

CEDAW, A/61/38 (2006)

Annex VIII

Views of the Committee in respect of communications under article 7, paragraph 3, of the Optional Protocol to the Convention

A. Views of the Committee in respect of communication No. 3/2004

Submitted by: Ms. Dung Thi Thuy Nguyen
Alleged victim: The author
State party: The Netherlands
Date of communication: 8 December 2003 (initial submission)

On 14 August 2006, the Committee on the Elimination of Discrimination against Women adopted the text set out below as the Committee's views under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 3/2004.*

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 14 August 2006,

Having concluded its consideration of communication No. 3/2004, submitted to the Committee on the Elimination of Discrimination against Women by Ms. Dung Thi Thuy Nguyen under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

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

Adopts the following:

Views under article 7, paragraph 3, of the Optional Protocol

1.1 The author of the communication dated 8 December 2003, is Ms. Dung Thi Thuy Nguyen, born on 24 June 1967 and a resident of the Netherlands currently living in Breda, the Netherlands. She claims to be a victim of a violation by the Netherlands of article 11, paragraph 2 (b) of the Convention on the Elimination of All Forms of

* The following members of the Committee participated in the examination of the present communication: Magalys Arocha Dominguez, Meriem Belmihoub-Zerdani, Huguette Bokpe Gnacadjia, Dorcas Coker-Appiah, Mary Shanthi Dairiam, Naela Mohamed Gabr, Françoise Gaspard, Rosario Manalo, Krisztina Morvai, Pramila Patten, Fumiko Saiga, Hanna Beate Schöpp-Schilling, Heisoo Shin, Glenda P. Simms, Dubravka Šimonović, Anamah Tan, Maria Regina Tavares da Silva and Zou Xiaoqiao. Pursuant to rule 60 (1) (c) of the Committee's rules of procedure, Cees Flinterman did not participate in the examination of this communication, as he is a national of the State party concerned.

Discrimination against Women. The author is represented by counsel, Mr. G. J. Knotter, and by Ms. E. Cremers, a self-employed researcher at Leiden, the

Netherlands. The Convention and its Optional Protocol entered into force for the State party on 22 August 1991 and 22 August 2002, respectively.

The facts as presented by the author

2.1 The author worked as a part-time salaried employee (a temporary employment agency worker) as well as together with her husband as a co-working spouse in his enterprise. She gave birth to a child and took maternity leave as from 17 January 1999.

2.2 The author was insured under the Sickness Benefits Act (Ziektewet — “ZW”) for her salaried employment and, in accordance with article 29a of this Act, received benefits to compensate for her loss of income from her salaried employment during her maternity leave over a period of 16 weeks.

2.3 The author was also insured under the Invalidity Insurance (Self-Employed Persons) Act (Wet arbeidsongeschikheidsverzekering zelfstandigen “WAZ”) for her work in her husband’s enterprise. On 17 September 1998, prior to the start of her maternity leave, she submitted an application for maternity benefits under the WAZ. On 19 February 1999, the National Institute for Social Insurance (Landelijk instituut sociale verzekeringen — “LISV”), the benefits agency, decided that, despite her entitlement, the author would not receive benefits during maternity leave for her loss of income stemming from her work in her husband’s enterprise. This was because section 59 (4) of the WAZ — the so-called “anti-accumulation clause” — allows (in cases of concurrent claims for maternity benefits) payment of benefits only insofar as they exceed benefits payable under the ZW. The author’s benefits from her work with her spouse did not exceed those from her salaried employment.

2.4 The author lodged an objection to the decision, which was rejected on 18 May 1999. Thereafter, she applied for a review with the Breda District Court (rechtsbank). Reportedly, this application was dismissed on 19 May 2000. The author then appealed to the Central Appeals Tribunal (Centrale Raad van Beroep), reportedly, the highest administrative court in the Netherlands in social security cases.

2.5 On 25 April 2003, the Central Appeals Tribunal (Centrale Raad van Beroep) confirmed the contested judgment of the Breda District Court (rechtsbank). The Tribunal found that section 59 (4) of the WAZ does not result in unfavourable treatment of women as compared to men. The Tribunal also referred to one of its earlier judgments in which it held that article 11 of the Convention lacks direct effect.

2.6 On 8 May 2002, the author began a second maternity leave (in connection with her second pregnancy) and again applied for benefits. On 4 June 2002 the benefits agency decided that the author’s entitlement under the ZW would be supplemented by the difference between her claim under the WAZ and her entitlement under the ZW.

Unlike during the previous period of maternity leave, her WAZ entitlement exceeded her ZW entitlement.

2.7 The author lodged an appeal against the decision of 4 June 2002, which she subsequently withdrew after the decision of the Central Appeals Tribunal (Centrale Raad van Beroep), which heard the appeal regarding benefits for her maternity leave in 1999, was rendered on 25 April 2003.

The complaint

3.1 The author complains that she is a victim of a violation by the State party of article 11, paragraph 2 (b) of the Convention on the Elimination of All Forms of Discrimination against Women. She contends that this provision entitles women to maternity leave with full compensation for loss of income from their work. The author claims that women whose income stems from both salaried and other forms of employment only receive partial compensation for their loss of income during their maternity leave. In this respect, the author submits that pregnancy has a negative effect on the income of this group of women. She alleges that partial compensation for the loss of income does not fulfil the requirements of the article 11, paragraph 2 (b) of the Convention and amounts to direct discrimination of women as a result of their pregnancy.

3.2 The author asserts that article 11 of the Convention applies to any conceivable professional activity carried out for payment and refers to legal literature on the *Travaux Préparatoires* of the Convention to substantiate her assertion. She believes that this is important in assessing the compatibility of the provisions of the WAZ in relation to pregnancy and maternity with article 11 of the Convention. She also considers it important to establish that the prohibition of discrimination against women means, *inter alia*, that pregnancy and maternity may not result in a subordinated position of women as compared to men.

3.3 As a result of the above, the author requests the Committee to examine to what extent the so-called “anti-accumulation clause” — i.e. section 59 (4) of the WAZ — as a result of which she did not receive any compensation for her lost income as a co-working spouse in connection with her maternity leave — is a discriminatory provision and violates article 11, paragraph 2 (b) of the Convention.

3.4 The author requests the Committee to recommend to the State party, under article 7 (3) of the Optional Protocol to the Convention, to take appropriate measures to comply with the requirements of article 11, paragraph 2 (b) of the Convention so that co-working spouses or self-employed women on pregnancy and maternity leave are provided with full compensation for loss of income. She further requests the Committee to recommend that the State party award her compensation for loss of income during both periods of maternity leave.

3.5 The author further asserts that article 11, paragraph 2 (b) provides a right that is open to tangible judicial review and that, under article 2 of the Optional Protocol, the Committee has been authorized

to decide whether the violation of a certain Convention right may be judicially reviewed in actual cases.

3.6 As to the admissibility of the communication, the author maintains that all domestic remedies have been exhausted in that she ultimately brought proceedings before the highest administrative court against the refusal to award benefits under the WAZ. She informs the Committee that she withdrew her appeal in connection with her second pregnancy after she lost her final appeal in connection with her first pregnancy.

3.7 The author also states that she has not submitted the communication to any other international body and thus, the requirement for admissibility in article 4, paragraph 2 (a) has been fulfilled. The author points out that, on several occasions, in its comments on the report of the Netherlands to the Committee of Experts, the Netherlands Trade Union Confederation FNV has claimed that section 59 (4) of the WAZ is contrary to article 12 (2) of the European Social Charter. It has reportedly also brought the issue to the attention of the International Labour Organization (ILO) in its comments on the report of the Netherlands under ILO Convention 103 on Maternity Protection. Nonetheless, the author maintains that both procedures differ from the individual right of complaint and that neither the European Social Charter nor ILO Convention 103 contain provisions identical to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. She also refers to case law on admissibility in individual complaints procedures of other international investigation procedures, including the Optional Protocol to the International Covenant on Civil and Political Rights.^a For these reasons, the author argues that there is no impediment as regards article 4, paragraph 2 (a) of the Optional Protocol.

3.8 The author contends that the communication is admissible under the terms of article 4, paragraph 2 (e) of the Optional Protocol. Although the decision not to pay the author benefits under the WAZ were taken before the Netherlands ratified the Optional Protocol, the decision of the Central Appeals Tribunal (Centrale Raad van Beroep) was delivered some time after ratification. The author argues that the decision of the highest court determines whether the facts should be considered to have occurred after ratification, as the facts only became final on that date. She maintains that international case law supports this view.^b Furthermore, she points out that part of her communication directly concerns the decision of the Central Appeals Tribunal (Centrale Raad van Beroep) itself. Additionally, the author argues that the so-called “anti-accumulation clause” has continued to be applied (now found in another piece of legislation^c) after the Optional Protocol’s entry into force for the State party. Lastly, the author argues that her withdrawal of her appeal in connection with her second pregnancy after she lost her final appeal in connection with her first

^a See *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*, annex VIII.B, para. 6.2.

^b See IACtHR Report No. 73/01, Case No. 12.350, MZ v. Bolivia, report of 10 October 2001; ECHR Application No. 323/57, X. v. Denmark, inadmissibility decision of 19 December 1957, European Commission of Human Rights, *Documents and Decisions, 1955-1956-1957*, p. 247.

^c Article 3:29 (2) of the Employment and Care Act of 16 November 2001.

pregnancy in April 2003 also indicates that the facts at issue continue (i.e. the application of the anti-accumulation clause).

The State party's submission on admissibility

4.1 By submission of 19 March 2004, the State party argues that the communication is inadmissible *ratione temporis* pursuant to article 4, paragraph 2 (e). It argues that the subject of the communication is the prohibition against receiving pregnancy and maternity benefits under both the WAZ and the ZW at the same time. This arose in the author's case at the point in time when the relevant implementing body took the decisions affecting her, namely on 19 February 1999 and 4 June 2002. Both dates were prior to the entry into force of the Protocol for the Netherlands on 22 August 2002.

4.2 The State party refers to the author's view that the deciding factor in determining whether the facts that are the subject of the communication occurred before the Protocol entered into force for the Netherlands is the date of the judgment given by the court of last resort, since it is only then that the facts are definitively established.

4.3 The State party is of the opinion that the author based her views on an incorrect interpretation of Report No. 73/01, Case No. 12.350, MZ v. Bolivia of the Inter-American Commission on Human Rights. While the petitioner's complaint in the Bolivian case was declared admissible where it related to a judgment by a Bolivian court that dated from after the entry into force of the individual right of complaint in respect of Bolivia, it had nothing to do with that judgment definitively establishing facts that had occurred prior to that date. The case concerned the course of the proceedings and the conduct of the judges involved in the case.

The author's comments on the State party's observations on admissibility

5.1 The author reiterates her arguments as to why her communication should be declared admissible in accordance with article 4, paragraph 2 (e) of the Optional Protocol to the Convention.

5.2 She explains that her interpretation of article 4, paragraph 2 (e) of the Optional Protocol cannot be directly inferred from the international case to which she referred in her initial submission. She wished merely to refer to judgments in which judicial bodies did not decide restrictively on the question of admissibility. The author, therefore, considers the comparison of the facts of her case to the facts in MZ v. Bolivia (IACtHR Report No. 73/01, case No. 12.350 of 10 October 2001) irrelevant.

State party's further submission on admissibility and observations on merits

6.1 The State party states that under article 2 of the Optional Protocol, communications may be submitted by or on behalf of individuals claiming to be victims of a violation of any of the rights set forth in the Convention. It is the State party's opinion that an individual can only be regarded as a victim under the article at the moment at which there has been some failure to respect his or her

rights. In the author's case, this would be the dates on which she was notified that all or part of the benefits was to be withheld. These decisions were taken before 22 August 2002, the date that the Optional Protocol entered into force for the State party. Ergo, the communication should be declared inadmissible *ratione temporis*. A different view would misconstrue the substance of the Optional Protocol by recognizing a general rather than an individual right of complaint.

6.2 The State party recalls that lodging an application for review in social security cases does not suspend legal proceedings in the Netherlands. Only the final judgment of a court can change (with retroactive effect) the earlier decisions of the bodies that implement social security legislation.

6.3 In addressing the author's contention that section 59 (4) of the WAZ is incompatible with article 11, paragraph 2 (b) of the Convention, which, the author believes, imposes an obligation to ensure full compensation of loss of income ensuing from childbirth in all cases and constitutes direct sex discrimination, the State party observes that the word "pay" is used in general to refer to a salary and not to income from business profits. This gives rise to whether the word "pay" in article 11, paragraph 2 (b) of the Convention should include the frequently fluctuating income arising from self-employment. The State party views its composite system of maternity benefits as adequately fulfilling the terms of article 11, paragraph 2 (b) of the Convention.

6.4 Initially, maternity leave and maternity benefits were regulated exclusively in the ZW, an insurance scheme that provided compulsory coverage for both male and female employees. Self-employed women or women working in their husbands' businesses could voluntarily take out insurance under the scheme. In 1992, a study revealed that only a small proportion of these women took out insurance — either because they were unaware of the option or because of the cost involved. It also emerged that the women concerned only took maternity leave if there were medical complications.

6.5 Subsequently, a compulsory insurance scheme was set up under WAZ for self-employed women or women who worked in their husbands' businesses, which resembled the other scheme — but with contributions based on profits. It was recognized that situations might arise in which women might be simultaneously entitled to benefits from both schemes and, in order to guard against giving more entitlements to persons who were insured in respect of the same risk under two sets of regulations, section 59 (4) was included in the WAZ.

6.6 To ensure that those who were insured under both schemes would not be disadvantaged, the principle of equivalence was applied in relation to contributions. In order to determine contributions, the income from salaried employment was deducted from other income in certain circumstances. This meant that the higher the income from salaried employment the lower the contribution would be to the WAZ. Benefits granted within the framework of the employees' insurance were deducted from the other benefits.

6.7 The State party shares the views expressed by the Central Appeals Tribunal (Centrale Raad van Beroep) as to whether the so-called “anti-accumulation clause” constitutes sex discrimination. It maintains that entitlement to maternity benefits under section 22 of WAZ, is an advantage exclusively for women. Furthermore, within the WAZ system as a whole, the basic principle of anti-accumulation of benefit in respect of the same risk also applies in the event of concurrence between a WAZ benefit and some form of benefit other than a maternity benefit — without any distinction according to sex.

6.8 In responding to the author’s contention that the Central Appeals Tribunal (Centrale Raad van Beroep) was wrong to conclude that article 11 of the Convention was not directly applicable, the State party states that the crucial point is whether further legislation has to be enacted to implement rights protected by the provision or whether without the enactment of further legislation citizens can derive entitlements which they can pursue before a national court, contrary to national law, if necessary. National constitutions determine the manner in which provisions of international law are incorporated into national systems of law. The State party, therefore, is of the opinion that the Committee cannot be asked to give its opinion on the matter. The State party considers it self-evident that statutory regulations that are incompatible with international law must be amended; in this type of situation the question is not so much whether but how these obligations must be fulfilled.

6.9 In the State party the courts decide on the basis of the nature, substance and tenor of a particular provision of international law, whether it is directly applicable. For a provision to be invoked directly by private individuals, it must be formulated so precisely that rights necessarily ensue from it unambiguously and without the need for any further action to be taken by the national authorities.

6.10 The State party would have it that the only possible conclusion is that article 11, paragraph 2 (b) of the Convention imposes on the legislature and Governments of States parties an obligation to pursue, rather than to achieve, a certain goal (*inspanningsverplichting*), with States parties being allowed certain discretionary powers. In the Netherlands, these powers are exercised by the legislature. The State party therefore concurs with the Central Appeals Tribunal (Centrale Raad van Beroep) in its view that article 11, paragraph 2 (b) of the Convention is not directly applicable.

6.11 The State party requests the Committee to declare the communication inadmissible, or alternatively, should it be deemed admissible, to declare it ill-founded.

The author’s comments on the State party’s observations on admissibility and merits

7.1 As to admissibility *ratione temporis*, the author believes that article 4, paragraph 2 (e) of the Optional Protocol must be read in conjunction with the other requirements of the article. Paragraph 1 provides that local remedies must be exhausted before a communication can be submitted. Viewed together with article 4, paragraph 2 (e), this means that “facts” must be understood to mean

the date of the court decision of the highest instance (i.e. 25 April 2003). The correctness of the facts cannot be assumed until such a final decision is reached.

7.2 Furthermore, the complaint concerns the period of the second maternity leave from 8 May to 28 August 2002, during which the author received benefits based on the decision of 4 June 2002 decision — that is to say that the “facts” (the period for which a benefit is received) continued after the entry into force of the Optional Protocol for the State party.

7.3 The author also points out that the State party does not challenge admissibility on grounds of non-exhaustion of remedies in respect of benefits covering the second maternity leave.

7.4 The author further states that “facts” should be understood to mean the facts to which the entitlement applies in accordance with the WAZ, including section 59 (4) and the Work and Care Act after 1 December 2001. She considers the facts to continue because the entitlement continues to exist and maintains that the right to complain is not limited to individual occurrences but generally concerns the right of victims of discrimination against women.

7.5 As to the issue of the definition of “pay” in article 11, paragraph 2 (b) of the Convention, the author maintains her position that all women who perform paid work should be covered — especially professional women or women in business. She disagrees with the argument that women who are insured under two insurance schemes would be unjustifiably accorded favoured treatment if they were to receive more benefits. Furthermore, referring to the State party’s comments on contributions, the author sees no connection between the issue of entitlements to benefits and the payment of contributions — because entitlements exist irrespective of the contributions paid.

7.6 As to whether section 59 (4) of the WAZ is discriminatory, the author contends that only women are affected negatively by a loss of income that can never be experienced by men. That loss of income — an effect of the Act — constitutes discrimination.

7.7 The author clarifies that she has not requested the Committee to decide whether or not article 11 of the Convention has direct effect. The author has only indicated that as a result of the decision of the Central Appeals Tribunal (Centrale Raad van Beroep), she has been deprived of the right to have national legislation tested against the provisions of the Convention.

Supplementary observations of the State party

8.1 The State party refers to the author’s claim that “the Government does not object to the statement that is not necessary for the admissibility of the complaint as regards the second period that the complainant should have exhausted the entire appeal proceedings once more”. The State party points out that this claim was not made in the author’s initial submission to the Committee. The only reference therein to the second period of pregnancy and maternity leave in 2002 was made to support the claim that the alleged violation continued after the Optional Protocol entered into force in the Netherlands. It

should not be inferred from the fact that the State party did not explicitly address the question of whether the author had exhausted domestic remedies regarding the decision on the benefits payable to her for the period of her maternity leave in 2002 that the State party believes that this condition for admissibility has been met regarding that period. Regarding article 4, paragraph 1 of the Optional Protocol, the State party believes that the Committee cannot take the communication into consideration, inasmuch as it must be assumed to apply to the benefit for the period of leave in 2002, on account of non-exhaustion of domestic remedies.

8.2 The State party reiterates that it considers the communication in any event to be inadmissible because the relevant facts took place before the date that the Optional Protocol entered into force for the Netherlands. It also wishes to emphasize that the Optional Protocol created an individual right of complaint that follows from article 2. In order to determine whether a person is a victim of a violation by a State, it is necessary to identify an act, legal or otherwise, by the State that can be defined as a violation, for instance a decision by the State on the application of a particular rule of law. In the State party's view, the right of complaint does not stretch to facts that a complainant considers to be discriminatory in general unless the complainant has been affected personally.

8.3 Concerning the merits of the author's claims, the State party wishes to clarify that it raised previously — but did not answer — the obvious question relating to the meaning of the word "pay" in article 11, paragraph 2 (b) of the Convention. The State party disagrees with the author's interpretation that the provision prescribes full compensation for loss of income resulting from pregnancy and childbirth. It views the provision as a general norm that imposes on States an obligation to make arrangements that enable women to provide for themselves in the period of pregnancy and childbirth and to resume work after childbirth without any adverse effects on their career. The way in which the obligation is fulfilled is left to States to determine. States may opt between arrangements based on continued payment of salary and arrangements creating a comparable social provision. That this must involve full compensation for loss of income cannot automatically be inferred.

8.4 The State party makes a comparison between paragraph 2 (b) of article 11 of the Convention and EC directive 92/85 of 19 October 1992 concerning the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, which provides for a payment to, and/or entitlement to an adequate allowance. While the State party finds it implausible that the European legislature envisaged a wholly different norm than the Convention's norm, it describes the EC directive as being more clearly formulated in that the term "adequate allowance" is defined.

8.5 The State party elaborates further about the reasoning behind section 59 (4) — the so-called "anti-accumulation clause" — of WAZ. Under this Act a self-employed woman would be entitled to a benefit of up to 100 per cent of the statutory minimum wage. Those who worked as a salaried employee as well would be entitled to a benefit

under both this Act and the ZW. If the latter exceeded 100 per cent of the statutory minimum wage the WAZ benefit would not be paid and if the ZW entitlement was lower than 100 per cent of the statutory minimum wage, the WAZ benefit could be paid as long as the two together would not exceed 100 per cent of the minimum wage. At the same time, the higher a woman's income would be from salaried employment — the greater the likelihood that her WAZ benefit would not be paid and the lower her contribution payable to the WAZ scheme would be.

8.6 As for the author's contention that the so-called "anti-accumulation clause" constitutes direct discrimination, the State party reiterates that the entitlement is exclusively given to women and is specifically designed to give women an advantage in relation to men. It is, therefore, impossible to see how it can lead to more unfavourable treatment of women in relation to men — considering that men cannot make any use whatsoever of the clause.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol to the Convention. Pursuant to rule 72, paragraph 4, of its rules of procedure, it shall do so before considering the merits of the communication.

9.2 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

9.3 With respect to article 4, paragraph 1 of the Optional Protocol, the Committee notes that the State party has not disputed that the author has exhausted all available domestic remedies concerning benefits for her first maternity leave in 1999. The issue is not as straightforward regarding the author's 2002 maternity leave benefits. The Committee is informed by the author in her initial submission, that she withdrew her appeal in connection with her second maternity leave after she lost her final appeal in connection with her first maternity leave. She did not explain her reasons. In its latest observations, the State party objected to the admissibility of the author's claim relating to the latter maternity leave on grounds of her failure to exhaust all available domestic remedies without explaining why. The Committee notes that in earlier observations in which the State party challenged the admissibility *ratione temporis* (see below) of the communication and in doing so referred to the decisions taken denying benefits under the WAZ system vis-à-vis both periods of maternity leave, it did not mention the issue of exhaustion of remedies. In the absence of particulars from either the State party or the author on which to assess whether the author should have continued her appeal or whether these proceedings were unlikely to bring relief, the Committee considers that, on the face of it and in light of the unambiguous wording of the decision rendered on 25 April 2003 by the Central Appeals Tribunal (Centrale Raad van Beroep), the highest administrative court in social security cases, proceedings

regarding the author's 2002 maternity leave benefits were unlikely to bring relief. The Committee therefore holds that it is not precluded by article 4, paragraph 1 of the Optional Protocol from considering the communication as regards claims relating to both periods of the author's maternity leave.

9.4 In accordance with article 4, paragraph 2 (e), the Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless those facts continued after that date. The Committee notes that the State party disputed the author's contention that article 4, paragraph 2 (e) posed no impediment to admissibility of the communication. The State party put forward that the pertinent dates for the Committee to consider in this regard were 19 February 1999 and 4 June 2002 — both dates being prior to the entry into force of the Protocol for the Netherlands. These dates were the dates on which decisions were taken to deny the author — the first time to fully deny her benefits under the WAZ in relation to her first maternity leave and the second time to partially deny her benefits under the WAZ in relation to her second maternity leave. The author, for her part, in her initial submission argued that 25 April 2003, i.e. after the Optional Protocol came into force for the Netherlands, is the pertinent date in relation to article 4, paragraph 2 of the Optional Protocol because on that date the Central Appeals Tribunal (Centrale Raad van Beroep), the highest administrative court in social security cases, took the final decision vis-à-vis her dispute with the WAZ authorities regarding her first maternity leave. The Committee is of the view that the central question to be answered is "when has the Dutch legislation at issue been applied to the alleged actual detriment of the author" (i.e. what the facts of the case are)?

9.5 The Committee takes into account that the actual leave periods for which the author applied for benefits spanned two 16-week periods, the first was in 1999, which clearly predicated the entry into force of the Optional Protocol for the State party. The second 16-week period, according to the author, was from 8 May to 28 August 2002. This period extended beyond the entry into force of the Optional Protocol for the State party on 22 August 2002 and justifies admissibility ratione temporis insofar as the communication relates to the author's maternity leave in 2002.

9.6 The Committee has no reason to find the communication inadmissible on any other grounds and thus finds the communication insofar as it concerns the author's later maternity leave in 2002 admissible.

Consideration of the merits

10.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is to determine whether the concrete application of section 59 (4) of the WAZ vis-à-vis the author insofar as it concerns the author's later maternity leave in 2002

constituted a violation of her rights under article 11, paragraph 2 (b), of the Convention because it resulted in her receiving fewer benefits than she would have received had the provision not been in operation and had she been able to claim benefits as an employee and as a co-working spouse independently of each other.

The aim of article 11, paragraph 2, is to address discrimination against women working in gainful employment outside the home on grounds of pregnancy and childbirth. The Committee considers that the author has not shown that the application of the 59 (4) of the WAZ was discriminatory towards her as a woman on the grounds laid down in article 11, paragraph 2, of the Convention, namely of marriage or maternity. The Committee is of the view that the grounds for the alleged differential treatment had to do with the fact that she was a salaried employee and worked as a co-working spouse in her husband's enterprise at the same time.

Article 11, paragraph 2 (b), obliges States parties in such cases to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances. The Committee notes that article 11, paragraph 2 (b), does not use the term "full" pay, nor does it use "full compensation for loss of income" resulting from pregnancy and childbirth. In other words the Convention leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits to fulfil Convention requirements. The Committee notes that the State party's legislation provides that self-employed women and co-working spouses as well as salaried women are entitled to paid maternity leave — albeit under different insurance schemes. Entitlements under both schemes may be claimed simultaneously and awarded as long as the two together do not exceed a specified maximum amount. In such cases, contributions to the scheme covering self-employed women and co-working spouses are adjusted with income from their salaried employment. It is within the State party's margin of discretion to determine the appropriate maternity benefits within the meaning of article 11, paragraph 2 (b), of the Convention for all employed women, with separate rules for self-employed women that take into account fluctuating income and related contributions. It is also within the State party's margin of discretion to apply those rules in combination to women who are partly self-employed and partly salaried workers. In the light of the foregoing, the Committee concludes that the application of section 59 (4) of the WAZ did not result in any discriminatory treatment of the author and does not constitute a violation of her rights under article 11, paragraph 2 (b), of the Convention.

10.3 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it do not reveal a violation of article 11, paragraph 2 (b), of the Convention.

Individual opinion of Committee members, Naela Mohamed Gabr, Hanna Beate Schöpp-Schilling and Heisoo Shin (dissenting)

Consideration of the merits

10.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is to determine whether the concrete application of section 59 (4) of the WAZ vis-à-vis the author insofar as it concerns the author's later maternity leave in 2002 constituted a violation of her rights under article 11, paragraph 2 (b), of the Convention, because it resulted in her receiving fewer benefits than she would have received had the provision not been in operation and had she been able to claim benefits as an employee and as a co-working spouse independently of each other.

10.3 The aim of article 11, paragraph 2, in general, and article 11, paragraph 2 (b), in particular, is to address discrimination against women working in gainful employment outside the home on grounds of pregnancy and childbirth. Article 11, paragraph 2 (b), obliges States parties in such cases to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances. Article 11, paragraph 2 (b), does not use the term "full" pay. A certain margin of discretion is left to States parties to devise a system of maternity leave benefits which fulfils the requirements of the Convention. This interpretation is bolstered by the "travaux préparatoires" of the Convention and by State practice as presented to the Committee in reports submitted to it under article 18 of the Convention. It can be argued that the explicit wording of article 11, paragraph 2 (b), read in conjunction with the other subparagraphs of article 11, paragraph 2, is aimed primarily at women as salaried employees in the public or private labour market sectors. On the other hand, the provision can also be interpreted to mean that States parties are also obliged to provide for a maternity leave with pay for self-employed women. We have seen that the State party has made some provision for this category of women. The manner in which States parties do so is left to their discretion — subject to their obligations under the Convention to achieve results.

10.4 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, we are of the following view. Based on the reasoning set forth above, we conclude that the law of the Netherlands which provides for a financially compensated maternity leave for women who are both salaried women and self-employed, albeit with the restriction of the so-called anti-accumulation clause in article 59WAZ, is compatible with the obligations of the State party under article 11, paragraph 2 (b), of the Convention *in the sense that it* does not reveal a violation of the author's rights under this article as concerns a *direct* form of discrimination based on sex.

10.5 At the same time, we are concerned about the fact that the so-called “equivalence” principle does not seem to take into account the potential situation of a woman working in a situation of both salaried part-time and self-employment, in which the number of her working hours in both categories of work equal or even may go beyond the hours of a full-time salaried female employee, who, in the Netherlands, to our knowledge, receives a maternity benefit which equals full pay for a certain period of time. In addition, the 1996 Equal Treatment (Full-time and Part-time Workers) Act (WOA) requires full-time and part-time employees to be treated equally. Therefore, we are of the view that the so-called anti-accumulation clause in article 59WAZ may constitute a form of *indirect* discrimination based on sex. This view is based on the assumption that an employment situation in which salaried part-time work and self-employment is combined, as described by the complainant, is one which mainly women experience in the Netherlands, since, in general, it is mainly women who work part-time as salaried workers in addition to working as family helpers in their husbands’ enterprises. However, no information was requested by the Committee or given by the State party under this communication procedure to substantiate this assumption with facts. However, in the State party’s fourth report under the Convention, which has been in general distribution since 10 February 2005 and which is to be discussed at the thirty-seventh session of the Committee, in 2007, the State party admits that part-time work is particularly common among women (CEDAW/C/NLD/4, p. 62). In addition, in the same report, the State party refers to the fact that in 2001, under a new Invalidity Insurance Act (WAO) for self-employed persons, 55 per cent of the applicants were women (*ibid.*, p. 61).

10.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, we, therefore, make the following recommendation to the State party:

- (a) Collect data on the number of women working in the combination of part-time salaried employment and as self-employed persons as compared to men in order to assess the percentage of women versus men in this situation and, if this data shows a preponderance of women in such situations of employment;
- (b) Review the “anti-accumulation clause” (section 59 (4) of the WAZ), in particular its principle of “equivalence”, which does not seem to take into account the overall number of hours of work in such combined employment situations, as constituting a possible form of indirect discrimination for women in such employment situations when pregnant and giving birth;
- (c) Accordingly amend the WAZ; or
- (d) Consider in the design of any new insurance scheme for self-employed persons, which includes maternity benefits, and which covers those who combine self-employment with part-time salaried employment, as referred to in the State party’s fourth report (CEDAW/C/NLD/4, p. 61), that integration of provisions ensure full harmony of Dutch law with the Convention on the Elimination of All

Forms of Discrimination against Women in the area of maternity leave benefits for all women, working in various forms of employment in the Netherlands.