



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Eightieth session  
15 March - 2 April 2004

**DECISION**

**Communication No. 977/2001**

Submitted by: R.P.C.W.M. Brandsma (represented by counsel,  
Mr. M.W.C. Feteris)

Alleged victim: The author

State party: The Netherlands

Date of communication: 30 October 2000 (initial submission)

Document references: Special Rapporteur's rule 86/91 decision,  
transmitted to the State party on 23 May 2001 (not  
issued in document form)

Date of adoption of decision: 1 April 2004

[ANNEX]

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

**ANNEX**

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER  
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT  
ON CIVIL AND POLITICAL RIGHTS

Eightieth session

concerning

**Communication No. 977/2001\*\***

Submitted by: R.P.C.W.M. Brandsma (represented by counsel,  
Mr. M.W.C. Feteris)

Alleged victim: The author

State party: The Netherlands

Date of communication: 30 October 2000 (initial submission)

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

Meeting on 1 April 2004

Having concluded its consideration of communication No. 977/2001, submitted to the Human Rights Committee on behalf of R.P.C.W.M. Brandsma 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, and the State party,

Adopts the following:

**DECISION ON ADMISSIBILITY**

1. The author of the communication is R.P.C.W.M. Brandsma, a Dutch national born on 14 October 1961. He claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights by the Netherlands. He is represented by counsel.

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

### **The facts as described by the author**

2.1 In 1998, the author worked as a civil servant both for the Ministry of Finance and for the University of Leiden. He was given holiday supplementary payment of Fl. 9,166 in addition to his normal wages during the holidays which totalled Fl. 11,894. These amounts of holiday payments were fully subject to the imposition of income tax, in conformity with the Dutch laws and regulations.

2.2 The author states that, like he, most employees in the Netherlands receive their holiday payments directly from their employer. In some sectors of industry, notably in the building sector, however, employees receive holiday vouchers. These are entitlements that can be cashed in, at the time of vacation, at a foundation that is funded with contributions from the employers. The value of these vouchers is taxed at the same time as the monthly or weekly salary, although the employees receive the actual payment at a later stage.

2.3 During the period before the tax reform of 1990, a technical complication in the calculation of wage taxes would have led to the holiday vouchers being taxed at a higher rate than normal holiday payments. In order to compensate for this disadvantage, holiday vouchers were taxed at only a percentage of their normal value (75% in 1950, 50% in 1953 and 60% in 1969). It is stated that the system led to criticism from fiscal experts, who claimed that the undervaluation of the vouchers privileged employees receiving holiday payments through vouchers.

2.4 In 1986, a committee of experts (the Oort-committee) advised the government about simplification of the tax system. This new system would take away the higher tax rate for the holiday voucher payments and the committee advised therefore to tax the vouchers at 100%. However, the Social Economic Council, a permanent advisory body to the government, was of the opinion that this would lead to increased expense for the employers and a decrease in net wages for the employees and, thus, would be opposed by those concerned. Following this advice, and after consultations with the Labour Foundation, the official consultative forum between organizations of employers and employees, a tax reform package was presented, abolishing the tax disadvantage of the holiday vouchers and at the same time raising their valuation to 75%. This proposal was accepted by Parliament and became effective on 1 January 1990.

2.5 In 1996, further tax reforms were proposed. After consultations with the organisations of employers and employees new rules were issued, effective 1 January 1999, which will gradually abolish the valuation of the holiday vouchers. From 1999 onwards, their valuation will increase with 2.5% every year, reaching 92.5% in 2005. As of 2006, it is proposed to tax the vouchers against their effective value (estimated at around 97.5% because of the discrepancy between the moment of taxation of the vouchers and the moment of effective payment).

### **The complaint**

3.1 The author complains that he is a victim of a violation of article 26 of the Covenant, because he had to pay taxes over 100% of his holiday payments in 1998 whereas those employees who were being paid their holiday payments through vouchers were taxed at 75% of their payments.

3.2 The author states that he has not objected to the tax assessment or exhausted domestic remedies in this respect, in the light of the Supreme Court's judgement of 16 June 1999 in a similar case, where the Court decided that the difference in taxation did not constitute unlawful discrimination. According to the author, the application of domestic remedies would thus not have any prospect of success.

3.3 The author argues that although his holiday payments are not identical to the holiday payments through vouchers, the two situations are so similar that unequal treatment cannot be justified. He argues that after the tax reform of 1990 no relevant distinction between the two systems of holiday payments exists. Only the difference between the moment of taxation and the moment of payment in the case of holiday vouchers would be a relevant distinction, but the estimated difference is said to be only around 2% and does not justify a difference in the taxable payment of 25%.

3.4 The author further remarks that the group of taxpayers who are entitled to holiday vouchers are mainly men, and stresses that the present system amounts to indirect distinction on the basis of sex prohibited by article 26.

3.5 Concerning the opposition against full taxation by employers and employees in the sectors where the holiday vouchers are used, the author argues that the opposition may be an explanation for the delay in providing equal treatment, but does not provide any justification for continuing the favourable treatment of a small group of taxpayers. He states that measures which have broad support in society can nevertheless be discriminatory and therefore violate the Covenant. As to the validity of the arguments used by the social partners, the author argues that the abolition of a privilege leads automatically to a financial disadvantage of the persons who used to enjoy the privilege. This argument can thus not be used to maintain privileges.

3.6 The author further argues that the gradual abolition of the privilege is not justifiable as the State party is under an unconditional obligation to secure the substantive Covenant rights. Even if some form of gradual change after 1990 can be accepted, it cannot be justified that the difference in taxation was still unchanged in 1998, eight years after the difference in tax basis between the two systems had been abolished.

3.7 If the Committee were to decide that the holiday vouchers and normal holiday payments are not similar payments that require equal treatment, the author argues that the difference in tax base of 25% is completely disproportionate in relation to the actual time difference between the moments of taxation, and thus still amounts to discrimination.

3.8 On the basis of the above, the author requests the Committee to rule that there has been discrimination in his case and that he should be retroactively granted the privileged treatment enjoyed by the others, and be compensated for the tax that he has paid additionally.

#### **State party's observations**

4.1 By submission of 23 November 2001, the State party refers to a comparable case submitted by the author's counsel on behalf of another client to the European Court of Human Rights, which was declared inadmissible by the Court on 23 October 2000.

According to the State party, the claims of discrimination of the case are the same as in the present case. Indeed, the author has referred to the Supreme Court's judgement in this case as a justification for the non-exhaustion of domestic remedies. The State party agrees in this context that it was reasonable for the author to expect that domestic remedies would not have given him any relief.

4.2 The State party refers to a letter to counsel from the registry of the European Court of Human Rights, dated 7 September 2000, in which it explains the obstacles to the admissibility of the case, referring to the Court's case law from which follows that States parties have a wide margin of appreciation in the implementation of social and economic policies, in assessing when and to what extent differences in otherwise similar situations justify a different treatment in law. In its decision declaring the case inadmissible, the Court found that the matters complained of did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention.

4.3 The State party recalls that it has not entered a reservation to article 5, paragraph 2(a), of the Optional Protocol vis-à-vis matters that have already been decided by the European Court because it was believed that wide-spread similar reservations could undermine the universal system for the protection of individual human rights. The State party requests the Committee however to avoid opposing rulings by international supervisory bodies and thus to share the conclusion of the European Court that there has been no violation of the principle of non-discrimination. In this connection, the State party argues that the difference in scope between article 14 of the European Convention and article 26 of the Covenant does not play a role in the present case, since the combined scope of article 14 and article 1 of the First Protocol is comparable to the scope of article 26 of the Covenant.

4.4 On the facts of the case, the State party explains that in the construction industry and related sectors, it has been the custom that workers are not paid while they are on holiday. Instead, they receive holiday vouchers from their various employers for each day they work, which can be exchanged for cash at a central fund in the holiday period. Out of the total of about five million employees in the Netherlands who have some kind of holiday entitlement, roughly 330,000 are entitled to holiday vouchers. The author is therefore in the same position as about 93.4% of the total number of employees with holiday entitlement.

4.5 The State party explains that the difference in treatment arose from the need to prevent the situation where those who received holiday vouchers were taxed more heavily than recipients of holiday pay. It further explains that after the simplification of the taxation system in 1990, the assessment of the value of holiday vouchers was raised to 75%. Although a rise to a 100% had been proposed originally, it was felt that this would confront employees concerned with a sudden, substantial drop in income. After consultation, a rate of 75% was therefore agreed as a temporary compromise. Further consultations finally led to the gradual abolition of the special rate as of 1 January 2006.

4.6 On the merits, the State party refers to the courts' finding that holiday pay and holiday vouchers are unequal cases, both de facto and de jure. The Supreme Court noted in its judgement of 16 June 1999 that it was not the existence of the differences that was contested but only their weight. It then concluded that an objective and reasonable justification existed for the unequal treatment given that the government had compelling reasons of a social, economic and political nature for not immediately raising the rate of the vouchers to their

market value. The State party explains that the Supreme Court explicitly examines cases in the light of international conventions, including the Covenant.

4.7 The State party reiterates that weighty social, economic and political considerations underlie the different tax regimes applied to holiday pay and holiday vouchers. It acknowledges that the difference in treatment should be abolished but affirms that this has to be done with caution. It suggests that the sudden denial to individuals of what were in the past undisputed rights, with reference to the principle of equality before the law, may be at odds with other human rights, in particular the right to the protection of property. The State party argues that this applies all the more in the present case since in contrast to the author the recipients of holiday vouchers belong to the lowest salary category.

4.8 The State party concludes that the communication (a) does not involve equal cases and (b) does not involve a manifest disproportionate treatment of unequal cases which could be classified as a violation of article 26 of the Covenant.

### **The author's comments**

5.1 By letter of 21 January 2002 the author comments on the State party's submission. He agrees that the case which was decided by the European Court is highly comparable with the present communication. He argues however, that decisions of the European Court interpreting the European Convention cannot be decisive when interpreting the Covenant, since they are two different treaties with different States parties and different supervisory mechanisms.

5.2 Furthermore, the author submits that the European Court leaves States parties in tax cases a wide margin of appreciation. The author argues that the application of this approach to article 26 of the Covenant would undermine the basic and general character of the principle of non-discrimination. The proper test under article 26 is whether the criteria for differentiation are reasonable and objective.

5.3 The author also argues that political considerations cannot, in themselves, be regarded as a reasonable and objective justification for a distinction between similar situations which does not have a reasonable, legitimate aim in itself. In the author's opinion, admitting such considerations as a justification under article 26 would largely deprive the non-discrimination clause of its content.

5.4 The author refers to his original communication and reiterates that the distinction made in the present case is discriminatory. He challenges the Supreme Court's conclusion, invoked by the State party, that holiday vouchers and holiday payments cannot be regarded as identical situations and refers in this respect to the government's initial proposal in 1990 to tax the vouchers against a rate of 100%. According to the author, the Supreme Court leaves too much of a margin of appreciation to the public authorities when deciding whether a different treatment of a very similar situation is justified. The author argues that to the extent that there may be a relevant difference between holiday vouchers and holiday payments, this difference is far too small to justify an exemption of 25% for holiday vouchers, making the difference in treatment disproportionate and thus discriminatory.

## Issues and proceedings before the Committee

6.1 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 the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author claims to be a victim of a violation of article 26 by the Netherlands because of the different treatment in taxation of holiday payments between him and those employees who receive their payments through vouchers. The Committee further notes that the courts in the Netherlands have decided that the difference in treatment is based on factual and legal differences in the two forms of payment. The author's claim is based on a different assessment of these differences.

6.3 The Committee takes note of the reasons advanced by the State party as to why it decided to raise the valuation of the holiday vouchers in a gradual manner. It considers that the author has not substantiated, for purposes of admissibility, his claim that he, as a recipient of holiday pay, similarly to the vast majority of employees in the State party, was discriminated against compared to the small minority of workers who, because of the nature of their work, receive holiday vouchers, the taxation of which continues to be somewhat lower than that of holiday pay. Therefore, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

6.4 Concerning the author's claim about indirect discrimination (paragraph 3.4 above), the Committee notes that the author is not a woman and thus cannot be considered to be a victim within the meaning of article 1 of the Optional Protocol. Accordingly, this part of the complaint is inadmissible pursuant to article 1 of the Optional Protocol.

7. The 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.

[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.]

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