Judgment No. 2020-UNAT-1004

Before:	Judge Dimitrios Raikos, Presiding Judge Martha Halfeld Judge John Raymond Murphy
Case No.:	2019-1318
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Ms. Larriera:	George G. Irving
Counsel for UNJSPB:	Janice Dunn Lee

1. Ms. Carolina Larriera appeals the decision of the Standing Committee of the United Nations Joint Staff Pension Board (Board or UNJSPB), which upheld the decision of the Secretary/Chief Executive Officer of the United Nations Joint Staff Pension Fund (Fund or UNJSPF), not to recognize her as the surviving spouse of Mr. M under Article 34 of the Fund's Regulations on the basis that Mr. M was married to another person. Now on appeal before the United Nations Appeals Tribunal (Appeals Tribunal), we dismiss the appeal and uphold the decision of the Board.

time of his death. She contends that, contrary to the Fund's assertion, Mr. M was not married but was legally separated at the time of his death.

14. Ms. Larriera also argues that the Standing Committee erred in law and failed to seek an authoritative opinion from the French Authorities. The Fund did not cite to any Regulations or Rules in support of the conclusion that only French law was applicable in this case as opposed to the law of the nationality of the Fund participant, which is Brazil. ST/SGB/2004/4 on determining personal status for United Nations benefits and entitlements indicates that family status for the purpose of entitlements under the United Nations Staff Regulations and Rules should be determined on the basis of the law of nationality of the staff member concerned. Further, no evidence has been presented to show that the Fund requested the French Government to confirm the interpretation of its Civil Code with regard to Mr. M's marital status. The Standing Committee has upheld a decision of the CEO which was an *ad hoc* interpretation of the French Civil Code and should not override the legal determination of the Brazilian court. While, under French law, Mr. M's first marriage supposedly remained valid, it was qualified by a decree of judicial separation from the Divorce Chamber of the Superior Court of Justice on 23 May 2003. It is also true that, under Brazilian law, she and Mr. M had a civil union at the time of his death which is recognized in Brazil as equivalent to marriage. The Fund has not provided any legal basis for its determination that Brazilian law has no application outside of Brazil.

15. Ms. Larriera further argues that the Fund's interpretation of the French Civil Code[2] is erroneous. Article 3 of the Code indicates that it applies to French nationals. Article 202-1 provides that the conditions to enter into a marriage are governed for each spouse by his personal law. Article 202-2 indicates that a marriage is validly celebrated if it has been celebrated according to the formalities contemplated by the law of the State within which the celebration has occurred. With respect to dissolution of a marriage, Article 309 states that "divorce and judicial separation are governed by French law, where both spouses are of French nationality; where both spouses have their domicile on French territory; where no foreign law considers it should govern ...". In this situation, both spouses were not French and Mr. M did not maintain a residence in France and was in fact legally separated at his death. As a result, Ms. Larriera argues that foreign law in fact governs this case since nationality is recognized as determinative of personal status and judicial determination was

[2] Cass. Civ. 21 jui 1987 n. 84-14354.

that the divorce proceeding was lapsed. However, this was issued two years after Mr. M had died.

18. The impugned decision also suggested that Ms. Larriera was not a designated beneficiary and the Fund's Administrative Rule B.3 precluded any changes. Article 34 of the Fund's Regulations, however, may not be circumvented by subordinate rules. Administrative Rule B.3 does not override Article 34. It applies to staff members whereas Article 34 applies to spouses making a claim. The argument that marital records may not be changed after separation is inapplicable to survivor's benefits per the *Sidell*[6] case, which says that the record may be changed to acknowledge a valid marriage that occurred before the separation.

19. The Fund argues that the appeal is not receivable as the Fund's Administrative Rule K.5 stipulates a 90-day deadline to submit a request for review to the Standing Committee following notification of a disputed decision. Ms. Larriera knew in 2003 that she was not recognized as the spouse, yet she only contacted the Fund regarding her claim in 2018 and not in the intervening 15 years since Mr. M's death.

20. Should the appeal be received, the Fund requests the Appeals Tribunal to reject the appeal in its entirety. Because Mr. M married in France, his marriage was subject to French law for purposes of determining spousal benefits regardless of his country of nationality. He, thus, could not change his marital status in a different jurisdiction other than where he entered into the marriage. If he wanted another individual recognized as his spouse, he was required to first divorce either in France or in a foreign jurisdiction in a manner compatible with, and recognized by, French law.

Administrative Rule B.3 restricts changes to the report of prospective beneficiaries after a participant's separation from service, as this late addition imposes additional costs on the Fund.

24. Lastly, the Fund argues that the Appellant's request for remedies should be denied as there is no legal basis to award her a widow's benefit under the Fund's Regulations. The Appellant incorrectly argues that Article 34 of the Fund's Regulations allows for the division of spousal benefits when there are multiple spouses. This is possible only when there are multiple spouses who ae legally entitled to a benefit, which occurs when there is legal polygamy.

25. The Appeals TribCID 106e( )-5.4 (b -2.82 Td[(2))-490 Tw 5.508 02( )-5.4 (b d 1.361 0 2s)-1.8 ( )5.1

Standing Committee acting on behalf of the United Nations Joint Staff Pension Board, alleging nonobservance of the regulations of the United Nations Joint Staff Pension Fund, submitted by:

> (a) Any staff member of a member organization of the Pension Fund which has accepted the jurisdiction of the Appeals Tribunal in Pension Fund cases who is eligible under article 21 of the regulations of the Fund as a participant in the Fund, even if his or her employment has ceased, and any person who has acceded to such staff member's rights upon his or her death;
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> (b) Any other person who can show that he or she is entitled to rights under the regulations of the Pension Fund by virtue of the participation in the Fund of a staff member of such member organization.

28. Our jurisprudence holds that a staff member is required to clearly identify the contested administrative decision.[7] The need to identify a specific administrative decision is obviously necessary for the purpose of determining when the 90-day time limit for requesting review in terms of the Fund's Administrative Rule K.5 has commenced.

29. As per the settled jurisprudence, an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment. Further, the date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine.[8]

30. Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.[9] What matters is not so much the functionary who takes the decision

[7] *Argyrou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-969, para. 32; *Haydar v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-821, para. 13.
[8] *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 31; *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para. 36.
[9] *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 32; *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 62, citing to *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50.

34. As the Appeals Tribunal has consistently held the absence of a resp.7 (d){ c)-0.-0..86-4.4 (n4j-0.T-

> date of his death in service or, if he was separated prior to his death, she was married to him at the date of separation and remained married to him until his death.

37. At the outset, the Fund submits that the Administrative Rules make clear the obligation on the part of an employing organization and a participant under Administrative Rules B.2 and B.3 to report his or her dependents and Administrative Rule B.3 goes on to state that there can be no change to the record after separation from service. Mr. M never reported Ms. Larriera to the United Nations or to the Fund as his spouse. He only ever reported his wife, Ms. M. Even Ms. Larriera, who herself was a participant in the Fund from 2 March 1998 to 14 March 2008, never reported Mr. M as her spouse. So, Mr. M was required, but failed, to report his marriage to the Fund to have his record and marital status amended, before his death in 2003.

38. The UNJSPF Administrative Rules B.2 and B.3 provide:

> B.2 The information shall normally include the name of the participant and the date of commencement of participation, date of birth, sex and marital status, and, as the case may be, the names and dates of birth of the participant's spouse, children under the age of 21, and secondary dependents; the organization shall verify, to the extent possible, the accuracy of the information furnished.
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> B.3 The participant shall be responsible for providing the information in rule B.2 above and for notifying the organization of any changes which occur therein; the participant may be required to submit documentary or other proof of such information to the organization or the secretary of the committee. No change in the records relating to the date of birth of a participant or his or her prospective beneficiaries shall be accepted after the date of the participant's separation.

39. As we have found in *Sidell*,[12] the prohibition of a change in the records after separation is specifically limited to the date of birth of the participant or his or her prospective beneficiaries, and nothing else. Further, the Appeals Tribunal finds that the language of B.3 neither prevents a participant from changing his or her record to acknowledge a valid marriage that occurred before separation,[13] nor does it prevent a spouse from reporting his/her alleged marriage to the Fund after separation from service.[14] Otherwise

result in the participant's spouse, who was validly married at the time of separation from service but was never reported to the Fund by the participant or the employing authority, being precluded from recognizing his/her marital status and exercising his/her lawful right to receive and enjoy his/her entitlement to a widow's benefit. Therefore, we reject the Fund's contentions to the contrary as baseless.

40. So, the remaining primary question for determination is whether Mr. M's marriage to Ms. M was valid and Ms. Larriera's "stable union" to Mr. M was legally invalid, for the purpose of disposing this appeal, at the time of Mr. M's death on 19 August 2003.

41. As we stated in *El-Zaim*[15] and *Al Abani*,[16] the reference to the law of the staff member's nationality in the area of marital status allowed the United Nations to respect the various cultural and religious sensibilities existing in the world, as no general solution is imposed by the Organization, which simply tolerates and respects national choices. Reference to national law is the only method whereby the sovereignty of all States can be respected.

42. We have also found in these cases that the principle of determining personal status by reference to the law of the staff member's nationality could only apply to a staff member who concluded a marriage or entered into another partnership recognized under his or her national law, and not to a staff member who chose to enter into a marriage or partnership under a law other than that of his or her nationality.

43. In the present case, Mr. M's marriage to Ms. M was not concluded under Brazilian law. Mr. Mand his wife chose to conclude a marriage under French law. Thus, the marriage was governed by French law and their marital status could not have been unilaterally changed under Brazilian law, the law of his nationality, ignoring the place and procedures of the marriage.

44. Ms. Larriera argues that the Fund is obliged to follow the nationality principle in deciding the personal status of the staff member as this policy is envisaged in former Secretary-General Bulletin ST/SGB/2004/4, in which it is stated that "family status for the purposes of entitlements under the United Nations Staff Regulations and Rules should be

[15] *El-Zaim v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT 007, para. 22, citing former Administrative Tribunal Judgment No. 1183, *Adrian* (2004), para. II.
[16] *Al Abani v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-663, para. 30.

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".

45. Nevertheless, irrespective of the issue as to whether the United Nations Secretary-General, who promulgated ST/SGB/2004/4, has any authority to administer the UNJSPF or to make, amend or interpret administrative issuances concerning the UNJSPF benefits, the relevant text, as per the plain reading of it, explicitly refers to "United Nations entitlements" and to the practice of the Organization when determining the personal status of staff members for the purpose of entitlements under the United Nations Staff Regulations and Rules. Hence, ST/SGB/2004/4, which governs recognition of personal status for United Nations employment benefit purposes and not for UNJSPF pension benefit purposes, as is the case in the present appeal, is not applicable to the present issue.

46. Additionally, as already held, Mr. M voluntarily subjected his marriage to the laws of France. Thus, even if former ST/SGB/2004/4 applied to the UNJSPF, which it does not, it would not provide a legal basis on which Ms. Larriera could change Mr. M's marital status, after his death, by invoking the law of his nationality.

47. As per the documents on file, Mr. M's marriage to Ms. M never came to an end or dissolved before his death on 19 August 2003. While it is true that in January 2003 Mr. M initiated divorce proceedings against Ms. M in France, and that on 23 May 2003, the Tribunal De Grande Instance De Thonon Les Bains issued an order allowing the parties to live separately, and authorized them to file an application for divorce, this proceeding never ever resulted in a divorce. Actually, as the Fund correctly contends, the French Court did not dissolve this marriage but simply noted that, in accordance with French law, if the husband did not file suit for divorce within three months, then the wife could, within a further period of three months, file such a suit herself, and that if neither spouse made such a filing within six months then the provisional measures would lapse.[17] No such filings were made, and by order dated 14 April 2005, the court decreed that the provisional measures had lapsed. Therefore, Mr. M remained married to Ms. M until his death on 19 August 2003. This fact is also confirmed by a marriage certificate issued by the French Civil Registry of

17 The order provides as follows: "*Rappelons aux époux les dispositions de l'article 1113 du Nouveau Code de Procédure Civile, lesquelles prevoient: «Si l'époux n'a pas usé de l'autorisation d'assigner dans les trois mois du prononcé de l'ordonnance, son conjoint pourra dans un nouveau délai de trois mois, l'assigner lui-même et requérir un jugement sur le fond. Si l'un ou l'autre des époux n'a pas saisi le Tribunal à l'expiration des six mois, les mesures provisoires seront caduques.»*"

marital status for UNJSPF purposes, ignoring the place and procedures of the marriage. Since Mr. M married Ms. M in France, he could not acquire a different marital status for UNJSPF purposes unless and until his marriage with Ms. M was properly dissolved to the satisfaction of the applicable French law, which never occurred. Consequently, to no avail Ms. Larriera invokes the law of Brazil, being the law of Mr. M's nationality, as the determinative law in the instant case in order to assess the validity of Mr. M's marriage to Ms. M.

51. On the same footing, the Appeals Tribunal finds as misplaced Ms. Larriera's argument that the Judgment of the Brazilian Court on 7 December 2016 had terminated Mr. M's marriage to Ms. M, as per the Brazilian law. First, it does not

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