

HUMAN RIGHTS COMMITTEE

J. G. v, the Netherlands

Communication No. 306/1988

25 July 1990

ADMISSIBILITY

Submitted by: J. G. (represented by counsel)

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 2 June 1988 (date of initial letter)

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

Meeting on 25 July 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication is J. G., a Dutch citizen residing in Rotterdam, the Netherlands. He claims to be a victim of a violation by the Government of the Netherlands of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The background

2.1 The author, who was born on 1 January 1918, suffers from a physical handicap. On 6 January 1983, after his 65th birthday, he requested admission into subsidized, purpose-built housing, referred to as "Fokushouses" (cluster dwellings), which are designed to enable their occupants to live, to the extent possible, as non-handicapped persons. The Financial Aid Scheme for the accommodation of the Disabled lays down the specifications for State-subsidized dwellings. Eligibility for admission into such housing is governed by Section 57 of the General Disablement Benefits Act (AAW) of 11 December 1975, which provides that applicants must be handicapped persons between the ages of 18 and 65. Dwellers of "Fokushouses" receive special assistance called ADL (activities of daily

life), intended to contribute to the maintenance, recovery or promotion of the beneficiary's fitness for work, to provide for medical or surgical facilities as well as other measures destined to improve the beneficiary's living conditions.

2.2 By letter of 7 February 1983, the Joint Medical Service (Gemeenschappelijke Medische Diensten, GMD) informed the Ministry of Housing that it would render a negative advice on ADL assistance with respect to a number of persons including the author, who had just become 65 years of age. This position was confirmed by letter dated 24 February 1983 from the ministry of Welfare and Health to the GMD. Thus, although he was permitted to move into a "Fokushouse", he was denied the ADL assistance granted to other persons who moved into the Fokushouse prior to their 65th birthday.

2.3 As to the requirement of exhaustion of domestic remedies, the author affirms that available means of redress have either been or would be ineffective. He acknowledges that since ADL assistance is provided pursuant to Section 57 of the AAW, remedies must in principle be pursued in compliance with the regulations of the AAW, that is by appeal to the Board of Appeal (Raad van Beroep) and the Central Board of Appeals (Centrale Raad van Beroep). He adds, however, that this procedure was not followed in his case because the GMD had informed the Ministry of Housing that it would render a negative advice on ADL. This position was confirmed by letter from the Ministry of Welfare and Health to the GMD, reaffirming that persons aged 65 and above cannot be granted ADL assistance if they move into purpose-built housing. This means, the author contends, that because the regulations under the AAW provide for an age limit of 65 years, persons aged 65 and above who request assistance pursuant to the AAW would be faced with a negative decision. The State party's practice on eligibility for accommodation in purpose-built housing has not changed since the amendments to the Financial Aid Scheme for the Accommodation of the Disabled, according to the author, as shown, by a letter dated 19 February 1990 from the Secretary of State for Social Affairs to the municipality of Veendam, reaffirming the position that individuals older than 65 were not eligible for ADL assistance. Moreover, during parliamentary debates in the Second Chamber of the Dutch Parliament towards the end of 1989, the Secretary of State is said to have promised that a decision on whether ADL assistance could be made available for handicapped persons older than 65 years would be made before 1 January 1992. Thus, at present this possibility does not exist.

2.4 On the bases of these considerations, the author also applied for assistance pursuant to another scheme, the General Assistance Act (ABW), because the ABW does not contain an age limit for applicants and because the procedure under the ABW operates as a form of "last resort" wherever other regulations do not provide for assistance. When the municipality of Rotterdam, on 15 February 1983, rejected his ABW application, the author, on 22 February 1983, requested the local (city) government to intercede with the municipal authorities. His request was rejected on 13 September 1983. On 11 October 1983, he filed an appeal with the Executive Council of the Province of South-Holland (College van Gedeputeerde Staten van de Provincie Zuid-Holland), which was dismissed on 20 March 1985. His subsequent appeal to the Council of State (Raad van State), filed on 12 April 1985, was dismissed on 28 April 1985.

The complaint

3. The author claims that the refusal to grant him ADL assistance constitutes discrimination on account of his age. He points out that for those individuals who move into “cluster dwellings” before they have reached the age of 65 and whose expenses are reimbursed on the basis of the AAW, ADL assistance continues after the age of 65. If an individual moves into purpose-built housing after the age of 65, as he did, or if he reaches the top of the waiting list after the age of 65, that person is excluded because of his age from reimbursement on the basis of the AAW. The author is of the opinion that this differentiation between handicapped persons because of the age is unreasonable and not based on objective criteria and thus constitutes discrimination prohibited under article 26 of the Covenant.

The State party’s observations

4.1 The State party contends that the communication should be declared inadmissible because the author failed to bring his case before any court competent to hear complaints concerning the application of the AAW. It reiterates that any person who considers to have been unjustly denied assistance under the AAW may request a ruling by the competent industrial insurance board. From there appeals to the courts competent in social security matters would be possible, and in the proceedings before these courts, applicants could directly invoke article 26 of the Covenant. The court of first instance would be the Board of Appeal, with the possibility of an appeal to the Central Board of Appeal. The fact that the author did appeal under the terms of the ABW to the municipal authorities and the Council of state does not, in the State party’s opinion, change the situation, as his complaint to the Committee does not relate to the ABW.

4.2 The State party further explains the procedure which would have to be followed by the competent organs under the AAW and contends that these would indeed constitute effective remedies within the meaning of the Optional Protocol. Thus, the Board of Appeal would not be bound by the negative advice from the Ministry of Welfare, Health and Cultural Affairs (as contained in the letter of 24 February 1983) or from the GMD (as contained in the letter of 7 February 1983). Any judgment of the Board of Appeal would be determined by the relevant statutory provisions and the relevant provisions of public international law; it would not be required to take into account any recommendation which it considered to be incompatible with these provisions. In this context, the State party recalls that the letter of 24 February 1983 is devoid of legal significance, as it does not emanate from a body with any competence to act in the framework of the AAW or the Financial Aid Scheme for the Accommodation of the Disabled.

Issues and proceedings before the Committee

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

5.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 Article 5, paragraph 2(b), of the Optional Protocol precludes the Committee from considering

any communication from an individual who has failed to exhaust all available domestic remedies. This is a general rule, which applies unless the remedies are unreasonably prolonged, or the author of a communication has convincingly demonstrated that domestic remedies are not effective, i.e. do not have any prospect of success.

5.4 On the basis of the information before the Committee, there are no circumstances which would absolve the author from attempting to pursue all domestic remedies, including those available pursuant to the AAW, namely an appeal to the competent authorities and courts. While the applicable rules and regulations resort to objective criteria in the determination of the beneficiaries of ADL assistance, the State party has shown that the competent courts would not only not be bound by negative recommendations from the administrative authorities in respect of ADL assistance to the author, but that they could set aside the terms of the applicable regulations if they considered them to be in conflict with relevant provisions of international law. The purpose of article 5, paragraph 2 (b), is, inter alia, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter. In the light of the above considerations, and having regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee considers that the author has not exhausted available domestic remedies.

6. 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 transmitted to the State party, the author and his counsel.

[Done in English, French, Russian and Spanish, the English text being the original version.]