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HUMAN RIGHTS COMMITTEE
Eighty-sixth session
13-31 March 2006

VIEWS

Communication No. 1016/2001

Submitted by:	Rubén Santiago Hinostroza Solís (not represented by counsel)
Alleged victim:	The author
State party:	Peru
Date of communication:	19 July 1999 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 October 2001 (not issued in document form)
Date of adoption of Views:	27 March 2006

* Made public by decision of the Human Rights Committee.

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Subject matter:	Dismissal of a public servant owing to the restructuring of the organization
Procedural issues:	
Substantive issues:	Age discrimination
Articles of the Covenant:	25 (c)

On 27 March 2006, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1016/2002. The text of the Views is appended to the present document.

[ANNEX]

Annex

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-sixth session

concerning

Communication No. 1016/2001*

Submitted by:	Rubén Santiago Hinostroza Solís (not represented by counsel)
Alleged victim:	The author
State party:	Peru
Date of communication:	19 July 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, acting through its Working Group on Communications,

Meeting on 27 March 2006,

Having concluded its consideration of communication No. 1016/2001, submitted by Mr. Rubén Santiago Hinostroza Solís 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:

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* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè-Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed jointly by Committee members Mr. Walter Kälin, Mr. Edwin Johnson, Mr. Michael O'Flaherty and Mr. Hipólito Solari-Yrigoyen, and a separate opinion signed by Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood, are appended to the present document.

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

1.1 The author of the communication, which is dated 19 July 1999, is Rubén Santiago Hinostroza Solís, a Peruvian national, who claims to be a victim of a violation by Peru of article 25 (c) of the Covenant. He is not represented by counsel.

1.2 The Optional Protocol entered into force for Peru on 3 January 1981.

Factual background

2.1 The author worked as a public servant in the National Customs Authority (SUNAD). Supreme Decree No. 043-91-EF of the Executive called for the reorganization of that body, including a reduction in the number of staff. In this connection, the National Customs Authority issued resolution No. 6338 of 5 September 1991 in which it declared a number of its employees redundant and ordered their dismissal on the basis of two criteria: time in service (25 years or more for women and 30 for men) and age (55 or older for women and 60 for men). The author, who was 61 years old and had 11 years of service, was one of those employees.

2.2 On 5 December 1991, the author appealed against the resolution before the National Civil Service Tribunal, alleging that he had been dismissed without any notification and because he was 61 years old, although the legal retirement age for National Customs Authority employees under the Public Service Act was 70. On 19 February 1992, the Tribunal declared that his appeal was unfounded.

2.3 On 5 December 1991, the author submitted a complaint against the aforementioned resolution to the National Civil Service Tribunal, requesting reinstatement in his job. On 19 February 1992, the complaint was declared unfounded.

2.4 The author submitted an administrative claim to the labour division of the Lima High Court of Justice on 26 March 1992. In its judgement of 28 December 1994, the labour division allowed the claim, finding that the author had been dismissed illegally, being under the legal retirement age, and that he had the right to be reinstated in his job.

2.5 On 11 December 1995, the State Procurator lodged an appeal before the Supreme Court. On 21 August 1996, the Supreme Court declared the judgement of the Lima High Court null and void for technical reasons, and ordered that another judgement be issued.

2.6 On 13 October 1997, the Lima High Court again ruled that the appeal was justified and ordered that the author be reinstated in his job. The State again lodged an appeal with the Supreme Court. The judgement of 7 October 1998 upheld the appeal, finding that the National Customs Authority had good reason to dismiss the author, since it was endeavouring to reduce civil service staff, which was "oversized".

2.7 The case has not been submitted to another procedure of international investigation or settlement.

The complaint

3.1 The author alleges a violation of article 25 (c) of the Covenant, since the National Customs Authority's resolution led to his dismissal without just cause. The resolution violated the principle of the hierarchy of norms, since it was contrary to the provisions of article 35 of Legislative Decree No. 276, the Public Service Act, which establishes 70 as the maximum age for employment in public service. Moreover, article 48 of the 1979 Constitution, which was in force at the time, recognizes the right to security of employment. The author also refers to the excessive length of the procedure, as well as the fact that the judiciary was under investigation by President Fujimori's Special Commission on Reorganization of the Government, which naturally brought the work of the Supreme Court to a standstill.

The State party's observations

4.1 In its observations of 22 April 2002, the State party states that it has no objections to the admissibility of the communication. With regard to the merits, it points out that the Supreme Decree of 8 January 1991, in which the Executive announced the reorganization of all public bodies, including ones in the central government, regional governments, decentralized public institutions, development corporations and special projects, was legally supported by article 211 of the 1979 Constitution and was decided upon in view of overstaffing and with the aim of securing the country's economic stability and financial balance. In this context, the Supreme Decree of 14 March 1991 announced the reorganization of the National Customs Authority in order to improve customs services as part of the process of liberalization of foreign trade. That reorganization plan called, among other things, for the streamlining of personnel, indicating that staff not joining in the voluntary resignation programme would be declared redundant and laid off because of restructuring. The Customs Authority issued resolution 2412 on 4 April 1991, establishing the criteria to be taken into account for announcing the redundancy of employees who had not joined in the voluntary resignation programme, identifying among others staff who had reached the age limit defined in the rules of Decree Law No. 20530 and 19990, i.e. 55 years for women and 60 for men.

4.2 Resolution No. 6338, which declared the author redundant and terminated his employment as of 6 September 1991, was in keeping with the legal framework governing the reorganization of the customs service and respected the principle of the hierarchy of norms, which was: article 211 of the Constitution; Supreme Decree No. 043-91-EF of 14 March 1991 concerning the reorganization of the National Customs Authority; and National Customs Authority resolution No. 002412 of 4 April 1991 establishing the criteria to be used for declaring that the Authority was overstaffed.

4.3 While article 48 of the Constitution, which was invoked by the author, guarantees the right to security of employment, it also points out that a worker can be dismissed for just cause provided in the law and duly proven. In the present case, there was just cause for dismissing the author, since he was terminated due to reorganization.

4.4 The State party declares that it has not violated article 25 (c) of the Covenant, since the author was not deprived of access, on general terms of equality, to public service in his country, as demonstrated by his 11 years of service in a public institution. His dismissal was motivated by objective reasons based on a reorganization of public bodies.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter has not been submitted to another procedure of international investigation or settlement.

5.3 The Committee notes that the State party indicates that it has no objections to the admissibility of the communication. There being no obstacle in this respect the Committee considers that the communication is admissible and that the issue raised by the author should be considered on the merits.

Consideration of the merits

6.1 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 for in article 5, paragraph 1, of the Optional Protocol.

6.2 The question raised by the author is whether his dismissal from public service for reasons relating to the reorganization of public bodies constitutes a violation of article 25 (c) of the Covenant. Article 25 (c) recognizes for every citizen the right to have access, on general terms of equality, to public service in his country, without any of the distinctions mentioned in article 2, paragraph 1, namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. To ensure access on general terms of equality, the criteria and procedures for appointment, promotion, suspension and dismissal must be objective and reasonable.

6.3 The Committee recalls its jurisprudence with respect to article 26,[1] to the effect that not every distinction constitutes discrimination, but that distinctions must be justified on reasonable and objective grounds. While age as such is not mentioned as one of the grounds of discrimination prohibited in 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 equal protection of the law within the meaning of the first sentence of article 26. This reasoning also applies to article 25 (c) in conjunction with article 2, paragraph 1, of the Covenant.

[1] See communication No. 983/2001, *Love v. Australia*, Views adopted on 25 March 2003, paragraph 8.2.

6.4 In the present case the Committee notes that the author was not the only public servant who lost his job, but that other employees of the National Customs Authority were also dismissed because of restructuring of that entity. The State party indicates that the restructuring originated from the Supreme Decree of 8 January 1991, wherein the Executive announced a reorganization of all public entities. The criteria for selecting those employees to be dismissed were established following a general implementation plan. The Committee considers that the age limit used in the present case for continued post occupancy was an objective distinguishing criterion and that its implementation in the context of a general plan for the restructuring of the civil service was not unreasonable. Under the circumstances, the Committee considers that the author has not been the subject of a violation of article 25 (c).

7. 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 25 (c) of the Covenant.

[Done in English, French and Spanish, the Spanish 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.]

APPENDIX

Individual opinion of Committee members Mr. Walter Kälin, Mr. Edwin Johnson, Mr. Michael O'Flaherty and Mr. Hipólito Solari-Yrigoyen (dissenting)

1. In the present case, the majority of the Committee concluded that age as such "was an objective distinguishing criterion" and "that its implementation in the context of a general plan for the restructuring of the civil service was not unreasonable" (para. 6.4). In our view this is tantamount to saying that age as such is an objective and reasonable criteria for deciding who would have to leave public service. This reasoning cannot be reconciled with the approach taken by the Committee in the case of *Love v. Australia*. There, the Committee decided that while age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, 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. It stressed that while a mandatory retirement age would generally not constitute age discrimination, it still would have the task under article 26 of the Covenant of assessing in the particular case whether any particular arrangement for mandatory retirement age departing from the general retirement age in a given country is discriminatory. As it did in the case of *Love v. Australia*, the Committee should have examined in the present case whether there were reasonable and objective grounds justifying the use of age as a distinguishing criterion. It did not do so and thus departed from the approach taken in the case of *Love v. Australia* in a way that cannot be justified in our view.

2. In the present case, the State party has failed to demonstrate that the aims of the plan to restructure the National Customs Authority were legitimate. In this context, we note that the Committee in particular did not address the claims of the author that both the Constitution and laws adopted by Parliament guaranteed him security of employment and that these guarantees were not removed as a result of a democratic process of amending the relevant provisions but by decree issued by the then President of Peru. Furthermore, the use of the criterion of age as applied to the author is not objective and reasonable for several reasons. First, the case concerns a matter of dismissal and not retirement. Second, while age may justify dismissal in cases where age affects the ability of the person concerned to perform their functions or where the person concerned has worked long enough to have acquired full or at least substantial pension rights, the State party has not shown that in the case of the author who, notwithstanding his age, had been employed for just 11 years, any such reasons were present. It is therefore our view that the author has been the subject of a violation of article 25 (c) of the Covenant.

(*Signed*): Mr. Walter Kälin

(*Signed*): Mr. Edwin Johnson

(*Signed*): Mr. Michael O'Flaherty

(*Signed*): Mr. Hipólito Solari-Yrigoyen

[Done 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 members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood (concurring)

The Committee has concluded that Peru did not violate the rights of the author under article 25 (c) of the Covenant, even though the Peruvian National Customs Authority dismissed him in a downsizing based in part on his age. This decision was evidently troubling for the Committee in the light of the fact that the State has offered no reason for its discriminatory use of age in lay-offs.

One thing remains clear, however: the Committee's decision in this case should not be understood as supporting Peru's use of gender discrimination in lay-offs and downsizing. The Peruvian National Customs Authority peculiarly requires women to leave public service five years earlier than men, based on age and length of service.

There is no evident reason why women should be forced into retirement at an earlier stage than men, and it is hard to see how, if the issue had been litigated between the parties, such a practice could be regarded as consistent with either article 25 or article 26 of the Covenant.

(*Signed*): Sir Nigel Rodley

(*Signed*): Mr. Ivan Shearer

(*Signed*): Ms. Ruth Wedgwood

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