be contested in Norwegian courts of law. Furthermore, it was made on grounds of fact and the administrative procedure was sound.

IR4's decision was the subject of an appeal and in such a case it is only the decision of the administrative appeal body that can be tested by submission to a court.

The competence of the courts of law is limited to the extent that only the legality of the decision may be tested and not the administrative appeal body's assessment of the case. Attention is drawn to *Norwegian Supreme Court Reports 1982*, p. 1729, and ibid., *1988*, p. 664.

The Ministry of Defence decision to dismiss Marøy was in pursuance of section 15 of the Civil Service Act. Marøy had acted improperly and had breached the confidence that is required.

The decision is not encumbered with procedural errors. The Ministry of Defence position is based exclusively on the content of the documents of the case, with which Marøy was well acquainted. It is not claimed that the Ministry of Defence position is based on errors of fact. No procedural error is implied by the fact that the Ministry's choice of emphasis differed somewhat from that of IR4. Marøy was not entitled to be notified of this in advance.

Furthermore, Marøy adduced no reasons or excuse of relevance to the case when he refused to obey orders and announced his intention to go ahead with an activity which had been expressly prohibited.

There has been no unlawful act or omission on the part of any Norwegian or, for that matter, United Nations agency.

Marøy has received the guidance to which he was entitled to the extent that he requested such guidance. It is not correct that Marøy asked how he should go about reporting occurrences that he may have observed or been apprised of by other means. Moreover, it is in itself improbable that an officer with the rank of major would be unfamiliar with the reporting routine. In any event, Marøy's superiors have not construed his approach as a request for guidance on how he should report matters he considered to be of importance.

For the sake of completeness it should be pointed out that no significance can be attached to any error that may have been committed in this respect.

It is not correct that Marøy was obliged under international law to undertake the acts from which he was ordered to abstain by his superiors.

As regards the claim for compensation, the Norwegian State has pointed out that Marøy has received salary up to the date on which his contract expired. He is not entitled to any additonal salary. Reference is made to section 7 of the Civil Service Act.

The High Court has arrived at the same conclusions as the City Court and has the following comments:

As pointed out by the Ministry of Defence, the case concerns the legality of the Ministry's decision of 23 June 1988 whereby Marøy's appeal was rejected and his dismissal accordingly affirmed. The courts of law can try the legality of the decision, i.e., the assessment of evidence, the procedure employed and the application of the law. The administrative appeal body's assessment of the case cannot be reviewed.

The High Court finds that no procedural errors encumber the decision of the Ministry of Defence, and cites the arguments adduced by the Norwegian State which are endorsed by the court.

The Court finds that Marøy's acts in the period 20 to 29 January 1988 were of such nature as to warrant his dismissal pursuant to section 15 of the Civil Service Act.

After the production of evidence at the appeal hearing, the High Court finds it to be established that Marøy, in a telephone conversation with Colonel Fosland on 23 January 1988, said that the journey to Gaza had been carried out. It is not necessary to decide whether Marøy really had gone to Gaza in contravention of the order issued to him. The Court would, however, remark that it is incomprehensible why Marøy should say that he had gone to Gaza if he had not done so.

The order issued to Marøy not to go to Gaza and to cease the journalistic activity he had commenced had an objective basis. His articles were polemical and emotional. They did not refer to personal experience. UNIFIL considered them detrimental to UNIFIL's activity in Lebanon, an assessment which the Court considers to be objective. As far as the Court can understand, UNIFIL personnel were prohibited from going to Gaza on security grounds. There was no reason why this prohibition should not apply to Marøy too.

The order was clear and unambiguous. Marøy was given 24 hours to think the matter through, after which he gave written notification that he would act in contravention of the order.

Accordingly the Court finds that there is no basis for holding the decision of the Ministry of Defence to be invalid. For the sake of completeness, and regard being had to Marøy's vigorous argument, the court adds:

Marøy was not obliged pursuant to any human rights provision to write the articles he wrote. Nor was he under any obligation to report the matters about which he had been told. That he could have submitted a report through the official channels is another matter, in the event he did not do so.

Furthermore, the Court is unable to go along with Marøy's contention that his primary wish was to ascertain how he should go about reporting human rights violations. Neither of his superiors—Colonel Strømmen and Colonel Fosland—had been given to understand that Marøy requested guidance on the procedure for reporting. The only written material cited in the case is Marøy's letter of 10 January 1987 to the Legal Affairs Department of the Norwegian Ministry of Foreign Affairs, the military prosecutor and the Norwegian UNIFIL force commander, Colonel W. Strømmen. This letter does not come across as a request to be told the procedure for reporting. At all events the recipients of the letter have not construed this to be what Marøy was requesting. Marøy could be in no doubt that the recipients—in the first instance Colonel Strømmen—had not construed the letter as an inquiry about reporting channels. If this was the question to which Marøy desired a reply, it should have been a simple matter for him to put the question clearly.

Accordingly, judgement must be found in favour of the Norwegian State, represented by the Ministry of Defence, in regard to the demand

that the dismissal be declared wrongful and invalid and in regard to the claim for compensation based on wrongful dismissal.

Furthermore, the Court finds that under section 19 of the Civil Service Act Marøy has no further claim to salary than what he has already received. He has received salary up to 31 October 1988, i.e., up to the expiry of his contract. He is entitled to this and no more; cf. section 7 of the Civil Service Act. Section 19 of the Civil Service Act merely states that complaints and lawsuits have suspensive effect, but does not state that a civil servant is entitled, irrespective of other legal relationships, to salary as long as the case is pendent.

Accordingly, the judgement of the City Court must be affirmed. The Norwegian State has submitted no claim to the effect that it should be awarded the costs of the case in the City Court. The appeal has been unsuccessful, and pursuant to the main rule set out in section 180, first paragraph, of the Civil Procedure Act, the appellant is ordered to pay the costs of the case in the High Court. The costs are set at NKr 25,000 in accordance with the statement submitted.

The judgement is unanimous.

CONCLUSION OF THE JUDGEMENT

1. The judgement of the City Court is affirmed.

2. Terje Marøy is ordered to pay the costs of the case in the High Court, totalling 25,000—twenty-five thousand—kroner, to the Norwegian State within 2—two—weeks of the service of the judgement.

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2. Sweden

SUPREME ADMINISTRATIVE COURT

APPEAL AGAINST THE JUDGEMENT OF THE FIRST INSTANCE
JUDGEMENT OF 13 NOVEMBER 1991

Request of a member of UNIFIL concerning his relief from taxation—Alleged higher cost of living of the applicant during his service with the United Nations—Question whether the applicant suffered an increase of personal living costs

A BRIEF SUMMARY[1]

In a judgement of 22 October 1990, the Country Administrative Court (Länsrätten) in Mariestad rejected the claim of Mr. L. Weghagen, who had served with the United Nations Interim Force in Lebanon, concerning relief from taxation owing to higher costs of living during his service with the United Nations.

On 8 February 1991, the Administrative Court (Kammarrätten) in Gothenburg upheld the judgement of the court of first instance. The appli-

cant applied for leave to appeal to the Supreme Administrative Court. Leave was refused on 13 November 1991. Consequently the judgement of first instance stands.

Facts:

Mr. L. Weghagen from Skövde, Sweden, served with the United Nations Interim Force in Lebanon during the taxation year of 1989. Owing to the fact that Mrs. Weghagen was resident in Israel during four months of the time when Mr. Weghagen was stationed in Lebanon, Mr. Weghagen was forced to pay for the upkeep of two households, an apartment in Israel and an apartment in Sweden.

The County Administrative Court considered Mr. Weghagen's alleged higher costs of living in the light of the fact that he, during his service, enjoyed both free food and accommodation through the United Nations. Furthermore, 20 per cent of the per diem allowance paid by the Swedish Government was exempt from taxation.

Owing to these facts, Mr. Weghagen could not be considered as having suffered an increase of personal living costs. The costs resulting from his wife's residence in Israel must be considered as personal, but not deductible costs.

NOTE

[1] Submitted by the Permanent Mission of Sweden to the United Nations.