Supreme Court of Justice
Appeal Case No.: 184/2009

Decision

Issued by the Supreme Court of Justice, held in Ramallah, which is authorized to conduct the trial and issue its sentence on behalf of the Palestinian Arab people;

Judging Panel Presided by her honor Judge Iman Nasir al-Din
And the following honorable judges as members: Mr. Hisham Hato, Mr. Rafiq Zuhd, Mr Amr Ibrahim, and Salah al-Manna.

Appellant: Mr. Nadir Ahmed Najy Amr / Hebron.
Represented by advocates: Gandhi Amin, Moussa Abou Dehim, Farid al-Atrash, Walid Ala'yssa and Mohammed Ri'bi

Respondents:
1) The Minister of Education and Higher Education in his personal and professional capacity
2) President of the General Personnel Council, in his personal and professional capacity

Procedures:

On 18/5/2009, the Appellant filed an appeal for the revocation of decision No WT/40/964474035/104 issued by the Minister of Education Higher Education on 19/1/2009 which suspended the Appellant from work as of 8/2/2009, and the revocation of decision No. TA/110 429 issued by the Head of the General Personnel Council (GPC) on 3/12/2008, that was referred to in the letter of the Minister of Education.

In the notice of appeal, the Appellant bases his request for nullification of the contested decision on the following reasons:

1. The contested decision contains gross violations of the legal provisions, specifically the provisions of the Civil Service law.
2. The contested decision is arbitrary, tarnished by abuse of power, does not provide the legal justification on which it was based as required by the law, and is unfair that the Appellant.
3. The contested decision is not based on any legal justified or actual reasons.

Consequently, the Appellant requests the issuance of a junction (a temporary decision) followed by a revocation of the contest decisions whereas the decision is considered null and void, in addition to requesting that respondents pay the Appellant's expenses and legal representation fees.
In the preliminary hearing, and upon reiterating the notice of appeal and presentation of the Appellant's explanations provided in exhibit No (A/1), the Court issued a provisional decision and summoned the Respondents to clarify the reasons behind the contested decisions and the reasons prohibiting the issuance of the requested appeal.
On 30/6/2009, the Public Prosecution filed its reply and requested the cancelation of the provisional decision and the dismissal of the appeal.

The Public Prosecution reiterated its justifications and responses, then the two parties presented their final argument that reiterated their requests, and submissions, and justifications of each party.

The Trial

After deliberations, scrutiny and perusal of the documents on the case in question, the court finds that the Appellant's representative filed the case on 18/5/2009 to appeal the aforementioned decision of the Minister of Education referred to, dated 19/1/2009, as well as to appeal the aforementioned letter of the head GPC dated 3/12/2008.

Whereas the court finds that the Appellant reported in the notice of appeal that he was appointed by the Minister of Education through an appointment letter that reads the following: "It was decided to appoint you as a school teacher at the Directorate of Education/Southern Hebron in a classified temporary position as of the date of job assumption provided that all pre-requisites for appointment were completed…. etc".

Whereas Minister of Education and Higher Education issued her contested decision that reads "with reference to the letter of the GPC, and given the non-approval of the competent authorities of your nomination/appointment to the cadres of the Ministry of Education, your are kindly required to handover all effects in you disposition and terminate your work as of the date indicated in this notice".

The Appellant also challenged the letter issued by of the head of the GPC that was referred to in the letter of the Minister of Education, as stated in the notice of appeal, but was not provide in the Appellant's documents.

The Public Prosecution raised several arguments that can be summarized as follows:

1. The Case should be dismissed in form, as it has neither been supported by a legal justification nor based on a sound legal basis.
2. The Appellant was appointed to the Ministry of Education's cadre as a schoolteacher provided that the prerequisites for appointment are completed. As stated in the contested decision, the Appellant's had not completed the prerequisites for appointment.
3. The decision issued by the Minister of Education is a preliminary rather than a final decision. As such, the decision has not invoked on the Appellant any acquired rights from the administration, and is not subject to appeal before the judiciary. The letter issued by the Minister of Education is not considered a decision for termination or dismissal.

Upon examination of to appointment decision issued to the Appellant, we find that it states the following "It was decided to appoint you as a schoolteacher at the Directorate of Education/ Southern Hebron in a classified temporary position as of the date of job assumption provided that all pre-requisites for appointment were completed…. etc." This indicates that the decision is dependent upon the fulfillment of several conditions, namely the fulfillment of all pre-requisites for appointment provided for in Article (14) through (29) of Chapter II the Civil Service Law No (4) of 1998. These articles are an extension of Article (7/4) of the same law which states that the

GPC shall review the administrative promotion and appointment decisions issued by the governmental department which is obliged to inform the GPC of within fifteen days of their issuance”. According to the same article, the GPC “may object to what it deems contrary of the provisions of this Act and the regulations in force on civil service. The GPC should inform the governmental department of the reasons for its objection within thirty days of notification. In case of disagreement between the GPC and the governmental department, the issue id referred to the Council of Ministers to take appropriate action in accordance with the provisions of this law”

Since finality of the administrative decision is the most important of its characteristics and qualities to make it appealable before the Supreme Court of Justice, we find that this condition is not fulfilled in the case before our hands. In all laws concerning the Supreme Court of Justice of Palestine, the legislator requires all decisions subject to appeal to be final, i.e. enjoys of the necessary characteristics of legal existence obtained through the exhaustion of all practical and preparatory phases for its issuance in an executable format and capable of invoking its legal effects without the need to any subsequent procedure. The phrase “provided that all prerequisites for appointment are completed” implies that there are certain conditions and deficiencies and that appellant should fulfill. This also means that the appointment decision is not final but rather a preparation and/or a prelude for taking the final decision. It is therefore not subject to nullification before the Supreme Court of Justice. Therefore, this decision remains one of the negative preliminary decisions as long as the Appellant as not completed the pre-requisites for appointment. In the event that the Appellant fulfills such pre-requisites, the decision becomes non-conditional. Both of administrative justice and jurisprudence define the administrative decision as “a disclosure of the administration’s own will, with the authority granted to it under the laws and regulations, with the intention to create or amend a legal status whenever possible or legally permissible”. This definition entails that to be subject to appeal before the Supreme Court of Justice, the decision must be executable and capable of generating a legal effect.

In addition, the appointment decision in question has not created a legal effect or impact for the Appellant since it does not indicate the workplace or the name of city or village in which the Appellant would work. The decision does not specify his rank or define the working hours so that the Appellant could claim any damages or harm ensuing from this decision. Therefore, we find that the content of the appointment decision does not amount to rank of administrative decisions subject to appeal before the Supreme Court.

As for the second decision on the cancellation of nomination and/or appointment, based on the GPC’s letter informing of the non-approval of the competent authorities on the nomination and/or appointment on the Cadre of the Ministry of Education and Higher Education, we find that the contents of this decision too do not qualify as an administrative decision subject to appeal to the Supreme Court of Justice since it signifies a procedure and/or measure subsequent to the aforementioned decision.

According to ruling No. 320/98 issued by the Supreme Court of Jordan, and cited in Page 2904 of 1999, the qualifications of decision subject to appeal were specified as follows:

“With reference to the first contested decision, the Court finds that it was conditionally issued upon the fulfillment of certain conditions. Given the fact that Article No (9/A/9) of the Law on

the Supreme Court of Justice, the law does require administrative decisions to be final before they become subject to appeal before the Supreme Court. Both the administrative justice and jurisprudence define the administrative decision as "a disclosure of the administration's own will, with the authority granted to it under the laws and regulations, with the intention to create or amend a legal status whenever possible or legally permissible. This definition entails that to be subject to appeal before the Supreme Court of Justice, the decision must be executable and capable in itself of generating a legal effect. Accordingly, the Minister of Health's decision to "grant the respondent a license to open a pharmacy in the Tlla'a Al Ali area provided that the she adheres to Law on Practicing Pharmaceutical Profession" is not capable of generating the said legal effect to the respondent because the decision has not designated the specific place intended for opening he pharmacy. Therefore the Appellant may not claim he has suffered damages due to the opening of a new pharmacy nearby his own pharmacy. As long as it does not specify a certain place for the new pharmacy, the contested decision does not amount to the level of administrative subject to appeal for revocation before the Supreme Court of Justice. Therefore, the case is dismissed for lack of court's jurisdiction in the subject matter and in accordance with the law".

Moreover, Article (31) of the Civil Service Law stipulates that "if the new employee successfully completes his/her probationary period, the head of concerned governmental department shall issue a decision to permanently appoint him/her in the post as of the date of assumption of work. The GPC should be sent a written notification to this effect". In court ruling No 442/2006 page 1770 of 2007, the Supreme Court of Justice of Jordan states that "according to Article (59/a) of the Civil Service law of 2002, the designated official appointed to the civil service for the first is appointed on a probationary basis for two years as of the date of commencement of work at his/her job. His/her services shall automatically expire at the end of that period unless a decision for permanent appointment to the service is issued by the competent appointment authority. Since no such permanent appointment was issued, the Appellant is considered not-appointed"

On the other hand, the law requires several administrative procedures be completed prior to the issuance of many administrative decisions. The long process culminates in the issuance of the administrative decision while taking into consideration hat nomination per se does not constitute an administrative decision even thought that the first contested decision contains the phrase "provide that pre-requisites for appointment are completed" which indicates a number of procedures and issues that must be fulfilled before a final, and full, administrative decision could be issued, provided for in Article (25) of the Civil Service Law. If such issues and procedures are not met, the administrative decision would not happen.

In page 1003 of the Encyclopedia of Administrative Justice, Dr. Ali Khattar Shatnami states that "it should be noted that the civil servant status must be available in the offender at the time of committing the criminal act not later. The offender must legally be a civil servant rather than a de-facto employee. The later is a person who in certain circumstances assumes a certain position and exercises the authorities assigned to it and makes the decisions conferred upon him/her by this position either because of non-existence of legal qualification (i.e. no appointment decision is issued) or hindered an illegal qualification. Consequently, the person has the status of a de-facto employee in case s/he receives qualifications to assume such a post (through appointment, election, or delegation), although this qualification remains illegal. The illegality of qualification

sometimes occurs at the beginning (through illegal election, appointment or delegation) and sometimes later in the process (as in the case of terminating the services of civil servant for whatever reason".

Furthermore, the Court of Justice of Jordan issued a decision No. (62) of 1994, page 3176 of 1995 to stipulate that "only the Supreme Court of Justice is mandated to address appeals filed by stakeholders in relation to appeals filed by the concerned persons with regard to final administrative decisions on appointments to public office, annual promotion, salary increase, transfer, secondement, or loaning pursuant to Article (9/A/2) of the Law on Supreme Court of Justice No. (12) of 1992. In other words, no stakeholder may appeal negative decisions to appointment to a public office, but may only challenge positive appointment decisions. Therefore, an appeal incorporating the negative appointment of the Appellant is considered a negative decision not subject to appeal for nullification. Therefore, the Supreme Court of Justice does not have the jurisdiction to address this case. In accordance with Article (9/3) of the Law on Supreme Court of Justice is specifically concerned with appeals filed by civil servants who already have established employment relationship with the governmental department.

In the case before discussion, the Appellant did not finalize the pre-requisites for his appointment which entails that this appeal is dismissed in form for lack of jurisdiction. In addition, the nullification case is considered a real action

In addition, the abolition case is considered an in-kind litigation involving the litigation on the administrative decision itself. The justice of nullification per se is not a dispute between two parties in the technical sense, but the adversarial relationship is with the administrative decision itself. This is not a case against the Administration as much as it is directed against the flawed decision himself which means that the adversary in this case is the administrative decision itself. If there is an administrative decision, there is an appeal for nullification; otherwise it is not possible to nullify a non-existent decision. The objective in this case is to try the same administrative decision to determine the extent of its legitimacy whereas the focus is on the decision itself.

In this case, an appeal for nullification requires the contested decision must be a full and final administrative decision. Otherwise, the court will dismiss any case for nullification of any decision other than full and final decisions.

For these reasons

For all of the above, we took a majority decision to dismiss the appeal case for lack of jurisdiction.
A decision issued by majority and is publicly recited on behalf of the Palestinian Arab people.
It is explained as of 17/03/2010.

President:
Clerk:
Checked by:

Dissenting Opinion of Honorable Judges
Iman Nasir Al-Din
And
Salah Manna

We the dissenting judges respectfully disagree with the majority opinion in their conclusions upon which the ruling is based. Upon examination of reasons for the appeal and the evidence presented to the court, as indicated in the exhibit No A/1, the Court concluded that the Appellant was indeed appointed upon a decision by the Minister of Education as a school teacher in Hebron provided that the first year in service is considered a probationary period. The court also concludes from exhibit No (A/1) which included a letter from the General Director of Directorate of Education dated 26/8/2008, that the Appellant was issued an appointment decision as a schoolteacher at Zaatari Basic School.

Therefore, we base our dissenting decision on the fact the place of appointment was indeed specified in the appointment letter. The court's decision of dismissal on the ground of not specifying the place of appointment is not warranted and contradicts the facts and documents in this case. On the other hand, upon examination of the Respondent's arguments for the dismissal of the case on the following grounds: -

1) The approval of competent security authorities is one of the pre-requisites for appointment on at PNA institution, in pursuant to a decision of the Council of Ministers made in its weekly meeting No. 18 that was held on 3/9/2007.
2) The GPC is the competent authority in issuing appointment decisions in accordance with the provisions of Article (25) of the Civil Service Law No. (4) of 1998. In addition, the GPC has not issued the Appellant a final appointment decision while the appointment decision issued by the Minister of Education for the Appellant to assume his job was a preliminary decision conditional upon successful passage of medical and security examinations as well as upon satisfaction of all appointment pre-requisites. The letter of the Minister of Education is not considered a dismissal decision given that no final appointment decision was issued to the Appellant from the competent authority (i.e. the General Personnel Council).
3) The decision of the Minister of Education and Higher Education is a decision that revealed that of the GPC, and therefore is an affirmative decision.

Upon the application of the provisions of the law on the facts in this case and the reasons upon which the Respondent relied, we find that:

First: with regard to approval of security agencies as a condition for appointment, the court finds that the provisions of Articles (25) and (26) of the Palestinian Basic Law guarantee every Palestinian the rights to work, participate in the political life both individually and collectively, and hold public office and functions on the basis of equal opportunities. To apply these provisions that guarantee basic citizens rights and human values, it is necessary to put in place various controls for holding public office appropriate for the nature of such jobs. These controls must not involve anything beyond the conditions, qualifications, experiences, and skills otherwise, the principle of equality and equal opportunities becomes devoid of any value. In

addition, the Civil Service Law No. 4 of 1998 is in line with the provisions of the Basic Law, particularly with Articles (24) and (25) which did not provided for the obtainment of security agencies as a condition for appointment to any public office. The only conditions stipulated in both articles is that the appointee to a public office should be in enjoyment of his/her civil rights and convicted by a competent Palestinian court of felony or misdemeanor involving moral turpitude or dishonesty unless s/he is cleared of all charges.

Both of the General Intelligence Law of 2005 and the Preventive Security Law of 2007 have addressed this issue in a clearer manner. For example, Article (13) of the aforementioned General Intelligence law states that "the General Intelligence shall take into account the rights and guarantees set forth in the Palestinian laws and the standards of international law in this regard". In addition, Article (8) of the Preventive Security Law obliges the Preventive Security to respect the rights and freedoms enshrined in the laws and international conventions. Neither law contains any provision that necessitates the approval of the General Intelligence or the Preventive Security agencies on the appointment of employees to public office.

Based on all of the above, the decision of the Council of Ministers dated 3/9/2007 that introduced the security clearance as a condition for appointment must be considered non existent (null and void) because it violates basic rights guaranteed by the Basic Law and contradicts three laws on the Civil Service, General Intelligence and Preventive Security.

Furthermore, this decision may not in any way have any retroactive effects that encroach upon the rights of employees appointed prior to its issuance, including the Appellant. We have also to refer to the Council of Ministers' Decision No (35) of 2006 which eliminated security clearance as a condition that must be fulfilled by candidates to public office. This decision by the Council of Minister is published in the Palestine Gazette No (68) dated 7/3/2007.

Secondly: In its final oral argument, the Public Prosecutors indicated that the final appointment decision is issued by the GPC and that the decision of the Minister of Education and Higher Education is a decision that affirmed the prior one issued by the GPC. We find that this conclusion is inconsistent with the provisions of the law for the following reasons:

A. Article (18) of the Civil Service Law No (4) of 1998 explicitly listed the category of civil servants to which the Appellant belongs under the jurisdiction of the head of the concerned governmental department.
B. Article (7) of the Civil Service law sets forth the functions and responsibilities of the GPC. Paragraph (4) of this article includes in the functions "the review of administrative decisions issued by the governmental department responsible for civil servants appointment and promotion that must be informed to the GPC within fifteen days of their issue date. The GPC may object to what it deems contrary to the provisions of the law and regulations in force on the civil service".

C. The phrase "the appointment of the employee in the service is considered effective as of the date of the employee's notification in writing to this effect by the governmental department at which s/he is affiliated to and works at" does not entail that the appointment decision is under the GPC jurisdiction. The phrase means the GPC shall

notify the appointee and it should be read with the provisions of Paragraph (4) of Article (7) of the aforementioned law. The law grants the GPC the right to object to the appointment decision in case it was contrary to law and regulations in force on civil service. In this case, the GPC must inform the concerned governmental department of the reasons for its objection within thirty days of notification of appointment decision".

D. The fact that Minister of Education and Higher Education did issue the appointment decision to the Appellant and that the thirty days objection period had passed without the objection from the GPC, make the decision legally enforceable. In addition, the Appellant did assume his job as evidenced by exhibit (A/1). All of that refute the Public Prosecution's claim that the contested decision can not be considered a dismissal from office because the Appellant had not been issued any appointment decision from the competent authority. The Prosecution's claim contradicts both fact and law and therefore is not justified.

Thirdly: In its concluding argument, the Public Prosecution claimed that the Minister of Education's decision revealed the prior GPC's decision and this is considered an affirmative decision not subject to appeal. This claim contradicts the earlier claim that the Appellant had not been issued a decision for dismissal from service because the Appellant had not been issued an appointment decision at all.

In addition, the court examined the letter of the GPC head, which reads that "kindly be informed that the appointment procedures have not been completed for the persons included in the attached list because the security agencies have not recommended their appointment". We believe that this letter does not entail the revocation of the appointment. The letter informed the Minister of Education and Higher Education of the security agencies' non- approval of the appointment and by doing returned to the Ministry the original justifications for appointment for the ministry to decide. The Minister of Education and Higher Education had indeed issued the contested decision, which suspended the Appellant from work and ordered him to hand over whatever in his custody.

Based on all of the above, we find that the disclosed reason upon which the administration based its decision to terminate the Appellant's services, i.e. failure to obtain security clearance, is incompatible with the law and the provisions of Article (105) of the Civil Service Law and Article (37) of the regulations of the same law, both of which specified the cases where the civil servant's services are terminated during and after the end of the probationary period.

Thus, the civil servant become a permanent employee after the expiry of the probationary period and becomes entitled to enjoy the right to be guaranteed protection from dismissal, termination or suspension unless upon a legal justification requiring such a measure. Therefore, the safeguards established by the legislation are mandatory and any departure from which is considered a violation of the law and its provisions.

With regard to the termination of civil servant's service, we believe that the general legal principle is that the employee is immune from dismissal unless s/he commits a criminal act or neglects his/her responsibilities and after being questioned and held accountable in accordance

with the provisions of the law. The procedures also identified the measures and conditions that the administrative authority must take into account and strictly adheres to.

Since Paragraph (1) of Article (10) of the Amended Palestinian Basic Law of 2003 stipulates that human rights and fundamental freedoms shall be binding and must be respected, and since the administrative justice and jurisprudence agree that a sound administrative decision must not be rescinded or canceled, we believe that it is in the best interests of the individual and the public to safeguard the acquired rights of any individual against our whims.

Therefore, and given that the contested decision is refuted by the grounds for appeal, we believe that the appeal is acceptable in the subject matter and call for the nullification of the contested decision for its lack of a sound legal basis.

An opinion issued and publicly recited in the name of the Palestinian Arab people and explained on 17/03/2010.

Clerk: **Dissenting President:**
Checked by: **Iman Nasser Edin**