EQUALITY AND DISCRIMINATION - FAMILY

III. JURISPRUDENCE

ICCPR

- *Danning v. The Netherlands* (180/1984), ICCPR, A/42/40 (9 April 1987) 151 at para. 14.

  ...
  14. ...In the light of the explanations given by the state party with respect to the differences made by Netherlands legislations between married and unmarried couples...the Committee is persuaded that the differentiation complained of by Mr. Danning is based on objective and reasonable criteria. The Committee observes, in this connection, that the decision to enter into a legal status by marriage, which provides, in Netherlands law, both for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, Mr. Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. Consequently, Mr. Danning does not receive the full benefits provided for in Netherlands law for married couples. The Committee concludes that the differentiation...does not constitute discrimination in the sense of article 26 of the Covenant.

- *Sprenger v. The Netherlands* (395/1990), ICCPR, A/47/40 (31 March 1992) 311 (CCPR/C/44/D/395/1990) at paras. 7.2-7.4 and Individual Opinion by Mr. Nisuko Ando, Mr. Kurt Herndl and Mr. Birama Ndiaya, 315.

  ...
  7.2 The Committee 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. Equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. b/

  7.3 ...[T]he State party submits that there are objective differences between married and unmarried couples, which justify different treatment. In this context the State party refers to the Committee's views in *Danning v. The Netherlands*, in which a difference of treatment between married and unmarried couples was found not to constitute discrimination within the meaning of article 26 of the Covenant.

  7.4 The Committee recalls that its jurisprudence permits differential treatment only if the grounds therefore are reasonable and objective. Social developments occur within States parties and the Committee has in this context taken note of recent legislation reflecting these developments, including the amendments to the Health Insurance Act. The Committee has also noted the explanation of the State party that there has been no general abolition of the

distinction between married persons and cohabitants, and the reasons given for the continuation of this distinction. The Committee finds this differential treatment to be based on reasonable and objective grounds. The Committee recalls its findings in communication No. 180/1984 and applies them to the present case.

Notes

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b/ See [Official Records of the General Assembly, Forty-second Session Supplement No. 40 (A/42/40)], sect. B, *Broeks v. The Netherlands*, Communication No. 172/1984, and ibid., sect. D, *Zwaan-de Vires v. The Netherlands*, Communication No. 182/194, views adopted on 9 April 1987.

Individual Opinion by Mr. Nisuko Ando, Mr. Kurt Herndl and Mr. Birama Ndiaya

We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. We further believe that this is an appropriate case to expand on the Committee's rationale, as it appears in these views and in the Committee's views in communications Nos. 180/194 , *Danning v. The Netherlands* and 182/1984, *Zwaan-de-Vries v. The Netherlands*. a/

While it is clear that article 26 of the Covenant postulates an autonomous right to non-discrimination, we believe that the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied. We note, firstly, that the determination whether prohibited discrimination within the meaning of article 26 has occurred depends on complex considerations, particularly in the field of economic, social and cultural rights. Social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. While the aims of social justice vary from country to country, they must be compatible with the Covenant. Moreover, whatever distinctions are made must be based on reasonable and objective criteria. For instance, a system of progressive taxation, under which persons with higher incomes fall into a higher tax bracket and pay a greater percentage of their income for taxes, does not entail a violation of article 26 of the Covenant, since the distinction between higher and lower incomes is objective and the purpose of more equitable distribution of wealth is reasonable and compatible with the aims of the Covenant.

Surely, it is also necessary to take into account the reality that the socio-economic and cultural needs of society are constantly evolving, so that legislation - in particular in the field of social security - may well, and often does, lag behind developments. Accordingly, article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in that field at all times; instead, it should be seen as a general undertaking

on the part of States parties to the Covenant regularly to review their legislation in order to ensure that it corresponds to the changing needs of society. In the field of civil and political rights, a State party is required to respect Covenant rights such as the right to a fair trial, freedom of expression and freedom of religion immediately from the date of entry into force of the Covenant, and to do so without discrimination. On the other hand, with regard to rights enshrined in the International Covenant on Economic, Social and Cultural Rights, it is generally understood that States parties may need time for the progressive implementation of these rights and to adapt relevant legislation in stages; moreover, constant efforts are needed to ensure that distinctions that were reasonable and objective at the time of enactment of a social security provision are not unreasonable and discriminatory by the socio-economic evolution of society. Finally, we recognize that legislative review is a complex process entailing consideration of many factors, including limited financial resources, and the potential effects of amendments on other existing legislation.

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Notes

a/ See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII, sects. C and D, Views adopted on 9April 1987.

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- *Oulajin and Kaiss v. The Netherlands* (406/1990 and 426/1990), ICCPR, A/48/40 vol. II (23 October 1992) 131 (CCPR/C/46/D/406/1990/426/1990) at paras. 7.3-7.5 and Individual Opinion by Messrs. Kurt Herndl, Rein Müllerson, Birame N'Diaye and Waleed Sadi, 137.

...

7.3 In its constant jurisprudence, the Committee has held that although a State party is not required by the Covenant on Civil and Political Rights to adopt social security legislation, if it does, such legislation and the application thereof must comply with article 26 of the Covenant. The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.3/

7.4 With respect to the Child Benefit Act, the State party submits that there are objective differences between one's own children and foster children, which justify different treatment under the Act. The Committee recognizes that the distinction is objective and need only focus on the reasonableness criterion. Bearing in mind that certain limitations in the granting of benefits may be inevitable, the Committee has considered whether the distinction between one's own children and foster children under the Child Benefit Act, in particular the requirement that a foster parent be involved in the upbringing of the foster, as a precondition to the granting of benefits, is unreasonable. In the light of the explanations given by the State

party, the Committee finds that the distinctions made in the Child Benefit Act are not incompatible with article 26 of the Covenant.

7.5 The distinction made in the Child Benefit Act between own children and foster children precludes the granting of benefits for foster children who are not living with the applicant foster parent. In this connection, the authors allege that the application of this requirement is, in practice, discriminatory, since it affects migrant workers more than Dutch nationals. The Committee...observes…that the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers. The Committee considers that the scope of article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits.

Notes

...

3/ See *Broeks v. The Netherlands*, communication No. 172/1984, and *Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987, paragraphs 12.4; *Vos v. The Netherlands*, Communication No. 218/1986, Views adopted on 29 March 1989, paragraph 11.3; *Pauger v. Austria,* Communication No. 415/1990, Views adopted on 26 March 1992, paragraph 7.2; *Sprenger v. The Netherlands*, Communication No. 395/1990, Views adopted on 31 March 1992, paragraph 7.2.

Individual Opinion by Messrs. Kurt Herndl, Rein Mullerson, Birame N'Diaye and Waleed Sadi

We concur in the Committee's finding that the facts do not reveal a violation of article 26 of the Covenant...[W]e consider it proper to briefly expand on the Committee's rationale...

It is obvious that while article 26 of the Covenant postulates an autonomous right to non-discrimination, the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.

Furthermore it would seem to us that it is essential to keep one's sense of proportion. With

respect to the present cases, we note that the authors are asking for child benefits not only for their own children - to which they are entitled under the legislation of the Netherlands - but also for siblings, nephews and nieces, for whom they claim to have accepted responsibility and hence consider them as dependents. On the basis of the information before the Committee, such demands appear to run counter to a general sense of proportion, and their denial by the government concerned cannot be considered unreasonable in view of the budget limitations which exist in any social security system. While States parties to the Covenant may wish to extend benefits to such wide-ranging categories of dependents, article 26 of the Covenant does not require them to do so.

- *Neefs v. The Netherlands* (425/1990), ICCPR, A/49/40 vol. II (15 July 1994) 120 (CCPR/C/51/D/425/1990) at paras. 7.2-7.4.

...

7.2 The Committee refers to its prior jurisprudence and reiterates that, although a State is not required under article 26 of the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant. The right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. 1/

7.3 In the instant case, the Committee notes that the author's claim that he is a victim of a violation of article 26, is based on the fact that he is sharing a household with his mother and on that basis receives a lower level of benefit under the Social Security Act than he would have if he had shared it with a non-relative or with a relative in respect of whom the regulations under the Act allow evidence of a commercially shared household.

7.4 The Committee observes that benefits under the Social Security Act are granted to persons with low or no income in order to provide for their costs of living. The author himself has conceded that his costs of living are reduced since he is sharing a household with his mother, be this on a commercial basis or on a basis of mutual support...[T]he Committee finds that the different treatment of parents and children and of other relatives respectively, contained in the regulations under the Social Security Act, is not unreasonable nor arbitrary, and its application in the author's case does not amount to a violation of article 26 of the Covenant.

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Notes

1/ See *inter alia* the Committee's Views with regard to Communication No. 395/1990 (*M.T. Sprenger v. The Netherlands*, adopted on 31 March 1992, paragraph 7.2) and No.415/1990

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(*Pauger v. Austria*, adopted on 26 March 1992, paragraph 7.3)

- *Byrne v. Canada* (742/1997), ICCPR, A/54/40 vol. II (25 March 1999) 354 (CCPR/C/65/D/742/1997) at paras. 3, 6.3, 6.4 and 7.

...
3. The authors claim that they are discriminated against because of their status as custodial mothers, in violation of articles 23, paragraph 4, and 26 of the Covenant...
...
6.3 The Committee notes that the authors' main grievance is that as a result of taxation they have paid more towards the maintenance of the child than their former spouses. The Committee observes that the proportional contributions of parents in paying child maintenance are set by the Family Court, not by the tax authorities. In the opinion of the Committee the alleged unequal payments in the authors' cases were the result of the interaction between the child support order providing for the payments and the application of the Income Tax Act. This is to be taken into account by the Court in determining the level of payments. It is not for the Committee to reevaluate the determination of payments by the domestic Courts. In this context, the Committee notes that if the Court did not take the tax consequences into account, as has been suggested by the authors, the authors could have applied for a variance of the order on this basis.

6.4 The Committee concludes that the facts submitted by the authors do not substantiate their claim that they have been a victim of a violation of article 26, nor of articles 23 and 24 of the Covenant.

7. Accordingly, the Committee decides:

(a) that the communication is inadmissible...

- *Young v. Australia* (941/2000), ICCPR, A/58/40 vol. II (6 August 2003) 231 (CCPR/C/78/D/941/2000) at paras. 2.1, 2.2, 9.3, 10.2-10.4, 12 and Individual Opinion of Mrs. Ruth Wedgwood and Mr. Franco DePasquale (concurring), 245.

...
2.1 The author was in a same-sex relationship with a Mr. C for 38 years. Mr. C was a war veteran, for whom the author cared in the last years of his life. He died on 20 December 1998, at the age of 73. On 1 March 1999, the author applied for a pension under section 13 of the Veteran's Entitlement Act ("VEA") as a veteran's dependant. On 12 March 1999, the

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Repatriation Commission denied the author's application in that he was not a dependant as defined by the Act. In its decision the Commission sets out the relevant legislation as follows:

Section 11 of the Act states:

> "dependant, in relation to a veteran (including a veteran who has died), means
>
> (a) the partner;"

Section 5E of the Act defines a "partner, in relation to a person who is a "member of a couple", [as] the other member of the couple."

The notion of couple is defined in section 5E(2):

> "a person is a "member of a couple" for the purposes of this Act if:
>
> (a) the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or
>
> (b) all of the following conditions are met:
>
> (i) the person is living with a person of the opposite sex (in this paragraph called the partner);
>
> (ii) the person is not legally married to the partner;
>
> (iii) the person and the partner are, in the Commission's opinion (...), in a marriage-like relationship;
>
> (iv) the person and the partner are not within a prohibited relationship for the purposes of Section 23 B of the Marriage Act 1961."

The decision reads "The wording of Section 5E (2) (b) (i) - the text that I have highlighted - is unambiguous. I regret that I am therefore unable to exercise any discretion in this matter. This means that under legislation, you are not regarded as the late veteran's dependant. Because of this you are not entitled to claim a pension under the Act."

The author was also denied a bereavement benefit under the Act, as he was not considered to be a "member of a couple".1/

2.2 On 16 March 1999, the author applied to the Veterans Review Board ("VRB") for a review of the Commission's decision. On 27 October 1999, the Board affirmed the Commission's decision, finding that the author was not a dependant as defined by the Act. In its decision the Board outlines the legislation as above and considers that it "has no discretion in its application of the Act and in this case it is bound to have regard to Section 11 of the Act. Hence, under the current legislation, the Board is required to affirm the decision under review in relation to the status of the applicant".

...

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that the author is not a victim as, regardless of the decisions of the domestic authorities, he has not established that he had a *prima facie* entitlement to a pension and therefore his sexual orientation is not determinative of the issue. The Committee recalls that an author of a communication is a victim within the meaning of article 1 of the Optional Protocol, if he/she is personally adversely affected by an act or omission of the State party. The Committee observes that the domestic authorities refused the author a pension on the basis that he did not meet the definition of being a "member of a couple" by not having lived with a "person of the opposite sex". In the Committee's view it is clear that at least those domestic bodies seized of the case, found the author's sexual orientation to be determinative of lack of entitlement. In that respect, the author has established that he is a victim of an alleged violation of the Covenant for purposes of the Optional Protocol.

...

10.2 The author's claim is that the State party's refusal to grant him a pension on the ground that he does not meet with the definition of "dependant", for having been in a same-sex relationship with Mr. C, violates his rights under article 26 of the Covenant, on the basis of his sexual orientation. The Committee notes the State party's argument that had the domestic authorities applied all the facts of the author's case to the VEA it would have found other reasons to dispose of the author's claim, reasons that apply to every applicant regardless of sexual orientation. The Committee also notes that the author contests this view that he did not have a *prima facie* right to a pension. On the arguments provided, the Committee observes that it is not clear whether the author would in fact have fulfilled the other criteria under the VEA, and it recalls that it is not for the Committee to examine the facts and evidence in this regard. However, the Committee notes that the only reason provided by the domestic authorities in disposing of the author's case was based on the finding that the author did not satisfy the condition of "living with a person of the opposite sex". For the purposes of deciding on the author's claim, this is the only aspect of the VEA at issue before the Committee.

10.3 The Committee notes that the State party fails specifically to refer to the impugned sections of the Act (sections 5(E), 5(E) 2 and 11) on the basis of which the author was refused a pension because he did not meet with the definition of a "member of a couple" by

not "living with a member of the opposite sex". The Committee observes that the State party does not deny that the refusal of a pension on this basis is a correct interpretation of the VEA but merely refers to other grounds in the Act on which the author's application could have been rejected. The Committee considers, that a plain reading of the definition "member of a couple" under the Act suggests that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The State party does not contest this. Consequently, it remains for the Committee to decide whether, by denying a pension under the VEA to the author, on the ground that he was of the same sex as the deceased Mr. C, the State party has violated article 26 of the Covenant.

10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.20/ It recalls that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences.21/ It transpires from the contested sections of the VEA that individuals who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfill the definition of "member of a couple" and therefore of a "dependant", for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

...

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

Notes

1/ The author does not make any specific claim on this fact.

...

20/ *Toonen v. Australia* [Case No. 488/1992, Views adopted on 31 March 1994].

21/ *Danning v. the Netherlands* [Case No. 180/1984, Views adopted on 9 April 1987].

Individual Opinion of Mrs. Ruth Wedgwood and Mr. Franco DePasquale (concurring)

Many countries recognize a right of privacy in intimate relationships, enjoyed by all citizens regardless of sexual orientation. In 1994, this Committee grounded a similar right on Article 17 of the Covenant on Civil and Political Rights - finding, in its views on *Toonen v. Australia*, 1/ that Tasmanian penal statutes purporting to criminalize "unnatural sexual practices" amounted to an "arbitrary or unlawful interference with...privacy." In Toonen, the federal Government of Australia represented to the Committee that the Tasmanian criminal law indeed amounted to "arbitrary interference with [Mr. Toonen's] privacy" and "cannot be justified" on policy grounds.2/ Laws penalizing homosexual activity had already been repealed in other Australian states, with the exception of Tasmania, and this Committee's decision seems to have served as a means for Australia to overcome barriers of federalism.

In Toonen, the author had complained that the Tasmanian criminal code did "not distinguish between sexual activity *in private* and sexual activity *in public* and bring[s] private activity *into the public domain*."3/ (Emphasis added.) The Committee's ruling was founded on the right to be left alone, where there are no reasonable safety, public order, health or moral grounds offered by the state party to justify the interference with privacy.

The current case of *Edward Young v. Australia* poses a broader question, where various states parties may have decided views - namely, whether a state is obliged by the Covenant on Civil and Political Rights to treat long-term same-sex relationships identically to formal marriages and "marriage-like" heterosexual unions - here, for the purpose of awarding pension benefits to the surviving dependents of military service personnel. Writ large, the case opens the general question of positive rights to equal treatment - whether a state must accommodate same-sex relationships on a par with more traditional forms of civil union.

On the facts and in the particular posture of this case, the Committee has concluded that the differentiation made by Australia between same-sex and heterosexual civil partners has not been sustained against Mr. Young's challenge. The trespass is not based on a right of privacy under Article 17, but rather on the claimed right to equality before the law under Article 26 of the Covenant.

...

In a case of this moment, it is perhaps surprising that Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under Article 26 of the Covenant.

Australia has offered no views concerning Mr. Young's argument that the distinction made by statute between same sex and heterosexual civil partners is unfounded, and the Committee has essentially entered a default judgment. Under Covenant jurisprudence, a State party must offer "reasonable and objective criteria" for making any distinction on grounds of sex or (according to our "guidance" to the state party in paragraph 8.7 of the Toonen case) on grounds of sexual orientation. Yet, as the Committee notes in paragraph 10.4 of the instant case of Mr. Young, "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced." In every real sense, this is not a contested case.

Many governments and many people of good will share an interest in finding an appropriate moral and legal answer to the issues and controversies of equalizing various government entitlements between same-sex and heterosexual couples, including the disputed claim that there is a trans-jurisdictional right to recognition of gay marriage. There is an equally engaged debate within many democracies on whether military service should continue to be limited to heterosexual persons.

In the instant case, the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other States and other complainants may offer in the future on these questions in the same or other contexts as those of Mr. Young. In considering individual communications under the Optional Protocol, the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.

Notes

1/ *Toonen v. Australia*, Communication No. 488/1992, Views adopted on 4 April 1994.

2/ *Id.*, paragraph 6.2.

3/ *Id.*, paragraph 3.1(a).

- *Althammer et al. v. Austria* (998/2001), ICCPR, A/58/40 vol. II (8 August 2003) 317 (CCPR/C/78/D/998/2001) at paras. 2.1, 2.2 and 10.2.

...

2.1 The authors are retired employees of the Social Insurance Board in Salzburg *(Salzburger Gebietskrankenkasse*). Counsel states that they receive retirement benefits under

the relevant schemes of the Regulations A of Service for Employees of the Social Insurance Board (*Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern*).

2.2 Amongst various monthly entitlements, the Regulations provided for monthly household entitlements of ATS 220 and children's entitlements of ATS 260 per child for those with children up to the age of 27. On 1 January 1996, an amendment to the regulations came into effect which abolished the monthly household entitlement and increased the children's benefits to ATS 380 per child.

...

10.2 The authors claim that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.7/ However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts...was based on objective and reasonable grounds. For these reasons, the Committee concludes that, in the circumstances of the instant case, the abolition of monthly household payments, even if examined in the light of previous changes of the Regulations of Service for Employees of the Social Insurance Board, does not amount to discrimination as prohibited in Article 26 of the Covenant.

Notes

...

7/ See the Committee's general comment No. 18 on non-discrimination and the Committee's Views adopted on 19 July 1995 in Case No. 516/1992 (*Simunek et al. v. the Czech Republic*) (CCPR/C/54/D/516/1992, para. 11.7)

EQUALITY AND DISCRIMINATION - FAMILY

- *Derksen v. The Netherlands* (976/2001), ICCPR, A/59/40 vol. II (1 April 2004) 173 at paras. 1, 2.1-2.4, 9.2, 9.3, 10 and 11.

1. The author of the communication is Cecilia Derksen, a Dutch national. She submits the communication on her own behalf and on behalf of her child Kaya Marcelle Bakker, born on 21 April 1995, and thus 5 years old at the time of the initial submission. She claims that she and her child are the victims of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

2.1 The author shared a household with her partner Marcel Bakker from August 1991 to 22 February 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. On 22 February 1995, Mr. Bakker died in an accident.

2.2 On 6 July 1995, the author requested benefits under the General Widows and Orphans Law (AWW, Algemene Weduwen en Wezen Wet). On 1 August 1995, her request was rejected because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.

2.3 On 1 July 1996, the Surviving Dependants Act (ANW, Algemene Nabestaanden Wet) replaced the AWW. Under the ANW, unmarried partners are also entitled to a benefit. On 26 November 1996 Ms. Derksen applied for a benefit under the ANW. On 9 December 1996, her application was rejected by the Social Insurance Bank (Sociale Verzekeringsbank) on the grounds that "(…) only those who were entitled to a benefit under the AWW on 30 June 1996 and those who became widow on or after 1 July 1996 are entitled to a benefit under the ANW".

2.4 Ms. Derksen's request for revision of the decision was rejected by the Board of the Social Insurance Bank on 6 February 1997. Her further appeal was rejected by the District Court Zutphen (Arrondissementsrechtbank Zutphen) on 28 November 1997. On 10 March 1999, the Central Council of Appeal (Centrale Raad van Beroep) declared her appeal unfounded. With this, all domestic remedies are said to be exhausted.

...

9.2 The first question before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant, because the new legislation which provides for equal benefits to married and unmarried dependants whose partner has died is not applied to cases where the unmarried partner has died before the effective date of the new law. The Committee recalls its jurisprudence concerning earlier claims of discrimination against the Netherlands in relation to social security legislation. The Committee reiterates

that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the State party has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee is of the opinion that the State party was under no obligation to make the amendment retroactive. The Committee considers that the application of the legislation to new cases only does not constitute a violation of article 26 of the Covenant.

9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the

communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 with regard to Kaya Marcelle Bakker in respect of whom half-orphans' benefits through her mother was denied under the ANW.

10. The Human Rights Committee...is of the view that the facts before it relating to Kaya Marcelle Bakker disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide half-orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy. The State party is also under an obligation to prevent similar violations.

- *Petersen v. Germany* (1115/2002), A/59/40 vol. II (1 April 2004) 538 at paras. 2.1-2.5, 6.6-6.8, 6.10 and 7.

...

2.1 The author is the father of a child born out of wedlock on 3 May 1985. He lived with the child's mother, Ms. B, from May 1980 to November 1985. They agreed that the son would bear the mother's surname. After separation from the mother, the author continued to pay maintenance and had regular contact with his son until autumn 1993. In August 1993, the mother married Mr. K., and took her husband's name in conjunction with her own surname, i.e. B.-K.

2.2 In November 1993, the author asked the Youth Office of Bremen whether the mother had applied for a change of his son's surname. By letter of 20 December 1993, he was advised that she had enquired about the possibility, but that no request had been filed yet. In his letter, the competent Youth Office official informed the author that, should such a request be lodged, he would agree to a change of surname, as the stepfather had been living together with the mother and the son for more than one year and since the child fully accepted him. On 30 December 1993, the mother and her husband recorded statements at the Bremen Registry Office, to the effect that they gave their family name (K.) to the author's son. They also filed a document issued by the Bremen Youth Office, on 29 December 1993, on behalf of the son (then 8 years old), according to which he agreed to the change of his surname. The Bremen Registry Office informed the Helmstedt Registry Office accordingly, following which the registrar of the Helmstedt Registry Office added the change of the child's surname to his birth record.

2.3 On 6 April 1994, the author filed an action with the Administrative Court of Bremen

against the Bremen Municipality, complaining that the Bremen Youth Office had failed to hear him about the envisaged change of his son's surname. On 19 May 1994, the Administrative Court of Bremen declared itself incompetent to deal with the action and transferred the case to the District Court of Braunschweig.

2.4 On 21 October 1994, the Braunschweig District Court dismissed the author's claim for rectification of his son's birth record, insofar as the change of his surname was concerned. The Court found that the entry was correct because the child's surname had been changed in accordance with s. 1618 2/ of the Civil Code. It considered that this section did not amount to a violation of the non-discrimination provision of the German Constitution or of article 8 of the European Convention on Human Rights. On balance, s. 1618 of the Civil Code did not affect the equality between children born out of wedlock and children born in wedlock. Rather, in providing for the possibility of having the same surname, s. 1618 ensured that the child's status - born out of wedlock - was not disclosed to the public. As far as procedural matters were concerned, the proceedings for a change of surname in which the natural father did not participate could not be objected to on constitutional grounds. In particular, there was no breach of the author's rights as a natural parent, since his son had never borne the father's surname. The change of surname served the best interests of the child. A right of the natural father to be heard in the proceedings, as argued by the author, without the possibility to block a change of surname would not be effective, as mother and stepfather would have the final say in any event.

2.5 On 4 January 1995, the Regional Court of Braunschweig dismissed the author's appeal, confirming the reasoning of the District Court and holding that there were no indications that the legal provisions applied in the present case were unconstitutional. The change of surname served the interests of the child's well-being, which prevailed over the interests of the natural father.

...

6.6 To the extent that the author claims, under article 26 of the Covenant, that he was discriminated against, in comparison with the child's mother or to fathers of children born in wedlock, the Committee notes that the European Court declared similar claims by the author inadmissible *ratione materiae*, since there was no room for the application of article 14 of the European Convention, as his right to respect to family life was not affected by the decisions in the change of name as well as the compensation proceedings. The Committee recalls its jurisprudence 17/ that, if the rights invoked before the European Court of Human Rights differ in substance from the corresponding Covenant rights, a matter that has been declared inadmissible *ratione materiae* has not, in the meaning of the respective reservations to article 5, paragraph 2 (a), been considered in such a way that the Committee is precluded from examining it.

6.7 The Committee recalls that the independent right to equality and non-discrimination in

article 26 of the Covenant provides greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. 18/ It notes that, in the absence of any independent claim made under the Convention or its relevant Protocols, the European Court could not have examined whether the author's accessory rights under article 14 of the Convention had been breached. Consequently, the author's claims in relation to article 26 of the Covenant have not been considered by the European Court. It follows that the Committee is not precluded by the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol from examining this part of the communication.

6.8 The Committee recalls that not every distinction made by the laws of a State party amounts to a discrimination in the sense of article 26 but only those that are not based on objective and reasonable criteria. The author has not substantiated, for purpose of admissibility, that reasons for introducing s. 1618 into the German Civil Code (para. 2.4 above) were not objective and reasonable. Likewise, the author has not substantiated that the denial of compensation for lost travel expenses amounted to a discrimination within the meaning of article 26. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights.
...
6.10 Insofar as the author alleges that he has been denied access to the German courts, in violation of article 14 of the Covenant, because, unlike fathers of children born in wedlock, he could not contest the decision to change his son's surname, nor claim compensation for the mother's failure to comply with his right of access to his son, the Committee notes that the author had access to the German courts, in relation to both matters, but that these courts dismissed his claims. It considers that he has not sufficiently substantiated, for purposes of admissibility, that his claims raise issues under article 14, paragraph 1, of the Covenant, which could be raised independently from article 26 and do not relate to matters that have already been "considered", within the meaning of the State party's reservation, by the European Court...

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (a), of the Optional Protocol;
...

Notes

...

2/ Pursuant to section 1617 of the German Civil Code in force at the material time, a child born out of wedlock received the surname that the mother was bearing at the time of the child's birth. A subsequent change of the mother's surname as a result of marriage did not affect the child's surname.

Section 1618 of the same Code provided that the mother of a child born out of wedlock and her husband could declare, for the record of a registrar, that the child, who was bearing a surname in accordance with section 1617 and was not yet married, should in future bear their family name. Similarly, the father of the child could declare, for the record of a registrar, that the child should bear his surname. The child and the mother had to agree to the change of the surname, in case that the father wanted to give his surname to the child.

...

17/ See e.g. communication No. 441/1990, *Casanovas v. France*, at para. 5.1.

18/ See communication No. 998/2001, *Althammer v. Austria*, at para. 8.4.

- *Snijders v. The Netherlands* (651/1996), ICCPR, A/53/40 vol. II (27 July 1998) 135 (CCPR/C/63/D/651/1996) at paras. 8.2-8.5. For text of communication, see **EQUALITY AND DISCRIMINATION** - GENERAL.