UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1277

Betty Mukomah

(Appellant)

v.

United Nations Joint Staff Pension Board

(Respondent)

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Martha Halfeld Judge Dimitrios Raikos
Case No.:	2021-1622
Date of Decision:	28 October 2022
Date of Publication:	23 November 2022
Registrar:	Juliet Johnson

Counsel for Appellant:	Martin Aquilina
Counsel for Respondent:	Rosemarie McClean

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Ms. Betty Mukomah appeals against the decision of the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) to reject her request for a widow's benefit under the Regulations of the United Nations Joint Staff Pension Fund (the Fund). The Fund determined that Ms. Mukomah was not eligible to receive a divorced survivor's benefit in terms of Article 35 *bis* of the Fund's Regulations because she had not been married to her former husband, Mr. Anthony Mukomah (the late participant), for a continuous period of 10 years during which he paid contributions to the Fund, as required by Article 35 *bis*. She requests the Appeals Tribunal to remand her case to the Standing Committee for an examination *de novo*. For the reasons that follow we dismiss the appeal and deny the request to remand the case to the Standing Committee.

Facts and Procedure

2. The late participant and Ms. Mukomah married on 9 June 2001 in Las Vegas (USA). About seven years later, the late participant became a participant in the Fund when he joined the United Nations Office at Nairobi (UNON) on 8 February 2008. The couple divorced on 27 March 2014 in terms of a decree of divorce issued by the High Court of Kenya. Thus, at the time of the divorce, the late participant had contributed to the Fund for just over six years.

3. The Fund is of the opinion that the late participant subsequently married Ms. Faith Mulinge in Kenya under customary law on 14 May 2014.

4. The late participant died in service on 15 March 2019.

5. At the time the late participant joined UNON, he and Ms. Mukomah were both nationals of Kenya. They later acquired Canadian nationality and on 5 February 2009, UNON issued a Personnel Action (PA) to change the participant's nationality to Canadian, with effect from 1 April 2008. UNON duly reported the change in nationality to the Fund on 8 February 2010.

6. On 30 May 2013, prior to the divorce, UNON raised a PA stating that the participant's wife, Ms. Mukomah, was no longer to be considered as his dependant, as per an e-mail instruction or communication on file. On 31 July 2014, UNON changed the marital status of

the participant to "divorced", recording that a divorce decree had been issued in Kenya on 31 March 2014, which had been verified and placed on file.

7. On 18 December 2014, UNON reported Ms. Mulinge, as the (second) wife of the late participant, together with her son, who became the stepchild of the participant. This PA recorded that the change in the late participant's personal status was based on a statutory declaration of a common-law union and an affidavit sworn by the late participant before a Commissioner of Oaths confirming that he was the husband of Ms. Mulinge, having celebrated a customary marriage on 24 May 2014 in Machakos (Kenya) under Kenyan customary law.

8. As he was also a Canadian national, the late participant submitted to the Department of Citizenship and Immigration in Canada, a "statutory declaration of common-law union" attesting to his common-law union with Ms. Mulinge, which he had deposed to before a Kenyan Commissioner of Oaths in Kenya on 7 July 2014. UNON confirmed in an e-mail dated 13 November 2014 to the late participant that it had received documentation from the Permanent Mission of Canada to the United Nations in New York confirming the recognition of Ms. Mulinge as his common law spouse and that the documentation submitted was valid for such recognition. In addition to the documents concerning his customary marriage, the late participant also submitted to UNON a copy of a decree absolute issued by the High Court of Kenya at Nairobi on 31 March 2014 that finalized the divorce effective 27 March 2014.

9. Some four years later, on 10 September 2018, the late participant wrote to UNON informing it of his intention to change his marital status to "legally separated", and that he had effected the change in UMOJA as he was separating from Ms. Mulinge, his common-law spouse in accordance with the provisions of Canadian law. On 4 October 2018, he requested UNON to stop all benefits regarding Ms. Mulinge, and his stepchild.[1]

10. On 28 August 2018, the late participant updated his form PENS. /A2 (Designation of beneficiary) to again include his first wife, Ms. Mukomah as his spouse. However, he failed to furnish the Fund with any proof that he had celebrated a second marriage with Ms. Mukomah in accordance with either civil or customary law.

[1] There is on record an affidavit filed with the Milimani Commercial Court in Kenya dated 17 September 2018 in which the late participant denied having concluded a customary marriage with Ms. Mulinge. This document is inconsistent with what was reported to the Fund and the correspondence dated 13 November 2014 confirming that UNON had recognised the customary union with Ms. Mulinge.

11. The Fund was informed on 28 May 2019, of the death in service of the late participant, which had occurred on 15 March 2019, in Kenya. The Separation PA dated 16 March 2019, issued by UNON following the death of the participant, reported to the Fund only Ms. Mulinge as the dependent wife of the participant.

12. Both Ms. Mulinge and Ms. Mukomah requested a survivor's benefit under Article 34 of the Fund's Regulations. The Fund determined that a survivor's benefit was payable only to Ms. Mulinge under Article 34 of the Fund's Regulations, and that Ms. Mukomah was not entitled to a survivor benefit under either Article 34 or Article 35 *bis* of the Regulations, most pertinently because she had not been married to the late participant for a period of ten years during the subsistence of their marriage as required by Article 35 *bis* (b)(i) of the Regulations.

13. Article 34 in relevant part provides:

> (a) A widow's benefit shall…be payable to the surviving female spouse of a participant who was entitled to a retirement, early retirement, deferred retirement or disability benefit at the date of his death, or who died in service, if she was married to him at the 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.

14. Article 35 *bis* deals with benefits payable to divorced surviving spouse in relevant part as follows:

> (a) Any divorced spouse of a participant or former participant, separated on or after 1 April 1999, who was entitled to a retirement, early retirement, deferred retirement or disability benefit, or of a participant who died in service on or after that date, may, subject to the provisions of article 34(b) (applicable also to widowers), request a former spouse's benefit, if the conditions specified in paragraph (b) below are fulfilled.
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> (b) Subject to paragraph (d) below, the divorced spouse is entitled to the benefit set out in paragraph (c) below, payable prospectively following receipt of the request for a divorced surviving spouse's benefit, if, in the opinion of the Chief Executive of Pension Administration, all of the following conditions are fulfilled:
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> i) The participant had been married to the former spouse for a continuous period of at least ten years, during which contributions were paid to the Fund on account of the participant or the participant was awarded a disability benefit under article 33 of the Regulations;
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> ii) The participant's death occurred within 15 years of the date when the divorce became final, unless the former spouse proves that at the time of death the participant was under a legal obligation to pay maintenance to the former spouse;

iii) The former spouse has reached the age of 40. Otherwise, the benefit entitlement shall commence on the day immediately following the day that age is reached; and

iv) Evidence is provided that a divorce settlement does not have an express renouncement of UNJSPF pension benefit entitlements.

15. There is no dispute before the Appeals Tribunal regarding the payment of the widow's benefit to Ms. Mulinge in terms of Article 34.

16. In an e-mail to the Fund dated 5 August 2019, Ms. Mukomah maintained that she and the late participant had in fact resumed their marriage prior to his death, the common-law partnership with Ms. Mulinge had been dissolved the previous year and that under Canadian law, a person could be in a common-law union and still be legally married to someone else, but until that marriage is legally dissolved under Canadian law, he/she would still be considered married to the first spouse.

17. The Fund advised Ms. Mukomah on 31 October 2019 that taking into consideration her marital status as reported to the Fund at the time of death of the participant - she was a divorced surviving spouse - it had considered her request in terms of Article 35 *bis*. As she had failed to provide any proof of a re-marriage between her and the late participant and, according to the dates recorded in the documents on file, she was only married to the participant for six years one month and 18 days, from 8 February 2008 to 27 March 2014, during which the late participant had contributed to the Fund. Consequently, as the first condition of Article 35 *bis* (b) had not been met in her case, she was not entitled to a divorced surviving spouse's benefit.

18. On 3 January 2020, Ms Mukomah submitted new payment instructions (PENS. E/2) together with an extract from the Nevada Registry, as well as an updated obituary whereby she said that the Canadian authorities had recognized her as the widow of the late participant. She again requested a benefit under Article 34 (Widow's benefit). She also informed the Fund on 20 January 2020 that she was willing to submit additional information to enable the Fund to review her case under Article 34 of the Regulations. On 12 April 2020, the Fund once again confirmed that Ms. Mukomah did not meet the conditions of Article 35 *bis* (Divorced surviving spouse's benefits) of the Fund's Regulations and therefore, she is not eligible for a divorced surviving spouse's benefit due to the length of the marriage while her former spouse was a participant in the Fund.

19. On 1 March 2021, Ms. Mukomah submitted to the Fund: i) a notice of award dated 15 February 2021 from the Social Security Administration of Baltimore, Maryland (USA), in which she was advised that she was entitled to monthly mother's benefits beginning May 2020 and a social security payment of USD 255.00 because of the death of the participant; and ii) a letter dated 4 February 2021 issued by the Central Registry of Divorce Proceedings of Ottawa (Canada) wherein it advised that based on a computer search conducted in the databank, no registration of divorce proceeding was found in the databank.

20. The Standing Committee of the UNJSPB considered the case at its meeting on 14 July 2021 and determined that Ms. Mukomah was not eligible to receive either a widow's benefit in terms of Article 34, because she had not provided proof of re-marriage, or a divorced surviving spouse's benefit under Article 35 *bis* as she did not fulfil the conditions precedent for such a benefit. A letter dated 19 July 2021 was sent to her informing her of the decision. She has appealed that decision to the Appeals Tribunal, which in terms of Article 2(9) of the Statute of the UNAT is required to determine whether the decision of the Standing Committee is in "non-observance" of the Regulations.

Submissions

Ms. Mukomah's Appeal

21. Ms. Mukomah maintains that the Fund should recognize her relationship with the late participant as being one akin to a marriage including a union "lawfully entered into and legally recognized by the competent authority where the status was established" and which confers similar legal effects to a marriage, in terms of the Fund's "Guidelines to determine eligibility for spousal benefits under articles 34 and 35 of the UNJSPF" (the 2016 Guidelines). She maintains that despite the decree of divorce, the late participant and Ms. Mukomah re-established a spousal relationship with similar legal effects prior to his death.

22. Ms. Mukomah maintains that the Fund erred in not giving full and complete consideration as to whether the competent authority of the Republic of Kenya recognized the relationship as being one that confers similar legal effects as marriage.

23. She maintains further that the Fund erred by relying on Canadian law rather than Kenyan law in determining the validity and status of the alleged union between the late participant and Ms. Mukomah. She also belatedly challenged the validity of the decree of divorce granted by the Kenyan High Court and disputed its effectiveness in dissolving the marriage.

24. Ms. Mukomah requests that the case be remanded to the Standing Committee for *de novo* consideration.

The UNJSPFs Answer

25. The Fund submits that Ms. Mukomah has failed to furnish adequate proof that she is entitled to a benefit under either Article 34 or Article 35 *bis*.

26. Regarding a benefit in terms of Article 34, the Fund maintains that the decree of divorce issued by the High Court of Kenya dissolved the marriage between Ms. Mukomah and the late participant and that there is no evidence supporting the claim that she remarried or established a union akin to a marriage with the late participant prior to his death as contemplated in the 2016 Guidelines.

27. The Fund submits that no benefit was payable under Article 35 *bis* because the late participant had not contributed to the Fund for a continuous period of 10 years at the time of the divorce.

28. The Fund requests that the appeal be dismissed, and the decision of the Standing Order be affirmed.

Considerations

29. The issue for determination in this appeal is whether Ms. Mukomah has proved by sufficient evidence her entitlement to a surviving spouse's benefit under Articles 34 or 35 *bis* of the Fund's Regulations.

30. Ms. Mukomah's submission that she was the spouse of the late participant at the time of his death and is therefore entitled on that basis to a widow's benefit under Article 34 is not sustainable based on the evidence presently before the Appeals Tribunal.

31. Article 34(a) stipulates specific conditions precedent for a spouse to be eligible to receive a UNJSPF widow's benefit. If the participant died in service (as in this case), the spouse must have been married to him at the time of his death in service; and if the participant separated from service prior to his death, not only the spouse must have been married to him at the time of separation from service but should have remained married to him until his death.

32. Ms. Mukomah thus bears the evidentiary burden of proving that she was married to the late participant at the time of his death in service on 15 March 2019.

33. There is incontrovertible evidence that the late participant divorced Ms. Mukomah in 2014. He allegedly later married Ms. Mulinge under customary law in Kenya. In her submissions to the Fund, after learning that her entitlement was in question, Ms. Mukomah belatedly disputed the validity of the final divorce decree on the grounds that it was issued without her being present. In her view, the family court in Kenya had no jurisdiction to hear the divorce. This submission cannot be accepted. Decrees of divorce are frequently granted on an undefended basis in the absence of one of the parties. More pertinently, Ms. Mukomah did not provide evidence of any further steps that she took to appeal or rescind the divorce order. On the face of it, the decree of divorce is legal, extant, and effective, certainly in Kenya.

34. Ms. Mukomah also maintained that the divorce was not recognized by the authorities in Canada and that the immigration authorities in Canada had rejected an application for Ms. Mulinge to obtain spousal status in Canada. Even accepting, for the purpose of argument, these contentions as possibly true, the position taken by the Canadian authorities does not confer any entitlement to a pension benefit on Ms. Mukomah. The marriage between Ms. Mukomah and the late participant was celebrated in the USA and there is no evidence, and no legal provision of the law of the USA has been referred to, which supports the contention that a Kenyan decree of divorce is not recognised in the USA or was ineffective in dissolving the marriage celebrated in Nevada. In the absence of any countervailing evidence adduced by Ms. Mukomah, it may be assumed in accordance with the international principles of reciprocity and comity that the decree of divorce issued by the High Court of Kenya is recognised as effective in the USA.

35. In sum, therefore, the decree of divorce of the High Court of Kenya establishes on a preponderance of probabilities that the civil marriage between the late participant and Ms. Mukomah was dissolved in 2014 and there is no further basis to doubt or question the validity and effectiveness of that order.

36. In light of the divorce order of 2014, the status of the marriage between the late participant and Ms. Mulinge (in Canada or Kenya) is strictly speaking not determinative of any entitlement on the part of Ms. Mukomah. In passing, it is important to note that there is no convincing evidence proving that the customary marriage of the late participant and Ms. Mulinge was void or voidable in terms of Kenyan law or had come to an end in terms of Kenyan or Canadian law. On the contrary, there are sworn affidavits by the late participant confirming the marriage and a statutory declaration of a common-law union filed with the Canadian government. While it seems that the late participant and Ms. Mulinge may have separated, as most pertinently evidenced by the late participant updating his form PENS. /A2 (Designation of beneficiary) on 28 August 2018 to again include Ms. Mukomah as his spouse, there is no evidence that the customary union was dissolved in terms of Kenyan or Canadian law. On the probabilities, therefore, that customary union continued to subsist in law at the time of his death and was recognised as such in Kenya and Canada. As mentioned earlier, there is no dispute before the Appeals Tribunal regarding the payment by the Fund of a widow's benefit to Ms. Mulinge.

37. There are nonetheless, as just said, clear indications that the late participant had separated from Ms. Mulinge. There is undisputed evidence that on 28 August 2018 the late participant updated his form PENS. /A2 (Designation of beneficiary) to again include his first wife, Ms. Mukomah, as his spouse. Thereafter, on 10 September 2018, the late participant wrote to UNON informing it of his intention to change his marital status to legally separated, and in an affidavit filed with the Milimani Commercial Court in Kenya dated 17 September 2018 he denied (inconsistently with what was reported to the Fund and the correspondence dated 13 November 2014 confirming that UNON had recognised the customary union with Ms. Mulinge) ever concluding a customary marriage with Ms. Mulinge.

38. However, the late participant never reported himself to the Fund as divorced from Ms. Mulinge. Accordingly, his marital status recorded with the Fund as at the time of his death remained unchanged as being married to Ms. Mulinge and divorced from Ms. Mukomah.

39. Despite that, the evidence still confirms that the late participant had probably ended his relationship with Ms. Mulinge, and in the months prior to his death had re-established some kind of relationship with Ms. Mukomah. The issue for determination is the precise nature of that relationship.

40. In 2016 the Fund published its "Guidelines to determine eligibility for spousal benefits under articles 34 and 35 of the UNJSPF" (the 2016 Guidelines). Paragraph 4 of the 2016 Guidelines extends the meaning of marriage 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.

41. It is incumbent on Ms. Mukomah to prove that after the High Court of Kenya granted a decree of divorce in 2014, she re-married or formed a similar union with the late participant. That is the decisive issue for the purpose of determining her entitlement to a widow's benefit under Article 34 of the Fund's Regulations.

42. The record on appeal does not disclose any evidence that Ms. Mukomah re-married the late participant in terms of either Kenyan or Canadian civil law. It is safe to assume that no such civil marriage was celebrated. Nor is there any evidence proving the establishment of a "common-law union" as recognised under Canadian law. The question rather is whether there is convincing factual evidence proving that in 2018 the late participant lawfully entered into a union with Ms. Mukomah, which was legally recognized by the competent authority of the location where the status was established (Kenya), and which conferred similar legal effects as a marriage in relation to pension rights, as contemplated in the 2016 Guidelines.

43. Ms. Mukomah's claim that it was permissible for the late participant to have two wives under the customary law of Kenya may or may not be true, but without proof that she re-married the late participant, that too is neither here nor there. If polygamy is legal under Kenyan law, it remained incumbent on Ms. Mukomah to prove that at the time of his death the late participant had taken her as a second spouse and that the union was legally recognised by the competent Kenyan authorities. There is insufficient evidence on record to support that claim.

44. In the appeal brief filed on her behalf, counsel for Ms. Mukomah merely makes bald assertions that "a spousal relationship conferring similar legal effects as marriage was re-established" after the divorce, that the location of that union was Kenya, and that the relationship was in existence at the date of the late participant's death. However, no supporting evidence was provided or referred to in substantiation of those assertions. Instead, it was merely submitted that the competent authority of Kenya recognised the relationship and that it conferred similar legal effects to a marriage with regard to pension rights. These bald assertions and submissions (without supporting evidence proving the nature, the duration, the surrounding circumstances of the alleged union and the position or stance of the competent authorities in Kenya), are insufficient to prove the existence and legal effects of the union for the purpose of granting a benefit under Article 34. Ms. Mukomah accordingly, on the face of it, failed to discharge her evidentiary burden to establish her entitlement.

45. Ms. Mukomah alleges that she was denied due process in proving her claim of a re-marriage. In 2021, she retained counsel to assist with her request for review by the Standing Committee. On 3 June 2021, she was informed by counsel to the UNJSPF that she was not permitted to submit "any new information or claims that were not previously submitted in the initial request for review" and that "this is not a new opportunity for additional facts, legal arguments or documents". The Fund's position was confirmed in an e-mail to Ms. Mukomah dated 3 June 2021.

46. Unfortunately, the evidence on the nature of the request to file additional evidence is incomplete in that the full correspondence regarding the issue is not filed as part of the appeal record. Counsel for Ms. Mukomah nonetheless has submitted that the position taken by the Fund constrained his ability to adequately present Ms. Mukomah's case regarding the union between the late participant and Ms. Mukomah in 2018. The denial, he argued, prevented him from reframing the case under the 2016 Guidelines and adducing relevant evidence. He notably neglected to state what evidence he intended to present and as stated, Ms. Mukomah failed to file the full correspondence regarding the issue. However, in this regard it must be kept in mind that the late participant in 2018 had specifically requested the Fund to recognise Ms. Mukomah as his spouse again. Counsel thus submitted that the interests of justice required the matter to be remanded to the Standing Committee in terms of Article 2(5) of the Statute of the UNAT for re-adjudication *de novo*.

47. Article 2(5), read with Article 2(9)(b), of the Statute of the UNAT provides *inter alia* that in exceptional circumstances the Appeals Tribunal may remand a case to the Standing Committee of the UNJSPB for additional oral testimony, but may not do so if the evidence was known to either party and should have been presented at the Standing Committee.

48. In response, the Fund referred to the decision of the UNJSPB at its session in July 2016[2] making certain modifications to the proceedings before the Standing Committee. One of the modifications was that appellants would have the opportunity to submit comments on the Chief Executive's submission to the Standing Committee within 15 calendar days, but that such comments may not include any new information or claims not previously submitted in the appeal. In this case, the Fund transmitted to Ms. Mukomah the Chief Executive's submission to the Standing Committee on her case for comments on 4 June 2021. Ms. Mukomah was given until 16 June 2021 to submit her comments and was informed that she could not include any new information or claims that were not previously submitted in the appeal before the Standing Committee. She was granted an extension to submit her appeal to the Standing Committee, as she believed that she had additional information that could assist the Fund in considering her case. Ms. Mukomah failed to submit her comments within the deadline. The Fund followed up and counsel for Ms. Mukomah submitted a short comment to the Fund on 22 June 2021, without providing additional convincing comment or proof of the alleged union between Ms. Mukomah and the late participant in 2018. The Standing Committee fully considered the case on the facts and evidence submitted.

49. Moreover, Ms. Mukomah has not identified or referred to any specific evidence that was not available at the time of the decision of the Standing Committee to prove the existence of the alleged re-marriage, which would justify a remand. Article 2(5) of the Statute of the UNAT does not permit the receipt of additional evidence or a remand in the interests of justice where the evidence was known to the party and should have been presented to the Standing Committee. If there was evidence of a union with similar effects to a marriage lawfully entered into and recognised by the competent authorities of Kenya in 2018, it stands to reason that it would and should have been presented to the Standing Committee in 2021.

[2] Report of the United Nations Joint Staff Pension Board, A/71/9, paras. 411-420.

50. In the premises, there is insufficient evidence proving that the late participant and Ms. Mukomah lawfully entered a union legally recognized by the competent authority of Kenya conferring similar legal effects as a marriage in relation to pension rights. Therefore, Ms. Mukomah is not entitled to a benefit under Article 34 and the Standing Committee did not err in reaching that conclusion.

51. The Fund's rejection of Ms. Mukomah's claim under Article 35 *bis* is correct. She was found ineligible under this provision because (accepting the legal consequences of the Kenyan divorce order) she and the late participant were married for only six years during which contributions were paid. The late participant commenced employment with UNON on 8 February 2008, the divorce was granted on 31 March 2014, and as explained, there is no evidence of any re-marriage after that date. But even if there was a re-marriage, it took place only months before the late participant died. Article 35 *bis* confers a benefit on a surviving divorced spouse only in cases where the divorced spouse was married to the participant for a continuous period of at least 10 years during which contributions were paid on account of the participant. Ms. Mukomah did not meet that requirement. There is accordingly no legal basis to grant Ms. Mukomah a benefit in terms of this provision.

Judgment

52. The appeal is dismissed, and the decision of the Standing Committee of the UNJSPB is affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Halfeld	Judge Raikos

Judgment published and entered into the Register on this 23rd day of November 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar