



International Covenant on Civil and Political Rights

Advance unedited version

Distr.: General
30 March 2020

Original: English

Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 2979/2017*,**

<i>Communication submitted by:</i>	Elena Genero (represented by Adriano Maffeo)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Italy
<i>Date of communication:</i>	30 March 2016
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 22 May 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	13 March 2020
<i>Subject matter:</i>	Exclusion as candidate to permanent firefighter due to height requirement
<i>Procedural issues:</i>	--
<i>Substantive issues:</i>	Discrimination based on gender; access to public service; equality before the courts and tribunals
<i>Articles of the Covenant:</i>	14 (1), 25 (c) and 26
<i>Articles of the Optional Protocol:</i>	--

1. The author of the communication is Elena Genero, an Italian national born in 1976. She claims that the State party has violated her rights under 14(1) and 25(c) of the Covenant. Although not expressly invoked by the author, the author's allegations also raise issues under article 26 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 15 December 1978.

* Adopted by the Committee at its 128th session (2 to 27 March 2020).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Bamariam Koita, Marcia V.J. Kran, Christof Heyns, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

The facts as submitted by the author

2.1 At the time of submitting the present communication, the author had served as a volunteer (temporary) firefighter for 17 years in the State party. In 2007, she competed to enter the Italian National Firefighters Corps as permanent staff. However, her candidacy was refused on the basis that she did not fulfil the minimum 165cm-height requirement. Her height was estimated at 160-161 cm.

2.2 Article 31 of the Italian *Legislative Decree No. 198/2006, of 11 April 2006 (Code of equal chances between men and women)* provides that “height cannot be a discrimination ground in accessing public professions and functions, except in special functions where it is possible to establish a minimum height, and for the Firefighting forces.” Decree No. 78 of the Ministry of Interior, of 11 March 2008, provides that physical and psychological conditions required to access the competition to the National Firefighters Corps shall be governed by article 3 (2) of the *President of the Council of Ministers Decree of 22 July 1987* (as modified by a later decree of 27 April 1993). This provision establishes a minimum height requirement of 165cm for permanent staff performing technical and operational functions, applicable to both men and women. With regard to volunteer (temporary) firefighters, Presidential Decree No. 76, of 6 February 2004, establishes a minimum 162cm-height requirement for both men and women.

2.3 The author filed a complaint with the Lazio Regional Administrative Court, challenging the disqualification decision and the Ministry of Interior Decree No. 3747/2007 calling for the public examinations in question. The author requested that the disqualification decision be declared illegitimate for being discriminatory and constituting an abuse of power. The author also challenged the constitutionality of the national decrees establishing a minimum height requirement of 165cm for male and female permanent firefighters and requested interim measures consisting in the suspension of the disqualification decision and her provisional admission to the Corps.

2.4 On 21 October 2009, the Lazio Regional Administrative Court rejected the author’s request for interim measures. On 18 January 2012, the same Court rejected the author’s complaint by declaring it ill founded. The Court considered that the minimum 165cm height requirement for both men and women was justified by the performance requirements of the service and security of staff and users. The Court also considered that the author’s rejection was neither illogical nor illegitimate or contrary to the equality and non-discrimination principles, considering that the minimum required height did not significantly differ from the female population’s minimum height, and that the difference between minimum height for voluntary (temporary) firefighters and civil servants (permanent staff) was only 3cm. This distinction was justified by substantial differences between the two categories, notably the duration of the recruitment and the additional effort that was expected from permanent firefighters. This justified more rigorous requirements for permanent staff, which should be left to the discretion of the Administration. Finally, the uniformity of the minimum height for both sexes was aimed at preventing discrimination against women.

2.5 The author appealed the decision by the Lazio Regional Administrative Court to the State Council (*Consiglio di Stato*)¹, including a request for interim measures consisting in the suspension of the disqualification decision. By decision of 3 December 2013², the State Council rejected the author’s complaint. It considered that article 31 of Legislative Decree No. 198/2006 “did not appear to be manifestly unreasonable as it identified the activities performed by firefighters as requiring a certain physical condition – more so than police officers – and therefore justifying a particular exception to the prohibition of gender discrimination based on height”. Regarding the difference established between temporary and permanent firefighters, the State Council noted that, although “this provision could be incoherent or contradictory when not justified by a difference in the tasks performed”, it was irrelevant in the present case since the author did not qualify for either permanent or voluntary firefighter, as she was shorter than 162 cm.

¹ The author notes that the State Council is the highest instance within the State party’s jurisdiction.

² On 1 February 2010, the State Council had rejected the author’s request for interim measures but considered that “the claim based on the principle of equality required an examination on the merits”.

2.6 On 31 May 2014, the author filed a complaint with the European Court of Human Rights, which was rejected on 11 September 2014 by a single-judge decision for being inadmissible based on articles 34 and 35 of the European Convention on Human Rights.

The complaint

3.1 The author claims that she is a victim of a violation of her rights under article 25 (c) of the Covenant. She notes that the legislation in force in the State party that provides for the 165 cm-height requirement, applicable to both men and women in order to access the National Firefighters Corps, constitutes indirect discrimination against women. This height requirement implies a disadvantage for women given the existing anthropomorphic objective differences between men and women. Whereas Italian women measure 161cm on average, the average height for men is 175cm. By establishing a minimum height requirement of 165cm, well above the female average, the State party excludes a priori the majority of women, including the author, from the competition based on their gender. Although the *Code of equal chances between men and women* (see para. 2.2) provides for an exception to height requirements for access to the National Firefighters Corps, this cannot be interpreted as allowing for discriminatory provisions based on gender. The author does not question the establishment of a minimum height requirement per se but the fact that this requirement is undifferentiated for women and men. The author adds that, while a certain physical condition is necessary to perform firefighting duties, such condition is not exclusively and directly attributable to height but also to other physical parameters, such as corporal composition and muscular strength. She cites a ruling by the Italian Constitutional Court declaring the unconstitutionality of the relevant legal provision in the autonomous province of Trento that established an undifferentiated minimum height of 165cm to accede to the Firefighters Corps of that region. The author adds that the fact that she has been serving as a firefighter for 17 years, integrating several rescue teams, shows that a height lower than 165cm is compatible with rescue functions.

3.2 The author claims that the State party has also violated article 25 (c) of the Covenant because the distinction of the minimum required height to accede the two categories of firefighters (162cm for temporary firefighters versus 165cm for permanent firefighters) is unjustified. According to article 11 of Legislative Decree No. 139, of 8 March 2006, temporary firefighters have the same obligations as permanent staff. The author notes that the only difference is the nature of their contract (indefinite or temporary). Additionally, the rescue team is composed of both permanent and temporary firefighters, with no distinction in the type of functions performed based on the nature of their contract. The author has served for 17 years fulfilling the same functions as permanent firefighters.

3.3 Finally, the author claims that a violation of article 25 (c) is also justified because of the discriminatory nature of the relevant provisions with regard to other forces in the State party, including police and military forces. The regulations for both of these forces establish a differentiated minimum height of 161 cm for women and 165cm for men. The author notes that members of these forces perform the same functions regarding security protection.

3.4 The author further claims a violation of article 14 (1) of the Covenant because the State Council, in another case (decision No. 768, of 19 February 2014) had already declared the illegitimacy of the undifferentiated minimum height requirement for male and female firefighters in a similar case concerning Ms. Barbara Barrani. The Lazio Regional Administrative Court also reached a similar conclusion in its decision No. 5598, of 15 April 2015, which considered that temporary firefighters fulfil the same functions as permanent staff and that the difference established for each category was unjustified.³ The author contends that the same judges that decided on the same issue discriminated against her, and “went against the legal and constitutional principles”. According to the author, these courts should “at least have requested a preliminary ruling on constitutionality”.

³ The author attaches both decisions to her communication.

State party's observations on the admissibility and merits

4.1 In its observations of 13 September 2017, the State party argues that the introduction of height requirements for accessing the firefighting career is a discretionary choice of the legislature, which takes into account the required activities deserving a special derogation from the prohibition on discrimination. The height requirements are justified by the specific duties assigned to the professional firefighters, i.e., "shoulder transport of wounded, high pressure water supply, jump pad positioning manoeuvres, heavy equipment transport, the need to wear certain equipment". These activities require particular physical strength and an adequate weight/power ratio. On the basis of these requirements and the studies undertaken, a height of 165cm has been estimated as the minimum required for the performance of these duties.

4.2 The State party contends that the reasonableness of the height requirement for both men and women has already been assessed by the first and second instance administrative courts in the present case.

4.3 The State party sustains that, based on the above, the communication is unfounded since there is no substantial discrimination.

Author's comments on the State party's observations on the admissibility and merits

5.1 In her comments of 21 November 2017, the author notes that the State party's justification of the minimum height required for firefighters in light of the tasks undertaken is insufficient to justify the gender discrimination argued by the author. She insists that, given the anthropomorphic differences between men and women, the latter are at a disadvantage. She adds that, while a certain physical condition may be required to perform duties as firefighters, such condition is not directly attributable to height but rather to physical requirements. This has been reflected, for instance, in the Law No. 2, of 12 January 2015, regulating the Armed Forces, which replaces the minimum height requirements with physical parameters on corporal composition, muscular force and active metabolic mass.

5.2 The author notes that, in a similar case, the French High Authority of fight against discrimination and for equality (HALDE) found that height was neither proportional nor justified as a physical requirement to perform firefighting functions. Similarly, the Italian State Council itself adopted an opinion⁴ on draft legislation that proposed the elimination of the minimum height requirements, in implementation of the Law No.2, of 12 January 2015, which amended article 635 of the Military Code, and other provisions establishing physical parameters of admission to recruitment for Armed and Police Forces and Firefighters corps. The State Council noted that "the objective of the draft legislation was to not exclude candidates to the firefighters corps based on existing height requirements by allowing for an evaluation based on different parameters to determine their capacity to fulfil the tasks of the military service." The author also cites the European Court of Justice decision on the *Kalliri* case⁵, where the Court concluded that the Greek regulations requiring a minimum height of 170 cm for candidates to the police school was against *European Directive 76/207/CEE of the Council, of 9 February 1976, on the implementation of the principle of equality of treatment between men and women in access to employment, to training and professional promotion, and work conditions*, as modified by Directive 2002/73/CE of the European Parliament and Council, of 23 September 2002. The Court concluded that the establishment of an undifferentiated height requirement amounted to indirect discrimination.

5.3 The author notes that the Lazio Regional Administrative Court has recently considered illegitimate the national law establishing height requirements and has admitted to the public competition candidates to the National Firefighters Corps who measured less than the legal requirement.⁶The author notes that she has been victim of an additional measure of

⁴ Opinion No. 2636/2015, of 10-18 September 2015.

⁵ Decision of 18 October 2017 (C-409/16).

⁶ The author cites the State Council decisions No. 9359/2017, of 21 August 2017; 8864/2017, of 21 July 2017; 8467/2017, of 13 July 2017; 4103/2017, of 31 March 2017; 3588/2017, of 16 March 2017; 1675 and 1676/2017, of 2 February 2017; 2636/2015, of 18 September 2015; and 10941/2015, of 17 August 2015.

discrimination in light of the constant jurisprudence by this regional court, and which confirms the lack of justification of the 165 cm minimum height requirement to perform firefighting functions.

5.4 Regarding the legal different height requirements for temporary and permanent firefighters, the author notes that the Lazio Regional Administrative Court has also stated that this differentiation is contradictory and unreasonable, as it is not justified by a sufficiently different type of work since both types of firefighters perform the same functions⁷. The author notes that the State party has failed to contest her allegations regarding this type of discrimination.

5.5 The author also reiterates her discrimination claims regarding other State forces, namely, police and military forces. She notes that, as considered by the ECJ in the *Kalliri* case, although the objective of ensuring the operational and good functioning of police services is an objective aim, it needs to be determined whether the minimum height does not go beyond what is necessary to achieve that aim. According to the Court, although police functions consisting in the protection of persons and property, arrest and policing of perpetrators of crime and preventive patrolling may require physical force and imply a particular physical aptitude, such an aptitude does not appear to be linked to a particular height.

5.6 Finally, the author reiterates her claims based on article 14 (1) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the author lodged an application concerning the same events with the European Court of Human Rights, which was rejected on 11 September 2014 for failure to meet the admissibility conditions laid down in articles 34 and 35 of the Convention. The Committee notes that, upon ratifying the Optional Protocol, Italy entered a reservation excluding the competence of the Committee to consider cases that are being or have been examined under another procedure of international investigation or settlement. The Committee recalls its jurisprudence regarding article 5(2)(a) of the Optional Protocol⁸ to the effect that when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of a case, then the same matter should be deemed to have been examined within the meaning of the respective reservations to article 5(2)(a) of the Optional Protocol.⁹ However, in the present case, given the succinct nature of the decision, which does not specify the inadmissibility grounds, the Committee considers that it is not in a position to determine that the case presented by the author has already been the subject of an examination, however limited, on the merits.¹⁰ Therefore, the Committee considers that the reservation made by the State party regarding article 5(2)(a) of the Optional Protocol does not in itself constitute an obstacle to the consideration of the merits by the Committee.¹¹

6.3 The Committee notes that the State party has not contested the admissibility of the communication on grounds of lack of exhaustion of domestic remedies. It also notes that the author brought her claims before the national administrative jurisdiction, and that she appealed the decision rendered on first instance by the Lazio Regional Administrative Court to the highest administrative court in the country, the State Council. In the light of the

⁷ The author cites decisions by the Regional Administrative Court Nos.1675 and 1676/2017, of 2 February 2017.

⁸ See, for example, *Rivera Fernández v. Spain* (CCPR/C/85/D/1396/2005), para. 6.2.

⁹ See, inter alia, the cases of *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; and *A.M. v. Denmark* (CCPR/C/16/D/121/1982), para. 6.

¹⁰ *Mahabir v. Austria*, para. 8.3.

¹¹ See also *A.G.S. v. Spain* (CCPR/C/115/D/2626/2015), para. 4.2.

foregoing, the Committee considers that article 5(2)(b) of the Optional Protocol is not an obstacle to the admissibility of the present communication.

6.4 The Committee takes note of the author's claim based on article 14 (1) of the Covenant, referring to the fact that both the Lazio Regional Administrative Court and the State Council, when considering other similar cases before them, declared the illegitimacy of the minimum height requirement for men and women to access the National Firefighters Corps. However, the Committee notes that both the decision by the Lazio Regional Administrative Court of 18 January 2012 and the decision by the State Council of 3 December 2013 precede the allegedly contradictory jurisprudence cited by the author. The Committee further considers that a change in jurisprudence does not per se entail a violation of the author's right to a competent, independent and impartial tribunal established by law, as enshrined in article 14 (1) of the Covenant. In the absence of further information or evidence in support of the author's claim based on this article, the Committee considers that it has not been sufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's claim under article 25 (c) of the Covenant based on the discriminatory nature of national provisions regulating access to the National Firefighters Corps as compared to provisions regulating access to Police and Military Forces, the Committee considers that the author has not provided sufficient information or evidence that would demonstrate that the functions performed by firefighters and those performed by other State forces are fully equivalent and therefore justify the same physical requirements to accede to such forces. The Committee thus finds that this part of the communication is also insufficiently substantiated and declares it inadmissible pursuant to article 2 of the Optional Protocol.

6.6 However, the Committee considers that the author's claims based on articles 25 (c) and 26 of the Covenant, relating to the alleged gender-based discrimination that she faced as a candidate to the National Firefighters Corps, as well as the unjustified distinction between the height-requirements introduced for permanent and temporary firefighters despite performing the same functions, have been sufficiently substantiated for the purposes of admissibility, declares them admissible and proceeds with their examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5(1) of the Optional Protocol.

7.2 The Committee must first ascertain whether the author's disqualification as a candidate to the National Firefighters Corps based on her height, and in application of the national legislation in force, which establishes a minimum 165 cm-height requirement for both male and female candidates, constitutes gender-based discrimination, in violation of article 26 of the Covenant.

7.3 The Committee recalls its General Comment No. 18 (1989) on non-discrimination, in which "discrimination" is defined, in paragraph 7, as "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms". The Committee recalls that the prohibition of discrimination applies to both the public and the private sphere and that a violation of article 26 may result from a rule or measure that is apparently neutral or lacking any intention to discriminate but has a discriminatory effect.¹² Yet, not every distinction, exclusion or restriction based on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, financial status, birth or other status, as listed in

¹² See the Committee's Views in *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2.

the Covenant, amounts to discrimination, as long as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate under the Covenant.¹³

7.4 The Committee notes the author's uncontested argument that the 165cm undifferentiated minimum height requirement, which is well above the alleged national average 161cm female height, has the effect of excluding the majority of Italian women from the competition to the National Firefighters Corps, including herself. The Committee observes that such height requirement constitutes a restriction in the access to the National Firefighters Corps. Although drafted in apparently neutral terms, in Italy, such a restriction has a disproportionate effect on women, since women are significantly shorter on average than men and the minimum height requirement set is situated between these averages, excluding most women and including most men. The Committee must therefore decide whether the undifferentiated legislative height requirement meets the criteria of reasonableness, objectivity and the legitimacy of the aim.

7.5 The Committee takes note of the State Party's argument that the 165cm minimum height requirement established by article 3(2) of the President of the Council of Ministers Decree of 22 July 1987 (as modified on 27 April 1993) is justified by the specific duties assigned to firefighters. While acknowledging that the State party may have a legitimate interest in ensuring the effectiveness of the National Firefighters Corps, and while admitting that the activities performed by firefighters may require certain physical conditions, the Committee notes that neither the State party nor the national administrative courts have justified the precise role that a height of 165cm would play in the effective performance of these functions, nor that other physical attributes, such corporal composition, muscular force and active metabolic mass, could not compensate for not meeting the existing height requirement. The Committee notes, in this regard, the author's uncontested argument that she had been successfully employed as a temporary firefighter for 17 years at the time of submitting the present communication, having participated in several rescue teams during that period and having performed the same functions as permanent staff. The Committee further notes the author's statement, uncontested by the State party, that the State Council itself, in later jurisprudence, declared the undifferentiated minimum height requirement unconstitutional, and that the Italian State Council recently called to eliminate minimum height requirements.¹⁴

7.6 In light of the all the above, the Committee considers that the 165cm legal height requirement for candidates to the National Firefighters Corps constitutes a restriction that is neither necessary nor proportionate to the legitimate aim pursued. The Committee therefore concludes that this provision, and its application to the author, constitutes in light of its disproportionate effect on access to the National Firefighters Corps by women candidates a form of indirect discrimination based on gender¹⁵, in violation of article 26 of the Covenant.

7.7 The Committee takes note of the author's claims in the sense that the different height requirements for permanent and temporary firefighters are also discriminatory. The Committee observes that the lower height requirement for temporary firefighters will inevitably imply that more candidates, in particular women, may qualify as temporary firefighters but not as permanent staff, while performing the same functions, as established by national legislation (see para. 3.2). The Committee considers that this does not lead to a separate discrimination ground but rather reinforces the discrimination based on gender concluded above.

7.8 With regard to the author's claims under article 25(c) of the Covenant and referring to the violation of her right to access public service in terms of equality, the Committee recalls that, according to its General Comment No.25, "To ensure access [to public service] on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable", and that "it is of particular importance to

¹³ See *inter alia* the Committee's Views in *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3; *Yaker v France* (CCPR/C/123/D/2747/2016), para. 8.14; and *Hebbadj v France* (CCPR/C/123/D/2807/2016), para. 7.14.

¹⁴ Opinion No. 2636/2015, of 10-18 September 2015.

¹⁵ See, in this same line, the European Court of Justice Judgement of 18 October 2017 in *Ypourgos Esoterikon et al v Kalliri* (Case C-409/16), para. 32.

ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.”¹⁶ Having considered that the legislative height requirement to access the National Firefighters Corps was unreasonable and discriminatory, the Committee concludes that the authors’ rights under article 25(c) were also violated.

8. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 25 (c) and 26 of the Covenant.

9. Pursuant to article 2 (3)(a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose rights have been violated. In this connection, the State party should, *inter alia*: a) provide the author with adequate compensation, and b) evaluate the possibility of admitting the author as a permanent firefighter, if she still wishes to be admitted to the National Firefighters Corps, in light of her continuous service over the years and the discriminatory nature of the height requirement based on which she was disqualified in 2007. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, in particular by amending the national legislation regulating conditions of access to the National Firefighters Corps.

10. 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 for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the present Views. The State party is also requested to publish the Committee’s Views and to have them translated into the official language of the State party and widely disseminated.

¹⁶ General Comment No 25, adopted by the Committee on 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 23.