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HUMAN RIGHTS COMMITTEE
Forty-ninth session

VIEWS

Communication No. 418/1990

Submitted by: Mrs. C.H.J. Cavalcanti Araujo-Jongen
[represented by counsel]

Alleged victim: The author

State party: The Netherlands

Date of communication: 16 August 1990 (initial submission)

Documentation references: Prior decisions
- Special Rapporteur's rule 91 decision,
transmitted to the State party on 18 October
1990 (not issued in document form)
- CCPR/C/44/D/418/1990
(Decision on admissibility, dated 20 March 1992)

Date of present decision: 22 October 1993

On 22 October 1993, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 418/1990. The text of the Views is annexed to the present document.

[Annex]

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

**Views of the Human Rights Committee under article 5, paragraph 4,
of the Optional Protocol to the International Covenant
on Civil and Political Rights
- Forty-ninth session -**

concerning

Communication No. 418/1990

Submitted by: Mrs. C.H.J. Cavalcanti Araujo-Jongen
[represented by counsel]

Alleged victim: The author

State party: The Netherlands

Date of communication: 16 August 1990 (initial submission)

Date of decision on admissibility: 20 March 1992

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

Meeting on 22 October 1993,

Having concluded its consideration of communication No. 418/1990, submitted to the Human Rights Committee by Mrs. C.H.J. Cavalcanti Araujo-Jongen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author :

1. The author of the communication is Mrs. C.H.J. Cavalcanti Araujo-Jongen, a citizen of the Netherlands, residing at Diemen, 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.

2.1 The author was born in 1939, and is married to Mr. Cavalcanti Araujo. From September 1979 to January 1983, she was employed as a part-time secretary for 20 hours a week. As of 1 February 1983 she was unemployed. In virtue of the WW (Unemployment Act) she was granted unemployment benefits. In conformity with the provisions of the Act, the benefits were granted for the maximum period of six months (until 1 August 1983). The author subsequently found new employment, as of 24 April 1984.

2.2 Having received WW benefits for the maximum period, the author, as an unemployed person in 1983-84, contends that she was entitled to benefits under the then WWV (Unemployment Provision Act), for a maximum period of two years. These benefits amounted to 75 per cent of the last salary, whereas the WW benefits amounted to 80 per cent of the last salary.

2.3 The author, on 11 December 1986, applied for WWV benefits to the Municipality of Leusden, her then place of residence. Her application was rejected on 8 April 1987 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, WWV, which did not apply to married men.

2.4 On 2 July 1987, the Municipality confirmed its earlier decision. The author subsequently appealed to the Board of Appeal at Utrecht which, by decision of 22 February 1988, declared her appeal to be well-founded; the decision of 8 April 1987 was set aside.

2.5 The Municipality then appealed to the Central Board of Appeal which, by judgment of 10 May 1989, confirmed the Municipality's earlier decisions and set aside the Board of Appeal's decision. The author claims she has exhausted all available domestic remedies.

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. She refers to the Views of the Human Rights Committee regarding communications No. 172/1984 (Broeks v. the Netherlands) and No. 182/1984 (Zwaan-de Vries v. the Netherlands).

3.2 In its judgment of 10 May 1989, the Central Board of Appeal concedes, as in earlier judgments, 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 meet specific requirements that are not applicable to married men, implies direct discrimination on the ground of sex in relation to (marital) status. However, the Central Board held "that as far as the elimination of discrimination in the sphere of national social security legislation is concerned, in some situations there is room for a gradual implementation with regard to the moment at which unequal treatment ... cannot be considered acceptable any longer, as well as in view of the question when in such a case the moment has come at which article 26 of the Covenant in relation to national legislation cannot be denied direct applicability any longer". The Central Board concluded in relation to the provision in the WWV that article 26 of the Covenant could not be denied direct applicability after 23 December 1984, the time-limit established by the Third Directive of the European Economic Community (EEC) regarding the elimination of discrimination between men and women within the Community.

3.3 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.

3.4 The author submits that the Netherlands had, when ratifying the Covenant, accepted the direct applicability of its provisions, in accordance with articles 93 and 94 of the Constitution. Furthermore, even if a 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.

3.5 The author claims she suffered damage as a result of the application of the discriminatory provisions in WWV, in that WWV benefits were refused to her for the period of 1 August 1983 to 24 April 1984. She contends that these benefits should be granted to women equally as to men as of 11 March 1979 (the date the Covenant entered into force for the Netherlands), in her case as of 1 August 1983, notwithstanding measures adopted by the Government to grant married women WWV benefits equally after 23 December 1984.

The Committee's admissibility decision :

4.1 During its 44th session, the Committee considered the admissibility of the communication. It noted that the State party, by submission of 11 December 1990, raised no objections against admissibility and conceded that the author had exhausted available domestic remedies.

4.2 On 20 March 1992, the Committee declared the communication admissible inasmuch as it might raise issues under article 26 of the Covenant.

State party's submission on the merits and author's comments :

5.1 By submission of 8 December 1992, the State party argues that the author's communication is unsubstantiated, since the facts of the case do not reveal a violation of article 26 of the Covenant.

5.2 The State party submits that article 13, paragraph 1, subsection 1, WWV, on which the rejection of the unemployment benefit of the author was based, was abrogated by law of 24 April 1985. In this law, however, it was laid down that the law which was in force to that date- including the controversial article 13, paragraph 1, subsection 1 - remained applicable in respect of married women who had become unemployed before 23 December 1984. As these transitional provisions were much criticized, they were abolished by Act of 6 June 1991. As a result, women who had been ineligible in the past to claim WWV benefits because of the breadwinner criterion, can claim these benefits retroactively, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant be unemployed on the date of application.

5.3 The State party therefore contends that, if the author had been unemployed on the date of application for the WWV benefit, she would be eligible to retroactive benefits on the basis of her unemployed status as from 1 February 1983. However, since the author had found other employment as of April 1984, she could not claim retroactive benefits under the WWV. The State party emphasizes that since the amendment of the law on 6 June 1991 the obstacle to the author's eligibility for a benefit is not the breadwinner criterion, but her failure to satisfy the other requirements under the law that apply to all, men and women alike.

5.4 The State party submits that, by amending the law in this respect, it has complied with the principle of equality before the law as laid down in article 26 of the Covenant.

5.5 Moreover, the State party reiterates the observations it made in connection with communications Nos. 172/1984¹ and 182/1984². It emphasizes that the intent of the breadwinner criterion in the WWV was not to discriminate between married men and married women, but rather to reflect a fact of life, namely that men generally were breadwinners whereas women were not. The State party argues therefore that the law did not violate article 26 of the Covenant, since objective and reasonable grounds existed at the time to justify the differentiation in treatment between married men and married women.

5.6 Furthermore, the State party argues that the implementation of equal rights in national legislation depends on the nature of the subject matter to which the principle of equality must be applied. The State party contends that, in the field of social security, differentiation is necessary to bring about social justice. The incorporation of the breadwinner criterion in the WWV should be seen in this light, as its object was to limit the eligibility of the benefit to those who were breadwinners. In this context, the State party refers to the individual opinion³ appended

¹ Broeks v. the Netherlands, Views adopted on 9 April 1987.

² Zwaan-de Vries v. the Netherlands, Views adopted on 9 April 1987.

³ Appended by Messrs. Nisuke Ando, Kurt Herndl and Briame Ndiaye.

to the Committee's Views in communication No. 395/1990⁴, which states that "article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in [the field of social security] at all times; instead it should be seen as a general undertaking on the part of States parties to the Covenant to regularly review their legislation in order to ensure that it corresponds to the changing needs of society".

5.7 In this connection, the State party submits that it regularly adjusts its social security legislation to accommodate shifts in the prevailing social climate and/or structure, as it has done in the WWV. The State party concludes that by amending the WWV in 1991, it has complied with its obligations under article 26 and article 2, paragraphs 1 and 2, of the Covenant.

6.1 By submission of 8 March 1993, counsel stresses that the central issue in the communication is whether article 26 of the Covenant had acquired direct effect before 23 December 1984, more specifically on 1 August 1983. She argues that the explicit exclusion of married women from benefits under the WWV constituted a discrimination on the grounds of sex in relation to marital status. Counsel argues that, even if objective and reasonable grounds existed to justify the differentiation in treatment between married men and married women at the time of the enactment of the provision, conditions in society no longer supported such differentiation in August 1983.

6.2 Counsel submits that, under the amended law, it is still not possible for the author, who has found new employment, to claim the benefits she was denied before. In this connection, she points out that the author failed to apply for a benefit during the period of her unemployment because the law at that time did not grant her any right to a benefit under the WWV. The author applied for a benefit after the breadwinner-requirement for women was dropped as from 23 December 1984, but had by then found new employment. She therefore argues that the discriminatory effect of the said provision of WWV is not abolished for her, but still continues.

6.3 Counsel refers to the Committee's Views in communications Nos. 172/1984⁵ and 182/1984⁶ and argues that, even if a transitional period is acceptable to bring the law in compliance with the Covenant, the length of that period, from the entry into force of the Covenant (11 March 1979) to the amendment of the law (6 June 1991), is unreasonable. Counsel therefore maintains that article 26 of the Covenant has been violated in the author's case by the refusal of the State party to grant her a WWV benefit for the period of her unemployment, from 1 August 1983 to 24 April 1984.

⁴ Sprenger v. the Netherlands, Views adopted on 31 March 1992.

⁵ Broeks v. the Netherlands, Views adopted on 9 April 1987.

⁶ Zwaan-de Vries v. the Netherlands, Views adopted on 9 April 1987.

Examination 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, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The questions before the Committee are whether the author is a victim of a violation of article 26 of the Covenant (a) because the state and application of the law in August 1983 did not entitle her to benefits under the WWV, and (b) because the present application of the amended law does still not entitle her to benefits for the period of her unemployment from 1 August 1983 to 24 April 1984. In this connection, the author has also requested the Committee to find that the Covenant acquired direct effect in the Netherlands as from 11 March 1979, or in any event as from 1 August 1983.

7.3 The Committee recalls its earlier jurisprudence and observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant.

7.4 The Committee observes that, even if the law in force in 1983 was not consistent with the requirements of article 26 of the Covenant, that deficiency was corrected upon the retroactive amendment of the law on 6 June 1991. The Committee notes that the author argues that the amended law still indirectly discriminates against her, because it requires applicants to be unemployed at the time of application and that this requirement effectively bars her from retroactive access to benefits. The Committee finds that the requirement of being unemployed at the time of application for benefits is, as such, reasonable and objective, in view of the purposes of the legislation in question, namely to provide assistance to persons who are unemployed. The Committee therefore concludes that the facts before it do not reveal a violation of article 26 of the Covenant.

7.5 As regards the author's request that the Committee make a finding that 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 August 1983, the Committee observes that the method of incorporation of the Covenant in national legislation and practice varies among different legal systems. The determination of the question whether and when article 26 has acquired direct effect in the Netherlands is therefore a matter of domestic law and does not come within the competence of the Committee.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any provision of the Covenant.

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