

## HUMAN RIGHTS COMMITTEE

### Love et. al. v. Australia

Communication No 983/2001

25 March 2003

CCPR/C/77/D/983/2001

### VIEWS

*Submitted by: John K. Love, William L. Bone, William J. Craig, and Peter B. Ivanoff (represented by counsel, Kathryn Fawcett)*

*Alleged victim: The authors*

*State party: Australia*

*Date of communication: 1 August 1997 (initial submission)*

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2003,

Having concluded its consideration of communication No. 983/2001, submitted to the Human Rights Committee by John K. Love, William L. Bone, William J. Craig and Peter B. Ivanoff under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The authors of the communication are William L. Bone, William J. Craig, Peter B. Ivanoff and John K. Love, all Australian citizens, who claim to be victims of a violation by Australia of articles 2, paragraphs 2 and 3, and 26 of the International Covenant on Civil and Political Rights. The

authors are represented by counsel. The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Australia on 25 December 1991.

### **The facts as presented**

2.1 On 27 October 1989, 24 November 1989, 10 January 1990 and 24 March 1990, respectively, Messrs. Ivanoff, Love, Bone and Craig, all experienced pilots, commenced contracts as pilots on domestic aircraft operated by Australian Airlines, now part of Qantas Airlines Limited. Australian Airlines was wholly State-owned and operated by government-appointed management. The airline terminated the authors' contracts upon their reaching 60 years of age pursuant to a compulsory age-based retirement policy. The respective dates of the authors' compulsory retirement were the day before they reached 60 years of age, that is, for Mr. Craig, 29 August 1990; for Mr. Ivanoff, 18 September 1990; for Mr. Bone, 12 October 1991, and, for Mr. Love, on 17 May 1992. The contracts under which they were employed did not include a specific clause to provide for compulsory retirement at that or any other age. Each of the authors held valid pilot licences, as well as medical certificates, at the time of the terminations. Following the termination, Mr. Ivanoff was engaged by another airline company as a B727 captain and in 1997 was working as a B737 simulator instructor. 1/

2.2 From 25 December 1991 onwards, the Airline refused the authors' requests for re-employment negotiations. On 12 June 1992, the four authors submitted a complaint to the Australian Human Rights and Equal Opportunities Commission (HREOC) claiming that they had been discriminated against on the basis of their age. The investigation of the complaints was drawn out, according to the authors, due to the airline's refusal to take part in negotiation or conciliation, and, possibly, contentious medical evidence. Following the takeover in 1993 of Australian Airlines by the Government-owned Qantas, Qantas was entirely sold to private ownership in a transaction completed on 31 July 1995.

2.3 On 30 March 1994, the federal Industrial Relations Act 1988 was amended to make it unlawful to terminate a person's employment on the grounds of his or her age. Following that amendment, a Mr Allman, also a pilot employed by Australian Airlines, lost his job upon reaching 60 years of age. He took an action against the company and, on 18 March 1995, the Industrial Relations Court found in his favour. Mr Allman was re-employed as a result. Since that date, Qantas (having taken over Australian Airlines) ceased to impose a retirement age on its domestic pilots.

2.4 On 14 August 1995, the (then) Human Rights Commissioner, who performs HREOC's function of inquiring into any act or practice that may constitute discrimination, reviewed the findings of previous Commissioners who had concluded that mandatory retirement was discriminatory and formed the same opinion. On 9 November 1995, the Commissioner convened an inquiry into the authors' dismissals, taking submissions from Qantas (the respondent) and the authors. On 12 April 1996, the Commissioner decided that the compulsory retirement of the authors upon reaching the age of 60 constituted discrimination in employment based on age. It rejected the argument that the age limit of 60 was *per se* required to ensure the safety of flight operations. The Commissioner made the following recommendations to Qantas: (1) the airline should discontinue the practice of compulsorily retiring its employees on the sole basis that they

reach 60 years of age; (2) that the airline should pay the authors compensation for loss of earnings suffered as a result of the discriminatory conduct; (3) that the airline should make the necessary arrangements for Mr. Ivanoff to undertake the Qantas "over 60" medical tests and, if these and other requirements of the Civil Aviation Authority were satisfied, to re-employ Mr. Ivanoff and where necessary retrain him as a pilot to fly equivalent aircraft or aircraft as near to equivalent as possible to those he was flying prior to his compulsory retirement. More generally, it recommended to the federal Government to institute a comprehensive national ban on age discrimination, including a removal of the mandatory retirement provisions in the *Public Service Act 1922* and other federal legislation.

2.5 Qantas, now in private hands, refused to accept the findings of the Commissioner and rejected its recommendation to pay compensation. On 10 May 1996, its legal advisors responded to HREOC that it had generally discontinued the practice of compulsory retirement at 60, however it considered that it was not appropriate to accept the recommendations for re-employment or compensation made by HREOC in the specific case. It noted that its policy, which had been based primarily on air safety, was lawful, and had not been rendered unlawful by the legislation empowering HREOC to make recommendations. It recalled that it had made plain during the HREOC hearings that it would not be inclined to accept recommendations for re-employment or compensation.

### **The complaint**

3. The authors allege that Australia has violated their rights to non-discrimination on the basis of age under article 26, through failing to protect them from terminations in the workplace made on this proscribed ground. They also allege a violation of article 26's protection against age discrimination in the refusal of the Australian Airlines to engage in, and the failure of the State to facilitate, from 25 December 1991, re-employment negotiations concerning Mr. Ivanoff. Moreover, the authors argue that, where violations have occurred, the State party is under an obligation to comply with the recommendations for redress of its own human rights commission. In response to the State party's submission, the authors further add a violation of article 2 in that the State party has failed to provide an effective remedy for a violation of a Covenant right. 2/

### **The State party's submissions on admissibility and merits**

4.1 By submission of 3 January 2002, the State party responded, disputing both the admissibility and the merits of the communication.

4.2 As to the complaint of principle that the State party has failed to implement HREOC's recommendations, the State party regards this complaint in its entirety as falling *ratione materiae* outside the Covenant, for nothing in article 26 of the Covenant requires any such thing.

4.3 Turning to the specific recommendations of HREOC (i) to repeal compulsory retirement provisions in the *Public Service Act 1922* and other federal legislation, and (ii) to legislate a comprehensive national prohibition on age discrimination, the State party further argues that the allegation is inadmissible *ratione personae* as the victims are not victims of an alleged failure to

take either of these steps. As to (i), the authors were not employed under the *Public Service Act 1922* and so any alteration to, or failure to alter, that Act would not have affected them. As to (ii), the authors have not demonstrated how they were affected by the absence of a comprehensive ban on age-discrimination. There is no indication such a legislative framework would have affected the dismissal decisions. Nor is there any evidence of post-dismissal discrimination, or how that would have been prevented by the framework in question.

4.4 As to the merits of these allegations, the State party states, as to (i), that the *Public Service Act 1999* removed compulsory age retirement for Commonwealth public servants. As to (ii), the State party notes that new legislation, designed to change old social conditions, cannot be translated into reality from one day to another. <sup>3/</sup> When making changes to legislative frameworks, it is appropriate that States be given time to make the changes in line with their democratic and constitutional processes. Currently, the State party has decided to implement one of the main recommendations of HREOC's "Age Matters" report (2000), by developing a Federal Age Discrimination Act, prohibiting age discrimination, in consultation with business and community groups. Drafting is in progress. The State party has also abolished compulsory age retirement in some areas of Commonwealth responsibility: *Public Service Act 1999* and *Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001*, and it intends to abolish compulsory retirement for directors of public companies. In 1996, the *Workplace Relations Act 1996* (superceding the *Industrial Relations Act*) prohibited termination of employment on the basis of age. In States and Territories, discrimination is unlawful in areas of employment, education and training, accommodation, goods and services and clubs. Accordingly, the State party argues it is taking gradual steps, in fact, to eliminate age discrimination.

4.5 As to the complaint that (i) the dismissals from Australian Airlines violated article 26, as did (ii) the State's failure to protect them against that, the State party argues that the claim is inadmissible *ratione temporis* in relation to Messrs. Bone, Craig and Ivanoff. These three authors were dismissed prior to the entry into force of the Optional Protocol. Nor have they argued that there are any continuing effects which, in themselves, constitute a violation of the Covenant. The State party submits that the consequence of the dismissals — no longer being employed — did not of itself constitute a violation of the Covenant, for the dismissals were one-off events. Any argument of continuing effects based on a refusal to re-employ the authors would, properly conceived, be a fresh and separate act of discrimination (if at all).

4.6 Moreover, the State party argues as to (i) that as the dismissals were carried out by an incorporated company, rather than the Government, the allegation does not relate to a State party, as required by article 1 of the Optional Protocol. The State party refers to the Committee's jurisprudence finding communications directed against non-State entities inadmissible. <sup>4/</sup> The State party argues that its responsibility for the acts of an incorporated company depends on its links with it. Where an entity is not part of the formal structure of the state, its acts may still constitute acts of the state where internal law empowers the entity to exercise elements of governmental authority. <sup>5/</sup> In this case, while the State party owned all shares in Australian Airlines, a Commonwealth Government Business Enterprise (CGBE), at the time of the dismissals, the Government did not intervene in day-to-day administration.

4.7 The State party explains that its relationship with the airline was governed by a mix of legislation covering its general governance arrangements and policy with all CGBEs. In 1988, policy changes enhances the airline's autonomy and gave it greater flexibility, with government control being minimized. Following the *Australian Airlines (Conversion to a Public Company) Act 1988*, day-to-day controls were removed from the public service, leaving more operations subject to commercial management decisions under a board with increased responsibilities. As such, employment matters were for the airline management, under direction of its board and within broad government guidelines. As an incorporated company, it acted at its own discretion and was not exercising government powers. Accordingly, if there was any discrimination (which is denied), Australian Airlines rather than the State party is responsible for it.

4.8 As to the merits of this allegation, the State party submits that the dismissals were based on reasonable and objective criteria, did not violate article 26 and accordingly the authors required no protection against such action. The State party refers to the Committee's jurisprudence that distinctions are not discrimination if based on reasonable and objective grounds and aimed at a legitimate purpose. The State party submits that, as a matter of logic and fairness, this determination should be made on the basis of the information available at the time the act took place. Thus, a distinction that was reasonable and objective on the medical information available to the airline at the time is not discounted by the emergence of subsequent contrary practice.

4.9 The State party points out that the Committee's test differs from that applied by HREOC and in the Australian courts, that is, the "inherent requirement" of the position test justifying an age distinction. 6/ Therefore the decisions of these local bodies denying that a particular age was an inherent medical requirement are not determinative of the broader question of whether the dismissals were objectively and reasonably justified.

4.10 Turning to the particular case, the State party argues the dismissals were justified, reflecting an internationally-accepted standard, based on medical studies and evidence, and enacted in order to ensure the greatest possible safety to passengers and others affected by air travel (a purpose legitimate under the Covenant). Before HREOC, Qantas has argued that mandatory retirement was necessary to minimize to the lowest extent possible risk to the safety of passengers, crew and the wider public; while any age limit was arbitrary, as some fit pilots would be forced to retire, a limit of 60 struck a fair balance between pilots wishing to prolong careers and public safety. Similarly, the decision of the Chief Pilot of Australian Airlines to impose a mandatory retirement was based on universally-applied and long-established custom of the Australian airline industry and the inherent requirements of the job.

4.11 The State party argues that the decision was informed by medical studies and evidence from various published scientific papers on the subject. 7/ In the Christie court proceedings, expert evidence had also considered the age restriction "prudent and necessary" and justified by the medical and operational data. Although HREOC accepted the court's finding in Christie that "none of the cited studies supports any conclusion between [mandatory retirement] and aircraft safety", the State party submits that this is not determinative for the wider question of reasonable and objective criteria. Rather, the medical studies and data available at the time of the dismissals were adequate to give rise to a belief that mandatory retirement was necessary for safety and that the

dismissals were objective and reasonable.

4.12 Moreover, the mandatory retirement policy was instituted with consideration to the international safety standards set by the International Civil Aviation Organisation (ICAO), which are intended to be mandatory and are followed by many States as best practice. It is expected that States conform to "standards" and endeavour to conform with "recommended practices". The Convention on International Civil Aviation provides a standard that 60 is the limit for a pilot-in-command of international flights, and a recommended practice that 60 be the limit for co-pilots. 162 States out of 186, have not notified the ICAO of a failure to conform with the standard. From these figures, the State party extrapolates a widely-accepted international safety standard pointing to reasonableness and objectivity of the dismissals.

4.13 In 1992, the State party modified its Civil Aviation Regulations enabling commercial passenger pilots aged 60-65, and aged over 65, to fly if, inter alia, they had completed an aeroplane proficiency check/flight review within a year or six months, respectively, of the flight. On 3 March 2000, the State party made notifications to the ICAO of non-compliance on the standard and the recommended practice. Thus, the State party permits pilots over 60 to fly, while recognizing that there are safety concerns requiring precautionary measures. While it no longer accepts that mandatory retirement at 60 is *per se* necessary to ensure safety, at the time of the dismissals it was reasonable and objective for a mandatory retirement to be based on this consideration, for at that time the medical evidence indicated risks arising solely after reaching age 60. It follows that the distinction was not contrary to article 26, and that the State party was not obliged to protect the authors against the application of that distinction.

4.14 As to the allegation that the refusal to enter re-employment negotiations constituted age discrimination, the State party again argues that any such refusal was taken by Australian Airlines, for which it was not responsible. Moreover, the allegation has not been substantiated, for the authors have provided no information relating to these alleged refusals, nor have they explained why the alleged refusals amounted to age discrimination. On these two bases, then, this allegation also is inadmissible.

### **The authors's comments**

5.1 By submissions of 14 March 2002, the authors reject the State party's submissions.

5.2 At the outset, they clarify that they make no allegation with respect to the *Public Service Act* 1922.

5.3 As to the first allegation (that the State party failed to legislate a comprehensive age-discrimination ban, contrary to HREOC's recommendation), the authors expand on their claim. They argue that this failure itself constitutes a breach of the Covenant. Moreover, since a primary statutory purpose of HREOC is to protect Covenant rights, a failure to give effect to its recommendations when it identifies violations of those rights breaches the State party's obligations under articles 2, paragraphs 2 and 3, and 26 of the Covenant. In the alternative, and at a minimum, the failure to implement HREOC recommendations should be seen as evidence of a violation.

5.4 As to the admissibility of this first claim, the authors cite the "actually affected" test of standing adopted in the Mauritian Women 8/ case, contending that they do not make abstract allegations but rather satisfy this condition in the following ways: (i) at the time of the dismissals, there was no legislation in place rendering that policy illegal, and/or (ii) when legal action began on 12 June 1992, there was no legislation in place enabling an effective challenge to the dismissal, and/or (iii) at the time HREOC issued its recommendations, there was no legislation in place allowing enforcement thereof, and/or (iv), in Mr Ivanoff's case, there was no provision to gain redress for the failure to re-employ him at that point.

5.5 As to the merits of this first claim, the authors invite the Committee to reject the State party's submissions of step-by-step implementation, over time, of HREOC's recommendations. They argue that while the Government has received recommendations concerning a comprehensive, enforceable age discrimination over the years, it has provided no details as to the progress in drafting an "Age Discrimination Bill", nor of its contents, nor whether and when it may enter into force. This, so argue the authors, distinguishes the case from the situation in Pauger v Austria 9/ where information on the timeframe and implementation of remedial legislation had been provided. If the Committee accepts that the State party is taking appropriate measures, the authors note that in Pauger the Committee regarded the State party implicitly acknowledging that the complaint had been made out. Similarly here, according to the authors, the State party had not denied that its failure to implement a comprehensive ban on age-discrimination violated the Covenant. Rather, by outlining the steps being taken to redress the breach, they are acknowledging the breach is made out. Additionally, the Committee in Pauger was of the view that the State party should offer the victim an appropriate remedy despite the steps being taken, and the authors invite the Committee to take the same approach.

5.6 As to the second claim (that the State party allowed the authors' dismissal from Australian Airlines on discriminatory grounds in contravention of its obligations under article 26), (i) the authors reject the State party's arguments as to admissibility. As to the arguments of inadmissibility *ratione temporis* for the three authors dismissed prior to the entry into force of the Optional Protocol on 25 December 1991 ('the relevant date'), they argue that these acts of discrimination continued, or had continuing effects, after that date in several ways. These were (a) that they were prevented from working at their former employer, subsequent to the relevant date, due to the compulsory retirement policy, (b) that they lodged complaints to HREOC after the relevant date, (c) that findings in their favour were made by HREOC after the relevant date, and (d) that their former employer, after the relevant date, failed to implement HREOC's findings, and, in Mr. Ivanoff's case, failed to re-employ him.

5.7 The authors also reject the State party's argument of inadmissibility *ratione personae*, which contended that, as Australian Airlines was an incorporated company and Commonwealth Government Business Enterprise at the time of the dismissals, subject to "the normal provisions relating to control, performance, accountability and performance of company activities", there was no violation by a State party. The authors argue that, while some steps had been taken to create a level of independence for the airline, its incorporation occurred pursuant to statute, and all shares were held by the State party's Government. They submit that the Government was ultimately

responsible for management decisions in its sole shareholder capacity, and accordingly is directly responsible for the discriminatory dismissals. In addition, the State party was responsible for the dismissals, as well as the subsequent effects, by failing to have legislation in place to prevent age-discrimination.

5.8 As to the merits of the second claim, the authors argue that the dismissals were not based upon reasonable and objective grounds and thus violated article 26. They submit that the proper test is whether, at the time of the dismissals, the age distinction made was objective, reasonable and legitimate for a purpose under the Covenant. The authors submit that test is not materially different from that applied by HREOC and the Australian courts, 10/ which evaluated whether it was an "inherent requirement" of the job that an airline pilot be under 60 and found this was not the case. The authors submit that HREOC, in rejecting the submissions advanced by Australian Airlines, implicitly found that the age distinction was neither reasonable nor objective, and that therefore the Committee need not re-examine that question *ab initio*.

5.9 The authors emphasise that a number of the considerations now advanced by the State party in favour of the proposition that the age distinction was objective and reasonable were considered by HREOC in its conclusions. These included (a) that the compulsory retirement age was based on an internationally accepted standard, (b) that medical evidence supported the policy, (c) that the policy ensured the greatest possible air passenger safety, (d) that the Australian Airlines chief pilot imposed the mandatory retirement age because of long-standing industry practice. The authors note that the State party has not implemented the international standards upon which they seek to rely in justifying the compulsory retirement policy. Indeed, the State party concedes that it no longer recognizes a mandatory retirement age of 60 as being of itself necessary to ensure safety. The authors go further to argue that on an objective and reasonable view, it had indeed never been necessary.

5.10 As to the State party's argument that the relevant test should be what Australian Airlines believed to be reasonable at the time of the dismissals, the authors note that this kind of "subjective" test was rejected by HREOC. The authors contend that the test of the justification for the distinction must be objective, for otherwise a State party could simply assert its belief that a differentiation was reasonable in order to avoid a finding of breach of the Covenant. The authors add that the State party had not demonstrated how the distinction in the case had the aim of achieving "a purpose which is legitimate under the Covenant", that being an extra element of the 'objective and reasonable' test which had to be satisfied.

5.11 In any event, the authors submit that HREOC's decision was in accordance with international interpretation of Discrimination (Employment and Occupation) Convention 111 of the International Labour Organisation (ILO). 11/ The ILO's Committee of Experts has commented that an 'inherent requirement' of an age distinction for a particular job must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The authors submit that the views of the Committee of Experts should be taken into account to assess the 'objective and reasonable' criterion under article 26.

5.12 In sum, the authors invite the Committee to conclude that the distinction was not based upon

objective and reasonable grounds, to accept HREOC's findings, or, if it wished to reconsider all the evidence in the matter, to invite the authors to supply further evidence.

5.13 As to the third claim (that the State party, in violation of the Covenant, failed to facilitate Mr. Ivanoff's attempt to be re-employed), the authors reject the State party's arguments of inadmissibility. Regarding substantiation, it considers that the letter of airline counsel to HREOC dated 10 May 1996 substantiates the claim, for it makes clear that Qantas would not re-employ Mr Ivanoff as its policy was based on air safety and was not unlawful. As to the argument that there was no violation by a State party, the authors repeat their arguments above on this point. 12/

### **Supplementary submissions by the State party**

6.1 By further submissions of 13 May 2002, the State party responded to the authors' comments, reiterating its earlier submissions and making certain further comments.

6.2 As to the allegation that a failure to create a comprehensive prohibition on age discrimination of itself violates Article 26 (as distinct from the allegation related to implementing HREOC's recommendations), the State party contends that as the authors' dismissals were based on reasonable and objective criteria and, therefore, were not discriminatory, then there was nothing for the law to prohibit. Accordingly, a failure to implement a comprehensive prohibition on age discrimination did not violate Article 26 in so far as the authors' case is concerned.

6.3 The State party rejects counsel's contention that it has implicitly admitted, by outlining the remedial steps being taken, that the alleged refusal to implement a legislative framework violated article 26. It reiterates that the authors cannot contend that an absence of legislation affected them in the abstract in the absence of some act of discrimination committed against them.

6.4 The State party rejects that age-discrimination legislation that it has described in progress is in response to HREOC's findings in the authors' case. Rather it is in response to the recommendations made entirely separately in HREOC's "Age Matters Report" of June 2000, that the Government is incidentally implementing the recommendation to create a comprehensive prohibition on age discrimination. The State party emphasises that it is not creating a comprehensive legislative prohibition on age discrimination because it considers itself to be in violation of the Covenant, but rather to ensure that there is a balance between the need to eliminate unfair discrimination on the basis of age and the need to ensure sufficient flexibility to allow for situations where age requirements have particular significance.

6.5 Responding to counsel's interpretation of Pauger v Austria, 13/ the State party argues that as there has been no violation of the Covenant, there is no reason for the authors to receive a remedy. In response to counsel's comment that (unlike Pauger) insufficient information on the progress of the proposed legislative prohibition on age discrimination has been provided, the State party argues that it is not necessary to do so, as there has not been any violation of the Covenant. However, to assist the Committee, it states that the Government has begun the process of developing age discrimination legislation. The Government is consulting with business and with community organisations representing older persons, children and youth before making informed

and balanced decisions about the specific content of the Bill. Initial work has been done in identifying the central issues and questions that arise as to content of an Age Discrimination Bill, and it is likely that the Bill will cover age discrimination in a range of areas of public life, such as employment; education and access to goods, services and facilities. The Bill will be introduced during the term of the current Government.

6.6 As to the contention that a failure to implement HREOC's recommendations violates article 2 (in addition to 26), the State party notes that this is a new allegation arising at a late stage of the communication process, and asks the Committee to consider whether it is appropriate for the Committee to accept allegations not included in the authors' original communication. In particular, the Committee is asked to note that the new allegation is not related to new evidence or events and therefore there is no reason why the authors could not have raised it in their original communication. In any event, the Committee's constant jurisprudence is that article 2 is an accessory right that cannot be invoked independently of another right. As there has been no violation of article 26 in this case, there cannot have been a violation of Article 2.

6.7 As to the temporal aspect of the alleged violations, the State party rejects that there were any continuing effects (for Craig, Ivanoff and Bone) which themselves constituted a violation of the Covenant. <sup>14/</sup> Specifically, in response to the continuing effects advanced by the authors, the State party notes that the authors' dismissals were one-off events. If there was any violation of the Covenant, it occurred at the time of dismissal. The fact that the authors were not able to work for their former employer after the date of dismissal is not itself a violation of the Covenant. Further, having the right to lodge a complaint (to HREOC), and doing so, is not of itself a violation of the Covenant, and having received findings in one's favour (by HREOC) is not of itself a violation of the Covenant. Finally, as a refusal to implement the recommendations of a domestic human rights body is not a violation of the Covenant, such a refusal cannot be a continuing effect as it cannot of itself be a violation of the Covenant.

6.8 The State party argues that there is no evidence to support counsel's contention that HREOC formed the implicit conclusion that the distinction made by Australian Airlines was neither objective nor reasonable. It goes on to argue that, even if there were such evidence, "the Committee must make its own determination of whether or not the authors' dismissals were objective and reasonable. The Committee, not [HREOC], is the body empowered by the Covenant to 'receive and consider communications'. It would be inappropriate for the Committee to subordinate its decision making power to a national body when the States Parties have consented that the Committee would be exercising its decision making power independent of the determinations of national bodies."

6.9 As to counsel's submissions on subjective/objective nature of the test to be applied, the State party states that, while it referred to "belief" in its submissions, it did not intend to submit that the Committee should consider whether the dismissals were reasonable and objective based on the belief of the decision-maker. Rather, it intended to ask the Committee to consider whether the dismissals were based on reasonable and objective criteria. It further submits that whether or not the criteria were reasonable and objective is to be determined by reference to the information available to the decision-maker at the time at which the dismissals occurred.

6.10 The State party argues that Australian Airlines based its decision to dismiss the authors on objective and reasonable criteria then available to it, derived from internationally accepted standards, medical studies and evidence, and concerns for passenger safety. As to counsel's comment that it had not demonstrated how the distinction in the authors' circumstances has the aim of achieving "a purpose which is legitimate under the Covenant", it refers to its submissions stating that a measure enacted in order to ensure the greatest possible safety to passengers and other persons affected by air travel is a purpose legitimate under the Covenant. Plainly, such a purpose falls under article 6 and is not contrary to the Covenant.

6.11 As to counsel's argument that HREOC's approach was consistent with the interpretation of ILO Convention 111 and should be respected by the Committee, the State party submits that the interpretation of ILO Convention 111 is not relevant to, nor determinative of, the case before the Committee under the Covenant.

6.12 In response to the authors' comments that the "inherent requirement" test, applied inter alia by the ILO Committee of Experts, is essentially analogous to the "objective and reasonable" test, the State party argues that there are significant differences, for asking whether or not a requirement is necessary differs from asking whether or not a requirement is objective and reasonable. A requirement may not be necessary in an absolute sense but it may still be objective and reasonable given the probabilities involved. The State party requests the Committee to follow its jurisprudence and apply the objective and reasonable test, rather than an inherent requirement/necessity test.

6.13 In response to the authors' comments that the State party has not implemented the international standards upon which it relies for the justification of the compulsory age retirement policy, the State party notes that while the ICAO standard referred to is not directly implemented in its law, it does conform with the standard where an Australian airline flies into or out of a country that complies with the standard.

6.14 In response to the authors' request to the Committee to supply further submissions if it decides to reconsider all the evidence in respect of this matter in order to make a determination pursuant to the objective and reasonable test, the State party asks the Committee to note that the authors are aware that the Committee may proceed to a determination pursuant to the objective and reasonable test. It asks, therefore, why the authors have not presented available evidence in support of their submissions at this point, rather than delay consideration of the communication in piecemeal fashion. The State party is satisfied that the matter is ready for consideration now, but requests the opportunity to respond if the Committee asks the authors for further evidence.

6.15 As to the allegation on the refusal to enter into re-employment negotiations, the State party maintains that no evidence has been presented indicating that the decisions not to enter re-employment negotiations, or to re-hire Mr. Ivanoff, were made on any other basis than that of legal considerations. Accordingly, the allegation is not substantiated and inadmissible.

### **Issues and proceedings before the Committee**

### ***Consideration of admissibility***

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. The Committee further notes that the State party has not advanced any argument that there remain domestic remedies to be exhausted, and thus is not precluded by article 5, paragraph 2(b), of the Optional Protocol from considering the communication.

7.3 As to the State party's arguments that the claims of three of the four author (Messrs. Bone, Craig and Ivanoff) are barred *ratione temporis*, the Committee considers that the acts of alleged discrimination, properly understood, occurred and were complete at the time of the dismissals. The Committee does not consider that the continuing effects in this case of these acts could themselves amount to violations of the Covenant, nor that subsequent refusals to take up re-employment negotiations could appropriately be understood as fresh acts of discrimination independent of the original dismissal. It follows that the claims of these three authors are inadmissible *ratione temporis*. The claim by Mr Love, however, being based on his dismissal after the entry into force of the Optional Protocol, is not inadmissible for this reason.

7.4 The Committee notes the State party's additional arguments on admissibility to the effect that Mr Love's dismissal was, in truth, an act purely of Australian Airlines and was not, under rules of attribution of State responsibility, imputable to the State party, and further that Mr Love cannot be regarded as a victim, in terms of the Optional Protocol, of an absence of an age-discrimination ban. The Committee considers that, in the light of the need for a close examination and assessment of the particular facts and law relevant to these issues, it is appropriate to address these arguments at the merits stage, for they are intimately bound up with the assessment of the scope of the State party's obligation under article 26 of the Covenant to respect and ensure the equal protection of the law against discriminatory dismissal.

7.5 As to the claim relating to a direct obligation under the Covenant to implement the findings of domestic human rights bodies (such as HREOC), which are non-binding under domestic law, the Committee considers that, while it will pay due consideration to the determinations of such bodies which have in whole or on part relied on provisions of the Covenant, in the ultimate analysis it must be for the Committee to interpret the Covenant in the manner it considers correct and appropriate. The Committee agrees with the State party's position that States parties have ratified the Optional Protocol on the understanding that it will be for the Committee to exercise its decision-making power on the interpretation of the Covenant independently of the determination by any national bodies. It follows that an obligation *per se* under the Covenant to implement non-binding findings of such non-judicial bodies is incompatible *ratione materiae* with the Covenant, and this particular claim is inadmissible under article 3 of the Optional Protocol.

### ***Consideration of the merits***

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

8.2 The issue to be decided by the Committee on the merits is whether the author(s) have been subject to discrimination, contrary to article 26 of the Covenant. The Committee recalls its constant jurisprudence that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant. While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26. However, it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the life-long working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age. The Committee notes that while the International Labour Organisation has built up an elaborate regime of protection against discrimination in employment, mandatory retirement age does not appear to be prohibited in any of the ILO Conventions. These considerations will of course not absolve the Committee's task of assessing under article 26 of the Covenant whether any particular arrangement for mandatory retirement age is discriminatory.

8.3 In the present case, as the State party notes, the aim of maximising safety to passengers, crew and persons otherwise affected by flight travel was a legitimate aim under the Covenant. As to the reasonable and objective nature of the distinction made on the basis of age, the Committee takes into account the widespread national and international practice, at the time of the author's dismissals, of imposing a mandatory retirement age of 60. In order to justify the practice of dismissals maintained at the relevant time, the State party has referred to the ICAO regime which was aimed at, and understood as, maximising flight safety. In the circumstances, the Committee cannot conclude that the distinction made was not, at the time of Mr Love's dismissal, based on objective and reasonable considerations. Consequently, the Committee is of the view that it cannot establish a violation of article 26.

8.4 In the light of the above finding that Mr Love did not suffer discrimination in violation of article 26, it is unnecessary to decide whether the dismissal was directly imputable to the State party, or whether the State party's responsibility would be engaged by a failure to prevent third party discrimination.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castllero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlèlè Ahanhanzo, Mr. Walter Käälän, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Hipóólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

\*\* The texts of two individual opinions signed by Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati are appended to the present document.

### **Individual Opinion of Committee Member Mr. Nisuke Ando**

(concurring in the result)

I share the conclusion of the majority Views that the imposition of a mandatory retirement age of 60 is not a violation of article 26. However, I am unable to agree to the Views' statement that "a distinction related to age ..... may amount to discrimination on the ground of 'other status' under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26" (paragraph 8.2) for the following reasons:

Firstly, I consider that 'age' should not be included in 'other status' because age has a distinctive character which is different from all the grounds enumerated in article 26. All the grounds enumerated in article 26 are applicable only to a portion of the human species, however large it may be. In contrast, age is applicable to all the human species, and because of this unique character, age constitutes ground to treat a portion of persons differently from others in the whole scheme of the Covenant. For example, article 6, paragraph 5, prohibits the imposition of death sentence on "persons below eighteen years of age", and article 23, paragraph 2, speaks of "men and women of marriageable age". In addition, terms such as "every child" (article 24) and "every citizen" (article 25) presuppose a certain age as a legitimate ground to differentiate persons. In my opinion, 'other status' referred to in article 26 should be interpreted to share the characteristic which is common to all the grounds enumerated in that article, thus precluding age. Of course, this does not deny that differentiation based on 'age' may raise issues under article 26, but the term "such as" which precedes the enumeration implies that there is no need to include 'age' in 'other status'. Secondly, I doubt if the issue in the present case is "a denial of the equal protection of the law within the meaning of the first sentence of article 26". In essence, the authors of the present case are claiming that 'professional qualifications' to be a pilot should be judged on the basis of each individual's physical and other capacities (abilities), that the imposition of a mandatory retirement age ignores this basis, and that such imposition constitutes discrimination based on age which is prohibited under article 26. This is tantamount to claiming that different treatment of persons of the same age with different capacities violates the principle of equal protection of the law. However, a professional qualification usually requires a minimum age, while a person below that age may well have sufficient capacities to qualify for the profession. In other words, a professional qualification

usually requires a certain minimum age as well as maximum age, and such age requirements have little to do with the principle of equal protection of the law. Thirdly, in my opinion, the present case concerns "the right to work" and its "legitimate limitations" under the International Covenant on Economic, Social and Cultural Rights (article 6, paragraph 1, and article 4, respectively). Thus, at issue here is a proper balance between an economic or social right and its limitations. Of course, article 26 of the International Covenant on Civil and Political Rights prohibits discrimination in law or in fact in any field regulated and protected by public authorities, thus applying to economic or social rights as well. Nevertheless, as in the present case, the limitations of certain economic or social rights, in particular the right to work or to pension or to social security, require thorough scrutiny of various economic and social factors, of which the State party concerned is ordinarily in the best position to make objective and reasonable evaluation and adjustment. This means that the Human Rights Committee should respect the limitations of those rights set by the State party concerned unless they involve clearly unfair procedural irregularities or entail manifestly inequitable results.

[signed]

Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

**Individual Opinion of Committee Member Mr. Prafullachandra Natwarlal Bhagwati**  
(concurring in the result)

The question is whether imposing a mandatory age of retirement at 60 for airline pilots could be said to be a violation of article 26 of the Covenant. Article 26 does not say in explicit terms that no one shall be subjected to discrimination on ground of age. The prohibited grounds of discrimination are set out in article 26, but age is not one of them. Article 26 has therefore no application in the present case, so runs an argument that could be made.

This argument, plausible though it may seem, is in my opinion not acceptable. There are two very good reasons why I take this view. In the first place, article 26 embodies the guarantee of equality before the law and non-discrimination. This is a guarantee against arbitrariness in State action. Equality is antithetical to arbitrariness. Article 26 is therefore intended to strike against arbitrariness in State action. Now, fixing the age of retirement at 60 for airline pilots cannot be said to be arbitrary. It is not as if a date has been arbitrarily picked out by the State party for retirement of airline pilots. It is not uncommon to find that in many countries 60 years is the age fixed for superannuation of airline pilots, since that is the age at which it would not be unreasonable to expect airline pilots would be affected, particularly since they have to fly airplanes which require considerable alacrity, alertness, concentration and presence of mind. I do not think that the selection of the age of 60 years for mandatory retirement for airline pilots can be said to be arbitrary or unreasonable so as to constitute a violation of article 26.

In the second place, the words "such as" preceding the enumeration of the grounds in article 26 clearly indicate that the grounds there enumerated are illustrative and not exhaustive. Age as a prohibited ground of discrimination is therefore not excluded. Secondly, the word "status" can be interpreted so as to include age. It is therefore a valid argument that if there was discrimination on the grounds of age, it would attract the applicability of article 26. But it must still be discrimination. Every differentiation does not incur the vice of discrimination. If it is based on an objective and reasonable criterion having rational relation to the object sought to be achieved, it would not be hit by article 26. Here, in the present case, for the reasons given above, prescribing the age of 60 years as the age of mandatory retirement for airline pilots could not be said to be arbitrary or unreasonable, having regard to the need for maximizing safety, and consequently it was not in violation of article 26.

[signed]

Prafullachandra Natwarlal Bhagwati

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

### **Notes**

1/ No information is provided on what, if any, further professional employment the remaining authors undertook.

2/ See, *infra*, para 5.3

3/ The State party refers to the similar submissions made by the State party in Pauger v Austria Case No. 415/1990, Views adopted on 26 March 1992.

4/ F.G.G. v The Netherlands Case No. 209/1986, Decision adopted 25 March 1987, and BdB v The Netherlands Case No. 273/1989, Decision adopted 30 March 1989.

5/ Shaw, M.: *International Law* (4th ed) (1997) pp.548-549; Brownlie, I.: *Principles of Public International Law* (5th ed.), p.449.

6/ JB Christie v Qantas Airways Ltd (1995) AILR 38; Qantas Airways Ltd v Christie (1998) 193 CLR 280.

7/ The studies referred to by the State party (Kulak et al., "Epidemiological Study of In-flight Airline Pilot Incapacitation" (1971); Booze, "An Epidemiological Investigation of Occupation, Age and Exposure in General Aviation Accidents" (1977); National Institutes of Health, "Report of the National Institute on Aging Panel on the Experienced Pilots Study" (1981); Golaszewski, "The Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates" (1983);

and Office of Technology Assessment of the United States Congress, "Medical Risk Assessment and the Age 60 Rule for Airline Pilots" (1990)) are summarised in the HREOC report.

8/ Aumeeruddy-Cziffra et al v Mauritius Case No. 35/1978, Views adopted on 9 April 1981.

9/ Op.cit.

10/ Christie v Qantas Airways Ltd [1995] AILR 1,623 (3-134).

11/ Article 1, paragraph 2, of the Convention provides that "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

12/ Supra, at para 5.7

13/ Op.cit. 14. M.A. v Italy Case No. 117/1981, Decision adopted on 10 April 1984.