

ILF-West Bank

The International Legal Foundation – West Bank

CASE NOTES – October to December 2010

Editor's Notes: Welcome to the first edition of the ILF-West Bank Case Notes. These Case Notes will be published every two months and will provide readers with changes in criminal defense practices in the civilian Palestinian court system. We hope you will find them useful. This first edition will deal with two key issues: the right of juveniles over 15 years of age to sign a contract with a lawyer without the prior approval of a parent or custodian and pretrial detention periods.

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As of January 17, 2011, judges in the conciliation court of Ramallah will be ordered by the Chief Judge to accept the contract between a lawyer and a juvenile for free legal services with the signature of the juvenile only.

In the Matter of Anonymous (a juvenile) (ILF-WB No. 8) (Attorney Ali Bazzar)

Courts in Ramallah have traditionally required the signature of a parent to accept the representation of a juvenile by a lawyer. ILF-West Bank lawyers were asked to represent three juveniles over 16 years of age. Two had parents who signed a contract with ILF-West Bank lawyers, but the parents and guardians of the third never came to Ramallah to sign. ILF-West Bank filed the application for bail in all three cases but submitted a contract signed by the juvenile himself in the third case. The court released the two juveniles with parental signatures but rejected the contract of the third juvenile, who remained in custody. The unfairness of the parental signature requirement was obvious. By delaying representation of juveniles while waiting for the signature of a parent, courts are keeping juveniles in detention when they could be freed on bail. ILF-West Bank successfully challenged the practice.

Indeed, there is no legal authority for the parental signature requirement, particularly when the lawyer offers his services at no cost and when the juvenile is over 15. On the contrary, the requirement appears to violate Basic Law 12 and 14 and its right to counsel provision as well as the Criminal Procedure Code, the Juvenile Reform Act, The Ottoman Code (applicable to contract in Palestine), the Convention on The Right of the Child, and the ICCPR.

Both the Basic Law and Criminal Procedure Code guarantee the right to counsel for the accused. Basic Law Article 12 guarantees a person arrested – long before charges are filed – the opportunity to contact a lawyer. The Criminal Procedure Code (C.P.C.) Article 8 guarantees “the accused,” defined as anyone against whom a penal action is initiated, the right to counsel. A number of provisions in the C.P.C. make it clear that the accused has a right to counsel at the time of interrogation under C.P. C Articles 96 (1) and 102. Article 98 of the C.P.C. provides that a defendant may be interrogated without counsel in cases where the person is caught in *flagrante delicto*, implying that counsel must be present during interrogation in all other cases. These rules are consistent with The International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child. ICCPR Article 14 (3) provides that in criminal cases “everyone shall be entitled” among other things, “to communicate with counsel of his own choosing” and “to be tried without undue delay . . . through legal assistance of his own choosing.”

There is no right-to-counsel exception for juveniles. On the contrary, under Article 37 (b) and (d) of the Convention on the Rights of the Child “no child shall be deprived of his or her liberty unlawfully or arbitrarily” and “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court.”

The Ottoman Manual governing the law of contracts and gifts in Palestine provides further support for the right of a juvenile – over 15 – to accept free services from a lawyer without a signature from a parent. The offer of free legal services is a gift. Under section 859 of the Ottoman Code, as long as the donor (here the lawyer) “is of sound mind,” the gift is valid. As stated in section 967, even the disposition of property entered into by a minor of imperfect understanding, if purely for his own benefit, such as the acceptance of gift and presents, is valid, without the assent of a tutor.

In addition, it appears that 15 is a pivotal age in criminal justice matters. Under C.P.C. Article 226, a person over 15 can testify under oath, and under C.P.C. Article 6 (1) a juvenile over 15 may file a complaint while a person under 15 can only do so through a guardian or custodian. Finally, the Juvenile Reform Act (1954) Article 13 draws a distinction between the court’s role in the treatment of juveniles above and under 15. Convinced by the above arguments, the chief judge of the conciliation court in Ramallah agreed to send out a circular to all judges to accept the signature of a juvenile over 15.

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Pre-trial detention periods are also misunderstood. The common understanding is that a defendant may be detained for six months as a matter of course before an indictment is filed under Criminal Procedure Code 120. Such an

interpretation of section 120 violates the most basic rule of statutory interpretation that every section of a statute must be given meaning.

In the Matter of K. Omar, (ILF-West Bank No. 6) (Attorney Hani Jahaleen)

Our client was accused, along with two codefendants, of the theft of a computer in a school. He was arrested on August 8, 2010 and had been detained ever since. By the January-third court date, he had been detained for four-and-a-half months.

Pretrial detention is governed by Criminal Procedure Code Section 120, which provides:

1. The conciliation judge may, after hearing the statements of the representative of the Public Prosecution and the accused, release or detain the accused for a period of not more than fifteen days. He may renew his detention for other periods to an aggregate maximum of forty-five days.

2. No person may be detained for a period longer than that prescribed in para (1) above, unless an application for his detention is submitted by the Attorney General or one of his assistants to the court of first instance. In such case, the period of detention may not exceed forty-five days.

3. The Public Prosecution is held to present the accused before the expiry of the three-month period referred to in the two preceding paragraphs to the court competent to try him in order that it extend his detention for further periods until the trial is over.

4. The period of detention referred to in the three preceding paragraphs may under no circumstances exceed six months, otherwise the accused shall be released immediately, unless he is referred to the court that is competent to try him.

5. In all cases, an arrestee's detention may not continue for longer than the period of the penalty prescribed for the crime by reason of which he is detained.

In essence, under subsection (1), the conciliation court may grant the prosecution a request for extension of detention of no more than 15 days at a time for up to 45 days. Under subsection (2), after the first 45 days, additional extensions can be granted only by the court of first instance for periods of no more than 15 days at a time for up to 45 days.

By then, a defendant has been detained for three months, and the statute provides, under subsection (3), that before the three-month period has passed, the public prosecutor must present the accused to the court who has the authority to try him – in misdemeanor cases carrying less than three-year sentences that would mean going back to the conciliation court – to extend “his/her detention for further periods until the trial is over.”

Under subsection (4), the period of allowable detention following the three-month period referred to under the prior three subsections, is three months. Under no circumstances may the period exceed six months under this subsection, “unless he is referred to the court that is competent to try him.” By providing separate subsections for the second three months of detention, the statute implicitly imposes on the prosecution a different burden of proof to justify additional detention.

ILF-West Bank made that argument successfully. The court released the client after four months because the prosecution had made no special showing of need. The prosecution simply repeated the same reasons, “danger and investigation,” for six months. While the factual issue has not come up in any case accepted so far by ILF-West Bank, it seems that after 6 months, the court must conduct the trial and cannot simply detain the accused endlessly while the trial proceeds since subsection (3) refers to time for detention until the trial “is over.”

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