



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1396

Case No. 1462

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Ms. Brigitte Stern; Sir Bob
Hepple;

Whereas at the request of a staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 July 2005, and once thereafter until 31 October;

Whereas, on 27 October 2005, the Applicant filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 January 2006, after making the necessary corrections, the Applicant filed an Application in which she requested the Tribunal:

“10. ... to find:

- a. The United Nations should not discriminate against its gay and lesbian staff
- b. The United Nations should not apply national law to determine personal status as this leads to discrimination against some gay and lesbian staff members on the basis of their nationality, which is contradictory to the ... Charter, international Human Rights law and the ... Staff Rules which govern the Applicant's contract ...

...

- d. The United Nations should not discriminate against the Applicant, as a lesbian staff member, and an American citizen, and should grant her, on the basis of her same-sex registered partnership, legally contracted in a member state, similar benefits to those which derive from marital status.
 - e. The United Nations should redress the untenable situation it created when it recognized a ‘one way’ domestic partnership between [Ms. C., the Applicant’s spouse,] and the Applicant; it should recognize [the Applicant’s spouse] ... It is illogical and impractical to fail to acknowledge that registered partnership or marriage, by definition, involves at least two persons, with mutually reciprocal obligations and rights.
11. ... [and] to order ...:
- a. The United Nations [to] cease discriminating against its staff members on the basis of their sexual orientation, nationality, and their status within same-sex domestic partnerships. Henceforth, the United Nations should be compelled to recognize domestic partnerships according to a neutral set of criteria. At the very least, the [Organization] should recognize that marriage or partnership contracted in one member state is equally valid for both parties.
 - b. The payment of compensation covering at least all benefits and entitlements which have been denied to the Applicant since 2001 when she requested in Geneva to grant, on the basis of her legally recognized registered partnership, benefits and entitlements similar to those which derive from marital status.
 - c. That [the Applicant’s spouse] would be entitled to the Applicant’s pension, as her legal spouse, in the event of the Applicant’s death.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 13 July 2006, and once thereafter until 13 August;

Whereas the Respondent filed his Answer on 14 August 2006;

Whereas the Applicant filed Written Observations on 30 October 2006;

Whereas on 13 February 2007, the Applicant’s spouse and a staff member of the United Nations, filed an Application for Intervention in the case.

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer on the Application for Intervention until 8 August 2007, and once thereafter until 10 September;

Whereas the Respondent filed his Answer on the Application for Intervention on 10 September 2007;

Whereas the Respondent submitted additional documentation on 23 June 2008, and the Applicant commented thereon on 26 June;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“... *Professional Record*

... The [Applicant] entered service at the Office for the Coordination of Humanitarian Affairs (OCHA) on 31 January 1998, as a Humanitarian Affairs Officer in Tbilisi, Georgia, at the L-2 level, on a project personnel appointment for a fixed term of 3 months and 1 day. [Her] appointment [was subsequently] renewed ... [On 1 January 2000, she commenced an L-2 level appointment as an Associate Humanitarian Affairs Officer with OCHA in Geneva, Switzerland. She continued to serve in Geneva on a series of contracts until 22 February 2008, on which date she was reassigned to New York as a P-4 Humanitarian Affairs Officer.]

...

Summary of Facts

... On 12 August 2000, the State of Denmark officially registered the [Applicant] and [Ms. C.,] a Danish national, as partners.

... On 13 November 2001, the [Applicant] wrote ... to ... OCHA ... seeking ... recognition of her registered partnership. [Her] letter [was] forwarded to the Office of Legal Affairs (OLA).

... By memorandum dated 14 January 2002, the Director, General Legal Division (GLD), OLA, informed OCHA that it is ... [United Nations'] practice 'to recognise the dependency status of a staff member's "spouse" for ... administrative purposes, depending upon whether the staff member and spouse are recognised as legally married under the law of the staff member's country of nationality'. He indicated that OLA would seek the views of the United States Government in this respect. He further [specified] that within the [United Nations] the term 'spouse' is defined by reference to the Administrative Committee on Coordination ... Report on the Inter-Organization Meeting on Salary Matters of 1957 which states 'the term spouse means husband and wife and excludes divorced partners'. He underlined that 'the [United Nations] has not so far recognised any domestic partnership arrangement, which although recognised as legal by the State in which it is formed, is not described either as a "marriage" or as a relationship of "husband and wife"'.

... The same day, the Director, GLD, OLA, sent a letter to the Permanent Mission of the United States to the United Nations seeking clarification on 'whether registered partnerships entered into in the State of Denmark are recognised by the United States Government as marriages and, thus whether, in the view of the United States Government, the staff member concerned is legally married under U.S. law'.

... By letter dated 12 March 2002, the General Counsel of the United States Mission to the United Nations [responded] that under the terms of the United States Public Law of September 21, 1996 'Defence of Marriage Act' ..., a same-sex registered partnership is excluded from the definition of 'marriage' and 'spouse' for purposes of federal law in the United States.

... On 21 March 2002, the Director, GLD, OLA, sent a memorandum to OCHA stating that 'it appears that by reference to U.S. law, the staff member's registered partnership is not defined as a marriage, and therefore, her partner cannot be recognised as a dependant spouse for United Nations' administrative purposes'.

... By letter dated 25 August 2002 ... to the Chief, Human Resources Management Service (HRMS), the [Applicant] sought 'full recognition by the [United Nations] of [her] legally registered same-sex partner'.

... By memorandum dated 16 September 2002, the Chief, HRMS, confirmed to the [Applicant] that it is the practice of the [United Nations] to apply the principle according to which 'if the laws of the country of citizenship of the staff member recognize the common law marriage/registered partnership and that it creates the same effects as contracting a marriage, the [United Nations] can recognize as an official spouse for [United Nations'] purposes'. She further

stated that as the [Applicant] is a national of the U.S.A. and not of Denmark, ‘[her] partner [could not be] recognized by the [United Nations] as [her] spouse’.

... On 11 November 2002, the [Applicant] sent a request for review of [this] administrative decision ...”

On 14 January 2003, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 28 September 2004. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

...

Merits

25. The Panel first noted that the question of whether the Appellant’s partner can be recognised for [United Nations’] administrative purposes as her spouse has been determined according to the national law of the Appellant, i.e. the federal law of the United States.

26. In this respect, the Panel underlined that as far as issues of the determination of the family status are concerned, the [United Nations] has applied the national law of the staff member. The Panel took note that in case of doubt related to aspects of family law, such as adoptions and marriages, the [United Nations] systematically contacts the Permanent Mission of the staff member’s country in order to get a confirmation on the legal recognition of an adoption or a marriage by the national authorities.

27. As the law of the United States does not recognise the Appellant’s same-sex partner as her legal spouse, the Panel considered that the Staff Rules have been applied without discrimination in the present case. The Panel is of the opinion that the application of the national law is not arbitrary, but consistent with the existing practice, to which no alternative exists.

28. The Panel put forward that by applying this principle, the [United Nations] takes into account the variety of cultural backgrounds. Thus, if same-sex couples cannot be legally recognised as domestic partnerships and are not provided with similar rights as married couples, this legal discrimination results from the national legislation, and not from the ... Staff Rules and Regulations.

29. The Panel stressed that it furthermore found no evidence whatsoever of discrimination based upon the sexual orientation of the Appellant, given that the same standards of proof of legitimacy are applied equally to heterosexual and homosexual unions. The Panel noted with surprise the Appellant’s assertion that this legal application of this Staff Rule in some way constituted an institutionalised and therefore sanctioned practice of discrimination against a particular segment of staff.

...

33. The Panel finally stressed that the Appellant did not provide evidence that she is particularly harmed by this application of the Staff Rules: thus, e.g. the alleged limitation to mobility is incumbent on any other unmarried staff member or on any other staff member whose partnership has not been recognised by the national law.

Conclusions and Recommendations

34. In view of the foregoing, the Panel *concludes* that the Appellant has no grounds for contesting the decision of 16 September 2002 concerning the non-recognition of her same-sex partner as her spouse.

35. The Panel therefore *recommends* to the Secretary-General that the present appeal be rejected.”

On 23 February 2005, the Officer-In-Charge for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB’s findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on her appeal.

In the interim, however, Ms. C. had entered into the service of the Organization. Thereafter, the Applicant and Ms. C. wrote to the Office of Human Resources Management (OHRM), requesting that they be recognized as legal spouses pursuant to ST/SGB/2004/4 of 20 January 2004. On 18 April 2005, OHRM indicated that the Organization would change Ms. C.’s personal status to “married and related”, but that the Applicant’s personal status would remain “single”.

On 30 January 2006, the Applicant filed the above-referenced Application with the Tribunal.

On 22 May 2007, the Assistant Secretary-General, OHRM, indicated that she had reviewed the Organization’s practice with respect to personal relationships between staff members which were recognized by the national laws of only one of the staff members. As she considered the practice to impact on the affected staff members’ “full enjoyment” of their rights, the Assistant Secretary-General requested OHRM to discontinue it and to consider both staff members in such relationships as “married and related”. Accordingly, on 26 June, OHRM issued a personnel action amending the status of the Applicant to “married and related” with retroactive effect to 1 February 2004, the date of entry into force of ST/SGB/2004/4, which was abolished and superseded by ST/SGB/2004/13 of 24 September 2004.

Whereas the Applicant’s principal contentions are:

1. The Organization’s policy of determining family status for purposes of entitlements under the Staff Regulations and Rules by reference to the law of the staff member’s nationality is discriminatory.
2. The Organization’s reference in the Applicant’s case to the laws of the United States had “a direct discriminatory effect on [her]”.

Whereas the Respondent’s principal contentions are:

1. The decision not to recognize the Applicant’s registered partnership for purposes of entitlements under the Staff Regulations and Rules is consistent with the long-established policy of the United Nations.
2. The policy of referring to the law of nationality of staff members in determining their personal status for purposes of entitlements is consistent with the Staff Regulations and Rules and allows for conflicting conceptions among the Member States regarding family status.

The Tribunal, having deliberated from 26 June to 25 July 2008, now pronounces the following Judgement:

I. The Tribunal will first outline the background to this case. The Applicant, a citizen of the United States of America, joined OCHA on 31 January 1998. On 12 August 2000, in Denmark, she contracted a same-sex union with a Danish citizen, Ms. C. On 13 November 2001, the Applicant applied to the Administration for formal recognition of her union. Current practice at that time within the Organization being to refer to the law of a staff member's home country in order to determine his or her marital status, OLA consulted the United States Government, which stated that under U.S. federal law, unions between persons of the same sex did not fall within the definition of "marriage", nor a partner of the same sex within the definition of "spouse". Accordingly, OHRM rejected the Applicant's request on 16 September 2002. The Applicant sent a request to the Secretary-General for review of that administrative decision. On 3 December, on behalf of the Secretary-General, OHRM confirmed its decision, referring *inter alia* to Judgement No. 1063, *Berghuys* (2002), which acknowledged the relevance of the principle followed by the Administration in such matters.

II. On 14 January 2003, the Applicant appealed that decision to the JAB. The JAB submitted its report on 28 September 2004, concluding that the Administration had applied the law correctly. On the consistent practice of referring to the law of nationality of the staff member concerned, the JAB stated:

"by applying this principle, the [United Nations] takes into account the variety of cultural backgrounds. Thus, if same-sex couples cannot be legally recognised as domestic partnerships and are not provided with similar rights as married couples, this legal discrimination results from the national legislation, and not from the ... Staff Rules and Regulations".

The report of the JAB was submitted pursuant to ST/SGB/2004/4, which pointed out that "family status for the purposes of entitlements under the United Nations Staff Regulations and Rules should be made in all cases on the basis of the long-established principle that matters of personal status are determined by reference to the law of nationality of the staff member concerned". It is interesting to note that, after recommending that the Secretary-General should reject the Applicant's request, the JAB made a "special remark":

"The Panel took note of the Secretary-General's Bulletin of 20 January 2004 (ST/SGB/2004/4) and considered it to be a step in the right direction, as it implies the official recognition of legally recognised domestic partnerships, provided that it has been contracted under the national law of the staff member. The Panel took also note of the Resolution of the General Assembly of 8 April 2004 (A/RES/58/285) and its request to reissue the above-mentioned SGB, taking into account the views and concerns expressed by Member States thereon.

The Panel expressed its desire that the Secretary-General's bulletin be reviewed in a progressive perspective, including a further analysis on what kind of legally recognised domestic partnerships

would allow staff members to benefit from the Family status for purposes of United Nations entitlements. The Panel therefore called on the Secretary-General to explicitly define the characteristics that would be required from such legally recognised domestic partnerships. The Panel notes that there may be legally recognised domestic partnerships which, while not employing the term ‘marriage,’ award similar rights to the partners as are awarded the husband-wife partnership in a ‘usual’ marriage. It urged the Secretary-General to further study whether such partnerships would be recognised as giving rise to the dependency entitlements under the ... Staff Regulations and Rules. It also recommended to the Secretary-General to review the definition of spouse in order to avoid inconsistencies in the application of the Staff Rules as far as domestic partnerships are concerned.”

III. Meanwhile, Ms. C., the Applicant’s partner, entered United Nations service on 17 February 2003. On 28 April 2004, the Applicant and her partner submitted a request for official recognition of their partnership to OHRM in conformity with ST/SGB/2004/4. On 18 April 2005, the Applicant’s status as the spouse of Ms. C. was acknowledged inasmuch as Danish law recognizes marriage between persons of the same sex, but Ms. C. still was not acknowledged as the spouse of the Applicant, whom the Organization regarded as single.

IV. In the present appeal, the Applicant is challenging the report of the JAB upholding the Organization’s refusal to grant her partner the status of spouse on the grounds that U.S. federal law does not recognize homosexual marriages. The Applicant considers that the United Nations policy of determining marital status by reference to national law constitutes discrimination on grounds of nationality: she challenges the JAB’s conclusion that “the application of national law is not arbitrary, but consistent with the existing practice, to which no alternative exists”. To avoid accusations of discrimination, the Applicant argues that the Organization should adopt its own definition, based on “a neutral set of criteria”, to identify couples entitled to United Nations family benefits. Pending the establishment of such a set of criteria, the Applicant argues that:

“[t]he decision to continue the practice of spousal determination by reference to national law is a *policy choice*, be it of the [United Nations] administration or the General Assembly. That choice has the effect that some staff members - who happened to be gay or lesbian - are treated differently under the ... Staff Rules as a function of their nationality. This practice runs counter to the United Nations Charter, International Human Rights Law, and the ... Staff Rules, which specifically prohibit discrimination on any grounds (regulation 1.2). *The discrimination that arises from the current ... practice outweighs any justification for it on the basis of member state sensitivity.*”

The Applicant therefore asks the Tribunal to order that:

“a. The United Nations should cease discriminating against its staff members on the basis of their sexual orientation, nationality, and their status within same-sex domestic partnerships. Henceforth, the United Nations should be compelled to recognize domestic partnerships according to a neutral set of criteria. At the very least, the UN should recognize that marriage or partnership contracted in one member state is equally valid for both parties.

- b. The payment of compensation covering at least all benefits and entitlements which have been denied to the Applicant since 2001 when she requested in Geneva to grant, on the basis of her legally recognized registered partnership, benefits and entitlements similar to those which derive from marital status.
- c. That [Ms. C.] would be entitled to the Applicant's pension, as her legal spouse, in the event of the Applicant's death."
- V. The Tribunal will consider these requests in reverse order, beginning with the Applicant's third plea to the Tribunal that it order that her partner is entitled to a pension upon the Applicant's death.
- VI. The Tribunal notes that this request does not appear to fall within its jurisdiction *ratione materiae* inasmuch as it was not submitted to the JAB. It also notes that the request is, today, moot. As of 18 April 2005, the Applicant was entitled to enjoy the benefits - including a survivor's benefit in the event of death - conferred upon her as Ms. C.'s partner. Ms. C., however, did not have the same standing since, for such purposes, the Applicant was regarded as single. But, that slightly surreal situation was resolved with the issuance, on 22 May 2007, by the Assistant Secretary-General, OHRM, of a memorandum to deal with such cases. The memorandum stipulates that, when the application of staff members' national laws give rise to a situation in which one partner is considered married or the spouse of the other while the other is regarded as single, "the current practice of treating staff members in the situation described [shall] be discontinued and ... both staff members [shall] be administratively considered as 'married and related'". The memorandum makes it clear that it applies equally to couples who, before its issuance, were in a similar situation. The Tribunal notes that the Applicant and her partner have benefited from this change in practice. The Applicant's request relating to this point is thus no longer relevant. For the same reasons, the Tribunal has decided not to accept Ms. C.'s request for intervention in this case.
- VII. On the Applicant's request for compensation, the Tribunal points out that the Applicant can claim the benefits in question only by virtue of ST/SGB/2004/4 and only from the date when the request was made. Actually, the Applicant has received benefits as of the time when she requested them. Since these benefits cannot be awarded retroactively, the Applicant has no right to compensation for any previous period.
- VIII. Finally, as to the Applicant's more general request that the Tribunal should order the United Nations to recognize same-sex partnerships under a neutral set of criteria, the Tribunal must point out that it is neither the General Assembly nor the Secretary-General - which are the only two authorities that can settle personnel questions. The request before it in this case is less concerned with inviting the Tribunal to consider the specific circumstances of a staff member whose rights may have been violated and who has allegedly suffered injury than with asking it to take a political position. In this connection, it is appropriate to state, as the Tribunal has done in an earlier judgement, that:

“... neither a JAB nor the Tribunal is a vehicle available to a staff member to be used to lobby management or to seek to persuade management to effect what the staff member would perceive to be improvements in his working conditions or the terms of his employment, unless that staff member seeks to establish that the matter of which he complains arises from the non-observance of the terms of his appointment or that it arises from the infringement or denial of some employment right. Both the JAB and the Tribunal are parts of the justice system whose primary objective is to right employment wrongs and to provide remedies to staff members who establish that they have been wronged in relation to a condition of employment or been denied an employment right.” (Judgement No. 1145, *Tabari* (2003), para. II. See also Judgement No. 722, *Knight et al.* (1995).)

IX. The Tribunal does, nevertheless, wish to make some brief comments on this request which, it reiterates, is not properly before it. First, it recalls what it clearly held Judgement No. 1183, *Adrian* (2004), paragraph X:

“The Tribunal wishes to state once again that the United Nations is not a body for determining the societal choices of the various communities existing throughout the world. It is, on the contrary, a forum of tolerance where States with conflicting conceptions regarding family relations must learn to coexist. The position taken by the Secretary-General is the only one that allows for such coexistence and such respect for diversity, since it accepts both polygamous unions and same-sex unions.”

To this, it adds a reference to *Berghuys (ibid.)*: “Although the word spouse is not new, its meaning is evolving and broadening in some nations, as are notions of the types of partnerships possible, the parties to those agreements and the consequences for public and private administrations”. Thus, the Tribunal recognized that the notions of “marriage” and “couple” are among those that are “by definition evolutionary”.

X. Other developments in family relations may come to pass, although a ready international consensus on how to approach the notion of “couple” is unlikely. Without question, the status of same-sex unions is a topical issue which is evolving towards a greater appreciation of the rights of homosexual couples. The United Nations is not insensitive to this evolution. At the eighty-eighth session of the Consultative Committee on Administrative Questions, in April 1998, the possibility of adopting a set of neutral criteria to identify partners for benefit purposes was discussed. The criteria invoked did not depend on national law. Instead, they envisioned a definition of a dependant relationship between the individuals concerned that gave them a right to certain United Nations family benefits. The Tribunal observes that this is a further step in thinking about the rights of same-sex partners which the Administration has not yet followed up.

XI. While taking account of this evolution, the Tribunal observes, as the JAB did, that the principle of referring to the law of a staff member’s home country to establish his or her personal status is, in the absence of an internationally agreed or customary definition of the notion of “couple”, the most satisfactory

means of deciding at present. In the part of the report on its seventy-eighth session entitled “Registered partnerships and same-sex marriages”, the Committee on Constitutional and Legal Matters at the Food and Agriculture Organization of the United Nations (FAO) advised the Director-General to issue an administrative instruction consistent with that issued by the Secretary-General of the United Nations, not only to standardize practice with the United Nations Secretariat but also because “such a reference to national law ... would continue to ensure respect for the social, religious and cultural diversity of the Member Nations and their nationals and, indeed, was the only method whereby the sovereignty of all States could be respected”. (FAO, report of the seventy-eighth session of the Committee on Constitutional and Legal Matters, document CL 128/5, 2005.)

XII. The Tribunal also notes that the same principle is applied today in other international settings. This is notably the case of the International Labour Organization (see, for example, ILO Administrative Tribunal Judgement No. 2549 (2006), paras. 7 and 11). It further notes that consulting the law of an individual’s home country in determining personal status is a practice that is also followed outside administrative settings. On the definition of the concept of “family” as used in article 23 of the International Covenant on Civil and Political Rights (protection of the family, right to marriage and equality of the spouses), the United Nations Human Rights Committee had the following to say: “The concept of the family may differ in some respects from State to State, and even from region to region within a State, and ... it is therefore not possible to give the concept a standard definition”. To determine when an individual may benefit from the protection offered under article 23, the Committee considers that “when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23” (General comment 19: protection of the family, right to marriage and equality of the spouses, Human Rights Committee, United Nations document HRI/GEN/1/Rev.2 (1990), para 2). Since the definitions of “couple” and “family” fluctuate widely from one State to the next, it is perfectly appropriate to refer to the laws of individuals’ home countries as a means of avoiding clashes between the political and cultural conceptions of different States.

XIII. The Tribunal must also add that the practice followed by the Organization does not result in discrimination on the basis of nationality. On this point, it must uphold what was said by the JAB: if there is any difference in treatment, it results from the national legislation and not from the Staff Regulations and Rules. The Organization grants substantive rights to anyone who can demonstrate that he or she is bound to a United Nations staff member by a legally recognized partnership. The national law of the staff member’s home country is consulted to determine whether the partnership is recognized. The reference to national law in considering the specific circumstances of the Applicant is necessary to uphold the diversity and sovereignty of States in a universal setting. It has, however, no effect on the conditions under which, at the Administration level, particular benefits are granted: the rules extend substantive rights to all partners bound to a staff member by a legally recognized union, not to partners of any particular nationality. There

is, accordingly, no reason to regard this well-established practice within the Organization as the source of any kind of discrimination on grounds of nationality.

XIV. For the above reasons, the Tribunal rejects the Application in its entirety.

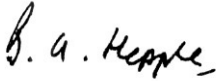
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Jacqueline R. **Scott**
Vice-President

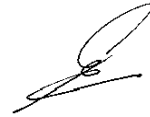


Brigitte **Stern**
Member



Bob **Hepple**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary