

2019-UNAT-914, Oglesby

UNAT Held or UNDT Pronouncements

UNAT found that at the time of his separation from service, the former staff member was not married to his husband; their same-sex relationship did not enjoy similar status to marriage under the law of the US; the Regulations did not afford retrospective recognition of their marriage in 2018; and the Regulations specifically regulated the situation of the former staff member by providing for an annuity under Article 35ter. Therefore, UNAT concluded that under the express terms of Articles 34 and 35, the former staff member's spouse was not entitled to a survivor's benefit. Nonetheless, UNAT found that "[t]here was (...) merit in [the appellant's] line of argument" that the differentiation between spouses in heterosexual marriages and homosexual persons in same-sex relationships was unfair and discriminatory. UNAT, however, held that unfortunately, it had no remedial power to grant the relief sought. UNAT emphasized that it did not have the prerogative to apply the UN Charter or the Universal Declaration of Human Rights directly, nor the power to strike down internal or subsidiary legislative provisions inconsistent with the norms it enacts. UNAT further held that it was not akin to a constitutional court and its jurisdiction was restricted by Article 2. 9 of the UNJSPF Regulations. UNAT concluded that in this case, UNJSPF acted in keeping with its Regulations and if there was indeed any enduring discrimination on the grounds of sexual orientation inconsistent with the Charter, that was a matter for the Secretary-General or the General Assembly. Accordingly, UNAT concluded that the appeal "regrettably" had to fail.

Decision Contested or Judgment/Order Appealed

A former staff member married his same-sex partner of 36 years in New York in April 2018, 20 years after his separation from service in December 1998. At the time of his separation from service, same-sex marriage was not legal in any country and therefore he could not marry his same-sex partner. The day after the marriage, he visited the Fund's New York office to inquire whether he could include his husband

as his surviving spouse. He was advised that, since he had not been married to his husband at the time of his separation from service in 1998, his husband did not meet one of the fundamental requirements for eligibility for a widower's benefit under Articles 34 and 35 of the UNJSPF Regulations and accordingly, his husband would not be recognized as his surviving spouse. The Fund advised that in 2016 the Pension Board had 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 rights as to marriage, including pension rights. However, the application of the guidelines was not retroactive, and moreover, under the expanded recognition of unions and registered partnerships, de facto unions and registered partnerships in New York were not accepted as being equivalent to marriage because they did not confer the same rights and obligations as marriage, including pension rights. The Fund advised of the option to purchase an annuity (i. e. a periodic benefit for life in a specified amount that is payable to a spouse married after separation from service) in his husband's favour under Article 35ter of the Regulations, which would take effect 18 months after the date of marriage. The former staff member requested the Fund to interpret the Articles in a constructive and humane manner taking into consideration that he had served the Organisation for approximately 25 years, was 79 years old, and was being treated for a serious heart condition, thus rendering the annuity a non-viable alternative since it would lapse if he did not live until its effective 18 months after the date of marriage. The Standing Committee of the UNJSPB upheld the decision to refuse to recognize his husband as a prospective survivor. The former staff member appealed against that decision, contending that the provisions of Articles 34 and 35 unfairly discriminate against persons in same-sex relationships and they are inconsistent with Article 8 of the UN Charter and Article 7 of the Universal Declaration of Human Rights, which prohibit unfair discrimination on illegitimate grounds including sexual orientation and marital status, and that he should be afforded relief on that basis.

Legal Principle(s)

i) Where the UNJSPF acts in keeping with its Regulations and if there is any discrimination inconsistent with the Charter, it is a matter for the Secretary-General or the General Assembly. ii) UNAT does not have the prerogative to apply the Charter or the Universal Declaration of Human Rights directly, nor the power to strike down internal or subsidiary legislative provisions conflicting with the norms

they enact. UNAT is not akin to a constitutional court and, thus, has no jurisdiction to declare the UNJSPF Regulations constitutionally incompatible or to strike them down as invalid. The jurisdiction of UNAT is clearly circumscribed by Article 2. 9 of the UNAT Statute. It may only determine if there has been “non-observance” of the Regulations.

Outcome

Appeal dismissed on merits

Outcome Extra Text

No relief ordered; No relief ordered.

Full judgment

[Full judgment](#)

Applicants/Appellants

Oglesby

Entity

UNJSPF

Case Number(s)

2018-1208

Tribunal

UNAT

Registry

New York

Date of Judgement

29 Mar 2019

President Judge

Judge Murphy

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Discrimination and other improper motives

Sexual orientation

United Nations Joint Staff Pension Fund (UNJSPF)

Survivor's benefits

Applicable Law

Agreements, conventions, treaties (etc.)

UN Charter

- Article 8

UNAT Statute

- Article 2.9

UNJSPF Regulations

- Article 34
- Article 35
- Article 35ter