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Consideration of communications under the Optional Protocol to the Covenant

Communications Nos. 1637/2007, 1757/2008 and 1765/2008

Views adopted by the Committee on 24 October 2011 103rd session

Submitted by:	Néstor Julio Canessa Albareda, Mary Mabel Barindelli Bassini, Graciela Besio Abal, María del Jesús Curbelo Romano, Celia Dinorah Cosio Silva, Jorge Angel Collazo Uboldi and Elio Hugo Torres Rodríguez (not represented by counsel)
Alleged victims:	The authors
State party:	Uruguay
Date of communications:	5 July 2007, 15 January 2008 and 18 February 2008 (initial submissions)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 30 November 2007, 25 January 2008 and 26 February 2008 (not issued in document form)
Date of adoption of Views:	24 October 2011
Subject matter:	Discrimination against civil servants on grounds of age
Substantive issues:	-
Procedural issues:	Non-exhaustion of domestic remedies, insufficient substantiation of claims

* Published by decision of the Human Rights Committee.

Articles of the Covenant: 2; 5; 25, paragraph 2 (c); and 26

Articles of the Optional Protocol: 2 and 5, paragraph 2

On 24 October 2011 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communications Nos. 1637/2007, 1757/2008 and 1765/2008.

[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 (103rd session)

concerning

Communications Nos. 1637/2007, 1757/2008 and 1765/2008*

Submitted by:	Néstor Julio Canessa Albareda, Mary Mabel Barindelli Bassini, Graciela Besio Abal, María del Jesús Curbelo Romano, Celia Dinorah Cosio Silva, Jorge Angel Collazo Uboldi and Elio Hugo Torres Rodríguez (not represented by counsel)
Alleged victims:	The authors
State party:	Uruguay
Date of communications:	5 July 2007, 15 January 2008 and 18 February 2008 (initial submissions)

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

Meeting on 24 October 2011,

Having concluded its consideration of communications Nos. 1637/2007, 1757/2008 and 1765/2008, submitted to the Human Rights Committee by Mr. Canessa et al. 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 authors of the communications and the State party,

Adopts the following:

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

1. The author of the first communication, dated 5 July 2007, is Néstor Julio Canessa Albareda, a Uruguayan citizen born in 1944. The authors of the second communication, dated 15 January 2008, are Mary Mabel Barindelli Bassini, Graciela Besio Abal, María del Jesús Curbelo Romano, Celia Dinorah Cosio Silva and Jorge Angel Collazo Uboldi, Uruguayan citizens born in 1942, 1939, 1942, 1942 and 1946 respectively. The author of the third communication, dated 18 February 2008, is Elio Hugo Torres Rodríguez, a

* The following members of the Committee participated in the consideration of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabían Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Uruguayan citizen born in 1940. All the aforementioned individuals are former diplomats who claim to be victims of violations by Uruguay of the rights recognized in articles 2, 5 and 26 of the International Covenant on Civil and Political Rights. The author of the third communication also claims a violation of article 25 (c) of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The authors are not represented by counsel.

The facts as submitted by the authors

2.1 The authors began working as civil servants in the Ministry of Foreign Affairs of Uruguay between 1973 and 1980 and were taken off their posts as secretaries in the Foreign Service upon reaching 60 years of age, pursuant to decisions adopted by the executive branch between 2001 and 2006. The decisions were based on article 246 of Act No. 16.170 of 28 December 1990, which replaced article 20 of Act No. 14.206 of 6 June 1974, on the Statute of the Foreign Service of the Ministry of Foreign Affairs, with the following: "Article 20: The following maximum age limits are established for the exercise of duties within the Ministry of Foreign Affairs: ambassador, minister, minister-counsellor, counsellor and category A technical professional, 70 years. First secretary, second secretary and third secretary, 60 years."[1]

Exhaustion of domestic remedies

2.2 On 17 September 2005, the author of the first communication submitted an application for constitutional review of article 246 of Act No. 16.170, claiming that the article violated the principle of equality and the right to work. In a decision dated 12 October 2006, the Supreme Court rejected the application without examining the constitutionality of the contested article. The Supreme Court found that, once the Act had been applied, it could not be subject to an application for constitutional review, since the purpose of the latter is to have a particular article declared inapplicable in a specific case, not to have it completely annulled. In a concurring opinion, two Supreme Court judges took the view that the application was admissible, but that there had been no violation of the principle of equality because there had been no unequal treatment of individuals in the same position, namely first secretaries.[2]

2.3 The author of the first communication points out that an action for annulment was not an option in the case at hand as it applies only to administrative acts that represent a misuse, abuse or excessive use of power or are contrary to a rule of law, in accordance with article 23 of the Organization Act on the Administrative Court. In the present case, the decision to declare vacant the post of first secretary occupied by the author was based on a legislative provision and did not meet any of the aforementioned conditions. Such an action therefore had no chance of success. The author of the first communication concludes that

[1] The previous version of article 20 of Act No. 14.206 established the following maximum age limits for the exercise of duties within the Ministry of Foreign Affairs:

(a) Ambassador, minister, class "AaA" technical professional: 70 years;

(b) Minister-counsellor: 65 years;

(c) Counsellor: 60 years;

(d) First secretary: 55 years;

(e) Second secretary: 50 years;

(f) Third secretary: 45 years.

[2] The details cited in this paragraph are taken from the Supreme Court decision of 20 September 2006, appended to the author's initial communication.

the application for constitutional review he submitted was the only viable remedy and that, consequently, he has exhausted all available domestic remedies.

2.4 The authors of the second communication also submitted an application for constitutional review of article 246 of Act No. 16.170, claiming that the article violated the principle of equality and the right to work. The Supreme Court rejected the application in a decision dated 8 June 2007. Citing its previous decision of 20 September 2006, the Court found that, as that decision matched the case at hand perfectly, the reasoning behind it should be considered to be applicable to the present decision.

2.5 On 26 April 2007, the author of the third communication submitted an application for constitutional review of article 246 of Act No. 16.170, claiming that the article violated the principle of equality and the right to work. The Supreme Court rejected this application on 14 December 2007. The Court found that the principle of equality was not undermined when, within the law, persons in different positions received different treatment. The Court was of the view that in the present case "there [was] no indication that the legal presumption [had] been established in an arbitrary or discriminatory manner".[3]

Efforts to secure the repeal of the contested article by the legislature

2.6 The authors point out that since 1998 they have made various unsuccessful attempts to secure the repeal of article 246 by the legislature. They add that in November 1998 the International Affairs Committee of the Chamber of Representatives unanimously adopted a bill to that effect,[4] but it was opposed by the then Minister for Foreign Affairs, supposedly for political reasons.

The complaint

3.1 The authors maintain that the aforementioned article 246 of Act No. 16.170, which led to the loss of their right to occupy their posts as secretaries when they reached 60 years of age, violates article 26 and article 2, paragraphs 1 and 2, of the Covenant. The authors assert that the provision establishes unequal treatment for equal individuals, namely the civil servants of the Foreign Service. According to the authors, the difference between the treatment of secretaries and that of higher-level civil servants of the Foreign Service (counsellors, ministers and ambassadors) with regard to cessation of duties is neither reasonable nor objective, given that age is the only criterion used to exclude individuals from a professional career in which intellectual capacity and experience should be paramount. The authors point out that civil servants who have not reached the level of counsellor before reaching the age of 60 are forced to leave their post and carry out administrative tasks, losing all their legally acquired rights and privileges, including diplomatic status. By contrast, civil servants who reach the rank of counsellor before the age of 60 can remain in that position until the age of 70. The authors cite the Committee's Views in the case of *Love et al. v. Australia* (communication No. 983/2001), in which the Committee found 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 article 26 of the Covenant. They also cite the Committee's general comments Nos. 18, 25 and 26, along with relevant decisions of the Constitutional Court of Colombia.

3.2 The authors claim a violation of article 5, paragraph 2, of the Covenant, with reference to article 7 of the International Covenant on Economic, Social and Cultural Rights (on the right to enjoy just conditions of work), articles 23 and 24 of the American

[3] The quotation in this paragraph is taken from the Supreme Court decision of 14 December 2004.

[4] The authors attach a copy of the bill in their communication of 10 October 2008, referred to in paragraph 5.1 below.

Convention on Human Rights (on access to the public service under equal conditions, and on equality before the law), article 7 of the Additional Protocol to the American Convention on Human Rights (on the right to work), the 1958 International Labour Organization (ILO) Convention concerning Discrimination in Respect of Employment and Occupation (No. 111), and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

3.3 The author of the third communication also claims a violation of article 25 (c) of the Covenant, without providing any argument to justify that claim.

State party's observations on the merits

4.1 On 2 September 2008, the State party informed the Committee that its relationship with Uruguayan civil servants is of a statutory, not contractual, nature. Consequently, an appointment is not an employment contract but rather the placement of the appointee in a position provided for in a statute establishing his or her rights and obligations. The right to occupy a post means that civil servants who continue to meet the requirements for the post cannot be transferred except under the conditions established in the statute – in this case, the Statute of the Foreign Service. The State party emphasizes that the right to occupy a post should not be confused with the right to hold it permanently. The civil servant is there to fill the post; the post does not exist for the benefit of the civil servant. Thus, diplomatic status is a prerogative of the post, not of the individual.

4.2 The State party asserts that the contested provision — article 246 of Act No. 16.170 — is not discriminatory, since it meets the requirements of reasonableness and objectivity, as confirmed by the Supreme Court. The provision stipulates that all civil servants who, having reached the age of 60, have not advanced to the position of counsellor shall leave category M (diplomatic staff) to join category R (specialized non-diplomatic staff), while civil servants who have advanced to the position of counsellor shall remain in category M. The State party asserts that this provision affects equally all civil servants in the same situation as the authors – that is, those who have reached 60 years of age and hold a position below that of counsellor. Therefore, there is no discrimination among individuals with the same statutory position. The State party points out that it has the authority to rationalize the civil service, including to regulate the criteria for entry, promotion, competitive examinations and retirement from service, with a margin of discretion that does not infringe human rights. The State party adds that those civil servants who, like the authors, have not reached the position of counsellor before reaching 60 years of age still remain civil servants of the Ministry of Foreign Affairs, even though they are assigned to different, though equally dignified, duties in category R. Furthermore, the authors' retirement and social security entitlements are not affected.

Authors' comments on the State party's submission

5.1 On 10 October 2008, the authors maintained that the State party's claim that civil servants in the same class as themselves — secretaries who have reached 60 years of age and have not advanced to the position of counsellor — are treated equally is misleading, because the very existence of this group is the result of the application of a discriminatory provision. The Statute of the Foreign Service of Uruguay treats staff in category M as a single group and does not distinguish between them by class or grade. Article 246 of Act No. 16.170, on the other hand, gives preference to four classes within category M (counsellor, minister-counsellor, minister and ambassador), who can continue in their diplomatic duties until the age of 70, while secretaries are relieved of these duties at the age of 60. The authors cite article 250 of the Constitution as an example of a provision that is in line with the contested right. That article establishes that all members of the judicial branch,

without any discrimination, shall leave their posts when they reach 70 years of age. The authors add that the State party has not justified the distinction made in article 246. They claim that this is an arbitrary and discriminatory distinction that has the sole purpose of creating vacancies to enable newly recruited civil servants to be appointed for reasons of "aesthetic appeal". The authors cite a communication dated 20 May 1998 from the Ministry of Foreign Affairs to the International Affairs Committee of the Chamber of Representatives in response to that Committee's proposal to repeal article 246. The communication states that "in the exercise of diplomatic functions, the existence of civil servants at the rank of secretary who are much older than their counterparts from other countries could have a negative effect on the country's image abroad".[5]

5.2 The authors assert that article 60 of the Constitution of Uruguay provides for an administrative career for civil servants covered by the budget, who are declared to have permanent status. The authors consider that their career opportunities have been curtailed, given that they have no chance of promotion between the ages of 60 and 70, the age at which they retire.

5.3 The authors point out that they were not simply reassigned to different duties, but were taken off their posts and reassigned to another at a lower level. The authors add that the State party cannot expect them to be happy to be able to stay on as civil servants when they have been divested of their diplomatic status, are unable to take a post abroad, receive substantially lower remuneration and are unable to progress in their career.[6] The authors stress that their posts were not eliminated, but left vacant while the authors were reassigned to category R posts.

5.4 The authors conclude that, when adopting a law, the State party must ensure that it complies with the requirement set out in article 26 of the Covenant, namely that the law must not be discriminatory. They add that the Supreme Court made no comment on the articles of the Covenant they invoked in their applications for constitutional review.

Additional observations by the parties

6. On 6 February 2009, the State party reiterated the arguments raised in its note of 2 September 2008 regarding the nature of the position of civil servant and the absence of discrimination in the contested provision, given that it provides for equal treatment for civil servants in the same class. The State party points out that the old article 20 of Act No. 14.206, prior to its amendment by the contested provision, already included different age limits for different classes of civil servant. The State party also refers to the Supreme Court decisions on the applications for constitutional review submitted by the authors. According to the Court: "The *ratio legis* of the contested provision seems to be, inter alia, to avoid reduced effectiveness in the performance of the duties of first secretary in the Ministry of Foreign Affairs owing to the loss of reflexes, memory, etc. commonly found in persons over 60 years of age. The intention is to have the aforementioned duties carried out by persons who, in the view of the lawmakers, are likely to carry them out more effectively thanks to their age. While this purpose ... might be open to question, it does not seem irrational."[7] The State party adds that the author of the first communication had the chance, between being notified of his removal from category M and being reassigned to category R, to take the examination for the post of counsellor but did not receive a high enough mark to qualify for promotion.

[5] The communication is appended to the authors' comments of 10 October 2008.

[6] The authors append to the communication a copy of the salaries they received as category M civil servants and those they received after reassignment to category R.

[7] Quoted from Supreme Court decisions Nos. 42/93, 206/2002/312/2004 and 192/2005.

7.1 On 9 March 2009, the authors responded to the State party's observations, pointing out that the latter did not provide any new evidence, but rather reiterated the same arguments, which did not prove there had been no violation of article 26 of the Covenant and the other articles invoked. The authors maintain that the fact that the old article 20 of Act No. 14.206 established different age limits for different classes of civil servant in the diplomatic service does not justify drafting a new provision that is equally discriminatory. The authors reiterate their arguments that the contested provision constitutes discrimination against secretaries of the Foreign Service who have reached 60 years of age, given that, though they are allowed to remain in the civil service, they are reassigned to an administrative post of a lower level and pay outside the Foreign Service, and have no opportunity for advancement.

7.2 On 11 January 2011, the authors informed the Committee about the enactment of the National Budget Act (No. 18.719) of 27 December 2010. Article 333 of this Act replaces article 20 of Act No. 14.206, as amended by article 246 of Act No. 16.170, with the following: "Article 20. The maximum age limit for the exercise of duties in category M in the Foreign Service is hereby set at 70 years. Those civil servants who, on the date of entry into force of the present Act, hold category R positions within the Ministry of Foreign Affairs in application of the age limit established under the provision previously in force (article 246 of Act No. 16.170) shall be automatically reappointed to the category M posts they previously occupied, for all purposes. The difference in pay shall be settled in the form of personal compensation."

7.3 The authors point out that, in enacting this new law and setting the maximum age limit at 70 years for all civil servants of the Foreign Service, the State party acknowledges that discrimination had existed. However, the authors maintain that they were not able to obtain just compensation for the years during which they were cut off from their diplomatic careers and deprived of the associated rights. Furthermore, some of the authors had already reached the age of 70 by the time the above-cited article 333 entered into force. They had therefore retired after having been arbitrarily separated from the diplomatic service for 10 years, yet the aforementioned article does not provide for any compensation for them. Consequently, the authors ask the Committee to rule that there was a violation of the Covenant and to request the State party to provide just compensation for the injury and loss suffered by those reappointed to category M posts and, especially, appropriate reparation for the injury and loss caused to those who retired from category R at the age of 70 under the former legislation.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the reference to article 25 (c) by the author of the third communication. However, it notes that the author has not provided any evidence of a violation of that article. Consequently, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.4 With regard to the authors' complaint under article 5, paragraph 2, the Committee notes that the authors have not demonstrated that there was any restriction upon or

derogation from the human rights recognized in the State party on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent. Consequently, the Committee considers that the authors have not sufficiently substantiated this complaint for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

8.5 With regard to the authors' complaint under articles 26 and 2, the Committee considers it as sufficiently substantiated for the purposes of admissibility. It thus declares the communication admissible with respect to this complaint.

Consideration of the merits

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

9.2 The Committee must determine whether the authors were victims of discrimination in violation of article 26. The Committee recalls its long-standing jurisprudence that not every differentiation of treatment necessarily constitutes discrimination within the meaning of article 26 if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[8] The Committee takes the view that age may constitute one of the grounds for discrimination prohibited under article 26, provided that it is the ground for establishing differentiated treatment that is not based on reasonable and objective criteria.[9]

9.3 In the case at hand, the Committee observes that the State party has not explained the purpose of the distinction established by article 246 of Act No. 16.170 between secretaries and other category M civil servants of the Foreign Service which led to the authors' cessation of duties, nor has it put forward reasonable and objective criteria for such a distinction. The Supreme Court of Uruguay mentions, as a possible *ratio legis* of the contested provision, the loss of reflexes and memory that might have an adverse effect on the effectiveness of staff performing the duties of first secretary, a reasoning which the Court does not find irrational.

9.4 The Committee takes the view that, while the imposition of a compulsory retirement age for a particular occupation does not per se constitute discrimination on the ground of age,[10] in the case at hand that age differs for secretaries and for other category M civil servants, a distinction which has not been justified by the State party. The latter has based its reasoning on the argument of the Supreme Court to the effect that the difference of treatment "does not appear irrational" and on the defence of a degree of discretion to which it would be entitled in exercising its right to rationalize the Public Administration. The Committee notes, however, that the State party has not explained how a civil servant's age can affect the performance of a secretary so specifically and differently from the performance of a counsellor, minister or ambassador as to justify the difference of 10 years between compulsory retirement ages. In light of the above, the Committee concludes that

[8] See communications Nos. 1565/2007, *Gonçalves et al. v. Portugal,* Views adopted on 18 March 2010, para. 7.4; 983/2001, *Love et al. v. Australia*, Views adopted on 25 March 2003, para. 8.2; 182/1986, *F.H. Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13; 180/1984, *L.G. Danning v. The Netherlands*, Views adopted on 9 April 1987, paras. 13 and 14; and *S.W.M. Broeks v. The Netherlands* communication No. 172/1984, Views adopted on 9 April 1987, para. 13.

[9] See in this respect communications Nos. 983/2001 (footnote 8 above), para. 8.2; and 1016/2001, *Hinostroza Solís v. Peru*, Views adopted on 27 March 2006, para. 6.3.

[10] See in this respect communication No. 983/2001 (footnote 8 above), para. 8.2.

the facts before it reveal the existence of discrimination based on the authors' age, in violation of article 26 of the Covenant, read in conjunction with article 2.

10. 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 information before it discloses a violation by the State party of article 26, read in conjunction with article 2, of the Covenant.

11. The Committee takes note of the information provided by the authors to the effect that article 246 of Act No. 16.170 has been amended by article 333 of Act No. 18.719 of 27 December 2010, which has set the maximum age limit for all category M posts in the Foreign Service at 70 years and has provided for compensation for loss of earnings for the civil servants adversely affected by the now repealed article 246. The Committee further notes the authors' allegations that they were not able to obtain fair compensation for the years during which they were deprived of their posts and the rights associated thereto. Consequently, the Committee takes the view that the State party must recognize that reparation is due to the authors, including appropriate compensation for the losses suffered.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views.

[Adopted 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.]