



International Covenant on Civil and Political Rights

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Human Rights Committee

Ninety-seventh session

12–30 October 2009

Decision

Communication No. 1541/2007

<i>Submitted by:</i>	Luis Carlos Gaviria Lucas (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	1 November 2006 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 January 2007 (not issued in document form)
<i>Date of decision:</i>	27 October 2009
<i>Subject matter:</i>	Revocation of the author's disability pension
<i>Procedural issues:</i>	Lack of substantiation; non-exhaustion of domestic remedies
<i>Substantive issue:</i>	Violation of the right to due process; persecution of the author for being a former trade unionist
<i>Articles of the Covenant:</i>	14, paragraph 1; 22
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

[Annex]

* Made public by decision of the Human Rights Committee.

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ninety-seventh session)

concerning

Communication No. 1541/2007*

Submitted by: Luis Carlos Gaviria Lucas (not represented by counsel)

Alleged victim: The author

State party: Colombia

Date of communication: 1 November 2006 (initial submission)

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

Meeting on 27 October 2009,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 1 November 2006, is Luis Carlos Gaviria Lucas, a Colombian citizen. He claims that his rights have been violated by Colombia, but invokes no specific article of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is not represented by counsel.

The facts as submitted by the author

2.1 The author began working at the Cartagena maritime and river terminal of the Government enterprise Puertos de Colombia (COLPUERTOS) on 18 March 1971. Shortly thereafter he sought membership in the enterprise's trade union, SINDICATERMA. In 1987 he was elected president of the Executive Committee of the Colombian National Federation of Dock Workers. While he held that post, he lost the sight in his right eye and suffered a significant impairment in his left eye as a result of a detachment of the retina. The firm's doctors in Bogotá (where COLPUERTOS was headquartered) determined that he had lost more than 66 per cent of his earning capacity and recommended that he receive

* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanelle Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

In accordance with rule 90 of the Committee's rules of procedure, Mr. Rafael Rivas Posada did not take part in the adoption of this decision.

a disability pension. This decision was announced on 25 April 1991, effective beginning 16 December 1990.

2.2 As a result of the liquidation of COLPUERTOS in 1991, the Government established a Social Liability Fund (FONCOLPUERTOS) to pay the labour-related obligations no longer covered by the company to its workers, including pensions. The Fund was subsequently replaced by the Internal Working Group for the Administration of Social Liabilities of the Former COLPUERTOS. According to the author, this body reviewed his disability status using a consolidated classification manual that was drawn up 10 years after his disability occurred and decided to decrease his disability rating. He notes, however, that the law stipulates that a person's disability must be reviewed using the materials that were in existence on the date that the incident occurred.

2.3 Following this review, in May 2002 the author was informed of an administrative decision decreasing the amount of his pension. Then, on 27 March 2003, the Internal Working Group decided to revoke the pension. The author also states that, in addition to revoking his pension, the Administration requested that he repay the money he received over and above what he was legally owed, amounting to approximately 1 billion pesos.

2.4 The author filed a complaint with the Administrative Court of Bolívar. Over the course of three years, several different courts declined jurisdiction over the case. The author then withdrew that complaint and filed a labour-related one. He also began the process of applying for his retirement pension, since he had completed 21 years of service and was 55 years old. In a decision of 9 June 2006, the Internal Working Group granted him the retirement pension, but deducted from it the debt arising from the disability pension. The author filed a number of claims, including an application for protection against the violation of his fundamental rights, with the Superior Court of the Judicial District of Cartagena (Labour Chamber) with a view to securing the reinstatement of his disability pension. The decision, however, went against him. He also appealed the decision before the Council of State and lodged a claim with the Constitutional Court, both of which also ruled against him.

The complaint

3.1 The author complains that the decision to revoke his pension and to order the repayment of money he had received was not made by a judicial body but by the Internal Working Group. He points out that, under Colombian law, only judges are empowered to revoke, reduce or modify pensions. He asserts that the Internal Working Group exceeded its powers, since it had authority only to review the injury, which had in fact gotten worse, but not to reclassify it.

3.2 The author does not claim a violation of specific provisions of the Covenant. He states, however, that the facts he has described constitute a violation of his right to due process. He also declares that he and many other former members of the executive boards of dock-worker trade unions and former board employees have been persecuted by the Colombian authorities.

State party's observations on admissibility and merits

4.1 On 18 May 2007, the State party argued against the admissibility of the communication. It pointed out that, in the 1990s, the author petitioned a number of circuit labour courts for the recognition of his entitlement to labour-related accruals and adjustments to his disability pension. The judges found in his favour and, in accordance with those rulings, the former Social Liability Fund of COLPUERTOS (FONCOLPUERTOS) issued a number of administrative acts ordering various payments and the recalculation of his pension. As a result, the author's monthly pension came to

exceed the maximum established under Act No. 71 of 1988. In fact, in 2002 it amounted to more than 15 million pesos, when it should have been a little over 5 million.

4.2 According to the State party, the judicial decisions mentioned above should have been subject to the level-of-jurisdiction requirement known as “consultative status” (*grado jurisdiccional de consulta*) provided for in article 69 of the Labour Procedure Code. However, the judges of the circuit labour courts did not abide by this requirement, and this situation was permitted to continue by FONCOLPUERTOS. After the Fund was liquidated and it became apparent that this serious omission had been committed, not only in the author’s case but in many other similar cases, the Administrative Chamber of the Higher Council of the Judiciary took measures to ensure that those cases were reviewed and brought into conformity with the law. The decisions of the courts of first instance in the author’s favour were consequently revoked, and a number of decisions were handed down establishing that the author had unduly received more than 1 billion pesos. He was therefore ordered to repay the money he had received over and above the legal maximums.

4.3 The State party asserts that, in accordance with the Labour Procedure Code, a remedy could have been sought before the labour courts against the Internal Working Group’s decision of 29 April 2002, which adjusted the author’s pension in order to bring it into line with the maximums established under Act No. 71 of 1988. The author provides no evidence that he pursued that remedy and gives no information regarding its outcome; nor has the Internal Working Group been notified of any such action brought by the author in relation to this decision.

4.4 The decision of 27 March 2003 revoking the author’s pension was taken during the review of his disability status in accordance with article 44 of Act No. 100 of 1993, which stipulates that benefits should be revoked when the pension recipient no longer exhibits the percentage of lost earning capacity necessary to qualify as disabled. The Disability Classification Board of the Bolivar region, in its finding No. 357 of 19 December 2000, determined that the author’s loss of earning capacity was equivalent to 62.93 per cent and thus below the 66 per cent level established by the 1989–1990 Collective Labour Agreement, which the Cartagena maritime terminal was bound by. The author could have appealed the Disability Classification Board’s decision against him, and he was informed of this possibility in the notification papers. Those remedies were not filed. He could also have challenged the finding before the labour courts, but did not.

4.5 The State party observes that the author’s communication indicates that he expects the Committee to act as a court of appeal to deal with matters that were appropriately addressed at the domestic level. It is not the role of the Committee to consider decisions of fact or law taken by the domestic courts or to annul judicial decisions in the manner of an appellate court, but rather to ensure that States provide their citizens with courses of legal action that uphold the principles of due process enshrined in the Covenant. Therefore, this part of the communication is not sufficiently substantiated for purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

4.6 The State party asserts that the Internal Working Group had the authority to issue the administrative acts it issued in respect of the author. If the author did not agree, he could have filed an action for annulment with the Administrative Disputes Court under article 85 of the Administrative Disputes Code; he did not. The State party therefore concludes that the author did not exhaust domestic remedies.

4.7 On 17 July 2007, the State party submitted its observations on the merits. In its view, the author’s communication fails to demonstrate any violation of the rights protected by the Covenant. The State nevertheless takes the liberty of associating the author’s complaints with the rights protected under article 7, article 14, paragraph 1, and article 22, paragraph 1, of the Covenant.

4.8 With regard to a possible violation of the right to due process under article 14, paragraph 1, the State party reiterates that the judicial decisions under which the pension was granted should have been subject to the level-of-jurisdiction requirement known as “consultative status” as provided for in article 69 of the Labour Procedure Code, a requirement with which the circuit labour court judges did not comply. As a result, those decisions were later rescinded by the Labour Case-Backlog Chamber of the Superior Court of the Judicial District of Bogotá in a decision of 15 February 2001.

4.9 The State party cites the jurisprudence of the Worker Appeals Chamber of the Supreme Court, whereby, under the terms of article 69 of the Labour Procedure Code, the consultative level-of-jurisdiction requirement shall apply, *inter alia*, in cases where the decision in first instance may prejudice the interests of the nation, a department or a municipality. When it is determined that a decision must be taken on a consultative basis, it must be formally reviewed by a higher court before the decision becomes enforceable.

4.10 With respect to a possible violation of articles 7 and 22, paragraph 1, of the Covenant, the State party observes that, according to the author, the State is persecuting former members of the executive boards of dock-worker unions and former board employees. However, the author does not provide reasons or evidence for his view that the State has violated his rights in this regard. The State therefore requests the Committee to dismiss these complaints as unfounded and unproven.

Author’s comments on the observations of the State party

5. On 28 August 2008, the author submitted his comments on the observations of the State party. He cites several decisions of the Constitutional Court which he believes are pertinent to his case. He also points out that the Office of the Procurator-General found that, with respect to the recalculation of FONCOLPUERTOS pensions, the Internal Working Group had taken unilateral decisions regarding adjustments and reductions without the express and written consent of the beneficiaries in disregard of article 73 of the Administrative Disputes Code. He states that the right to a pension and the pension payments were accepted in good faith. In this regard, the Office of the Procurator-General observed that the evidence showed that bad faith could not be imputed to the beneficiaries and that it was therefore inappropriate to request the return of payments received. He adds that the Administration wholly disregarded the required legal procedure for handling disputed decisions. Under that procedure, the State must, within two years, bring an action for annulment of the administrative decisions under which the pensions were granted. This procedure was not initiated within that time period, and the action for annulment therefore expired.

Consideration of admissibility

6.1 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.

6.2 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.

6.3 The author claims that the Administration exceeded its powers and committed irregularities that violated his right to due process when it decided to review his disability status and to deprive him of the pension he had been receiving in accordance with a number of judicial decisions. The State party asserts that the administrative decision under which his pension was recalculated could have been challenged before the labour courts, but was not. It adds that the author also failed to pursue the available legal remedies against the

decision of the Disability Classification Board to lower the percentage of his loss of earning capacity. The author has not explained why he did not use those remedies. The Committee therefore finds that the author has not exhausted the available domestic remedies and decides that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With respect to the author's claims that he was persecuted by the State party for being a trade unionist, the Committee considers that those claims have been presented in a very general and insufficiently precise manner. The Committee therefore finds that this part of the communication has not been sufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

(b) That this decision shall be transmitted to the State party and to the author of the communication.

[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.]
