PROTECTION OF THE FAMILY - MARRIAGE

III. JURISPRUDENCE

ICCPR

- *Mauritian Women v. Mauritius* (35/1978) (R.9/35), ICCPR, A/36/40 (9 April 1981) 134 at paras. 9.2, 9.2(a), 9.2(b)1, 9.2(b)2, 9.2(b)2(i)5, 9.2(b)2,(i)6, 9.2(b)2(i)8, 9.2(b)2(ii)1-9.2(b)2(ii)4, 9.2(c), 10.1 and 11.

  ...
  9.2 In the first place, a distinction has to be made between the different groups of the authors of the present communication. A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility.

  9.2 (a) In this respect the Committee notes that in the case of the 17 unmarried co-authors there is no question of actual interference with, or failure to ensure equal protection by the law to any family. Furthermore there is no evidence that any of them is actually facing a personal risk of being thus affected in the enjoyment of this or any other rights set forth in the Covenant by the laws complained against. In particular it cannot be said that their right to marry under article 23 (2) or the right to equality of spouses under article 23 (4) are affected by such laws.

  9.2 (b) 1 The Committee will next examine that part of the communication which relates to the effect of the laws of 1977 on the family life of the three married women.

  9.2 (b) 2 The Committee notes that several provisions of the Covenant are applicable in this respect. For reasons which will appear below, there is no doubt that they are actually affected by these laws, even in the absence of any individual measure of implementation (for instance, by way of a denial of residence, or an order of deportation, concerning one of the husbands). Their claim to be "victims" within the meaning of the Optional Protocol has to be examined.
  ...
  9.2(b)2(i)5 The protection owed to individuals...is subject to the principle of equal treatment of the sexes which follows from several provisions of the Covenant. It is an obligation of the State parties under article 2(1) generally to respect and ensure the rights of the Covenant "without distinction of any kind, such as...(i.e.) sex"...

PROTECTION OF THE FAMILY - MARRIAGE

9.2(b)2(i)6 The authors who are married to foreign nationals are suffering from the adverse consequences of the statutes...only because they are women. The precarious residence status of their husbands...results from the 1977 laws which do not apply the same measures of control to foreign wives.

...

9.2(b)2(i)8 ...Whether or not the particular interference could as such be justified if it were applied without discrimination does not matter here. Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination. Here it is sufficient, therefore, to note that the present position an adverse distinction is made, affecting the alleged victims in their enjoyment of one of their rights. No sufficient justification for this difference has been given. The Committee must then find that there is a violation of articles 2(1) and 3 of the Covenant, in conjunction with article 17(1).

...

9.2 (b) 2 (ii) 1 At the same time each of the couples concerned constitutes also a "family" within the meaning of article 23 (1) of the Covenant, in one case at least - that of Mrs. Aumeeruddy-Cziffra - also with a child. They are therefore as such "entitled to protection by society and the State" as required by that article, which does not further describe that protection. The Committee is of the opinion that the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions.

9.2 (b) 2 (ii) 2 Again, however, the principle of equal treatment of the sexes applies by virtue of articles 2 (1), 3 and 26, of which the latter is also relevant because it refers particularly to the "equal protection of the law". Where the Covenant requires a substantial protection as in article 23, it follows from those provisions that such protection must be equal, that is to say not discriminatory, for example on the basis of sex.

9.2(b)2(ii)3 It follows also in this line of argument the Covenant must lead to the result that the protection of a family cannot vary with the sex of one or the other spouse. Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them for security reasons...legislation which only subjects foreign spouses of Mauritian women to these restrictions, not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.

9.2 (b) 2 (ii) 4 The Committee therefore finds that there is also a violation of articles 2 (1), 3 and 26 of the Covenant in conjunction with the right of the three married co-authors under article 23 (1).

...

PROTECTION OF THE FAMILY - MARRIAGE

9.2 (c) 2 The Committee considers that restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, i.e. deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of article 25 or to the provisions of the Covenant against discrimination, for example if such interference with opportunity should infringe the principle of sexual equality.

...

10.1 Accordingly, the Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts, as outlined in paragraph 7 above, disclose violations of the Covenant, in particular of articles 2 (1), 3 and 26 in relation to articles 17 (1) and 23 (1) with respect to the three co-authors who are married to foreign husbands, because the coming into force of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, resulted in discrimination against them on the ground of sex.

...

11. The Committees accordingly, is of the view that the State party should adjust the provisions of the Immigration (Amendment) Act, 1977 and of the Deportation (Amendment) Act, 1977 in order to implement its obligations under the Covenant, and should provide immediate remedies for the victims of the violations found above.

- *Lovelace v. Canada* (R.6/24) (24/1977), ICCPR, A/36/40 (30 July 1981) 166 at paras. 17 and 18.

...

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked...The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles...

PROTECTION OF THE FAMILY - MARRIAGE

- *Danning v. The Netherlands* (180/1984), ICCPR, A/42/40 (9 April 1987) 151 at paras. 2.2, 12.1-12.4, 13 and 14.

...

2.2 [Ludwig Gustaaf Danning] states that, as a consequence of an automobile accident n 1979, he became disabled and confined to a wheelchair. During the first year after the accident he received payments from his employer's insurance; after the first year, payments were received under another insurance programme for employees who have been declared medically unfit to work. This programme provides for higher payments to married beneficiaries. The author claims that since 1977 he has been engaged to Miss Esther Verschuren and that they live together in common-law marriage. Therefore he maintains that he should accorded insurance benefits as a married man and not as a single person. Such benefits, however, have been denied to him and he has taken the case to the competent instances in the Netherlands. The Raad van Beroep in Rotterdam (an organ dealing with administrative appeals in employment issues) held in 1981 that his claim was ill-founded; he subsequently appealed to the Centrale Raad van Beroep in Utrecht, which confirmed the decision of the lower instance. He claims that this appeal exhausted domestic remedies.

...

12.1 ...The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject matter is referred to or covered in other international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2 ...The Committee has perused the relevant *travaux préparatoires* of the International Covenant on Civil and Political Rights...which provide a "supplementary means of interpretation"(art. 32 of the Vienna Convention on the Law of Treaties). The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3 For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light

of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4 Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

...

13. The right to equality before the law and to 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.

...

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.

- *Müller and Engelhard v. Namibia* (919/2000), ICCPR, A/57/40 vol. II (26 March 2002) 243 (CCPR/C/74/D/919/2000) at paras. 2.1-2.6, 6.7-6.9 and 8.

...

2.1 Mr. Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken up with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms. Engelhard. The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of adopting Ms. Engelhard's surname. A legal practitioner

informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2 The Aliens Act No. 1 of 1937 (hereinafter named the Aliens Act) Section 9, paragraph 1 as amended by Proclamation A.G. No. 15 of 1989, states that it is an offence to assume another surname than a person has assumed, described himself, or passed before 1937, without the authorisation by the Administrator General or an officer in the Government Service, and such authority has been published in the Official Gazette, or unless one of the listed exceptions apply. The listed exception in the Aliens Act Section 9, paragraph 1 (a), is when a woman on her marriage assumes the surname of her husband. Mr. Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (article 10), his and his family's right to privacy (article 13, paragraph 1), his right to equality as to marriage and during the marriage (article 14 paragraph 1), and his right to have adequate protection of his family life by the State party (article 14 paragraph 3).

2.3 Mr. Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms. Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich were he comes from, contained several pages of the surname Müller, and that there were 11 Michael Müller alone in the phonebook for Munich. He contends that Engelhard is a far more unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr. Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr. Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr. Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about him not being the father.

2.4 Mr. Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that Section 9, paragraph 1 of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the marriage, and with regard to the right to family life.

2.5 Ms. Engelhard filed an affidavit with her husband's complaint, in which she stated that she supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

...

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that 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 26.8/ A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

6.9 In the light of the Committee's finding that there has been a violation of article 26 of the Covenant, the Committee considers that it is not necessary to pronounce itself on a possible violation of articles 17 and 23 of the Covenant.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

_____

Notes

...

8/ See Views *Danning v. The Netherlands*, Case No. 180/1984.

_____

- *Joslin v. New Zealand* (902/1999), ICCPR, A/57/40 vol. II (17 July 2002) 214 (CCPR/C/75/D/902/1999) at paras. 2.1-2.4, 8.2, 8.3, 9 and Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring), 226.

...

2.1 Ms. Joslin and Ms. Rowan commenced a lesbian relationship in January 1988. Since that point, they have jointly assumed responsibility for their children out of previous marriages. In living together, they have pooled finances and jointly own their common home. They maintain sexual relations. On 4 December 1995, they applied under the Marriage Act 1955 to the local Registrar of Births, Deaths and Marriages for a marriage licence, by lodging a notice of intended marriage at the local Registry Office. On 14 December 1995, the Deputy Registrar-General rejected the application.

2.2 Similarly, Ms. Zelf and Ms. Pearl commenced a lesbian relationship in April 1993. They also share responsibility for the children of a previous marriage, pool financial resources and maintain sexual relations. On 22 January 1996, the local Registry Office refused to accept a notice of intended marriage. On 2 February 1996, Ms Zelf and Ms Pearl lodged a notice of intended marriage at another Registry Office. On 12 February 1996, the Registrar-General informed them that the notice could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

2.3 All four authors thereupon applied to the High Court for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage licence and to marry pursuant to the Marriage Act 1955. On 28 May 1996, the High Court declined the application. Observing

inter alia that the text of article 23, paragraph 2, of the Covenant "does not point to same-sex marriages", the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

2.4 On 17 December 1997, a Full Bench of the Court of Appeal rejected the authors' appeal. The Court held unanimously that the Marriage Act, in its terms, clearly applied to marriage between a man and a woman only. A majority of the Court further went on to hold that the restriction in the Marriage Act of marriage to a man and a woman did not constitute discrimination. Justice Keith, expressing the majority's views at length, found no support in the scheme and text of the Covenant, the Committee's prior jurisprudence, the *travaux préparatoires* nor scholarly writing1/ for the proposition that a limitation of marriage to a man and a woman violated the Covenant.

...

8.2 The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

Notes

1/ Harris, D., Joseph, S.: *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford, Oxford University Press, 1995, p. 507 ("It seems clear that

the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2).")

Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring)

We found no difficulty in joining the Committee's consensus on the interpretation of the right to marry under article 23, paragraph 2. This provision entails an obligation for States to recognize as marriage the union of one adult man and one adult woman who wish to marry each other. The provision in no way limits the liberty of States, pursuant to article 5, paragraph 2, to recognize, in the form of marriage or in some other comparable form, the companionship between two men or between two women. However, no support can be drawn from this provision for practices that violate the human rights or dignity of individuals, such as child marriages or forced marriages.

As to the Committee's unanimous view that it cannot find a violation of article 26, either, in the non-recognition as marriage of the same-sex relationships between the authors, we wish to add a few observations. This conclusion should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.

Contrary to what was asserted by the State party (para. 4.12), it is the established view of the Committee that the prohibition against discrimination on grounds of "sex" in article 26 comprises also discrimination based on sexual orientation.a/ And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences.b/ No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.

However, in the current case we find that the authors failed, perhaps intentionally, to demonstrate that they were personally affected in relation to certain rights not necessarily related to the institution of marriage, by any such distinction between married and unmarried persons that would amount to discrimination under article 26. Their references to differences in treatment between married couples and same-sex unions were either repetitious of the

refusal of the State party to recognize same-sex unions in the specific form of "marriage" (para. 3.1), an issue decided by the Committee under article 23, or remained unsubstantiated as to if and how the authors were so personally affected (para. 3.5). Taking into account the assertion by the State party that it does recognize the authors, with and without their children, as families (para. 4.8), we are confident in joining the Committee's consensus that there was no violation of article 26.

_____

Notes

a/ *Toonen v. Australia*, Communication No. 488/1992.

b/ *Danning v. the Netherlands*, Communication No. 180/1984.

_____

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

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.

- *Ngambi v. France* (1179/2003), ICCPR, A/59/40 vol. II (9 July 2004) 558 at paras. 2.1-2.4, 6.3-6.5 and 7.1.

...

2.1 Mr. B. Ngambi states that he married Ms. M.-L. Nébol in Cameroon on 15 January 1983. After engaging in political activity, he was arrested by the police on two occasions and fled Cameroon in 1993. He submitted an application for refugee status in France in 1994.

2.2 On 8 March 1995, the French authorities accorded refugee status to Mr. B. Ngambi and, on 16 May 1995, issued a record of civil status acknowledging his marriage to Ms. M.-L. Nébol.

2.3 Nevertheless, in a decision dated 19 September 1999, the Consul General of France in Douala, Cameroon, denied the application for a visa for Ms. M.-L. Nébol on the ground of family reunification, as the Cameroonian authorities had indicated that the authors' marriage certificate was not genuine. The decision states that the denial did not constitute a disproportionate interference with the right to privacy and to a family life owing to the circumstances indicated above, and to the fact that in practice Ms. M.-L. Nébol and Mr. B. Ngambi had no conjugal life together; the latter had in fact had a relationship with Ms. M.K., with whom he had had a child.

2.4 On 23 May 2001, in a ruling on Ms. M.-L. Nébol's appeal against the decision by the Consul General of France, the Council of State found that the fact that the marriage certificate submitted by the authors was not genuine, and that this circumstance became known subsequent to recognition by the French authorities of the authors' marriage certificate, constituted legal justification for the denial of a visa for Ms. M.-L. Nébol. The Council concluded that, since the authors did not cohabit as spouses, the decision of 19 September 1999 was not a disproportionate interference with the right of the party to respect for private and family life, as guaranteed by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

...

6.3 With regard to the claimed violation of article 23 of the Covenant, the Committee has noted the arguments of the authors and of the State party. Although the authenticity of the authors' "marriage certificate" was not at first questioned either by OFPRA or by the Ministry of Foreign Affairs in a letter dated 30 December 1997, nonetheless, marriage certificate No. 117/83 of 15 January 1983 purporting to be from the municipality of Douala was determined by the municipality on 30 March 1998 to be inauthentic and this report was invoked by the Consul General of France in Douala on 19 September 1999 as a ground for denial of Ms. Nébol's visa application. In addition, the birth certificates supplied by Ms. Nébol to authenticate the family relation of the authors' two claimed sons, Franck Ngambi and Emmanuel Ngambi, as well as her own birth certificate, were also determined by the Consul General to be inauthentic.

6.4 Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term "family", for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect. The Committee notes that the authors submitted to the French authorities documents supposedly attesting to the family relationship, but these documents were determined by the French authorities to

be fabricated. The Committee further notes that the authors have not effectively refuted these findings, thus giving the French authorities sufficient basis to deny the authors' applications for a long-term visa and family reunification. The Committee considers that the authors have not substantiated their allegation that the right to protection of family life has been infringed by the French authorities.

6.5 With regard to the alleged violation of article 17 of the Covenant, that is, interference with private and family life, the Committee notes that the inquiries conducted by the French authorities as to Ms. Nébol's status and family relations followed upon her request for a visa for family reunification, and necessarily had to cover considerations relating to the private and family life of the authors. The Committee considers that the authors have not demonstrated that these inquiries amounted to arbitrary and illegal interference in their private and family life. Nor have the authors substantiated their allegations of pressure and intimidation on the part of the French authorities aimed at undermining their so-called marriage.

...

7.1 Accordingly, the Committee finds the complaints inadmissible under article 2 of the Optional Protocol.