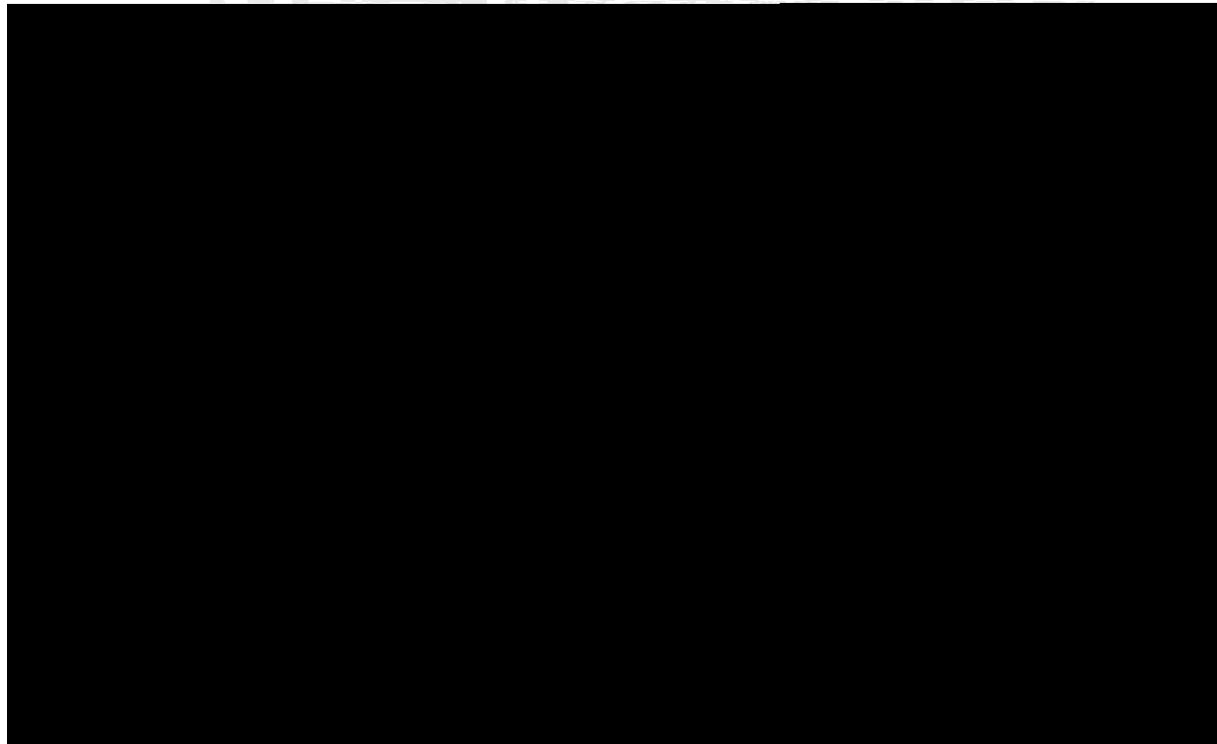




Judgment No. 2019-UNAT-914



Counsel for Appellant: Aleksandra Jurkiewicz, OSLA

Counsel for Respondent: Paul Dooley, UNJSPF

JUDGE JOHN RAYMOND MURPHY , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Samuel Oglesby against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (Standing Committee and UNJSPB, respectively) which was communicated to Mr. Oglesby on 6 August 2018. Mr. Oglesby filed the appeal on 5 November 2018, and the United Nations Joint Staff Pension Fund (UNJSPF or the Fund) filed its answer on 21 December 2018.

Facts and Procedure

2. Mr. Oglesby, a national of the United States of America, participated in the Fund for approximately 25 years (from 29 May 1973 to 31 December 1998), as a staff member of the United Nations Development Programme (UNDP). Upon his separation from service in 1998, Mr. Oglesby opted for a reduced early retirement benefit (with one-third lump sum) under Article 29 of the UNJSPF Regulations.

3. Even though he had lived in a same-sex relationship with his partner, Mr. Ariady Nurdin, since 1982, throughout his participation in the Fund , and also at the time of his separation from service, Mr. Oglesby was reported by the UNDP to the Fund as *single*. At the time of Mr. Oglesby's separation from service on 31 December 1998, same-sex marriage was not legal in any country. Same-sex marriage was legalized in the United States of America on 26 June 2015. On 23 April 2018, twenty years after his separation from service, but after having lived together continuously for thirty-six years, Mr. Oglesby and Mr. Nurdin married one another in New York.

4. Because same-sex marriage was not legally possible in any country on the date of Mr. Oglesby's separation, Mr. Nurdin *prima facie* did not qualify for th

5. On 24 April 2018, the day after his marriage, Mr. Oglesby visited the Fund's office in New York to inquire whether he could include Mr. Nurdin as his surviving spouse under Article 35. Mr. Oglesby provided proof of their shared life such as their joint bank account statements since 1989, their joint home owners' insurance policy, and their joint home ownership. Mr. Oglesby was advised that he did not meet the conditions therein and accordingly, Mr. Nurdin would not be recognized as Mr. Oglesby's surviving spouse.

6. On the same day, the Fund's legal officer addressed an e-mail to Mr. Oglesby, which read:

Your query regarding recognition of your husband, Mr. Nurdin, as your prospective surviving spouse under the Regulations of the [UNJSPF] was referred to the Legal Office for review [...].

Under [A]rticles 34 and 35 of the Fund's Regulations, in order for a spouse to be recognized as a prospective survivor, the participant and his or her spouse must have been married at the time of the participant's separation from service and must have remained married until the participant's death. Given that you and Mr. Nurdin were not married at the time of your separation from service in December 1998, he does not meet the requirements under [A]rticles 34 and 35 of the Fund's Regulations. As you may be aware, in 2016, the Pension Board extended the interpretation of marriage to include unions and registered partnerships that are legally entered into in the jurisdiction where the status is established and that confer similar legal rights as marriage, including pension rights. However, the application of the guidelines is not retroactive. Moreover, even under the expanded recognition of unions and registered partnerships, *de facto*

In the case of a participant such as yourself who marries after separation from service, Article 35^{ter} of the Regulations provides for the option of purchasing an annuity in the spouse's favour.

Finally, I note that, in 2016, the United Nations Joint Staff Pension Board extended the interpretation of "*marriage*", for the purpose of [A]rticles 34 and 35, to include "*unions/registered partnerships lawfully entered into and legally recognized by the competent authority of the location where the status was established as long as the union confers similar legal effects as marriage, specifically including pension rights.*" That change was prospective in nature and, therefore, applies to active participants in the Fund, for whom the Fund will recognize marriages or unions and partnerships that are equivalent to marriage based on the jurisdiction in which they were entered into. However, even if the Pension Board's extended interpretation of marriage had existed at the time of your separation from service, your relationship with Mr. Nurdin would still not have met the requirements of Article 35 of the Fund's Regulations, because at the time of your separation from service your relationship with Mr. Nurdin did not confer similar legal effects as marriage in the United States, including pension rights.

11. On 18 May 2018, Mr. Oglesby filed a request for review of the Fund's decision to the Standing Committee. The Standing Committee considered the case at its 20th meeting held on 24 July 2018 and upheld the decision of the UNJSPF. By letter dated 6 August 2018, Mr. Oglesby was informed of the Standing Committee's decision. The pertinent part of the letter reads:

After reviewing all the documents, the Committee decided to uphold the decision of the Secretary/CEO. The Committee based its decision on the fact that you married Mr. Nurdin on 23 April 2018, after your separation from service on 31 December 1998. The Committee found that, since you were not married to Mr. Nurdin at the time of your separation from service, Mr. Nurdin does not meet one of the fundamental requirements for eligibility for a widower's benefit under Articles 34/35 of the Fund's Regulations. As concerns the fact that it was not possible for you and Mr. Nurdin to marry at the time of your separation from service due to the unavailability of same-sex marriage under national law at that time, the Committee recalled that, in line with Pension Board policy, there is no retroactive recognition of marital status, even if there has been a change in national legislation. Under the Fund's Regulations, Article 35^{ter} provides a mechanism whereby a participant married after separation may elect to purchase an annuity for his or her spouse.

12. As noted above, Mr. Oglesby filed his appeal on 5 November 2018, and the Fund filed its answer on 21 December 2018.

Submissions

Mr. Oglesby's Appeal

13. Mr. Oglesby argues that he presented evidence of a 36-year partnership through joint bank account statements, real estate holdings, and other legal agreements throughout several countries wherein they resided. Such partnership, he submits, constitutes a *de facto* common law marriage recognized in many jurisdictions within the United States and other countries. Common law marriage, also known as

16. Mr. Oglesby submits further that the decision based on his marital status has denied him equal protection rights against discrimination, contrary to Article 7 of the Universal Declaration of Human Rights (UDHR) and Article 8 of the Charter of the United Nations (Charter).

17. He argues that staff members who formalize their same-sex marriages after their separation from service, following a change in national legislation, should be entitled to assume that their previous commonly accepted partnerships would be recognized by UNJSPF as such recognition is based on equal protection rights of Article 7 of the UDHR and Article 8 of the Charter noted above. The equal protection principle prevents any discriminatory or differential treatment of two persons in similar situations without an objective and reasonable justification. Article 8 of the Charter enshrines the obligation of non-discrimination. Pursuant to the Appeals Tribunal's jurisprudence, the Charter is part of the staff members' terms and conditions of appointment and is legally binding on the Organization. Thus, the Secretary-General's discretion must be exercised in accordance with Article 8 of the Charter. The principle of equality and right to equal treatment form part of Mr. Oglesby's essential terms and conditions of his employment. In addition, he argues that there is no justification for denying a surviving partner their benefits simply because they were prohibited by discriminatory laws to formalize their union.

18. Mr. Oglesby urges the Appeals Tribunal to consider, as persuasive authority, the rulings of various jurisdictions, which have found situations similar to his own, to constitute a violation of human rights. For example, the European Court of Human Rights indicated that the absence of marriage between two parents is an aspect of personal status that may be a source of discrimination, which is prohibited. The Supreme Court of the United Kingdom held a provision refusing widowed parent benefits because her and her partner of 23 years were not married was incompatible with applicable human rights norms governing non-discrimination.

19. Lastly, Mr. Oglesby argues that the position of the UNJSPF is duplicitous. The UNJSPF's change in interpretation of same-sex marriage to include same-sex partnerships is in line with the large social acceptance of gay marriage that has seen several states finding prohibition of same-sex marriage unlawful; yet it is still interpreting the rules under the old discriminatory practice for staff members who separated before same-sex marriage was legalized. The Fund is retaining a discriminatory practice despite its obligations under the Charter.

20. Mr. Oglesby requests the Appeals Tribunal to rescind the Fund's decision not to recognize his husband as his prospective survivor under Article 35 of the Regulations.

The Fund's Answer

21. The UNJSPF requests the Appeals Tribunal to dismiss the appeal in its entirety and uphold the decision of the Standing Committee, which in turn upheld the decision of the UNJSPF.

22.

former United Nations Administrative Tribunal upheld the Fund's rejection of survivor benefits because he was not married at the time of the participant's death. The former United Nations Administrative Tribunal specifically noted that since the registered partnership was not equivalent to marriage the surviving partner was not entitled to spousal benefits under Articles 34 and 35. Similarly in *Adrian*,⁴ the former United Nations Administrative Tribunal confirmed that a change in policy that led to recognition of a union that was previously not recognized did not apply retroactively.

26. The Fund further argues that Article 35 *ter* specifically covers the case of spouses married after separation and confirms there is no basis on which Articles 34 and 35 can be applied to spouses married after separation. Lastly, the Fund argues that should Mr. Oglesby be exempted from Article 35 *ter* and be permitted to receive survivor benefits under Articles 34 and 35, this would result in an unfair application of the regulations as relates to all other couples in a relationship at the time of separation who were unable to formalize their marriage due to national legislation. This would impose an additional cost on all Fund participants as it expands the availability of survivor benefits beyond the scope intended for in the Regulations and by the Board.

Considerations

27.

recognized in the United States as being akin to a marriage. The Guidelines stipulate that the effective date of recognition of personal status for purposes of spousal benefits follows the effective day of national legislation as well as the actual date of celebration of the marriage/union

34. The universal principle of non-discrimination reflected in Article 8 of the Charter and Article 7 of the UDHR prohibits unfair discrimination on illegitimate grounds including sexual orientation and marital status. Mr. Oglesby submits that Articles 34 and 35 of the Regulations unfairly differentiate between spouses in heterosexual marriages and homosexual persons in same-sex relationships that in the past did not enjoy recognition (the excluded group). Had his relationship been heterosexual there would have been no legal obstacle to marriage and, assuming he had married before separation from service, his spouse would have automatically qualified for a spousal benefit at some time in the future.

35. By granting a benefit to married people that is not granted to the excluded group, the Regulations do indeed differentiate between groups of people. This differentiation overlaps and intersects on three grounds: sexual orientation, family life, and marital status. Mr. Oglesby submits that such differentiation is unfair and thus discriminatory. The exclusion denies homosexual persons the conventional advantages of a family life in which spouses work together to contribute to their financial security; and, more generally, perpetuates harmful and hurtful stereotypes that same-sex relationships are unworthy of the family-oriented characteristics of marriage: consortium, companionship and support. This is demeaning and an invasion of dignity and equality which Mr. Oglesby contends is in contravention of Articles 1 and 7 of the UDHR and Article 8 of the Charter. The enduring discrimination against the excluded group in this specific instance, Mr. Oglesby intimates, is unfair and unjustifiable for that reason.

36. As discussed earlier, the Pension Board in recent years has taken steps to eradicate and ameliorate the unfair discrimination prospectively. Staff members in same-sex relationships, whose relationships are recognized as being akin to conventional marriage by the *lex loci celebrationis*, will, after 2016, enjoy the benefits provided in Articles 34 and 35 of the Regulations, on condition they have not separated from service or were in a legally recognized marriage-type relationship when they separated from service after 2016. The effects of the pre-2016 differentiation, however, endure for the members of the excluded group, including Mr. Nurdin, Mr. Oglesby's spouse, who (unlike a heterosexual spouse) will not receive a survivor's benefit after Mr. Oglesby's death. And the only reason for that is the fact that Mr. Nurdin could not marry Mr. Oglesby at the relevant time owing to past discrimination on grounds of sexual orientation. The differentiation is, accordingly, continuing in nature and effect – it is extant; and Article 35 *ter* of the Regulations, it has been suggested, does not provide adequate redress for gay and lesbian persons because heterosexual participants in the fund who

were married at the time of their separation from service do not suffer the reduction of their retirement benefits (as contemplated in Article 35 *ter*) in order to fund a survivor benefit in the form of an annuity.

37. There is thus merit in Mr. Oglesby's line of argument, but unfortunately the Appeals Tribunal has no remedial power to grant hi

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