

Press Release

Inter-American Court of Human Rights

I/A Court H.R._PR-24/2023 English

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I/A Court H.R. Protecting Rights

PERU IS RESPONSIBLE FOR DISCRIMINATION BASED ON SEXUAL ORIENTATION

San José, Costa Rica, April 11, 2023. - Today the Inter-American Court of Human Rights released a Judgment on the case *Olivera Fuentes v. Peru*, holding the State of Peru internationally liable for violating the right to personal freedom, right to judicial guarantees, right to a private life, right to equality before the law, and right to judicial protection in injury of Olivera Fuentes, due to the administrative and judicial response delivered by national authorities when he lodged a complaint claiming that on August 11, 2004, he had been subject to discrimination in a supermarket cafeteria due to his sexual orientation.

The official summary of the Judgment can be found in Spanish [here](#), and the complete text of the Judgment is available in Spanish [here](#).

On August 11, 2004, Crissthian Manuel Olivera Fuentes and his same-sex companion were in a coffee shop located in a Lima supermarket. Mr. Olivera and his companion were engaged in displays of affection while inside the establishment. Another customer complained to the supermarket manager, claiming he had been made to feel “uncomfortable and annoyed” by the “attitude” of Mr. Olivera and his companion. In response to the complaint, the store manager, together with members of the security staff, approached the couple and pressed them to refrain from “their scenes of affection out of respect for other customers,” one of whom had complained because “there were children in the play area.” The store manager told them that they should purchase products from the coffee shop and refrain from their affectionate behavior so that other customers would not be made to feel uncomfortable; otherwise, they should leave the establishment.

Mr. Olivera contacted the Consumer Protection Commission (CPC) of the National Bureau for the Protection of Competition and Intellectual Property Rights (Indecopi) on October 1, 2004, to file a complaint against the corporation Supermercados Peruanos S.A., claiming to have been subject to discrimination based on his sexual orientation because of the unjustified treatment he had received on August 11, 2004. The CPC dismissed the complaint on August 31, 2005, holding it groundless in view of certain ambiguity in the evidence, which was based on the stories submitted by the two parties; as such, there was no evidence of discriminatory treatment. Subsequent motions were lodged with the Court for the Protection of Competition and Intellectual Property Rights, Indecopi, the Superior Court of Lima and the Supreme Court of Peru, but were disallowed.

The Court developed new standards on equality and non-discrimination based on sexual orientation, gender identity and gender expression applied to corporations. More particularly, the Court emphasized that the process of eliminating all types of discriminatory practices and attitudes and bring about material equality, even beyond formal equality, called for involvement by the entire community, especially the business sector. This sector is therefore not only able, but also expected to foster a positive change for the LGBTIQ+ community, which suggests that commercial enterprises must assume their responsibility to respect the rights of LGBTIQ+ individuals, not only in the labor setting, but also in their commercial relations through the goods or services they provide.

The Court found, accordingly, that the States are under obligation to establish appropriate policies, regulatory processes, monitoring and oversight to ensure that companies adopt actions designed to eliminate all types of discriminatory practices and attitudes against the LGBTIQ+ community. Companies should: (i) develop policies for meeting their responsibility to respect human rights, explicitly including the rights of LGBTIQ+ people; (ii) exercise due diligence to detect, prevent and mitigate any actual or potential negative repercussions they may have caused or to which they may have contributed that undermined the ability of LGBTIQ+ individuals to enjoy their human rights, or that may be associated directly with their operations, products, services and business relations, and to be held accountable for how they are doing so; and (iii) address any negative human rights impact that they may have caused or to which they may have contributed and instituting mechanisms of reparation, either alone or in cooperation with other legitimate processes, to include introducing effective grievance mechanisms at the operational level for affected individuals or communities, and taking part in them.

The Court, in examining this case, emphasized as a preliminary consideration that, in the case of claims of discrimination by the actions of a third party, the administrative and/or judicial authorities are the institutions responsible for monitoring the actions of companies in the framework of their labor and business relations in keeping with inter-American and international standards. Furthermore, given that acts of discrimination generally take place under conditions of particular disadvantage, it is reasonable to expect complainants to raise only those matters that they are materially able to prove. This means that once the victim has presented a *prima facie* case demonstrating the existence of differentiated, discriminatory treatment by a company, and that this treatment was based on a category protected under Article 1.1 of the American Convention, the burden of proof passes to the responsible party, in this case, the company, to demonstrate that it did not draw such a distinction or, if it did, that there was an objective, reasonable justification behind this difference in treatment.

The Court then noted that in this case, the Peruvian administrative and judicial authorities were faced with compelling evidence of discrimination based on the sexual orientation of Mr. Olivera and his companion, and therefore no restriction of rights could be applied without rigorous, weighty justification. It was the task of national authorities to require the accused business to demonstrate such justification, or at least to show that its actions did not serve discriminatory purposes or have a discriminatory effect, or were justified by objective, reasonable causes, that is, that they pursued a legitimate purpose and that there was a reasonable, proportional relationship between the means used and the purpose sought. This did not happen in the case at hand. The Court also held that the administrative decisions handed down in this case drew on social prejudices concerning demonstrations of affection by a homosexual couple and their alleged impact on others (especially on children), which barred Mr. Olivera from access to an impartial body that could analyze his grievance based on inter-American standards of due diligence.

The Court therefore held that the State was responsible for violating Articles 7.1, 8.1, 11.2, 24 and 25.1 of the American Convention, read in conjunction with Article 1.1 thereof.

The Court ordered specific measures of reparation to redress these violations.

The Judges sitting on the Court for this Judgment were: Ricardo C. Pérez Manrique, President (Uruguay), Eduardo Ferrer Mac-Gregor Poisot, Vice-President (Mexico), Humberto Antonio Sierra Porto (Colombia), Nancy Hernández López (Costa Rica), Verónica Gómez (Argentina), Patricia Pérez Goldberg (Chile), and Rodrigo Mudrovitsch (Brazil).

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