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HUMAN RIGHTS COMMITTEE
Fiftieth session

DECISIONS

Communication No. 477/1991

Submitted by: Mrs. J.A.M.B.-R. [represented by counsel]

Alleged victim: The author

State party: The Netherlands

Date of communication: 22 October 1991

Documentation references: Prior decisions:
- Special Rapporteur's rule 91 decision, transmitted to the State party on 27 January 1992 (not issued in document form)

Date of present decision: 7 April 1994

[Annex]

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ANNEX */

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights
- Fiftieth session -

concerning

Communication No. 477/1991 **/

Submitted by: Mrs. J.A.M.B.-R. [name deleted]
[represented by counsel]

Alleged victim: The author

State party: The Netherlands

Date of communication: 22 October 1991

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

Meeting on 7 April 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mrs. J.A.M.B.-R., a citizen of the Netherlands, residing in De Lier, the Netherlands. She claims to be a victim of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as submitted by the author:

2.1 The author, who is married, was employed as a schoolteacher from August 1982 to August 1983. As of 1 August 1983, she was unemployed. She claimed, and received, unemployment benefits by virtue of the WW (Unemployment Act). Pursuant to the provisions of that Act, the benefits were granted for a maximum period of six months, i.e. until 1 February 1984. The author subsequently found new employment as of 18 August 1985.

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*/ Made public by decision of the Human Rights Committee.

**/ An individual opinion by Mr. B. Wennergren is appended to the decision.

2.2 Having received WW benefits for the maximum period ending on 1 February 1984, the author contends that she was entitled, thereafter, to a benefit under the then WWV (Unemployment Provision Act), for a period of up to two years. Those benefits would have amounted to 75 per cent of the last salary, whereas the WW benefits amounted to 80 per cent of the last salary.

2.3 On 1 April 1985, the author applied for WWV benefits; her application was, however, rejected by the Municipality of De Lier on 23 May 1985, on the grounds that, as a married woman who did not qualify as a breadwinner, she did not meet the requirements of the Act. The rejection was based on article 13, paragraph 1, subsection 1, of WWV, which did not apply to married men.

2.4 On 26 February 1987, the municipality confirmed its earlier decision. On 26 April 1989, however, it partly revoked its decision and granted the author WWV benefits for the period of 23 December 1984 to 18 August 1985. It still refused benefits for the period of 1 February to 23 December 1984 (see paragraph 2.5 below). The author appealed the decision to the Board of Appeal in The Hague which, on 15 November 1989, declared her appeal unfounded. The author subsequently appealed to the Central Board of Appeal which, by judgment of 5 July 1991, confirmed the Board of Appeal's decision.

2.5 In its judgment of 5 July 1991, the Central Board of Appeal refers to its judgment of 10 May 1989 in the case of Mrs. Cavalcanti Araujo-Jongen,[1] in which it noted that article 26 in conjunction with article 2 of the International Covenant on Civil and Political Rights applies also to the granting of social security benefits and similar entitlements. The Central Board further observed that the explicit exclusion of married women, unless they met specific requirements that are not applicable to married men, implied direct discrimination on the ground of sex in relation to marital status. The Central Board, having made reference to article 26 of the Covenant, indicated that it was to have direct applicability as of 23 December 1984.

2.6 On 24 April 1985, the State party abolished the requirement of article 13, paragraph 1, subsection 1, limiting the retroactive effect, however, to persons who had become unemployed on or after 23 December 1984. In 1991, further amendments to the WWV resulted in the abolition of this limitation as a consequence of which women can claim benefits also when they became unemployed before 23 December 1984, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant must be unemployed on the date of application.

The complaint:

3.1 In the author's opinion, the denial of WWV benefits amounts to discrimination within the meaning of article 26 of the Covenant. In this context, she refers to the Committee's Views in respect of communications No. 172/1984 (Broeks v. the Netherlands) and No. 182/1984 (Zwaan-de Vries v. the Netherlands).

[1] Mrs. Cavalcanti's communication to the Human Rights Committee was registered as No. 418/1990; Views were adopted on 22 October 1993.

3.2 The author notes that the Covenant entered into force for the Netherlands on 11 March 1979, and that, accordingly, article 26 was directly applicable as of that date. She contends that the date of 23 December 1984 was chosen arbitrarily, as there is no formal link between the Covenant and the Third EEC Directive. The Central Board had not, in earlier judgments, taken a consistent view with regard to the direct applicability of article 26. In a case relating to the General Disablement Act (AAW), for instance, the Central Board decided that article 26 could not be denied direct applicability after 1 January 1980.

3.3 The author submits that the Netherlands had, upon ratifying the Covenant, accepted the direct applicability of its provisions, in accordance with articles 93 and 94 of the Constitution. She further argues that, even if the possibility of gradual elimination of discrimination were permissible under the Covenant, the transitional period of almost 13 years between the adoption of the Covenant in 1966 and its entry into force for the Netherlands in 1979 was sufficient to enable it to adapt its legislation accordingly.

3.4 The author contends that the changes recently introduced in the legislation do not provide her with a remedy for the discrimination suffered under article 13, paragraph 1, subsection 1, of the old law. In this context, she points out that, although she applied for benefits while she was still unemployed, the new law still does not entitle her to benefits for the period of 1 February to 23 December 1984. According to the current interpretation of the law, based on the jurisprudence of the Central Board of Appeal, WWV benefits can be granted to women who had a claim originating in unemployment that began before 23 December 1984, but these benefits can only be granted as from 23 December 1984. For the unemployment period before that date, benefits are still not being granted. In a memorandum from the Deputy Minister of Social Affairs, dated 14 May 1990, in which the proposed amendments to the WWV were explained, it is clearly stated that the starting date of the benefits is either 23 December 1984 or a later date.

3.5 The author claims that she suffered financial damage as a result of the application of the discriminatory WWV provisions, in the sense that benefits were denied to her for the period of 1 February to 23 December 1984. She requests the Human Rights Committee to find that article 26 acquired direct effect as from the date on which the Covenant entered into force for the Netherlands, i.e., 11 March 1979, and that the denial of benefits on the basis of article 13, paragraph 1, subsection 1, of WWV is discriminatory within the meaning of article 26 of the Covenant. She claims that WWV benefits should be granted to women on an equal footing with men as of 11 March 1979, and in her case as of 1 February 1984.

The State party's observations:

4. By submission of 18 February 1993, the State party confirms that the author has exhausted domestic remedies and states that it is not aware of any other obstacles to admissibility of the communication.

Issues and proceedings before the Committee:

5.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the State party does not object to the admissibility of the communication. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met.

5.3 The Committee notes that the author contends that she is entitled without discrimination to benefits for the period of 1 February to 23 December 1984 and that the amendments in the law do not provide her with a remedy. The Committee notes that the author applied for benefits under the WWV on 1 April 1985, and that benefits were granted retroactively as from 23 December 1984. With reference to its constant jurisprudence,[2] the Committee recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them retroactively, in respect of the date of application. However, when such benefits are regulated by law, then such a law must comply with article 26 of the Covenant.

5.4 The Committee notes that the law in question grants to men and women alike benefits as from the day of application, unless there are sufficient reasons to grant benefits as from an earlier date. The Committee also notes the view expressed by the Central Board of Appeal that benefits for those women who did not qualify for benefits under the old law should be granted retroactively as from 23 December 1984 but not earlier. The author has failed to substantiate, for purposes of admissibility, that these provisions were not equally applied to her, in particular that men who belatedly apply are granted wider retroactive benefits, as from the date in which they have become eligible for benefits, whereas she, as a woman, was denied such benefits. Accordingly, the Committee finds that the author has failed to substantiate her claim under article 2 of the Optional Protocol in this regard.

5.5 As regards the author's claim that the discriminatory nature of the law from 1 February to 23 December 1984, and the application of the law at that time, made her a victim of a violation of the right to equality before the law, the Committee notes that the author, in the period between 1 February and 23 December 1984, did not apply for benefits under the WWV. Therefore, she cannot claim to be a victim of a violation of article 26 by the application of the law in force during that period, even if the law in question were found to be discriminatory in respect of some of those applying under it. This aspect of the communication is thus inadmissible under article 1 of the Optional Protocol.

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[2] See inter alia the Committee's Views with regard to communications No. 172/1984 (Broeks v. the Netherlands) and No. 182/1984 (Zwaan-de Vries v. the Netherlands), adopted on 9 April 1987, and No. 415/1990 (Pauger v. Austria), adopted on 26 March 1992.

5.6 As to the issue raised by the author whether article 26 of the Covenant acquired direct effect in the Netherlands as from 11 March 1979, the date on which the Covenant entered into force for the State party, or in any event as from 1 February 1984, the Committee notes that the Covenant applies for the Netherlands as from its date of entry into force. The question of whether the Covenant can be invoked directly before the Courts of the Netherlands is however a matter of domestic law. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

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

[Adopted in English, French and Spanish, the English 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.]

APPENDIX

Individual opinion by Mr. Bertil Wennergren under rule 94, paragraph 3, of the rules of procedure of the Human Rights Committee, concerning the Committee's decision to declare inadmissible communication No. 477/1991 (J.A.M.B.-R. v. the Netherlands)

I do not agree with the Committee's decision to declare this communication inadmissible under articles 1, 2 and 3 of the Optional Protocol. In my view, it should have been declared admissible, as it may raise issues under article 26 of the Covenant. My reasons are set out hereafter:

1. The communication must be compared with communication No. 182/1984 (F.H. Zwaan-de Vries, Views adopted on 9 April 1987), communication No. 418/1990 (C.H.J. Cavalcanti Araujo-Jongen, Views adopted on 22 October 1993) and communication No. 478/1991 (A.P.L.-v.d.M., declared inadmissible on 26 July 1993).

2. The relevant facts in this case are laid out in paragraphs 2.1-2.3 of the Committee's decision. They are essentially the same as the facts in the Zwaan-de Vries case. There is, however, one difference. Mrs. Zwaan-de Vries applied for continued support on the basis of the Unemployment Benefits Act (WWV), once the payment of her unemployment benefits under the Unemployment Act (WW) was terminated on 10 October 1979. On the other hand, Mrs. B.-R., whose benefits under the WW expired on 1 February 1984, did not apply for benefits under the WWV until 1 April 1985; at that time, she was still unemployed.

3. It should be noted that the Council of the European Communities had, on 19 December 1978, adopted a directive on the progressive implementation of the principle of equal treatment of men and women in the field of social security (79/7/EEC), giving Member States a deadline until 23 December 1984 so as to make such amendments to their legislation as might be necessary in order to bring it into line with the EC Directive. The Netherlands thus, on 29 April 1985, amended Section 13, subsection 1(1), of the WWV to comply with the EC directive. Under the amendment, Section 13, subsection 1(1), was deleted, with the result that it became possible for married women, who were not breadwinners, to apply for WWV benefits.

4. In its Views in Zwaan-de Vries, the Committee observed that what was at issue was not whether or not social security benefits should be progressively established in the Netherlands, but whether the legislation providing for social security violated the prohibition of discrimination in article 26 of the Covenant, and its guarantee, to all persons, of equal and effective protection against discrimination. The Committee explained that, when legislation providing for social security is adopted in the exercise of a State's sovereign power, such legislation must comply with article 26 of the Covenant. The Committee then found that the differentiation in Section 13, subsection 1(1) of the WWV, which placed married women at a disadvantage compared with married men, was unreasonable, and that this fact appeared to have been conceded by the State party itself through enactment of the legislative amendment of 29 April 1985, with retroactive effect to 23 December 1984. The situation in which Mrs. Zwaan-de Vries found herself at the material time, and the application to her of the then applicable Dutch law, made her a victim of a violation, based on sex, of article 26 of the

Covenant, because she was denied social security benefits on an equal footing with men. Although the State party had taken the necessary measures to put an end to this discrimination suffered by the author, the Committee was of the view that the State party should offer Mrs. Zwaan-de Vries an appropriate remedy.

5. In its Views in the Cavalcanti case, the Committee considered whether the amended WWV law continued to indirectly discriminate against the author, because it required applicants to be unemployed at the time of application, a requirement which effectively barred her from retroactive access to benefits. The Committee, however, deemed this requirement to be reasonable and objective and found that the facts before it did not reveal a violation of article 26 of the Covenant. With regard to the case of L.-v.d.M. (No. 478/1991), the Committee noted that the requirement of being unemployed at the time of application for benefits under WWV applied to men and women alike and declared the communication inadmissible.

6. As Mrs. B.-R. was unemployed when she applied for benefits under WWV, she did comply with the requirements that had stood in the way in the two cases that I have just discussed. However, as she made her application not immediately upon expiry of her WW-benefits but some 14 months later, her application was made not only with respect to future but also past benefits. The Central Board of Appeal did not pay particular attention to this point in its decision of 5 July 1991; instead, it concentrated on whether article 26 was directly applicable. The Board found that article 26 of the Covenant could not be denied direct applicability after 23 December 1984, the time-limit established by the Third EC Directive on the elimination of discrimination between men and women within the Community. In its Views in the Cavalcanti case (paragraph 7.5), the Committee expressly stated that the determination of whether and when article 26 acquired direct effect in the Netherlands is a matter of domestic law and does not come within the competence of the Committee. The Committee instead had to consider, as was made clear in the Zwaan-de Vries case, whether domestic legislation violated the prohibition of discrimination in article 26 of the Covenant. In this context, I find it difficult to see any relevant difference between the Zwaan-de Vries case and the present case. What is at issue in the present case is, more precisely, whether domestic law made Mrs. B.-R. a victim of a violation, based on sex, of article 26 of the Covenant in her situation at the material time, i.e. between 1 February 1984 and 1 April 1985. This matter, which must be considered independently of the EC Directive and the deadline set by it, may, in my view, and just as the similar matter in the case of Zwaan-de Vries, raise issues under article 26 of the Covenant, as well as issues about the appropriate remedy. It cannot be assumed as a matter of course that a retroactive granting of benefits as of 23 December 1984 is an appropriate remedy.

7. If the Central Board of Appeal provided the author with benefits from 23 December 1984, which I have presumed it did, different wording should have been chosen to imply that the fact that the law subsequently limited retroactivity to 23 December 1984, did not concern the present case, as the judgment here was based on the Third EC Directive and its deadline, and not on the law as amended. I then would like to state that it is for the Committee to consider whether such a limitation of a State party's obligation under article 26 of the Covenant, in relation to the application of a law, complies with this provision.

[Bertil Wennergren]

[Done in English, French and Spanish, the English 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.]

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