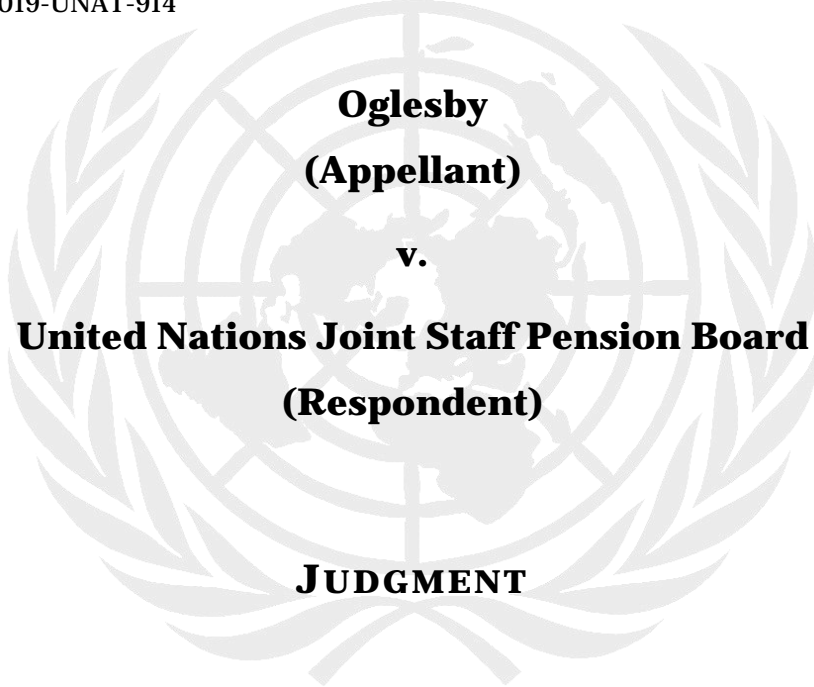




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2019-UNAT-914



**Oglesby  
(Appellant)**  
**v.**  
**United Nations Joint Staff Pension Board  
(Respondent)**

**JUDGMENT**

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**Before:** Judge John Raymond Murphy, Presiding  
Judge Sabine Knierim  
Judge Martha Halfeld

**Case No.:** 2018-1208

**Date:** 29 March 2019

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Aleksandra Jurkiewicz, OSLA

**Counsel for Respondent:** Paul Dooley, UNJSPF

**JUDGE JOHN RAYMOND MURPHY, PRESIDING.**

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

**Facts and Procedure**

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

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

4. Because same-sex marriage was not legally possible in any country on the date of Mr. Oglesby’s separation, Mr. Nurdin *prima facie* did not qualify for the widow/widower benefit pursuant to Article 35 read with Article 34 of the UNJSPF Regulations. These provisions provide that a widow/widower’s benefit shall be payable to the surviving spouse of a participant who was entitled to a pension benefit at the date of his/her death, or who died in service, if the participant and spouse were married to each other at the date of the participant’s death in service or, if the participant was separated from service prior to his death, they were married at the date of separation and remained married until the participant’s death.

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

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

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

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

As an alternative, and in view of the fact that you [married] Mr. Nurdin after separation, you could elect to purchase an annuity in his favour under Article 35*ter* of the Regulations. Should you wish to further explore this route, the Funds Client Services Section would be able to provide you with an estimate of the cost of the annuity. Your election under Article 35*ter* would need to be made within one year of your marriage to Mr. Nurdin and would take effect 18 months after the date of marriage.

7. The reference in the letter to the change in policy is important. Between 2006 and 2016, the Pension Board specifically and thoroughly considered the scope of Articles 34 and 35 in the context of non-traditional unions. This process resulted in the Secretary-General issuing ST/SGB/2004/13/Rev.1 (Personal status for purposes of United Nations entitlements), which expanded the recognition of marriage to include unions and registered partnerships legally

recognized by the competent authority of the location where the status was established, as long as the union confers similar legal effects as marriage, specifically including pension rights. Subsequently, with effect from 1 September 2016, the Fund issued guidelines allowing prospectively for spousal benefits under Articles 34 and 35 of the Regulations in unions/registered partnerships recognized by the competent authority of the relevant location.

8. Article 35*ter* of the Regulations, to which the legal officer referred in his e-mail, provides that a former participant receiving a periodic benefit may elect to provide a periodic benefit for life in a specified amount to a spouse who was not married to him or her at the date of separation. Such election shall be made within one year of the date of marriage and shall become effective 18 months after the date of marriage. The benefit shall be payable as of the first day of the month following the death of the former participant. When the election becomes effective, the benefit payable to the former participant shall be reduced in accordance with actuarial factors in order to fund the annuity.

9. Mr. Oglesby replied immediately and requested the Fund to interpret the articles in a constructive and humane manner taking into consideration that he served the Organization including in hardship duty stations for approximately 25 years, was 79 years old and was being treated for a serious heart condition making it unlikely that he would live until 2020, thus rendering the annuity a non-viable alternative since it would lapse if he did not live until its effectiveness 18 months after the date of marriage (October 2020).

10. On 9 May 2018, the Chief Executive Officer (CEO) of the Fund provided a formal response to Mr. Oglesby. The letter recorded that the eligibility requirements for a widow's or widower's benefit are that: i) the participant must have been married to the spouse at the time of the participant's separation from service; and ii) the participant must have remained married to the spouse until the participant's death. The CEO went on to explain the Fund's reluctance to make an exception for Mr. Oglesby as follows (Emphasis in original):

[T]he Fund does not have the discretion to make an exception to the application of the Regulations, nor to expand the scope of coverage for survivor's benefits beyond those parties recognized under the Regulations. The recognition of a prospective survivor after a participant's separation from service would impose an additional actuarial cost on the Fund, which would stand to be borne by all participants.

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

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

11. On 18 May 2018, Mr. Oglesby filed a request for review of the Fund's decision to the Standing Committee. The Standing Committee considered the case at its 201<sup>st</sup> meeting held on 24 July 2018 and upheld the decision of the UNJSPF. By letter dated 6 August 2018, Mr. Oglesby was informed of the Standing Committee's decision. The pertinent part of the letter reads:

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

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

## Submissions

### Mr. Oglesby's Appeal

13. Mr. Oglesby argues that he presented evidence of a 36-year partnership through joint bank account statements, real estate holdings, and other legal agreements throughout several countries wherein they resided. Such partnership, he submits, constitutes a *de facto* common law marriage recognized in many jurisdictions within the United States and other countries. Common law marriage, also known as *sui iuris* marriage, informal marriage, marriage by habit and repute, or marriage in fact, is a legal institution in a number of jurisdictions where a couple is legally considered married, without being formally registered in a civil or religious marriage. Thus, spouses' actions of representing themselves as being married and organizing their life as if they were married is evidence of their marriage.

14. He further submits that the Standing Committee's decision is a conservative interpretation of Articles 34 and 35. While it acknowledged an evolutionary character of same-sex partnership rights and indicated that as early as in 2006 first suggestions were made to recognize same-sex partnership rights for the purpose of granting benefits and entitlements, no consideration was given to a larger historical context in which these provisions were drafted. The Standing Committee refused to recognize the existence of same-sex partnership rights that were not explicitly stated in the Regulations.

15. Article 34 was originally the only provision providing a benefit to a surviving widow. It was drafted on the assumption that women would not work after marriage and the death of their husband resulted in the loss of their sole income. Following social evolution, Article 35 was added to allow widower's benefits to avoid discriminating against men. Further, in 2004 the former United Nations Administrative Tribunal in *Adrian*,<sup>1</sup> recognized same-sex legal partnership for the purposes of spousal benefits following promulgation of ST/SGB/2004/4 (Family status for purposes of United Nations entitlements).

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<sup>1</sup> Former United Nations Administrative Tribunal Judgment No. 1183, *Adrian* (2004).

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

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

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

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

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

### **The Fund's Answer**

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

22. The Standing Committee correctly determined that Mr. Oglesby did not meet the conditions under Articles 34 and 35 as Mr. Oglesby and Mr. Nurdin were not married at the time of Mr. Oglesby's separation. The Appeals Tribunal concluded in *Williams*<sup>2</sup> that a spouse married after separation from service does not meet the requirements for eligibility for a survivor's benefit under Article 34(a).

23. In addition, the UNJSPF correctly rejected Mr. Oglesby's argument that he was in a common law relationship at the time of separation. The expansion of the scope of Articles 34 and 35 in the context of non-traditional unions was limited to unions and registered partnerships legally recognized by the competent authority of the location where the status was established as long as the union conferred similar legal effects as marriage, specifically including pension rights. Mr. Oglesby falls outside the scope of this expanded recognition because at the time of his separation from service his relationship with Mr. Nurdin was not legally recognized in the United States and did not confer similar legal effects as marriage, including pension rights. Thus, his relationship at the time of his separation would not be considered equivalent to marriage for purposes of Articles 34 and 35.

24. In addition, even if his relationship had been equivalent to marriage, the Pension Board's decision to recognize such relationships as equivalent to marriage does not apply retroactively.

25. The former United Nations Administrative Tribunal has confirmed in similar cases that there is no retroactivity to recognition of personal status such as in *Berghuys*<sup>3</sup> which concerned a request for a widower's benefit from the surviving same-sex partner of a participant who died in service. They entered a domestic partnership agreement in Netherlands prior thereto. At the time of the participant's death, the Netherlands had not yet legalized same-sex marriage. The

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<sup>2</sup> *Williams v. United Nations Joint Staff Pension Board*, Judgment No. 2017-UNAT-736.

<sup>3</sup> Former United Nations Administrative Tribunal Judgment No. 1183, *Berghuys* (2002).



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

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

### **Considerations**

27. The jurisdiction of the Appeals Tribunal to determine appeals from the Standing Committee is governed by Article 2(9) of the Appeals Tribunal's Statute. The relevant part reads:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal of a decision of the 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 [...].

28. Mr. Oglesby's claim for a survivor benefit does not fall within the express terms of Articles 34 and 35 of the Regulations as expanded by the implementation guidelines (the Guidelines) formulated by the CEO of the Fund.<sup>5</sup> Mr. Oglesby was not married to Mr. Nurdin when he separated from service in 1998 and his relationship at that time was not legally

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<sup>4</sup> Former United Nations Administrative Tribunal Judgment No. 1183, *Adrian* (2004).

<sup>5</sup> Pursuant to the resolution adopted by the Pension Board at its 63<sup>rd</sup> Session in July 2016, giving effect to the general policy in ST/SGB/2004/13/Rev. 1 that the personal status of staff members for the purpose of entitlements must be determined by reference to the law of the competent authority under which the personal status has been established.

recognized in the United States as being akin to a marriage. The Guidelines stipulate that the effective date of recognition of personal status for purposes of spousal benefits follows the effective day of national legislation as well as the actual date of celebration of the marriage/union following the revised national legislation. The Guidelines added importantly: “[A]nd there is no retroactivity in recognition. If the legislation changes after the staff member’s/participant’s separation from service, a former participant is considered eligible to elect an annuity under article 35 *ter* of the UNJSPF Regulations.”

29. Thus, in summary, it is indisputable that Mr. Oglesby’s case falls squarely within the circumstances requiring him, should he wish, to obtain an annuity under Article 35 *ter*, as contemplated in the Guidelines. At the time of his separation from service, he was not married to Mr. Nurdin; their same-sex relationship did not enjoy a similar status to marriage under the law of the United States; the Regulations do not afford retrospective recognition to their 2018 marriage; and the Regulations specifically regulate Mr. Oglesby’s situation (and similarly situated participants) by providing for an annuity under Article 35 *ter*. Therefore, under the express terms of Articles 34 and 35, Mr. Oglesby’s spouse is not entitled to a survivor’s benefit.

30. However, Mr. Oglesby’s contentions go beyond a claim for benefits under Articles 34 and 35 of the Regulations. He argues that the provisions of Articles 34 and 35, restricting his entitlement, are inconsistent with Article 8 of the Charter and Article 7 of the UDHR, and that he should be afforded relief on that basis.

31. Article 8 of the Charter reads:

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

32. Article 1 of the UDHR reads:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

33. Article 7 of the UDHR reads:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

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

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

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

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

37. There is thus merit in Mr. Oglesby's line of argument, but unfortunately the Appeals Tribunal has no remedial power to grant him the relief he seeks. Mr. Oglesby challenges the very adoption of the relevant Regulations by the Pensions Board on the grounds of inconsistency with higher constitutional standards. The Appeals Tribunal does not have the prerogative to apply the Charter or the UDHR directly, nor the power to strike down internal or subsidiary legislative provisions conflicting with the norms they enact. The Appeals Tribunal is not akin to a constitutional court and, thus, has no jurisdiction to declare the Regulations constitutionally incompatible or to strike them down as invalid. Its jurisdiction and remedial powers do not extend that far. The jurisdiction of the Appeals Tribunal is clearly circumscribed by Article 2(9) of the Appeals Tribunal's Statute. It may only determine if there has been "non observance" of the Regulations. The term "non observance" means a failure to fulfill or comply with the terms of a provision, rule or policy. The Fund has acted in keeping with its Regulations. If there is indeed any enduring discrimination on grounds of sexual orientation at variance with the Charter, that is a matter for the Secretary-General or the General Assembly.

38. Mr. Oglesby referred to the decision of the former United Nations Administrative Tribunal in *Mullan*,<sup>6</sup> which held that the terms of appointment include the possible application of the Charter, implying that powers exercised under the Regulations of the Fund must be exercised in accordance with the Charter. The argument posits the possibility of the Appeals Tribunal, through legitimate techniques of extensive interpretation, applying the Charter indirectly by "reading down" or construing the Regulations in accordance with the objects, spirit and purport of the Charter to eradicate the alleged enduring discrimination against homosexuals. However, the applicable Regulations are clear and unambiguous in their language and purpose. In the circumstances, there is no room for a contextual or teleological interpretation broadening the scope of the benefit and imposing additional financial burdens on the Fund, even though it is doubtful that any budgetary intrusion to include the excluded group would be actuarially unsupportable.

39. In the premises, the appeal regrettably must fail.

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<sup>6</sup> Former United Nations Administrative Tribunal, Judgment No. 162, *Mullan* (1972).

**Judgment**

40. The appeal is dismissed, and the decision of the Standing Committee is hereby affirmed.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of March 2019 in New York, United States.

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Knierim

*(Signed)*

Judge Halfeld

Entered in the Register on this 29<sup>th</sup> day of May 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar