



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1440

Case No. 1512

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Mr. Agustín Gordillo;

Whereas, on 20 December 2006, a staff member of the United Nations filed an Application in which he requested the Tribunal, inter alia:

**“II. Pleas**

...

8. ... [T]o find:

(a) that [Office of Human Resources Management (OHRM)] should not discriminate against its homosexual staff such as [the Applicant] (this tenet is derived, inter alia, from the relevant provisions of the Charter of the United Nations, especially paragraphs 2, 4 and 5 of the Preamble and Articles 1.3 and 101.3);

(b) that [OHRM] should follow the Organization's precedent vis-à-vis the equal treatment of staff by not depriving staff of benefits and entitlements on the basis of nationality or the cultural, religious or social mores of their countries of nationality;

(c) that [OHRM] should recognize same-gender marriages as it does heterosexual marriages (i.e. on the basis of marriage licenses issued at the sub-national level);

(d) and that the Office of Legal Affairs inappropriately advised the United States Mission in its interpretation of the Secretary-General Bulletin of 20 January 2004 (ST/SGB/2004/4), going well beyond the actual terms of said Bulletin and offering the US Mission an interpretation thereof which was untoward, cavalier and resulting in substantial prejudice.

9. Having found the above to be true, the members of the Administrative Tribunal are respectfully requested to find:

(a) that OHRM shall be estopped from discriminating against its staff members on the basis of nationality and should be compelled to follow its own precedent in granting benefits and entitlements to homosexual staff (i.e. on the basis of legally issued sub-national-level certificates of marriage)

(b) that the payment of compensation covering at least all benefits and entitlements that have been denied [the] Applicant since 30 June 2004, when he requested [OHRM] (New York) to grant him the benefits and entitlements due [to] staff members by virtue of marital status, shall be made to the staff member;

(c) and that, having found the above, the unanimous recommendations of the Joint Appeals Panel ... shall be applied by the Respondent, with effect from the date referred to therein;

(d) and that, furthermore, the claims not directly addressed in the Joint Appeal Board Panel's report ... are also valid and shall be applied by the Respondent."

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 18 June 2007, and once thereafter until 17 July;

Whereas the Respondent filed his Answer on 17 July 2007;

Whereas the Applicant filed Written Observations on 20 August 2007;

Whereas the Applicant filed additional comments on 27 August 2007;

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

***“Employment history***

[The Applicant joined the United Nations on 21 September 1992 on a Short-Term Appointment. After various promotions and transfers, on 1 July 1998, the Applicant was offered a permanent appointment at the P-3 level. The Applicant is currently working at the same post.]

***Summary of the facts***

... On 1 June 2004, the [Applicant] and his same-sex partner obtained a certificate of marriage from the Office of the Town Clerk, Town of Provincetown, Massachusetts.

... [On] 30 June 2004, ... the [Applicant] requested [OHRM to] change [his] dependency status, [and] requested the benefits and entitlements derived from marital status, and the United Nations' recognition of his marriage.

... By letter dated 7 July 2004, addressed to [the] Ambassador, Deputy Permanent Representative of the United States of America to the United Nations, [OHRM] stated that 'I wish to refer to the long-established practice that personal status for the purposes of entitlements under the United Nations Staff Regulations and Rules should be determined in all cases by reference to the law of nationality of the staff member concerned.' [OHRM]'s letter went on to request '...[advice] as to whether the status claimed by the staff member is legally recognized under the

laws of the United States for granting benefits, and whether the attached documentation ... would be sufficient to establish such a status.'

... By letter dated 20 August 2004, addressed to [OHRM], [the] Ambassador, Permanent Representative of the United States of America to the United Nations, stated in part that:

'...[y]ou inquired as to whether the status claimed by the staff member is legally recognized under the law of the United States for granting of benefits, and whether the attached documentation ... would be sufficient to establish such a status.

We understand your query to refer to U.S. federal law, as we have been previously advised by the UN Office of Legal Affairs that the UN seeks our views as to whether a particular union would be legally recognized under U.S. federal law. Accordingly, I would direct your attention to the Defense of Marriage Act ('DOMA') ... Section 3 of DOMA amended Chapter 1 of title 1 of the United States code by inserting the following definition for 'marriage' and 'spouse.'

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife.

Under the terms of this law, a same-sex union would be excluded from the definition of 'marriage' and 'spouse' for purposes of federal law in the United States, including for the granting of federal benefits.'

... [On] 16 June 2005 ... the [Applicant] requested [from OHRM] an update on his request for change in his family status, benefits and entitlements, and the recognition of his marriage by the Organization.

... By letter dated 23 June 2005, addressed to [the] Ambassador ... [OHRM] requested an update on [its] initial request of 7 July 2004 regarding whether the staff member's union was recognized under the laws of the United States of America. Additionally, the letter drew the US Mission's attention to the Secretary-General's Bulletin '...governing personal status for purposes of United Nations entitlements...re-issued as ST/SGB/2004/13, which entered into force on 1 October 2004.'

... [On] 5 July 2005 ... [OHRM] updated the [Applicant] regarding the status of his application for recognition of a change in family status. [OHRM] stated that [they] corresponded with the US Mission soon after the [Applicant] submitted his request on 30 June 2004, and further stated that OHRM requested that the US Mission:

'... advise as to whether the status claimed in [the Applicant's] memorandum was legally recognized under the laws of the United States for granting of benefits, and whether the documentation which was attached [a copy of the Provincetown, MA, marriage license] would be sufficient to establish such a status. This action was taken in accordance with the procedures outlined in ST/SGB/2004/4 dated 20 January 2004, which was in effect at the time your memorandum was submitted to OHRM (and which has since been superseded by ST/SGB/2004/13 of 24 September 2004).

3. Following receipt of an interim reply on 19 July 2004 from the Permanent Mission of the United States, which indicated that our request had been transmitted to the U.S. Department of State for its consideration, this Office received no further reply. Consequently, OHRM dispatched a letter following up with the Permanent Mission, again requesting that it advise the United Nations concerning your personal status under the laws of the United States.

4. Please be assured that immediately upon receipt of a response from the Permanent Mission, I will notify you accordingly.'

... By letter dated 13 July 2005, addressed to [OHRM], [the] Minister Counsellor for UN Management & Reform, Permanent Mission of the United States of America to the United Nations stated that [the Ambassador's] requested that [s] reply shall be to OHRM's letter of 25 June 2005, regarding [the Applicant]'s request for UN entitlements based on a certificate of marriage from the Commonwealth of Massachusetts. [The Minister] referenced the letter dated 20 August 2004, wherein the US Mission responded to OHRM's initial inquiry of 7 July 2004 ...

... By email dated 18 August 2005, addressed to [OHRM], [the] Executive Secretary, UN Management & Reform, Permanent Mission of the United States of America, attached a copy of [the Ambassador]'s letter dated 20 August 2004 addressed to OHRM.

... [on] 18 August 2005 ... [OHRM] attached the US Mission's reply concerning the [Applicant]'s personal status. [OHRM] informed the [Applicant] that the Mission's 'earlier reply' of August 2004 did not reach OHRM. In [its] conclusion, [OHRM] stated that '[i]n view of the contents of [the Minister]'s letter, it is sincerely regretted that the Organization is not in a position to recognize your request for a change in your personal status.'

... [On] 31 August 2005 ... the [Applicant] requested a copy of the Mission's 'earlier reply' regarding his request.

... By letter dated 6 September 2005, addressed to the Secretary-General, the [Applicant] requested a review of the administrative decision rendered on 18 August 2005 denying his request for recognition of marriage.

... By email dated 9 September 2005, addressed to the [Applicant], [OHRM] referenced the [Applicant]'s request and attached a copy of the 'earlier reply' from the US Mission dated 20 August 2004.

... By letter dated 13 September 2005, addressed to the [Applicant], [the] Officer-in-Charge (OIC), Administrative Law Unit (ALU), acknowledged receipt of the [Applicant]'s request for administrative review.

... [On] 22 September 2005 ... the [Applicant] informed [OHRM] that:

'I am writing to inform you that, inter alia, my appeal is based on the central argument that the Office of Legal Affairs (OLA) acted inappropriately in seeking to ascertain the purview of United States federal law in connection with the Secretary-General's 2004 bulletin setting out the conditions for the determination of the personal status of United Nations staff. Given that the Secretary-General's bulletin makes no reference whatever to 'federal' law, I believe that OLA's unwarranted intrusion has negatively prejudiced my application. In this connection, I refer you to the second paragraph of [the Minister]'s letter to you of 20 August 2004.

... I understand that the Organization had recognized the same-gender marriages of several Canadian staff members on the basis of provincially sanctioned unions well before the Canadian Parliament made same-gender marriage part of its federal law. OLA's involvement is therefore all the more egregious, as it implicitly assumes a 'federal' reading of the language in the Secretary-General's bulletin, which, as you know, employs no such wording. If the Organization had already recognized cases of same-sex unions on the basis of provincial laws, why did OLA deem it necessary to seek a federal interpretation vis-à-vis my case?

... I believe your decision violates the fundamental principle that there is to be no discrimination among staff on the basis of national origin. Nationals of other countries have had their same-sex partnership/marriages recognized by the Organization. Therefore, denying my request flies in the face of the principle, as my nationality is being employed to deny me rights that other staff have already been granted. Does the Organization clear the employment of female staff in cases where laws and/or social

norms in their countries of origin forbid mixed-gender or female employment, prior to extending a contract to a potential staff member?’

... [On] 5 October 2005 ... [OHRM] informed [ALU] regarding the [Applicant]’s request for recognition of personal status and correspondences between OHRM and the US Mission and OHRM and the [Applicant] regarding the matter.

... [On] 11 October 2005 ... OLA, referred to [ALU]’s memorandum dated 26 September 2005, regarding the [Applicant]’s request for the administrative review of the decision not to recognize his marriage and stated in part that:

‘1. ... I note that your memorandum appears to be a standard letter sent to managers whose decision is being appealed, although OLA has taken no such decision. In any event, I understand that you seek any comment OLA may have on this matter before 12 October 2005.

...

3. [The Applicant] appears to be under the erroneous impression that OLA inappropriately sought the advice from the US Mission, specifically requesting whether Federal law recognized his marriage. In fact, OLA has had no involvement in the matter until now. In any event, OLA is of the view that OHRM acted appropriately, and in accordance with the provisions of ST/SGB/2004/13 in dealing with this matter. Indeed, paragraph 2 of ST/SGB/2004/13 states that the Administration is to submit any request relating to the determination of the personal status of staff members to the permanent mission to the UN of the country of nationality of the staff member concerned, seeking its verification on whether the status in question is legally recognized *under the laws of that country for the purposes of granting benefits and entitlements*. OHRM followed this provision, seeking the US Mission’s verification on whether [the Applicant]’s marriage *was recognized under US law for the purposes of granting benefits*. [Emphasis as cited within original letter].

4. [The Applicant] also claims that the treatment of his case is discriminatory. In this respect, he refers to ‘several Canadian staff members’ whose same-sex marriage was recognized for the purpose of benefits and entitlements on the basis of state law, before Federal law endorsed same-sex marriages. I am not specifically aware of what cases [the Applicant] is referring to, but I assume that the Canadian mission verified to OHRM that such marriages [were] recognized under the laws of Canada, for the purposes of benefits and entitlements, according to the Staff Regulations and Rules. [The Applicant] also asserts that his case has been treated in a discriminatory fashion since it violates the ‘fundamental principle’ that all staff members should be treated equally, without discrimination on the basis of national origin. It is however, a long established practice of the Organization that the personal status of a staff member is determined according to the laws of the country of his or her nationality. As such, [the Applicant]’s case was not treated differently from the way any other case would have been treated by the Organization which is in accordance with the Staff Regulations and Rules.

5. I suggest that [the Applicant] be clearly explained the above, as his appeal seems to be based on erroneous facts and interpretations of the Staff Regulations and Rules.’

... By letter dated 12 October 2005, addressed to the [Applicant], [ALU] stated that after careful review and consideration of the decision, [OLA]’s letter of 11 October 2005 has addressed appropriately the issues raised by him. The [Applicant] was informed regarding the option of appealing the decision should he not be satisfied with the review.

...

... On 1 November 2005, the [Applicant] filed his Statement of Appeal.”

The JAB adopted its report on 8 November 2006. Its considerations and recommendation read, in part, as follows:

*“Considerations*

...

32. The Panel agreed that the central issue for its consideration was whether the Appellant’s marriage was recognized under the ‘law of [his] nationality.’ The Panel further agreed that a related issue was whether or not OLA biased the US Mission’s response by directing them to review the question of the Appellant’s personal status under the purview of US federal law as cited by the US Mission.

33. First, the Panel examined the parties’ assertions ... Second, the Panel concluded that the operative Bulletin in this particular case is ST/SGB/2004/4 dated 20 January 2004, which entered into force on 1 February 2004 and which was in effect: on the date the Appellant’s marriage certificate was issued in Provincetown, MA, on 1 June 2004; on the date the Appellant submitted his request for recognition of his marriage, on 30 June 2004; on the date OHRM submitted its initial query to the US Mission regarding the Appellant’s personal status, on 7 July 2004; and on the date the US Mission submitted its first response to OHRM’s query, on 20 August 2004.

34. The Panel noted that although ST/SGB/2004/4 was abolished and replaced by ST/SGB/2004/13 effective on 1 October 2004, the crucial facts took place prior to 1 October 2004 and therefore ST/SGB/2004/4 governs the Panel’s evaluation of this case.

35. The Panel reviewed ST/SGB/2004/4 which details that:

- ‘1. The Secretary-General has decided that family status for the purposes of entitlements under the United Nations Regulations and Rules should be determined 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....
2. This decision will continue to ensure respect for the social, religious and cultural diversity of the Member States and of their nationals.
3. As a result, a marriage recognized as valid under the law of the country of nationality of a staff member will qualify that staff member to receive the entitlements provided for eligible family members.’

36. Third, the Panel noted that except for [the Ambassador]’s response citing OLA’s directive that the US Mission was to equate the ‘law of nationality’ as US federal law in matters regarding whether a particular marriage was recognized, the Organization’s Rules, Regulations and other pertinent issuances do not define this term. The Panel examined the Appellant’s assertion regarding marriage falling under the purview of State law in the US, that his same-sex marriage is certified and recognized by the State of Massachusetts and that OHRM’s denial to recognize his marriage is discrimination based on nationality. Upon the Panel’s review of DOMA and the marriage laws of Provincetown, Massachusetts, on the date the Appellant’s marriage certificate was issued, the Panel was mindful that marriage falls under the purview of the individual States within the US and that same-sex marriages were legalized in the State of Massachusetts effective on 17 May 2004. The Panel was further mindful that the Appellant obtained a valid marriage certificate legally issued in Provincetown, Massachusetts on 1 June 2004.

37. The Panel considered it a contradiction that the Appellant’s marriage is recognized and legally-sanctioned under the laws of the State of Massachusetts but the US Mission asserts that under DOMA, the Appellant’s marriage would be excluded from the definition of “marriage” and ‘spouse’ for the ‘...purposes of federal law in the United States, including for granting of federal

benefits.’ Consequently, the Panel was perplexed regarding [the Ambassador]’s assertion that the US Mission’s review of the Appellant’s personal status would be examined under US federal law per OLA’s directive. The Panel was further perplexed that the Respondent did not submit a clarification to [the Ambassador]’s reference regarding the OLA directive. The Panel noted OHRM’s insistence that it did not receive [the Ambassador]’s initial letter dated 20 August 2004. The Panel further noted that it was not until the Appellant’s ‘follow-up request for change in dependency status (marriage)’ dated 16 June 2005 that the OHRM sought an update from the US Mission.

38. The Panel acknowledged that it was necessary to clarify whether or not OLA directed the US Mission to review the Appellant’s personal status under US federal law. On 15 September 2006, the Panel submitted an interrogatory to OLA regarding [the Ambassador]’s initial response. On 29 September 2006, [OLA] responded to the Panel’s inquiry and stated that:

‘...[t]o the best of our knowledge, this Office has not at any time advised the United States Permanent Mission to the United Nations regarding the definition of the ‘law of nationality’ in reference to same-sex unions/marriages and the above SGB [citing to ST/SGB/2004/13], nor has this Office at any time informed or advised the U.S. Mission that the law of nationality equated to U.S. federal law.’

39. Based on the foregoing, the Panel recognized that if as OLA confirmed, it did not instruct the US Mission as to the definition of the ‘law of nationality’ in reference to same-sex marriages or on equating said term with US federal law, then the US Mission labored under the incorrect assumption in its evaluation of the Appellant’s personal status. The Panel further recognized that said assumption negatively influenced the US Mission’s response to OHRM’s query. Therefore, the Panel concluded that the Appellant’s same-sex marriage was not recognized by the Organization because of the errors in evaluation cited above. The Panel fails to understand why the Organization did not step in to correct this misunderstanding sooner. The Panel is aware that the matter of same-sex marriage is a controversial and political issue in the United States. Nonetheless, a clarification to the US Mission was of utmost necessity. The Panel concluded that the Administration failed to do its part to clarify the matter and that the Appellant’s rights as a staff member were not honored by the Administration.

40. Fourth, the Panel examined how OHRM posed the question regarding the recognition of the Appellant’s same-sex marriage to the US Mission. In this regard, the Panel considered that the central question per the operative Bulletin was not exclusively whether a marriage is recognized for the sake of receiving entitlements but primarily if it is recognized under the law of the country. Though the terms ‘marriage’ and ‘spouse’ preclude the recognition of the Appellant’s same-sex marriage at the federal level, the US Congress recognized the ‘powers reserved to the States’ to accept or decline said recognition. The Panel concluded that the Appellant’s marriage certificate was issued by a competent authority and recognized by the State of Massachusetts. Therefore, the Appellant’s marriage is valid.

41. Fifth, under the current protocol, the Administration only queries the Permanent Mission to the UN regarding a staff member’s personal status. The Panel concluded that the Administration partially fulfilled this part of its obligation towards the Appellant. The Panel further concluded that based on the errors and omissions on the part of the Administration ... the Respondent was negligent in how he processed the Appellant’s request for recognition of his same-sex marriage.

42. The Panel acknowledged that the matter could be rectified by resubmitting the inquiry before the US Mission. Nonetheless, the Panel further acknowledges that this matter has dragged on since August 2004 and the Appellant’s rights have been violated. The Panel recommends that the exact question posed to the Mission in the Appellant’s case and in all future cases should stress that there is no validity to the Mission’s assumption that the query is to be reviewed strictly under

US federal law. The Mission is to review whether or not a marriage certificate is recognized under the marriage laws of the US.

43. Sixth, the Panel acknowledged that the vagueness of the term ‘law of nationality’ within the Bulletin under review and the one currently in force allows the 192 member states to exercise their diverse and divergent views on the matter. Nonetheless, this vagueness has caused unnecessary conflict between the Appellant and the Organization and between the Organization and the US Mission.

44. Seventh, the Panel found that the Appellant’s claim ... is unsupported by the facts. The particular statement reads: ‘A recent case in which OHRM recognized the status of a Secretariat couple also serves to underscore OHRM’s capricious approach to the matter. In that case, one of the staff members was a national of a country in which there is no recognition of same-gender unions whatever.’ Upon the Panel’s insistence that the Appellant supply information to substantiate his claim on this particular case, the Appellant supplied the names of two staff members. The Panel queried the Respondent regarding the staff members concerned and OHRM confirmed that both countries of nationality recognized the staff members’ ‘Un Pacte Civil de Solidarite.’ Therefore, the Appellant’s contention is unsubstantiated.

45. Lastly, the Panel reviewed several [T]ribunal cases in order to fully address the issues raised in the Appellant’s case. It found that none of the cases addressed the intricacies at issue here. The Panel is aware that it is the law of the country of nationality that defines the terms “marriage” and ‘spouse.’ For purposes of US Federal law, these terms are defined in a manner that denies the recognition of same-sex marriages. The Panel is further aware that DOMA allows each State to recognize or deny US Constitutional marital rights between persons of the same sex that have been recognized in another State. Now that the error regarding OLA’s directive to review the matter under US Federal law has been highlighted, the Panel considers the Appellant’s marriage must be recognized under the law of the US and by the Organization.

***Recommendation***

46. In light of the foregoing, the Panel unanimously found that the Respondent did not put forth a reasonable basis explaining why the Appellant’s same-sex marriage was not recognized, that the Appellant’s rights as a staff member were not protected by the Respondent, and thus unanimously concluded that the Appellant’s due process rights were violated. It therefore unanimously decided to recommend the recognition of the Appellant’s same-sex marriage with compensation for entitlements and benefits retroactive to 30 June 2004, the date the request for compensation was filed. The Panel rejected all other claims.”

On 27 February 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General has carefully considered the report of the JAB and the full circumstances of this case but regrets to inform you that he is not able to accept the unanimous findings, conclusions and recommendations relating to the recognition of your marriage. Family status for the purposes of entitlements under the Staff Rules is decided on the basis of the long-established principle that matters of personal status, including recognition of marriages, are determined by reference to the law of nationality of the staff member concerned. Under ST/SGB/2004/4 and ST/SGB/2004/13, which superseded ST/SGB/2004/4, the responsibility for this determination lies with the relevant Member State, through its Permanent Mission to the United Nations, not the Organization. However, the Secretary-General agrees that the JAB was correct in finding that the Administration should have sent a clarification to the US Mission once the Administration became aware that the US Mission was acting under an erroneous assumption. Accordingly, the



Administration shall resubmit the request concerning your case to the US Mission containing the above clarification.”

On 20 December 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. OHRM discriminates against its homosexual staff such as the Applicant.
2. OHRM does not recognize same-gender marriages as it does heterosexual marriages.
3. OLA inappropriately advised the United States Mission in its interpretation of the ST/SGB/2004/4, going well beyond the actual terms of said Bulletin and offering the US Mission an interpretation thereof which was untoward, cavalier, and resulting in substantial prejudice.
4. The Applicant’s procedural rights were violated.

Whereas the Respondent’s principal contentions are:

1. The US Mission’s reference to US federal law in determining the Applicant’s personal status was neither erroneous nor the result of bias; rather, such reference to US federal law was a correct application of the Organization’s long-established policy concerning the determination of personal status for purposes of entitlement to benefits under the United Nations Staff Regulations and Rules.
2. The reliance by the JAB and the Applicant on the provisions of ST/SGB/2004/4 is misplaced because that bulletin was abolished and replaced by ST/SGB/2004/13, which more accurately reflects the procedures for applying the Organization’s long-established policy concerning personal status for purposes of entitlement to benefits under the Staff Regulations and Rules.
3. The policy of referring to the law of nationality of the Applicant in determining his personal status for purposes of entitlement to benefits was not discriminatory, but rather was consistent with the Staff Regulations and Rules and allows for conflicting conceptions among the Member States regarding family status.

The Tribunal, having deliberated from 10 July to 31 July 2009, now pronounces the following Judgement:

I. The Applicant, a national of the United States of America, joined the service of the United Nations on 21 September 1992. From 1993 he lived with his same-sex partner and on 2 June 2004 he received a certificate of marriage issued by the Town of Provincetown, in the State of Massachusetts, where same-sex marriages are recognized. On 30 June 2004, the Applicant wrote to the Administration requesting official recognition of his marriage in order to obtain for his partner the rights and benefits deriving from marital status. Since the practice of the United Nations is to refer to the law of nationality of the staff member in order to determine personal status, the Director of the Operational Services Division of OHRM wrote on 4 July 2004 to the Permanent Mission of the United States of America to the United Nations asking whether

or not, under United States law, the Applicant's marriage should be recognized for the purposes of entitlement to United Nations family benefits.

II. In its first letter, dated 20 August 2004, which allegedly was never received by the Administration, the United States Mission stated that, under United States federal law - specifically the Defense of Marriage Act - same-sex unions are excluded from the definition of "marriage" and same-sex partners are excluded from the definition of "spouse". The Administration wrote again to the United States Permanent Mission on 23 June 2005 and, in a second letter dated 13 July 2005, the Mission recalled the contents of its previous communication.

III. In a letter dated 18 August 2005, the Director of the Operational Services Division of OHRM informed the Applicant that, in view of the reply received from the United States Permanent Mission, it was not possible to grant his request. On 6 September 2005, the Applicant sought a review of that administrative decision under staff rule 111.2. In a letter dated 12 October 2005, the Director of the General Legal Division of the OLA advised the Applicant that the decision of 18 August 2005 would be upheld.

IV. On 1 November 2005, the Applicant filed an appeal against this decision with the JAB. Insofar as the arguments put forward by the Applicant to the Tribunal are virtually the same as those first put to the JAB, the Tribunal will summarize them briefly here.

V. Firstly, the Applicant submitted that, in accordance with the long-established policy of the Organization to determine the personal status of staff members by reference to the law of a staff member's nationality, and under ST/SGB/2004/4 issued by the Secretary-General on 20 January 2004, the "law of nationality" to which reference should be made in his case was the law of the state of Massachusetts because in the United States marriage is governed by state law. Consequently the Applicant claimed that the marriage certificate issued under Massachusetts state law constituted a valid marriage that entitled him to the benefits and advantages deriving from his marital status within the Organization.

VI. Secondly, and this is his central argument, the Applicant alleged that the OLA had inappropriately influenced the response to be given by the representative of the United States. The first letter of 20 August 2004 stated: "We understand your query to *refer to US federal law*, as we have been previously advised by the UN OLA that the UN seeks our view as to whether a particular union would be legally recognized under US federal law". (Emphasis added). In the Applicant's view, the OLA had biased the question since there is nothing in the practice of the Organization or in the Secretary-General's bulletin to say that the law of nationality to which reference must be made is necessarily federal law as opposed to State law.

VII. Lastly, the Applicant believed that the Administration's refusal to recognize his marriage constituted disproportionately discriminatory treatment of homosexual staff members inasmuch as there was no reason to consider his same-sex partnership less valid than a heterosexual marriage.

VIII. The JAB first stated that the central issue for its consideration was whether the Applicant's marriage was recognized under the "law of [his] nationality", and that the question of whether the OLA had biased the question it put to the United States Permanent Mission should be taken as a related issue. In order to answer these two closely intertwined questions, the JAB proceeded in stages.

IX. The JAB first determined which of the two Secretary-General's bulletins, ST/SGB/2004/4 of 20 January 2004 or ST/SGB/2004/13 of 1 October 2004, was applicable. Inasmuch as the crucial facts took place before 1 October 2004, the JAB found that it should refer to ST/SGB/2004/4, which states:

“1. The Secretary-General has decided that family status for the purposes of entitlement under the United Nations Regulations and Rules should be determined 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

...

3. As a result, a marriage recognized as valid under the law of the country of nationality of the staff member will qualify that staff member to receive the entitlements provided for eligible family members.”

X. The JAB then considered the marriage laws of Massachusetts and the Defense of Marriage Act. It found it a contradiction for same-sex marriage to be legally recognized under state law yet excluded from the definition of marriage under federal law. Given this ambiguity, the JAB considered that the Administration should have requested clarification from the United States Mission. In any case, however, the JAB found that, under Massachusetts law, the Applicant's marriage should be deemed valid and recognized.

XI. The JAB then turned to the question of whether the OLA had influenced the United States Mission in its reply to the question put by the Director of the Operational Services Division of OHRM. When invited to give an explanation, the OLA, in a communication dated 29 September 2006, denied having in any way indicated to the United States Mission that the law of nationality in question necessarily equated to United States federal law. In the view of the JAB, however, judging from the first letter dated 20 August 2004, the Mission's reply was based on an incorrect assumption concerning the question being asked. The JAB found that the Applicant's same-sex marriage had not been recognized as a result of that error. Insofar as the Applicant's marriage was recognized by the State of Massachusetts, the JAB considered that the marriage was valid and must be "recognized under the law of the US and by the Organization".

XII. Consequently, the JAB recommended the recognition of the Applicant's marriage and payment to the Applicant of compensation for the entitlements and benefits deriving from his marital status as from 30 June 2004, the date he had submitted his request for recognition of the marriage.

XIII. In a decision of 27 February 2007, the Secretary-General did not accept the recommendations of the JAB relating to the recognition of the Applicant's marriage. The Secretary-General did however agree with the JAB in respect of the need to ask for clarification from the United States Mission. A request for clarification was sent to the United States Mission on 6 March 2007 but no reply appears to have been received to date.

XIV. Before the Tribunal, the Applicant asks that all the JAB recommendations should be confirmed by the Tribunal and applied by the Administration. In his written observations on the Respondent's answer, as well as in additional documents submitted to the Tribunal in August 2007, the Applicant makes several additional requests. He states that on several occasions the Administration violated the deadlines for providing a response in the various proceedings initiated by the Applicant: 14 months elapsed between the Applicant's request for benefits for his partner and the Administration's notification of denial. Accordingly, he requests payment of compensation for moral damages resulting from the many months of uncertainty he has undergone. He also requests payment of compensation for moral damages in respect of the prejudicial treatment allegedly arising from the fact that the OLA biased the question it put to the United States representative to the United Nations.

XV. For his part, the Respondent puts forward three main arguments against recognition of the Applicant's marriage for the purposes of entitlement to United Nations rights and benefits deriving from marital status.

XVI. The Respondent first contends that the United States Mission's reference to United States federal law was neither erroneous nor the result of manipulation on the part of the Administration. The Respondent recalls that the practice of the Organization is now reflected in Secretary-General's bulletin ST/SGB/2004/13, which replaced bulletin ST/SGB/2004/4, and paragraph 2 of which states:

“2. Requests relating to the determination of personal status of staff members in connection with their entitlements will be submitted by the Secretariat for verification by the Permanent Mission to the United Nations of the country of nationality of the staff member concerned. Once the Mission has verified that the status in question is legally recognized under the law of that country for the purposes of granting benefits and entitlements, the Secretariat will take action in accordance with that verification.”

Accordingly, the Respondent argues that the marriage in question must be recognized under the law of the Applicant's State of nationality *for the purposes of granting benefits and entitlements deriving from marital status within the Organization*. In the present case it is clear, according to the Respondent, that the Defense

of Marriage Act precludes recognition of same-sex marriages for the purposes of granting benefits derived from marital status.

XVII. The Respondent goes on to explain that the bulletin to be applied in the Applicant's case is ST/SGB/2004/13, which replaced ST/SGB/2004/4 on 24 September 2004. In the Respondent's view it is perhaps no coincidence that the Applicant and, subsequently, the JAB, should have based themselves on ST/SGB/2004/4 which does not state that the law to which reference should be made is "the law of that country for the purposes of granting benefits and entitlements". The Respondent recalls, however, that the new bulletin did not change the old one, merely clarified and amplified it. Thus that criterion was already applied before the new bulletin was adopted.

XVIII. Lastly, recalling the Tribunal's consistent case law on this point, the Respondent states that the Organization's practice is not discriminatory since the practice of determining entitlements by reference to the law of the staff member's nationality applies to all staff members of the Organization.

XIX. The Tribunal has on several occasions considered the same issues as those raised in the present case. Just recently, in Judgement No. 1396, considered in July 2008, it considered whether a same-sex marriage between a staff member who is a United States national and a Danish national who entered United Nations service some time after could be recognized for the purposes of the entitlements and benefits derived from marital status in the United Nations. It is true that the Tribunal recognized this same-sex union between two women, but although the United States staff member was recognized as the wife of her Danish partner, even though she was a United States national, the situation is different in the present case. Recognition was granted under a memorandum dated 22 May 2007 from the Assistant Secretary-General for Human Resources Management which was intended to avoid situations in which one partner is considered the spouse of the other while the other is regarded as single (Judgement No. 1396 (2008), para. VI). Earlier the Tribunal had had occasion to deliberate on similar issues in Judgement No. 1063, *Berghuys* (2002) and in Judgement No. 1183, *Adrian* (2004). The fact that these issues continue to be raised shows how topical they are, but also how extremely sensitive they are, making the Tribunal's task all the more delicate. The Tribunal has always made sure, however, that it does not overstep its functions in resolving these disputes by entering into the political and moral debate to which such issues give rise. Hence, in Judgement No. 1396, the Tribunal recalled that "it is neither the General Assembly nor the Secretary-General - which are the only two authorities that can settle personnel questions" and thus the application before it, which asked it to take a political position, was inadmissible (Judgement No. 1396 (2008), para. VIII). Similarly, and as regards the role of the United Nations generally, the Tribunal emphasized in *Adrian* 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" (*Adrian, ibid* para. X).

Consequently the Tribunal must state from the outset that those of the Applicant's requests in which the Tribunal is urged to engage in a form of judicial activism are inadmissible. The Tribunal is referring here to parts of the application that speak, for example, of the need for the Organization to adopt a different rule from the one requiring reference to the law of the staff member's nationality in order to determine marital status.

XX. That having been said, the Tribunal must also emphasize that it has always tried to evaluate the situations before it realistically, taking account of the fact that the institutions of marriage and the family are evolving concepts that are undergoing profound and continuous changes, particularly today (See Judgement No. 1063, *Berghuys* (2002), para. I; Judgement No. 1396 (2008), paras. IX and X). It is these facts that the Tribunal must now take into account in determining whether the Applicant's marriage should be recognized for the purposes of entitlement to benefits deriving from marital status within the Organization.

XXI. In this case the question comes into especially sharp focus because, as the JAB pointed out, the central issue is whether it is United States federal law or state law - specifically, in the Applicant's case, Massachusetts law - that should be deemed the "law of nationality" the United Nations is required to refer. In this case, United States federal law, which the United States Mission's representative mentions twice in the form of the Defense of Marriage Act, provides that same-sex partnerships, even where they are recognized in certain states, are excluded from the definition of the term "marriage" and that same-sex partners are excluded from the definition of the term "spouse". However, in the United States marriage is a matter for state jurisdiction and not federal Government jurisdiction, a separation of powers that gives rise to a highly complex situation in which some states such as Massachusetts recognize the legality of same-sex marriage while others - the majority - are still opposed to it.

XXII. The complexity of the situation should not however cast doubt on the relevance - repeatedly emphasized not only in the United Nations but also in other settings (see, inter alia, Judgement No. 1396 (2008), paras. XI-XII) - of the practice of referring to the law of the staff member's nationality, particularly as that practice has been gradually refined in light of its application by the Organization. Indeed, the purpose of Secretary-General's bulletin ST/SGB/2004/13 was to provide such clarification. The parties differ over the question of whether it is this bulletin that should apply or the earlier one of 20 January 2004. The Tribunal recalls that, in adopting these bulletins, it was not the Secretary-General's intention to introduce new rules. He merely articulated the Organization's practice. The Tribunal established this once before in respect of the 20 January 2004 bulletin, in the *Adrian* case (*Adrian, ibid* para. X), and does so again now with reference to the 24 September 2004 bulletin: it was issued in order to clarify the earlier bulletin in accordance with the practice of the Organization. Consequently there will be no need in the

future to raise the question of the applicability of this bulletin, since it constitutes the most recent issuance reflecting the practice of the Administration in this area.

XXIII. Having clarified this point, the Tribunal must turn to the substantive issue, namely whether, inasmuch as it is the states of the federation that have jurisdiction in the area of marriage in the United States, the “law of nationality” to which reference must be made in order to determine the Applicant’s status is United States federal law or Massachusetts law. Notwithstanding the position of the United States Mission, which has twice cited the Defense of Marriage Act as the law of nationality applicable in this case, the JAB found that reference should be made to Massachusetts law. The Tribunal cannot agree. The reason for referring to national law, as identified by the Government responsible for that legislation, is to determine whether the Applicant meets the criteria for the granting of benefits and entitlements deriving from marital status. As the Respondent rightly points out, and as is clearly stated in the provisions of the Secretary-General’s bulletin, the Administration is required to refer to the law of the State “for purposes of granting benefits and entitlements”. In that light it is clear that the law which makes it possible to determine whether the Applicant meets the conditions for the granting of such benefits is the Defense of Marriage Act. The Tribunal cannot ignore this federal law, which explicitly excludes same-sex partnerships from the institution of marriage, without violating the sovereignty of the United States. The JAB has drawn attention to a contradiction between Massachusetts law, which recognizes same-sex marriage, and United States federal law. It can only be said that the JAB went too far in its deliberations on the law of nationality to be applied in this case and, in the Tribunal’s view, came to a mistaken conclusion.

XXIV. The Administration’s practice of referring to the law of the staff member’s nationality is intended to ensure respect for the sovereignty of all Member States of the United Nations (*Adrian*, *ibid.*, para. II). Following this fundamental principle, it is clear that the applicable law of nationality is the Defense of Marriage Act. It might have been otherwise had United States federal law made no provision whatsoever on the subject of marriage. Since, however, notwithstanding the delegation of powers to the states of the federation, the United States Congress has adopted such a law, it must be because the federal State wished to retain some jurisdiction in the matter. Consequently the law of the Applicant’s nationality is in this case United States federal law.

XXV. Accordingly the Tribunal confirms - even though it had no need to do so since the Administration acted correctly in asking the United States Mission which law it should refer to - that under United States law the Applicant’s marriage cannot be recognized by the United Nations. In that context the Tribunal must now turn to the Applicant’s allegation that the answer given by the representative of the United States Mission was influenced by the OLA, which, he claims, indicated that the question was whether same-sex marriage was recognized under *United States federal law*. This is the Applicant’s central argument. It is also the argument the JAB relied on in finding that the refusal to recognize the Applicant’s marriage was

based on an error. This Tribunal is by no means convinced that the alleged error had any effect whatsoever on the answer given by the representative of the United States Mission.

XXVI. In the first place, the Tribunal notes that, when invited by the JAB to give an explanation of this situation, the OLA replied: “To the best of our knowledge, this Office has not at any time advised the United States Permanent Mission to the United Nations regarding the definition of the ‘law of nationality’ in reference to same-sex unions/marriage and the above SGB [citing ST/SGB/2004/13], nor has this Office at any time informed or advised the U.S. Mission that the law of nationality equated to US federal law”. Insofar as the OLA did not need to intervene in the procedure of asking the United States Mission which was the applicable law of nationality (it was the Director of the Operational Services Division of OHRM who made the enquiries with the Permanent Mission of the United States) and insofar as there is no evidence that the OLA was in any position to influence the reply by the United States Mission, the Tribunal sees no reason to doubt the good faith of the OLA.

XXVII. It is nonetheless the case that the United States Mission did in fact answer the question put to it in its first letter of 20 August 2004 and clearly understood the question to refer to United States federal law. Even so the Tribunal does not find that the answer showed bias.

XXVIII. The fact is that in Judgement No. 1396, mentioned above, which was heard in July 2008, the United States Mission had been asked the same question, for the Applicant, who requested the benefits and entitlements deriving from marital status for her same-sex partner, was a United States national. In that case the United States Mission had explicitly referred to United States federal law in stating that the marriage in question could not be recognized under United States law. The answer given by the representative of the United States Mission in the present case, in the letters of 20 August 2004 and 13 July 2005, is thus in line with a consistent position adopted by the United States Mission. To go against that position would certainly constitute a violation of the sovereignty of the United States.

XXIX. In this context the Tribunal cannot agree with the JAB’s conclusion that as a result of an error the Applicant’s marriage should be recognized under United States law and by the Organization. The JAB went much too far in its analysis and literally substituted its judgement for that of the representative of the United States Mission, whose responsibility it is to identify the law of nationality. If the JAB had found, as it said it did, that recognition of the Applicant’s marriage had been denied because of an alleged error that formed the basis of the reply given by the representative of the United States Mission, it should have confined itself to recommending that the Administration should put the question again more clearly so that the Administration could make a determination in the Applicant’s case on the basis of correct information. In no circumstances could the JAB decide for itself that, because in its view United States federal law appears to conflict with Massachusetts law, which recognizes same-sex marriage, it can simply be set aside.



It seems clear that the JAB has succumbed to the temptation to engage in judicial activism, which does not make for good administration of justice.

XXX. Accordingly, the Tribunal must find that, in basing itself, in accordance with the long-established practice of the Organization, on an appropriate answer given by the representative of the United States Mission, the Administration was correct to deny the Applicant the entitlements he claimed.

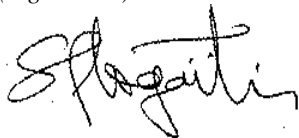
XXXI. The Applicant also claimed that the practice of the Organization constituted a disproportionately discriminatory practice. In rejecting this argument, the Tribunal will confine itself to recalling, as it has done in the past, that

“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”. (Judgement No. 1396 (2008), para. XIII).

XXXII. Lastly, in respect of the Applicant’s requests for compensation for moral damages, the Tribunal notes that these requests do not fall within its competence *ratione materiae* inasmuch as they were not put before the JAB.

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

(Signatures)



Spyridon **Flogaitis**  
President



Brigitte **Stern**

Member  
Geneva, 31 July 2009



Tamara **Shockley**  
Executive Secretary

**Concurring Opinion of Agustín Gordillo**

I. I concur with the rejection of the Applicant's pleas, and I would like to emphasize that the grounds on which the majority based its decision are congruent with the current case law of the UN Administrative Tribunal.

II. However, although I fully concur with the rejection of the pleas, I wish to respectfully state that my position on the context of the matter differs. See "The Administrative Law of International Organizations: Checks and Balances in Law Making —The Case of Discrimination," in: *European Public Law Series / Bibliothèque de Droit Public Européen*, vol. LXXXIII, *Internationalisation of Public Law / L'Internationalisation du Droit Public*, London, Esperia, 2006, pp. 289-312; also in : *Revue Européenne de Droit Public / European Review of Public Law*, vol. 18, No. 1, Spring of 2006, London, Esperia, 2006, pp. 289-312; also distributed in: *International Administrative Tribunals and the Rule of Law*, World Bank Administrative Tribunal / American Society of International Law, *Joint Colloquium*, 27 March, 2007, Washington, D.C.; previously, in Spanish, "Frenos y contrapesos en la creación del derecho en organismos internacionales. El caso de la discriminación" in: *LL*, 2005-F, 1404.

III. I recently held the same restrictive view in my dissenting opinion to a Plenary Judgement of the ILO Administrative Tribunal, made public on 8 July 2009.

IV. In the case of the United Nations, I believe that the statutory authority to decide whether or not, and/or to which extent, partnerships of persons of the same sex may be legally assimilated to marriages, at least to the extent of social benefits, rests with the General Assembly and not with the Administration or the Administrative Tribunal. That different line of reasoning would not, of course, change the outcome of the present case.

(Signatures)



Agustín **Gordillo**  
Member

Geneva, 31 July 2009



Tamara **Shockley**  
Executive Secretary