HUMAN RIGHTS COMMITTEE

Hoofdman v. The Netherlands

Communication No 602/1994**

3 November 1998

CCPR/C/64/D/602/1994*

VIEWS

Submitted by: Cornelis Hoofdman (represented by Mr. L. J. L. Heukels, a lawyer in Haarlem)

Alleged victims: The author

State party: The Netherlands

Date of communication: 26 May 1994

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

Meeting on 3 November 1998,

Having concluded its consideration of communication No. 602/1994 submitted to the Human Rights Committee by Cornelis Hoofdman, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Cornelis P. Hoofdman, a citizen of the Netherlands born in 1952. He claims to be a victim of violations by the Netherlands of article 26 of the International Covenant on Civil and Political Rights, as well as of his right to respect for his private and family life, and his right to a fair hearing, as protected by articles 6, paragraph

1, and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He is represented by Mr. L. J. L. Heukels, a lawyer in Haarlem.

Facts as submitted by the author

2.1 The author and his girlfriend, lived together as an unmarried couple from January 1986 until her death, on 14 February 1991. On 26 February 1991, the author applied for a pension or temporary benefit under the General Widows' and Orphans' Act (Algemene Weduwen- en Wezenwet) (AWW). On 26 April 1991, the Social Security Bank (Sociale Verzekeringsbank) (SVB), which is responsible for implementing the AWW, rejected the author's application on the ground that, since he had not been married, he did not meet AWW requirements. The decision was based on articles 8 and 13 of the Act, under which pension entitlements or temporary benefits are only awarded to the widow or the widower of the (insured) spouse.

2.2 On 12 May 1991, the author appealed to the Board of Appeal (Raad van Beroep), arguing that the distinction drawn by the SVB between married and unmarried cohabitants, for purposes of AWW benefits, amounted to prohibited discrimination within the meaning of article 26 of the Covenant. The President of the Board of Appeal, on 2 December 1991, declared the appeal unfounded, relying on a decision taken on 28 February 1990 by the highest court in social security cases, the Central Board of Appeal (Centrale Raad van Beroep) (CRvB), in a case similar to that of the author.

2.3 In that decision (also concerning the AWW), the CRvB pointed out that, further to the Committee's Views on communication No. 180/1984 (Danning v. the Netherlands),[1] it had already decided, in cases concerning the Sickness Benefits Act, that differentiation between married and unmarried cohabitants under Netherlands social security legislation did not amount to prohibited discrimination within the meaning of article 26 of the Covenant. According to the CRvB, the social conditions and views in the field of marriage and cohabitation prevailing at the time in question (1987) had not changed in such a way as to conclude that the restriction laid down in the AWW violated article 26 of the Covenant. In this connection, the CRvB noted that the fact that the legislature, in the light of the recent revision of the social security system, had introduced the principle of equality of treatment of married and unmarried couples who shared a household, did not necessarily mean that the restriction still maintained under the AWW (i.e., that only the widower or widow of the insured spouse was entitled to a pension or temporary benefits) amounted to a prohibited differentiation under article 26 of the Covenant. The CRvB added that, even though discrimination did not arise, the Dutch Government remained, of course, free to strive for the equal treatment of married and unmarried cohabitants.

2.4 On 24 December 1991, the author filed an appeal against the decision of 2 December 1991 with the full Board of Appeal. He argued that the CRvB's findings in the other case were based on the social conditions and views in the field of marriage and cohabitation prevailing in 1987, and that the CRvB had not excluded that those conditions and views could be subject to changes within a short period of time, as a result of which the denial of AWW benefits to unmarried cohabitants would amount to prohibited discrimination within

the meaning of article 26 of the Covenant. The author pointed out that the relevant time in question in his case was 14 February 1991, when his girlfriend died; he contended that at that date changes had occurred in the conditions and views held in society in respect of marriage and cohabitation.

2.5 In this connection, the author referred to the following passages of the Explanatory Memorandum to the proposed new General (Bereaved) Relatives' Act (Algemene Nabestaanden Wet) (ANW), which was discussed in the Lower House in 1990-1991:

- "The General Widows' and Orphans' Act is subject to revision. The changes that have occurred in society since the entering into force [of the Act] in 1959 justify this conclusion";

- "A third reason for revising the AWW is the wish to secure the equal treatment of married and unmarried cohabitants. Through revision of the AWW, shape should be given to the [...] objective not to differentiate between forms of cohabitation";

- "[...] If equal treatment of married and unmarried cohabitants cannot be realized in the ANW, it will result in an incongruity within the social security system. If the ANW is to be excluded, unjustifiable situations could arise. From that perspective, also, the Government considers that the equal treatment of married and unmarried cohabitants under the ANW is necessary."

According to the author, the drafting of the ANW and the view of the Government as laid down in the Explanatory Memorandum to that Act indicated that conditions and views in the field of marriage and cohabitation held in society in 1991 were different from those that prevailed in 1987.

2.6 On 26 May 1992, the Board of Appeal rejected the author's appeal, referring to a judgment of 16 October 1991 of the Central Board of Appeal; in that case, the CRvB had decided that, in October 1991, the restriction in the AWW under which only the widow or widower was entitled to AWW benefits did not yet amount to prohibited discrimination within the meaning of article 26 of the Covenant. The Board of Appeal concluded that, accordingly, the same could be said for the author's case, and that the proposals under the ANW did not make any difference.

2.7 On 29 June 1992, the author appealed to the Central Board of Appeal. He argued that, according to the CRvB's own jurisprudence, the date of decease of the partner with whom the applicant lived together is relevant to the question of whether the difference of treatment under the AWW between married people and unmarried cohabitants constituted prohibited discrimination within the meaning of article 26 of the Covenant; the question of whether the conditions and views held in society in the field of marriage and cohabitation have changed should thus be assessed as of that moment. The author pointed out that the CRvB's judgment of 16 October 1991 concerned a request for AWW benefits of an applicant whose partner had died on 6 February 1988; he contended that, while in 1988 one could still have doubts as to whether relevant changes had occurred in social conditions and views, one could not question this in 1991, since, at that time, the proposed ANW, with its principle of equal

treatment of married and unmarried cohabitants, had been placed before the Lower House; the fact that the ANW had not yet entered into force did not make a difference.

2.8 On 17 June 1993, the Central Board of Appeal confirmed the Board of Appeal's judgment of 26 May 1992. It referred to its earlier jurisprudence (including a judgment of 24 May 1993) on the matter and pointed out that it had already ruled that it was for the legislature to outline which categories of cohabitants were entitled to pensions or benefits after the death of the partner, and that it did not consider it expedient to interfere with the proposed legislation (i.e., the ANW). With this, it is submitted, all domestic remedies have been exhausted.

Complaint

3.1 The author claims that his private and family life has not been respected because he was denied AWW benefits simply because he was not married. He points out that under several other social security acts, unmarried cohabitants are treated as married cohabitants, and that he and his partner fulfilled the criteria used in respect of these acts (joint accommodation and joint contribution to the household costs). In this context, he submits that both he and his partner were unemployed and received unemployment benefits as a "married couple" under the relevant act. However, in order to receive benefits under the AWW, he would have been forced to marry first; according to the author, such an artificial construction constitutes arbitrary interference with his private life.

3.2 The author refers to the grounds he argued before the Board of Appeal and Central Board of Appeal; he reiterates that conditions and views held in society as to marriage and cohabitation have changed, and claims that the unequal treatment under the AWW of married couples and unmarried couples who share a household amounts to prohibited discrimination within the meaning of article 26 of the Covenant.

3.3 The author further argues that he did not receive a fair hearing with regard to the determination of his right to a pension benefit, because the law applied was discriminatory.

3.4 It is submitted that the same matter has not been submitted to the European Commission of Human Rights.

State party's observations and author's comments thereon

4. The State party, by submission of 30 August 1995, raises no objections to the admissibility of the author's claim under article 26 of the Covenant. With regard to his claims under articles 6 and 8 of the European Convention, however, the State party notes that these claims concern another convention than the Covenant, and, moreover, that the author has not submitted these claims to the Dutch courts. The State party concludes therefore that this part of the communication is inadmissible.

5. In his comments on the State party's submission, the author states that his claims under articles 6 and 8 of the European Convention are to be seen in conjunction with his claim

under article 26 of the Covenant, and should therefore be considered admissible.

The Committee's admissibility decision

6.1 At its 57th session, the Committee considered the admissibility of the communication. It noted that the State party had raised no objections to the admissibility of the author's claim under article 26 of the Covenant. The Committee considered that the question whether or not the difference in treatment of the author, as a consequence of his marital status, was unreasonable or arbitrary, should be examined on the merits, in the context of the State party's obligations under article 26 in conjunction with article 23, paragraph 1, of the Covenant. It invited the State party to explain the basis of the differentiation, as well as the different obligations and benefits under the law for married and unmarried couples at the material time.

6.2 The Committee noted the State party's objections to the admissibility of the author's claims of unfair hearing and interference with private and family life. The Committee observed, however, that articles 6, paragraph 1, and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms were similar in contents to articles 14, paragraph 1, and 17 of the Covenant. The Committee recalled that, whereas authors must invoke the substantive rights contained in the Covenant, they were not required, for purposes of the Optional Protocol, necessarily to do so by reference to specific articles of the Covenant.

6.3 The author had claimed that the difference in treatment between married and unmarried couples under the AWW constituted a violation of his right to respect for his private and family life. The Committee noted that the information before it showed that the State party at no time interfered with the author's decision to cohabit with his girlfriend without marrying her, and that the author was free to marry or not to marry. The fact that a freely made decision regarding one's private life may have certain legal consequences in the field of social security could not be seen as constituting arbitrary or unlawful interference by the State party under article 17 of the Covenant. This part of the communication was therefore inadmissible under article 3 of the Optional Protocol, as being incompatible with the provisions of the Covenant.

6.4 As regards the author's claim that he had not had a fair hearing with respect to the determination of his right to a pension benefit, the Committee noted that he had not adduced any information to substantiate, for purposes of admissibility, that the hearings concerning the determination of his pension claim were unfair. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

7. On 3 July 1996, the Human Rights Committee therefore decided that the communication was admissible as far as it might raise issues under article 26, in conjunction with article 23, paragraph 1, of the Covenant.

State party's submission on the merits and the author's comments

8.1 By submission of 6 February 1997, the State party refers to the Committee's decision in communication No. 180/1984 (Danning v. the Netherlands). It explains that in the Netherlands, marriage entails specific legal consequences that do not apply to unmarried cohabitants. The latter are free to choose whether or not to enter into matrimony; if they do, they become subject to a different set of laws. The Dutch Civil Code contains many provisions solely applicable to married couples. For example, a married person is obliged to provide for his or her spouse's maintenance; the spouse is jointly liable for debts incurred in respect of common property; a married person requires the permission of his or her spouse for certain undertakings. Matrimonial law also covers the rights and obligations in case of divorce. Likewise, inheritance law distinguishes between married and unmarried persons. According to the State party, the legal situation that formed the basis of the Committee's decision in Danning was unchanged in 1991, the year in which the author applied for a benefit under the AWW.

8.2 The State party explains that the AWW, which was in force until 1 July 1996, reflected the provisions of the Civil Code. Under the AWW, all insured persons with an income paid contributions and the risk of death was covered only so long as the marriage partner on whose death the entitlement to benefit depended remained insured. The purpose of the AWW, which entered into force on 1 October 1959, was to provide a minimum income for a person's widow who could not be deemed able to support herself by her own earnings. The conditions for an entitlement to pension were that the widow, at the time of her spouse's death (a) had an unmarried child of her own, or (b) was pregnant, or (c) was unfit for work, or (d) was 40 years or older. If none of these conditions were met, the widow was entitled to a temporary benefit.

8.3 On 7 December 1988, the CRvB decided that the restrictions of AWW entitlements to widows was incompatible with article 26 of the Covenant, and since then widowers are entitled to a benefit, under the same conditions as widows, awaiting new legislation.

8.4 The State party maintains that many legal differences remain between marriage and co-habitation and that equal treatment is by no means self-evident and cannot be claimed merely on the basis of a change in the social climate. The State party does not accept that its willingness to incorporate the equal treatment of married persons and cohabitants into legislation implies that it should be obliged to treat these two groups on an equal basis in the absence of, or prior to, the introduction of legislative measures to that effect.

8.5 In this regard, the State party also refers to its submission in communication No. 395/1990 (Sprenger v. the Netherlands) [2] and emphasizes that at no time has it taken a general decision to abolish the distinction in legal status between married and unmarried couples. However, in undertaking an extensive programme of legislation, the State party is responding to shifts in social views on this matter and is aiming to achieve the progressive introduction of equal treatment in the relevant laws. The State party emphasizes, however, that each law is being examined separately to see whether it requires amendment. The State party is of the opinion that although the equal treatment of married and unmarried couples was introduced in tax legislation in 1983 and in certain social insurance and social assistance schemes in 1987 and 1988, this does not mean that the right to equal treatment can be

invoked in respect of other legislation without being formalised by law. In this connection, the State party associates itself with the individual opinion of Messrs. Ando, Herndl and Ndiaye in the Sprenger decision, in which it was stated that article 26 should be seen as a general undertaking on the part of States parties to the Covenant to regularly review their legislation in order to ensure that it corresponds to the changed needs of society.

8.6 In the instant case, the CRvB held that it was up to the legislature to decide whether married and unmarried partners should be treated alike for purposes of widow(er) pensions.

8.7 With regard to the author's argument that he and his partner received unemployment benefit as a married couple, the State party explains that the RWW benefit received by the author was not a social insurance benefit but a social assistance benefit, meant to enable persons without any other means of income to support themselves. It is awarded to persons who have no income or whose income is below the minimum set by the Government. The benefits are paid out of public funds and their amount depends on the actual situation and is means-tested. Married couples, unmarried couples and single persons sharing a home have lower costs and therefore receive a reduced benefit.

8.8 The State party refers to its new legislation, the Surviving Dependants Act, which entered into force on 1 July 1996. It provides for entitlement to surviving dependants who (a) have an unmarried child under the age of 18 who does not belong to another person's household, or (b) are unfit for work, or (c) were born before 1 January 1950. The benefits are means-tested. The State party points out that the author is not entitled to a pension under the new legislation, as he does not fulfil any of the conditions set out in the legislation.

8.9 In this context, the State party points out that the duration of the debate concerning the new legislation (the bill was introduced on 12 March 1991) and the problems that were encountered are evidence that it is by no means manifest that married and unmarried persons should be treated equally, outside the context of an extensive and careful legislative programme.

9. In his comments on the State party's submission, counsel notes that the State party provides general information on the distinction between married and unmarried couples, but fails to explain the specific reasons for the distinction in the AWW. He states that the author had the obligation to pay contributions under the AWW as a married person, but that he did not establish the right to benefit from the AWW as a married person. This is said to constitute discrimination within the meaning of article 26.

10.1 In a further submission, dated 16 March 1998, the State party explains that the AWW is a national insurance scheme ensuring every inhabitant of the Netherlands over 15 years of age. Pensions paid out under the scheme are funded by contributions payable by those insured. Contributions are means-tested, the contribution rate being the same for all the insured. The State party emphasizes that in determining a person's contribution under the scheme, marital status is of no account whatsoever. The State party concludes that no inequality of treatment exists on the basis of marital status in relation to persons insured under the AWW.

10.2 The State party further explains that the AWW makes a distinction between AWW pensions and temporary pensions. The AWW pension is a long-term benefit that is awarded until the person reaches the age of 65. The temporary benefit is a short-term benefit awarded for a maximum of 19 months and confined to widows or widowers who have no unmarried children, who are not pregnant or unfit to work, and have not yet attained 40 years of age. The State party submits that these persons are deemed to be capable of providing for themselves and are thus ineligible for an AWW pension, but they are awarded a temporary benefit to give them time to adjust to the situation.

Issues and proceedings before the Committee

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The issue before the Committee is whether the author is a victim of a violation of article 26 of the Covenant, because he was denied a widower's pension on the basis of his marital status. The Committee notes that on the basis of the information before it, it appears that the author, even if he had been married to his partner rather than cohabitating with her without marriage, would not have been entitled to a pension under the AWW, since he was under 40 years of age, not unfit for work and had no unmarried children to care for. The matter before the Committee is thus confined to the entitlement to a temporary benefit only.

11.3 The author has claimed that he paid contributions under the AWW as a married person, and that the failure to grant him the same rights to benefits as a married person therefore constitutes unequal treatment, in violation of article 26 of the Covenant. The State party has refuted this argument, and stated that the contribution under the AWW was the same for married and unmarried persons alike. The State party has also explained that the AWW was a national insurance, to which all Dutch residents with an income contributed, and that benefits were available, among certain other categories of persons, to married persons whose spouse had died.

11.4 The Committee recalls its 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 has argued, and this has not been contested by the author, that married and unmarried couples are still subject to different sets of laws and regulations. The Committee observes that the decision to enter into a legal status by marriage, which provides under Dutch law for certain benefits and for certain duties and responsibilities, lies entirely with the cohabitating persons. By choosing not to enter into marriage, the author has not, in law, assumed the full extent of the duties and responsibilities incumbent on married persons. Consequently, the author does not receive the full benefits provided for by law to married persons. The Committee finds that this differentiation does not constitute discrimination within the meaning of article 26 of the Covenant. [3]

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

facts before it do not disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

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*/ The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdalla Zakhia.

**/ The text of an individual opinion signed by Committee member Elizabeth Evatt is appended to the present document.

1/ Views adopted on 9 April 1987, during the Committee's twenty-ninth session.

2/ Committee's Views adopted on 31 March 1992.

3/ See also the Committee's Views in communication No. 180/1984, Danning v. the Netherlands, adopted on 9 April 1987.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion by Ms. Elizabeth Evatt (concurring)

While accepting the Committee's decision in this matter, I would like to emphasise that the State party has accepted that cohabitees are to be considered as a family unit for some purposes. This factor needs to be taken into account in examining whether the grounds put forward for maintaining the distinction between married couples and cohabitees are reasonable and objective in regard to the benefit in question. In that regard, I do not find the arguments of the State party based on the legal consequences of marriage or inheritance law to be convincing or of particular relevance in regard to the granting of a benefit designed to alleviate, on a temporary basis the loss of a partner by death. For distinctions between different family groups to be regarded as reasonable and objective, they should be coherent and have regard to social reality.

Elizabeth Evatt (signed)