

The Administrative Tribunal,

Considering the complaint filed by Mr E. J. P. against the Food and Agriculture Organization of the United Nations (FAO) on 19 October 2005, the Organization's reply of 29 December 2005, the complainant's rejoinder of 3 February 2006 and the FAO's surrejoinder of 30 March 2006;

Considering the *amicus curiae* brief submitted by the Federation of International Civil Servants' Associations (FICSA) on 30 August 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen born in 1975, joined the FAO in April 2003 as an Associate Professional Officer based in Rome. On 6 May 2003 he submitted a request for dependency benefits in respect of his same-sex partner, whom he had married in the Netherlands on 1 May 2003. In support of his request he attached his marriage certificate. By a memorandum of 7 November 2003 the Director of the Human Resources Management Division informed him that the Organization was not yet in a position to take a decision on his request. She explained that since the complainant's request – the first of its kind at the FAO – raised issues which “touch[ed] upon policy considerations and b[ore] significant implications”, the Administration had decided to seek guidance from its governing bodies; thereafter, the Committee on Constitutional and Legal Matters (CCLM), a subsidiary committee of the FAO Council to which the matter had been referred, had recommended that the FAO follow closely the ongoing discussions within the United Nations (UN) system regarding the recognition of same-sex spouses and domestic partners with a view to reaching a common position, but that common position had yet to be formulated.

On 13 January 2004 the complainant appealed to the Director-General, challenging the Organization's refusal to take a decision on his request. He also asked the Director-General to take a final decision, within the meaning of Staff Regulation 301.11.1.

By a letter of 8 April 2004 the Assistant Director-General in charge of the Administration and Finance Department, writing on behalf of the Director-General, informed the complainant that his appeal had been rejected. Referring to a number of consultations that had recently taken place under the aegis of the Chief Executives Board for Coordination, he stated that the issue of same-sex marriage and domestic partnership was still under review within the UN system and that, for the time being, the term “spouse” would continue to be interpreted as meaning husband or wife, excluding divorced partners. He added that since the matter was still under review, it would be premature for the Director-General to take a final decision on his request.

On 12 May 2004 the complainant lodged an appeal with the Appeals Committee. In its report dated 10 June 2005 the Committee recommended that his request for dependency benefits be granted on the grounds that it was in conformity not only with the FAO Staff Regulations and Rules, but also with the principle applied by the Organization in determining matters of personal status, namely that such matters are determined by reference to the law of the country of nationality of the staff member concerned. The Committee rejected the complainant's argument that the Organization had denied his request on discriminatory grounds.

On 8 August 2005 the Director-General wrote to inform the complainant that he was “not in a position to accept the Committee's recommendation at th[at] point in time”. He explained that the deliberations of the governing bodies on the issue of same-sex marriage had not yet been concluded. Indeed, at its 128th Session held in June 2005, the FAO Council had decided that this issue should be further examined by the CCLM at its next Session in October 2005. In the meantime, therefore, the position of the Organization as expressed in the letter of 8 April 2004

continued to stand. The Director-General added that once the governing bodies' deliberations had been concluded, his request would be entertained without delay. That is the impugned decision.

B. The complainant considers that his spouse meets all the criteria for dependency status stipulated in the FAO Staff Regulations and Rules, which do not define the term "spouse" and which contain no condition concerning the spouse's gender or the sexual orientation of the staff member concerned. Noting that the Organization has repeatedly confirmed its adherence to the principle that the personal status of staff members for the purpose of entitlements is determined by reference to the law of the country of nationality of the staff member concerned, he submits that the application of that principle to his case can only lead to recognition of his marriage.

According to the complainant, the Organization could have resolved any perceived ambiguity as to the meaning of the term "spouse" by referring to the Tribunal's case law, particularly Judgments 1715 and 2193, or to the emerging practice in the UN system. In this regard he draws attention to the fact that the World Food Programme – an autonomous joint subsidiary programme of the UN and the FAO – recognises same-sex marriages for the purpose of granting dependency benefits, even though it is bound by the FAO Staff Regulations and Rules. He also argues that the Organization should have resolved any ambiguity in the manner most favourable to him, in accordance with the general rule of law whereby ambiguous provisions should be construed against the person responsible for drafting them and in favour of those upon whom they are imposed.

The complainant considers that the decision to refer his request to the governing bodies was unnecessarily dilatory. He points out that the UN Secretary-General did not resort to the UN General Assembly in deciding that same-sex marriages that are valid under the law of a staff member's country of nationality should be recognised by the UN for the purposes of dependency benefits. Equally dilatory, he says, is the approach whereby the decision on his request is postponed until a common UN system position is developed: indeed, the issue of same-sex marriage has all but disappeared from the agendas of the inter-agency bodies, and the FAO does not appear to be very active in getting the issue back on the agenda.

He also contends that the impugned decision is inconsistent with the Organization's own decisions and practice concerning claims for dependency benefits for domestic partners. He submits that claims for dependency benefits in respect of a same-sex domestic partner have been refused on the grounds that such partnerships were legally not entirely equivalent to marriage and were not supported by an official marriage certificate. His same-sex marriage, however, is legally identical to an opposite-sex marriage under Dutch law and is evidenced by an official certificate.

Lastly, the complainant argues that the FAO's approach to his request is discriminatory, being based on personal characteristics that are irrelevant to the performance of his duties, namely his sexual orientation and/or the gender of his spouse. Such discrimination, he asserts, is contrary to the Charter of the United Nations, to general principles of law and to international instruments on human rights.

The complainant seeks the acknowledgement of his marital status, and the retroactive granting of all entitlements and relevant dependency benefits from the date of his marriage, plus compound interest at the rate of 12 per cent per annum. In addition, he claims 3,500 euros in compensation for the cost of his spouse's health insurance, 10,000 euros in costs for both the present proceedings and the internal appeal proceedings, 25,000 euros in moral damages "for pain and suffering inflicted by the Organization's failure to recognise [his] marriage, including suffering caused by humiliating immigration procedures", and "punitive" damages in the symbolic amount of one euro.

C. In its reply the Organization submits that there is no basis for accepting the complainant's request under the existing Staff Regulations and Rules, which do not provide for the recognition of same-sex spouses. It explains that, in accordance with "consistent and long-standing UN practice", it interprets the term "spouse" by reference to Part IV of the Report of the Inter-Organization Meeting on Salary Matters issued by the Administrative Committee on Co-ordination on 29 March 1957, which provides that "[t]he term 'spouse' means wife or husband and excludes divorced partners". Moreover, Staff Regulation 301.3.22, concerning dependency allowances, expressly refers to "husband and wife". The Organization argues that the Staff Regulations and Rules must be changed in order to accommodate the complainant's request, hence the need to refer the matter to the governing bodies.

The FAO states that it recognises the principle that matters of personal status are to be determined by reference to the law of the country of nationality of the staff member concerned, but argues that this principle can only be applied to the extent that it is compatible with the Staff Regulations and Rules. It points out that in the present

case, reference to the Dutch law governing same-sex marriage leads to an outcome which is inconsistent with the definition of the term “spouse” under the Staff Regulations and Rules. In order to resolve that incompatibility it was necessary to refer the matter to the governing bodies. In this regard the FAO recalls that in Judgment 2193 the Tribunal reaffirmed the principle that the domestic legislation of Member States cannot take precedence over the internal laws of an international organisation.

The Organization emphasises that the issue of same-sex marriage is highly controversial in the vast majority of its Member States, and that in submitting the matter to the governing bodies it attempted, in good faith, to find a definitive answer to the question. Furthermore, it made every effort to convince the governing bodies of the validity of the principle that matters of personal status should be determined by reference to the law of the country of nationality of the staff member concerned. However, it submits that it is bound by the guidance of its governing bodies, and that in the absence of a pronouncement on the issue by the FAO Council it cannot allow the complainant’s request.

The FAO asserts that the complainant’s requests for compensation are groundless. It denies any discrimination, pointing out that it has merely applied the existing rules and that it has made every attempt within its institutional framework and rules to seek appropriate changes to the way in which the Staff Regulations and Rules are applied. It considers that it cannot be held responsible for the humiliating treatment that the complainant allegedly suffered at the hands of the Italian immigration authorities, adding that he would have had to go through Italian immigration procedures even if his spouse had been recognised as such by the Organization. It rejects his claim for “punitive” damages as inappropriate, since it has committed no wrongful act. Lastly, it notes that his claims for legal costs and for compensation in respect of the cost of his spouse’s health insurance are not supported by any evidence of the actual costs incurred, and that his claim for interest is well above the rate usually awarded by the Tribunal.

D. In his rejoinder the complainant reiterates his arguments. He contends that the Organization was not compelled to refer the issue of same-sex marriage to its governing bodies, but chose to do so in order to delay a decision on his request, even though the matter had already been settled by Judgment 2193. He asserts that the FAO Council, which has repeatedly referred the matter back to the CCLM, is clearly unwilling to take a position, and that under such circumstances the Organization’s failure to administer its human resources policies constitutes a “derogation of duty” on its part.

E. In its surrejoinder the FAO maintains its position. It insists that the suspension of a decision to recognise the complainant’s same-sex spouse as a dependent, pending a decision by the governing bodies, was not an act of discrimination, but was the inevitable outcome of a set of rules that did not provide an immediate answer to the new question raised by the complainant’s case.

F. In its *amicus curiae* brief FICSA expresses its wholehearted support for the complainant. It submits that in the light of recent developments, and particularly Judgments 2549 and 2550, which were delivered on 12 July 2006, it is particularly regrettable and unacceptable that the FAO should continue its resistance to the recognition of same-sex partners, thereby endorsing discrimination against homosexual members of its staff.

## CONSIDERATIONS

1. Having joined the FAO in April 2003, the complainant, who holds Dutch nationality, informed the Administration and Finance Department on 6 May 2003 that he had been married on 1 May on the basis of Dutch law, which authorises same-sex marriages. He asked to be granted dependency benefits in respect of his same-sex spouse.

On 7 November 2003 the Director of the Human Resources Management Division replied that, due to the unprecedented nature of his request, the Organization was not yet in a position to take a decision and that it was preferable to wait, as suggested by the CCLM, until the discussions taking place within the United Nations system led to a common policy on the subject being adopted. Interpreting this reply as a negative decision, the complainant asked the Director-General to reconsider the matter, but he was informed on 8 April 2004 that, although the Secretary-General of the United Nations had determined that a marriage recognised as valid under the law of the country of nationality of a staff member gave rise to benefits for eligible members of that staff member’s family, that policy applied for the time being only to staff of the United Nations Secretariat. The issue therefore had to be considered as still under review and for its part the Organization would continue to interpret the term “spouse” in

the Staff Regulations and Rules as meaning husband and wife.

2. The complainant filed an appeal against that decision with the Appeals Committee, which, meeting on 12 May 2005, recommended that the Director-General grant his request. The Committee took the view that since the applicable texts gave no definition of the term “spouse”, they should be interpreted in the light of the changes occurring in society, and that the fundamental and members must be determined by reference to the law of their country of nationality should not be brought into question. It therefore considered that the complainant’s request should be granted, given that he had shown that his marriage had been validly contracted in accordance with the law of his country, but it rejected the view that his request had been denied on discriminatory grounds.

3. On 8 August 2005 the Director-General decided not to follow that recommendation. He considered that he could only confirm his former position in view of the fact that the deliberations of the FAO governing bodies on the issue of same-sex marriages had not yet been concluded. He added, however, that following the outcome of those deliberations the complainant’s claim would be examined without delay.

4. It is that decision of 8 August 2005 which the complainant is challenging before the Tribunal. He argues that since the defendant itself admits that the personal status of staff members is determined by reference to the law of their country of nationality, his spouse’s rights ought to have been recognised. The Organization’s attitude is in his view both dilatory and discriminatory. He claims compensation for the material and moral injury he has suffered as a result of that attitude. The Federation of International Civil Servants’ Associations (FICSA) has submitted an *amicus curiae* brief supporting the complainant’s claims.

5. Before weighing up those opposing arguments, the Tribunal recalls that the FAO Council and the CCLM have considered the issue of the “Recognition of ‘spouses’ under same-sex marriages” on several occasions. The CCLM reviewed the situation under that heading in October 2003, in the light of existing case law and of the discussions taking place within the United Nations system, and recommended that the Organization follow closely the discussions within the United Nations system with a view to reaching a common position in that regard.

The FAO Council supported that recommendation at its 125th Session in November 2003. At its 77th Session in October 2004, the CCLM considered the developments that had occurred within the United Nations system over the past year and asked the Secretariat to prepare a comprehensive document with a view to submitting a proposal at its following session, thus allowing the Organization and its Members “to take an active approach on the issue” at the subsequent session of the Council. At its 127th Session in November 2004, the latter took note of the said developments and supported the recommendation that a proposal be submitted for discussion at its session in June 2005.

After considering the very detailed report provided by the Secretariat, the CCLM, at its 78th Session in April 2005, recommended:

(a) that the Council recall the principle “that the personal status of staff members for purposes of FAO’s entitlements should continue to be [determined] by reference to the law of nationality of the staff member concerned” and

(b) that the Council request the Director-General to issue an administrative directive consistent with that of the United Nations Secretary-General of 24 September 2004, which “would not involve changes to the Staff Regulations but would merely constitute an interpretation of existing provisions”.

At its 128th Session in June 2005, however, the Council merely decided that the issue should be examined further by the CCLM at its session of October 2005. When the CCLM reiterated its recommendation to the Council, under the heading “Personal Status for Purposes of Staff Entitlements”, the Council referred the matter back to it again at its 129th Session in November 2005, in the following terms:

“(w)hile recognizing the importance of the well-established legal principle that the personal status of staff members for purposes of FAO’s entitlements is determined by reference to the law of the nationality of the staff member concerned, the Council requested the CCLM to review further some aspects of the proposal and report to it at its regular Session in November 2006.”

6. The Tribunal notes that at that 129th Session the Council acknowledged, as the Secretariat had done before it, that the personal status of staff members must be determined in accordance with their national legislation.

Furthermore, it is not disputed that the complainant, whose personal status is governed by Dutch law, validly contracted a same-sex marriage. According to the Tribunal's case law, "[a]s a general rule, and in the absence of a definition of the term, the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate" (see Judgment 1715, under 10); thus, "a link [is established] between the word 'spouse' and the institution of marriage, whatever form it may take" (see Judgment 2193, under 10). In the present case, the FAO's Staff Rules and Regulations give no definition of the term spouse, apart from a passing reference to husband and wife in the English version of Staff Regulation 301.3.22, which cannot justify interpreting all the relevant texts as denying legally married, same-sex spouses any right to benefits. The 1957 report of the Administrative Co-ordination Committee referred to by the defendant cannot in any case prevail over the principles adopted by the United Nations Consultative Committee on Administrative Questions or by the High-Level Committee on Management, even though the FAO has not subscribed to the agreements in principle obtained by those bodies. It was therefore up to the Director-General to interpret the rules on which the complainant relies so as to recognise the fact that he is married, without having either to modify those rules or to refer the matter to the Council, which does not appear to have been in any hurry to deal with the matter, even though it recognised that the personal status of staff members should be determined by reference to the law of their country of nationality.

7. The Tribunal therefore considers, like the Appeals Committee, that the complainant is entitled to claim the dependency benefits provided for in the current regulations in respect of the person to whom he is lawfully married. It does not appear from the submissions that the Organization's attitude reflects discriminatory intent, and in this respect the complainant's arguments must be rejected; it is clear, rather, that the FAO was concerned not to take any positive decision without the Council's prior approval. In a case involving such controversial issues in some Member States, that concern was legitimate, but it does not obviate the fact that, owing to successive postponements of any decision and the rejection of the complainant's claims by the impugned decision, the latter did not receive the benefits to which he was entitled in due time and was unable to obtain the necessary assistance in dealing with the Italian immigration authorities, even though Italy does not recognise the discriminated against its staff members on account of their gender or sexual orientation.

8. The defendant Organization shall pay the complainant the sums due retroactively since 1 May 2003 corresponding to the benefits arising from his marriage. These sums shall include the amounts paid for his spouse's health insurance, estimated by the complainant at 3,500 euros, provided that the latter submits proof of such payments, as required by the FAO. They shall bear interest at the rate of 8 per cent, and not 12 per cent as requested by the complainant, in each case from their due dates.

9. Since he succeeds, the complainant is entitled to costs, both for the internal appeal proceedings and for those before the Tribunal, which are set at 5,000 euros.

## DECISION

For the above reasons,

1. The impugned decision of 8 August 2005 is set aside.
2. The case is referred back to the FAO for determination of the complainant's rights in accordance with 8 above.
3. The Organization shall pay the complainant 10,000 euros in compensation for moral injury.
4. It shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.