

HUMAN RIGHTS COMMITTEE

v. d.M. v. The Netherlands

Communication No. 478/1991

26 July 1993

CCPR/C/48/D/478/1991*

ADMISSIBILITY

Submitted by: A.P.L.-v.d.M. (name deleted)

Alleged victim: The author

State party: The Netherlands

Date of communication: 27 October 1991 (initial submission)

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

Meeting on 26 July 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 22 October 1991) is Mrs. A.P.L.v.d.M., a Netherlands citizen, residing in Voorhout, 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 background:

2.1 The author, who is married, was employed as a seasonal worker during part of the year as of July 1982. During the intermittent periods of unemployment, she received unemployment benefits by virtue of the *Werkloosheidswet* (WW) (Unemployment Act). Pursuant to the provisions of the Act, the benefit was granted for a maximum period of six months. On 2 March 1984 the author, who was then unemployed, was no longer entitled to

WW benefits. She was subsequently re-employed on 25 July 1984.

2.3 After having received benefits under the WW, an unemployed person at that time was entitled to benefits under the *Wet Werkloosheids Voorziening* (WWV) (Unemployment Benefits Act). These benefits amounted to 75 per cent of the last salary, whereas the WW benefits amounted to 80 per cent of the last salary. However, article 13, paragraph 1, subsection 1, of the law provided that married women could only receive WWV benefits if they qualified as breadwinners. A similar requirement did not apply to married men. The author, who did not meet this requirement, therefore did not apply for benefits at that time.

2.4 However, after the State party had abolished the requirement of article 13, paragraph 1, subsection 1, with a retroactive effect to 23 December 1984, the author, on 22 January 1989, applied for benefits under the WWV, for the period of 2 March to 25 July 1984. The author's application was rejected by the municipality of Voorhout, on 8 June 1989, on the ground that the author did not meet the statutory requirements which were applicable at the material time.

2.5 On 19 December 1989, the municipality confirmed its decision. The author then appealed to the *Raad van Beroep* (Board of Appeal) in The Hague, which, by decision of 27 June 1990, rejected her appeal.

2.6 The *Centrale Raad van Beroep* (Central Board of Appeal), the highest instance in social security cases, in its judgment of 5 July 1991, referred to its judgment of 10 May 1989 in the case of Mrs. Cavalcanti Araujo-Jongen¹, in which it found, as it had done in previous cases, that article 26, read in conjunction with article 2, of the International Covenant on Civil and Political Rights, applied to the granting of social security benefits and similar entitlements and that the explicit exclusion of married women from WWV benefits, except if they meet specific requirements that are not applicable to married men, amounted to discrimination on the ground of sex in relation to marital status. However, the Central Board found no reason to depart from its established jurisprudence that, with regard to the elimination of discrimination in the sphere of national social security legislation, in some situations gradual implementation may be allowed. The Central Board concluded that, in relation to article 13, paragraph 1, subsection 1, of WWV, article 26 of the Covenant had acquired direct effect not before 23 December 1984, the final date established by the Third Directive of the European Community (EC) for the elimination of discrimination between men and women within the Community. It therefore confirmed the decision of the Board of Appeal to refuse the author benefits under WWV for the period of 2 March to 25 July 1984. With this judgment, all domestic remedies are said to have been exhausted.

2.7 In 1991, further amendments to the WWV abolished the restriction on the retroactive effect of the abolishment of article 13, paragraph 1, subsection 1. 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 must be unemployed on the date of application.

The complaint:

3.1 In the author's opinion, the denial of WWV benefits for the period of 2 March to 25 July 1984 amounts to discrimination within the meaning of article 26 of the Covenant.

3.2 The author recalls that the Covenant and the Optional Protocol entered into force for the Netherlands on 11 March 1979, and argues that, accordingly, article 26 acquired direct effect on that date. She further contends that the date of 23 December 1984, as of which the distinction under article 13, paragraph 1, subsection 1, WWV was abolished, is arbitrary, since there is no formal link between the Covenant and the Third EC Directive.

3.3 She also claims that the Central Board of Appeal had not, in earlier judgments, taken a consistent stand with respect to the direct applicability of article 26 of the Covenant. For example, in a case pertaining to the General Disablement Act (AAW), the Central Board decided that article 26 could not be denied direct effect after 1 January 1980.

3.4 The author claims that the Netherlands had, upon ratifying the Covenant, accepted the direct effect of its provisions, pursuant to articles 93 and 94 of the Netherlands Constitution. She further argues that, even if the possibility of gradual elimination of discrimination were permissible under the Covenant, the transitional period of over 12 years between the adoption of the Covenant in 1966 and its entry into force for the Netherlands in 1979, should have been sufficient to enable it to adapt its legislation accordingly. In this context, the author refers to the Views of the Human Rights Committee in communications Nos. 182/1984 (*Zwaan-de Vries v. the Netherlands*)² and 172/1984 (*Broeks v. the Netherlands*)³.

3.5 The author submits that the amendments recently introduced in WWV do not eliminate the discriminatory effect of article 13, paragraph 1, subsection 1, WWV as applied prior to December 1984. The author points out that women can only claim these benefits retroactively if they meet the requirements of all the other provisions of WWV, especially the requirement that they are unemployed at the time of the application for WWV benefits. Thus, women who, like the author, are employed at the time of applying for retroactive benefits, do not fulfil the legislative requirements and are therefore not entitled to a retroactive benefit. According to the author, therefore, the discriminatory effect of said WWV provision has not been completely eliminated.

3.6 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 2 March to 25 July 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; 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; and that WWV benefits should be granted to married women on an equal footing with men as of 11 March 1979, and in her case as of 2 March 1984.

State party's observations and the author's comments thereon:

4. By submission, dated 2 September 1992, the State party concedes that the author has exhausted all available domestic remedies. The State party, however, argues that the author cannot be considered to be a victim within the meaning of article 1 of the Optional Protocol, since, even if the benefits would be available to married women on an equal footing with men as of 2 March 1984, the author still would not be eligible to these benefits, since she did not fulfil one of the basic requirements in the law, which is applicable to both men and women, that a person applying for benefits be unemployed at the date on which the application is made.

5. In her comments on the State party's submission, the author submits that the date of the application never was at issue in the prior proceedings, which focused on the date of 23 December 1984, in connection with the Third Directive of the European Community. She states that the issue before the Committee is whether article 26 of the Covenant has direct effect for the period preceding 23 December 1984, and not whether she fulfilled the requirement of being unemployed on 22 January 1989, the date of her application for benefits under WWV.

Issues and proceedings before the Committee:

6.1 Before considering any claim 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.

6.2 The Committee notes that the author claims that the state of the law from March to July 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 and equal protection of the law, as set out in article 26 of the Covenant. The Committee further notes that the State party has amended the legislation in question, abolishing with retroactive effect the provision in the law which the author considers discriminatory.

6.3 The Committee considers that, even if the law in question, prior to the enactment of the amendment, were to be considered inconsistent with a provision of the Covenant, the State party, by amending the law retroactively, has corrected the alleged inconsistency of the law with article 26 of the Covenant, thereby remedying the alleged violation. Therefore, the author cannot, at the time of submitting the complaint, claim to be a victim of a violation of the Covenant. The communication is thus inadmissible under article 1 of the Optional Protocol.

6.4 The author further contends that she is a victim of discrimination because the application of the amended law still does not entitle her to benefits for the period of her unemployment from March to July 1984, since she does not fulfil the requirement of being unemployed on the date of application for the benefits. In this connection, the Committee notes that said requirement applies to men and women equally. The Committee refers to its decision in communication No. 212/1986 (P.P.C. v. the Netherlands), in which it considered that the scope of article 26 did not extend to differences of results in the application of common rules in the allocation of benefits. In the present case, the Committee finds that the requirement

of being unemployed at the time of application as a prerequisite for entitlement to benefits is not discriminatory, and that the author does not, therefore, have a claim under article 2 of the Optional Protocol.

6.5 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, the Committee observes that the method of application of the Covenant 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.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

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

Footnotes

*/ All persons handling this document are requested to respect and observe its confidential nature.

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

1/ Mrs. Cavalcanti's case was registered before the Human Rights Committee as communication No. 418/1990 and declared admissible on 20 March 1992.

2/ Views adopted on 9 April 1987.

3/ Views adopted on 9 April 1987.