

ILF-West Bank

The International Legal Foundation – West Bank

CASE NOTES – January and February 2011

Editor's Notes: This second issue of the Case Notes discusses ILF-West Bank's as yet unsuccessful attempts to get courts to rule on the admissibility of evidence before trial, to accept the defendant's right to counsel in conciliation courts, and to follow the universal principle that detention pending trial should be an exception and not the rule.

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Seeking pretrial evidentiary rulings.

In the Matter of A. (A juvenile) (ILF-West Bank 23) (Attorney Hani Jahaleen)

Our client, A., is charged with murder. At the time of the incident he was 14 years old. He was arrested at his house at midnight, five hours after the killing occurred, and taken to the police station alone. In the police car on the way to the station, he was allegedly threatened, and shortly after arriving at the station he made a statement.

Most civil law jurisdictions — unlike common law jurisdictions — admit all evidence at trial and then weigh the value of the evidence depending on a number of factors, including whether it was illegally obtained. The laws of Palestine can be interpreted otherwise. The Palestinian Basic Law and the Criminal Procedure Code (CPC) identify evidence that is deemed null and void. Basic Law Article 13 provides in part that all statements or confessions obtained through duress or torture “shall be considered null and void.” Furthermore, CPC Section 474 provides that “a procedure is deemed to be null when the law expressly provides for its nullity.” Clearly, if a procedure is a “nullity,” the evidence gathered as a result is also a nullity. If not, the rule that a procedure is void would be meaningless. In looking at illegally obtained confessions, it is clear that the Basic Law intended to give no weight to confessions obtained by torture or duress.

Although it is not the practice, a court in Palestine may rule on the “nullity” of evidence before trial. Under CPC Section 415, the nullity of a procedure “may be invoked **at any stage** of the proceeding or pronounced by the court *sua sponte*” (emphasis added). “Any stage” must include the pretrial stage. Given these rules, ILF-West Bank is arguing that the courts should rule on the admissibility or inadmissibility of confessions before trial to avoid having the illegally obtain confession taint the evidence presented at trial.

In the case of A., on the day of arraignment, the ILF-West Bank lawyer objected to the prosecution reading the charges against A. on the grounds that the charges were based on illegally obtained — and therefore null — evidence. ILF-West Bank essentially sought a pretrial evidentiary ruling on the admissibility of the

statements. The court surprisingly agreed to hear the motion but denied it, ruling that it needed more evidence about the circumstances of the confession and that evidence would be presented at trial.

This was a first step. The next step will be to convince the courts that evidence regarding the circumstances surrounding a confession can be heard in a separate proceeding before trial. Such procedures would streamline criminal proceedings and potentially reduce the delays endemic in the criminal justice system.

In the Matter of B., (ILF-West Bank 24) (Attorney Ali Bazaar)

This case involved the possession of hashish. As in the previous case, B. had made a statement to the police during the pretrial investigation. ILF-West Bank attempted to argue that the confession had been obtained illegally, but the court again refused to rule on the issue before trial, preferring to wait until further evidence was presented at trial.

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The right to counsel in conciliation courts.

In the Matter of H. Bitar (ILF-West Bank 26) (Attorney Ali Bazaar)

Before being represented by counsel, Mr. Bitar was charged and convicted with fraud for “passing” a bad check. He was sentenced in the Conciliation Court to three months imprisonment. The sentence was converted to a fine equivalent to five Jordanian dinars for each day of imprisonment. Unable to pay, the client began to serve his sentence. ILF-West Bank entered the case and successfully applied for bail pending appeal. On appeal, ILF-West Bank is arguing that the client’s courtroom confession was null and void because the Conciliation Court never asked him if he wanted to obtain legal representation.

In the Palestinian court system, there seems to be an understanding that conciliation courts, which have jurisdiction over non-felony cases, have no obligation to ask defendants if they have obtained counsel. The basis for this practice seems to be Basic Law 14, which provides that “any person accused of a **felony** shall be represented by a lawyer” (emphasis added) and CPC section 244, which is applicable to courts of first instance, provides that “the court asks the accused if he has chosen a defense counsel and, if he has not done so because of the paucity of his financial resources, the president of the court appoints one for him from among the lawyers who have practiced at the bar.”

While these provisions guarantee free counsel in felony cases, it does not remove the obligation of the conciliation courts to ask defendants if they have obtained counsel. Indeed, CPC Section 307 expressly provides that the provisions of Chapter V, which are applicable to first instance courts, apply to trial procedures before conciliation courts. Since CPC Section 244 requires courts to ask defendants if they have obtained counsel, the conciliation courts must do the same. The appeal was argued February 12, 2011, and a decision is expected shortly.

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As discussed in the first edition of the Case Notes, courts are very lenient in granting the prosecution's demands for pretrial detention.

In the Matter of Hamlawi (ILF-West Bank 30) (Attorney Nael Ghannam)

This client was charged with using and possessing drugs. Drug offenses in the Palestinian Civil Law system are prosecuted under Israeli Military Orders. Before going into the arguments made in this case, a few words may be helpful to understand the basis for the continued applicability of Israeli Military Orders in the civilian Palestinian court system. Basic Law Article 118 provides in part that “law, regulation and decisions in force in Palestine before the implementation of this law shall remain in force ... until they are amended or repealed in accordance with this law.” This provision raises the question of whether Israeli Military Orders are correctly to be considered as having been “in force” at the time of the enactment of the Basic Law. Article XVIII of the second Oslo Agreement, which deals with the legislative powers of the Palestinian Authority, states that “legislation shall mean any primary and secondary legislation, including basic laws, laws, regulations and other legislative acts” and refers in another context to “legislation, including legislation which amends or abrogates existing laws or military orders.” It implicitly suggests that the parties to the agreement considered that such orders could remain in force. As a result, drug crimes are prosecuted under Israeli Military Orders.

In this case, our client was charged under Israeli Military Order 558. He apparently confessed to the police but exercised his right to remain silent under the CPC Section 217 when questioned by the public prosecutor. In court, the prosecutor asked the court to remand our client during investigation. ILF-West Bank attempted to oppose the request on the grounds that there was no reason for detention. The investigation could be conducted without further detention.

CPC Section 119, governing pretrial detention, provides that “if the procedures of the investigation entail the detention of the arrestee for more than twenty-four hours, the deputy prosecutor may request the conciliation judge to extend the detention for a period of fifteen days.”

By stating that detention is appropriate when the “procedures of investigation” so require, the statute establishes a link between the investigation and the need for detention. In other words, the prosecutor must demonstrate that there is an identifiable risk that the accused will interfere with the investigation if not detained and, thus, obstruct the evidence-gathering process. Requiring the prosecutor to demonstrate that link is entirely consistent with Basic Law Articles 11 and 14, guaranteeing the right to liberty and the presumption of innocence. The prosecutor in this case did not demonstrate the need for detention during investigation nor show a risk of flight.

Interestingly, the court rejected all the arguments on the grounds that they could be made only in support of a request for bail and not in opposing a request for detention. The court's explanation is somewhat perplexing, since opposing detention is essentially a request for bail, and both are governed by the same rights under the Basic Law. An appeal to the Court of First Instance was filed and rejected.

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Implementing the statute of limitations.

In the Matter of Omar (ILF-West Bank 22) (Attorney Hani Jahaleen)

CPC Section 12 provides that “the prescription period for the penal action and the civil action is ten years in felonies, three years in misdemeanors and one year in contraventions, unless otherwise provided by law.” Our client was charged under Section 407 of the Jordanian Penal Code with theft. The incident allegedly occurred on June 30, 2007. The charges were filed on December 12, 2010, or more than three years later. The court agreed with ILF-West Bank and dismissed the charges. Had he not been represented, the action would probably have proceeded.

The ILF would like to thank Stephen Lawrence, a criminal defense lawyer from Australia, currently on leave from the Aboriginal Legal Service NSW/ACT Ltd (Western Zone), for his volunteer services as an International Fellow at ILF-West Bank. For additional information about ILF-West Bank, its lawyers, and its mission, please visit the ILF website at www.TheILF.org.

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