



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October-3 November 2005

DECISION

Communication No. 1103/2002

<i>Submitted by:</i>	Jaime Castro Ortíz (represented by counsel, Germán Humberto Ricón Perfetti)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	13 December 1998 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 July 2002 (not issued in document form)
<i>Date of decision:</i>	28 October 2005
<i>Subject matter:</i>	Dismissal of an HIV-infected worker from his place of employment

* Made public by decision of the Human Rights Committee.

<i>Procedural issues:</i>	Failure to exhaust domestic remedies
<i>Substantive issues:</i>	Right not to be subject to discrimination, right to equality, right to privacy and right to an impartial tribunal
<i>Articles of the Covenant:</i>	2, 3, 5, 14, paragraph 1, 17 and 26
<i>Article of the Optional Protocol:</i>	2 and 5, paragraph 2 (b)

[ANNEX]

Annex

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE
OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

Eighty-fifth session

concerning

Communication No. 1103/2002*

Submitted by: Jaime Castro Ortíz (represented by counsel,
Germán Humberto Ricón Perfetti)

Alleged victim: The author

State party: Colombia

Date of communication: 13 December 1998 (initial submission)

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

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 13 December 1998 is Jaime Castro Ortíz, a Colombian citizen born in 1961, who alleges that he is a victim of violations by Colombia of articles 2, 3, 5, 14, paragraph 1, 17 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is represented by counsel, Germán Humberto Rincón Perfetti.

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

The facts as submitted by the author

2.1 On 1 December 1989 the author began working in the information systems division of Banco del Comercio, now Banco de Bogotá. On 24 July 1991 he was diagnosed as carrying the human immunodeficiency virus (HIV), and accordingly as from that date attended the HIV/AIDS Programme of the Social Security Institute (ISS).

2.2 On 11 November 1997 the author's attending physician, Dr. Luis Paulino Pineda, who was attached to ISS, wrote out a series of written recommendations for the author aimed at ensuring that his treatment was successful; these included maintaining a regular schedule of rest, meals and medication. The author maintains that at that time his working hours were irregular and unpredictable, as he might be assigned to a day shift or a night shift without knowing which shift he would have the next month.

2.3 On 25 November 1997 the author met with Ms. María del Carmen Centena, the administrator in the production area of Banco de Comercio, to whom he gave the list of recommendations prepared by the ISS physician. Ms. Centena said that the list was intended only for the author and that he should obtain a letter from the ISS Department of Occupational Health addressed to Banco de Bogotá.

2.4 On 20 March 1998 the ISS Department of Occupational Health addressed a letter to the bank in which it noted that "[the author's] illness could be aggravated by his current working conditions" and made a series of recommendations. On the basis of this letter, the author wrote to Banco de Bogotá on 8 April 1998 requesting that he should be given a permanent shift assignment, preferably to a day shift. On 14 April 1998 Mr. Gonzalo Urbina Jiménez, head of personnel of Banco de Bogotá, replied to the author in writing that the entity responsible for determining the measures to be taken in his case was the insurance company Aseguradora de Riesgos Profesionales Seguros de Vida Alfa S.A., which was affiliated with the bank, and not ISS. In the same letter the author was informed that he had an appointment with the insurance company's physicians on 20 April 1998.

2.5 The author alleges that before he went to the appointment, María del Carmen Centena, the administrator in the production area, told him that Banco de Bogotá was unable to reassign him and tried to convince him to resign, to which end she was prepared to negotiate a settlement. The author replied that he could not accept her offer because he was young and wished to continue working at the bank.

2.6 The author attended his medical appointment with the insurance company physician, whom he told that he was HIV-positive, adding that he did not want the bank to know. The doctor said that he agreed with the recommendations of ISS but that he would have to reveal the author's diagnosis to the bank so that his shift could be changed.

2.7 In a letter dated 25 April 1998 the head of the production management department of Banco de Bogotá informed the author that the bank had unilaterally decided to terminate the author's contract of employment "without just cause", in accordance with the provisions of article 6 of Act No. 50 of 1990, with effect from that day.

2.8 The author filed a complaint (*acción de tutela*) with civil circuit court No. 23, claiming compensation and alleging a violation of his right to work, to privacy, to equality and to human dignity. On 14 May 1992 the judge rejected the complaint, ruling that no violation had occurred.

2.9 The author appealed the civil court's decision in the Civil Division of the Superior District Court of Santa Fé de Bogotá, which upheld the decision of the court of first instance on 2 July 1998.

2.10 The author affirms that the matter is not being examined under another procedure of international investigation.

The complaint

3.1 The author alleges that the State party violated article 2 of the Covenant because it did not honour its undertaking to ensure the rights recognized in the Covenant without distinction of any kind. He maintains that the Ministry of Health has stated that HIV is not a priority issue and that the Banking Supervisory Authority did not take steps to prevent discrimination.

3.2 The author alleges a violation of article 3 of the Covenant, arguing that the State party allowed a public entity to dismiss an individual solely because he was HIV-positive.

3.3 The author considers that article 5 of the Covenant was also violated because the State party was aware of the circumstances of the case and yet authorized acts aimed at the destruction of the author's rights.

3.4 The author maintains that the State party violated article 14, paragraph 1, of the Covenant because the judges did not order the entity in question to restore the victim's violated rights and that in a situation very similar to his own the Constitutional Court had granted the remedy of *amparo*, which had not happened in his own case.

3.5 The author alleges a violation of article 17, claiming that the State party allowed confidential information about him to be made public, which resulted in his dismissal from employment.

3.6 The author maintains that the State party violated article 26 because it did not provide equal and effective protection against the discrimination he suffered as a result of his diagnosis.

State party's observations on admissibility and the merits

4.1 In a letter dated 28 January 2005 the State party maintains that the communication must be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author has not yet availed himself of the ordinary labour courts, from which he might have obtained a decision in his favour and compensation for the harm he suffered. The State party adds that both the Colombian Government and the Constitutional Court have established numerous mechanisms to protect the human rights of persons with HIV with a view to ensuring that they are not marginalized. It notes further that there have been Constitutional Court decisions that protect the rights of persons with AIDS from any kind of discrimination, but that

they are not applicable in the present case. An employee may not be dismissed solely because he or she is HIV-positive. However, a sick person may be dismissed when the grounds have nothing to do with the person's health status, as in the case of the author.

4.2 The State party recalls that the requirement of exhaustion of domestic remedies is based on the notion of the subsidiary nature of international human rights protection, with its implicit acknowledgement that every State must be able to offer a judicial system capable of settling the matters brought before it. It points out that the author still has recourse to the ordinary labour courts and that he must determine that they are not effective in his case. The fact that the decision relating to the author's *acción de tutela* did not have the outcome he sought was due to a series of considerations related to the case having to do with the judge's assessment of the information presented during the proceedings, and not to a denial of access to justice. The State party notes that one must not assume that a judicial mechanism will be ineffective, since its assessment must be made in accordance with the facts and circumstances of each case; thus it is impossible to say that a particular mechanism is always ineffective, as that would mean that recourse to domestic law had become the exception or that it was for individuals to decide who had jurisdiction to hear cases of presumed violations of international norms. According to the State party, the author is attempting to make the Committee a fourth instance.

4.3 The State party further alleges that the present complaint must be found inadmissible under article 2 of the Optional Protocol as it is insufficiently substantiated. It notes that the author was not dismissed because he was HIV-positive, since while he was employed at Banco de Bogotá the bank did not know that he was carrying the virus until it learned of the *acción de tutela* brought by the author. Moreover, while it was true that the author had submitted various medical certificates justifying his inability to work, none of them contained any mention of his diagnosis; in fact, his file was reviewed, and no document of any kind from which his health status might have been inferred was found. The State party maintains that, according to Banco de Bogotá, the author did have different work schedules, but that they all conformed to the law and that he was informed of changes of schedule in advance, so that the author's allegations are untrue.

4.4 The State party says that the body authorized to recommend a job reassignment was the insurance company Aseguradora de Riesgos Profesionales Seguros de Vida Alfa S.A., which was affiliated with Banco de Bogotá, as the author was told. It adds that the report issued by the insurance company merely stated that the author was suffering from an illness of "common origin", without specifying what it was, and that it did not recommend a job reassignment. Moreover, the report was submitted in May 1998, when the author had already left the bank.

4.5 The State party notes that, as the bank itself reported, Banco de Bogotá terminated the author's contract of employment without just cause on 25 April 1998, but it did so on the basis of article 6 of Act No. 50 of 1990 of the Substantive Labour Code in force at the time, and the dismissal occurred without compensation, pursuant to the court's decision in respect of the *acción de tutela*. The State party goes on to say that, as the bank noted, the author's dismissal was occasioned by his conduct at work and the many mistakes he made on the job; this was the bank's objective motive for wanting to get rid of him, a motive very different from discrimination based on his positive HIV status. The State party insists that the author was denied the remedy of *amparo* because the judges considered that that remedy bore no relation to his dismissal or to his positive HIV status. There was no indication that the bank was

aware of the author's condition when it terminated his contract of employment, which leads to the conclusion that his dismissal was due to reasons that had absolutely nothing to do with his health status. Accordingly, the State party considers that there has been no violation of articles 2, 3, 5, 14, paragraph 1, 17 or 26 of the Covenant.

Authors' comments on the State party's observations

5.1 In a letter dated 15 June 2005 the author states that it is not true that Banco de Bogotá only learned of his health problems when he filed his *acción de tutela*, since on 8 April 1998 he had submitted a request to be assigned to the day shift on account of the fact that for approximately one year now he had been having health problems that required "ongoing medical treatment, and he had attached copies of medical certificates to the letter. In addition, the note from ISS dated 9 March 1998 stated that the author was HIV-positive, and the medical certificates attesting to the author's inability to work that were submitted to the bank, and which the bank acknowledges having received, contained the code for the medical condition in question, as it would have been impossible to justify his inability to work without it.

5.2 The author insists that he requested a change of schedule because Banco de Bogotá did not respect legal work schedules, and that the Constitutional Court had found in its judgement No. 256/96 of 30 May 1996 that no one may have his or her contract of employment terminated without an explanation. In the author's case, the courts accepted the termination of his contract without taking the jurisprudence of the Constitutional Court into account.

5.3 The author maintains that it is not true that the State party had set up programmes to combat discrimination against persons living with HIV and to increase public awareness of misconceptions about HIV and AIDS, since there was not even an office that dealt with HIV-related issues.

5.4 As to the exhaustion of domestic remedies, the author maintains that similar cases in which persons were dismissed from their jobs because they were HIV-positive were dealt with by the constitutional courts through the remedy of *tutela*, a remedy that he himself had tried, thereby exhausting domestic remedies.

Issues and proceedings before the Committee

6.1 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 the complaint is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee takes note of the State party's allegations that the communication must be declared inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol because the author did not exhaust the remedies available to him in the ordinary labour courts and that the complaints have not been sufficiently substantiated. The Committee observes that the author merely states that he has exhausted valid domestic remedies because he filed an

acción de tutela before the constitutional court. He does not, however, deny that judicial remedies offered in the ordinary labour courts were available to him, nor does he explain why such a remedy would have been ineffective in his case. These doubts about the effectiveness of judicial remedies do not absolve an author from exhausting them. In the light of the foregoing, the Committee finds the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author has not exhausted domestic remedies. The Committee therefore regards the consideration of the State party's remaining arguments unnecessary.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author of the communication and to his counsel.

[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.]
