



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October – 3 November 2005

VIEWS

Communication No. 1238/2004

<u>Submitted by:</u>	G. J. Jongenburger-Veerman (represented by counsel, Mr. F.A.J. Kalberg)
<u>Alleged victim:</u>	The author
<u>State party:</u>	The Netherlands
<u>Date of communication:</u>	7 August 2003 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 26 January 2004 (not issued in document form)
<u>Date of adoption of Views:</u>	1 November 2005

* Made public by decision of the Human Rights Committee

Subject matter: Special widow's pension rights

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Discrimination under article 26 of the Covenant

Articles of the Covenant: 14(1), 26

Articles of the Optional Protocol: 5(2)(b)

On 1 November 2005, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1238/2004. The text of the Views is appended to the present document.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-fifth session

concerning

Communication No. 1238/2004**

Submitted by: G. J. Jongenburger-Veerman (represented by counsel,
Mr. F.A.J. Kalberg)

Alleged victim: The author

State party: The Netherlands

Date of communication: 7 August 2003 (initial submission)

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

Meeting on 1 November 2005,

Having concluded its consideration of communication No. 1238/2004, submitted to the
Human Rights Committee on behalf of G. J. Jongenburger-Veerman under the Optional Protocol
to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication, dated 7 August and 17 October 2003, is Mrs. G. J. Jongenburger-Veerman, a Dutch national, born on 18 July 1911. She claims to be a victim of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Rights (the Covenant). She is represented by counsel. The Optional Protocol entered into force for the Netherlands on 11 March 1979.

Factual background

2.1 In January 1976, the author's 40 year marriage was dissolved by the court upon request by her husband, from whom she lived separated since 1952. The husband was a former employee of the Assistance Corps of Netherlands New Guinea (*Bijstandskorps van burgerlijke rijksambtenaren*) which was dissolved on 5 July 1967. Under the Assistance Corps Act (*Wet op het Bijstandskorps*) of 25 May 1962, all employees of the Assistance Corps enjoyed the status of Dutch public servants. The author's ex-husband died on 25 March 1991.

2.2 The issue of pensions for surviving relatives of former employees of the Assistance Corps of Netherlands New Guinea is not regulated by the Public Servants Superannuation Act (*Algemene Burgerlijke Pensioenwet*) but by special legislation, namely the Pension Scheme Rules and Regulations for Netherlands New Guinea (*Pensioensreglement Nederlands Nieuw-Guinea*) (PRNG), of 29 December 1958. These Rules and Regulations do not provide for pensions to divorced widows of former public servants. However, under a hardship clause contained in article 31 of PRNG, a pension can be granted in special cases for which the Regulations do not provide.

2.3 On 1 January 1966, in light of a change in the divorce legislation, a new section G 4 was introduced in the Public Servants Superannuation Act, providing for a special pension for divorced widows of public servants. On 6 February 1973, Article 8 (a) of the Pensions and Savings Fund Act (*Pensioen en Spaarfondsenwet*) was adopted, providing that all pension regulations should provide the possibility of a special pension for divorced widows. The PRNG was not amended accordingly.

2.4 After the decease of her ex-husband, the author applied to the Minister of the Interior for a special widow's pension with effect from 26 March 1991. On 12 July 1991, the Minister of the Interior rejected the author's application, based on his discretionary power under the hardship clause of Article 31 PRNG. Her objection against that decision was rejected on 16 October 1991. The author's appeal to the Judicial Division of the Council of State (*Afdeling Rechtspraak van de Raad van State*) was dismissed on 18 May 1993.

2.5 On 1 March 1999, the author again applied to the Administration of the Indonesian Pensions Fund (*Stichting Administratie Indonesische Pensioenen*) (SAIP), mandated since 1995 to administer the New-Guinea pensions, to grant her a special widow's pension effective from 26 March 1991, based on an analogous application of section G 4 of the Public Servants Superannuation Act, as well as article 8 (a) of the Pensions and Savings Funds Act. On 29 November 1999, following instructions by the Minister of the Interior who considered that the absence of a right to a special widow's pension was no longer in keeping with the prevailing attitudes in society, the SAIP granted her a special widow's pension with effect from 1 January 1999, pursuant to article 31 PRNG. The author challenged this decision, insofar as it denied her a pension for the period between 26 March 1991 and 31 December 1998. On 2 March 2000, the SAIP rejected her objection.

2.6 The author's appeal to the District Court of The Hague, administrative law section, (*Arrondissementsrechtbank 's-Gravenhage, afdeling bestuursrecht*) in which she also claimed violations of article 1 of the Dutch Constitution (equality principle) and article 26 of the Covenant, was dismissed on 14 August 2000. On 9 August 2001, the Central Appeals Tribunal (*Centrale Raad van Beroep*) in Utrecht dismissed her further appeal, holding that the author's request in 1999 was substantially the same as her request in 1991, and that, because the decision in that case had become final and conclusive, it should be respected unless it was manifestly arbitrary or unless new developments had occurred that would make it unreasonable not to quash it. The Tribunal did not find such circumstances and considered that the difference in treatment was the result of a policy decision of the legislator to distinguish between the overseas and European territories of the State, which was based on reasonable and objective criteria. Similarly, the Court found that the decision to grant the author a special widow's pension with effect from 1 January 1999 only was within the Minister's discretion under article 31 PRNG.

The complaint

3.1 The author alleges a violation of her rights under article 26 of the Covenant, arguing that her application for a special widow's pension should have been determined on the same legal basis as special widow's pensions for the survivors of all other public servants in the Netherlands. In this context she refers to declarations made by the State Secretary for Home Affairs during the public reading in Parliament on 9 May 1962 of the Assistance Corps Act, to the effect that civil servants of the Assistance Corps would be treated analogously to their Dutch counterparts. She argues that following the adoption of section G4 in the Public Servants Superannuation Act in 1966, the PRNG should have been amended accordingly, as this showed the acceptance of a divorced survivor's right to a (partial) widow's pension.

3.2 With reference to the Human Rights Committee's jurisprudence that it is not for the Committee to review the facts and evidence that were brought before the courts of the State party, the author argues that this should not be an obstacle in her case, as the Judicial Division of the Council of State which decided on her appeal in 1993 is not an independent and impartial tribunal, since it advised the Minister of the Interior to adopt the pertinent legislation which distinguishes between widows of former employees of the Assistance Corps, on one hand, and those of other public servants, on the other hand.¹ The author concludes that the lack of objective impartiality of the Judicial Council is thus in violation of article 14, paragraph 1, of the Covenant. Moreover, the author submits that the Judicial Council was not competent to deal with her appeal against the Minister's decision of 16 October 1991, as the Council of Appeal (*Raad van Beroep*) would have been the competent court to deal with appeals relating to public servants, including former employees of the Assistance Corps. Instead of directing her to the competent tribunals, the advice on applicable remedies in the Minister's decision had falsely indicated the Judicial Council as the competent appeals tribunal. The decision of the Judicial Council should thus be considered null and void.

¹ In this context, the author refers to the *Procola v. Luxembourg* judgment of the European Court of Human Rights, Series A, vol. 326.

3.3 The author claims that she has exhausted domestic remedies, as no further appeal is available from the judgement of the Central Appeals Tribunal, and that the same matter is not being examined under another procedure of international investigation or settlement.

State party's submissions

4.1 By submission of 23 March 2004, the State party argues that the claim under article 14 of the Covenant is inadmissible because the author has not raised this issue in the domestic proceedings and thus failed to exhaust domestic remedies in this respect.

4.2 By submission of 24 July 2004, the State party explains that the author could have challenged the lack of impartiality of the Council of State in her notice of appeal or in her pleading, but instead she raised the issue eleven years after her case was heard. The State party further argues that the author has failed to substantiate her claim that there was a lack of independence and impartiality. The State party explains that the advisory and judicial tasks are carried out by different departments within the Council and that all members of the Council are appointed for life and that their independence is guaranteed like for members of other judicial bodies.² Likewise, the author's argument that the Council of State was not competent to deal with her claims could have been raised at the time. The State party concludes that this part of the communication should be declared inadmissible or alternatively ill-founded.

4.3 With regard to the author's claim that she should be treated equally with widows of former civil servants in the Netherlands, the State party explains that, after Dutch divorce law was reformed in 1971, the legislator purposely made no provision in the PRNG in 1971 for the specific group of widows to which she belongs. This position was explained in a letter from the Minister to Parliament on 19 August 1971. The State party states that upon the transfer of administrative responsibility for the former overseas territories of the Dutch East Indies and New Guinea, the Netherlands undertook to award and pay pensions to widows of former civil servants in these territories. Under the agreement regulating the transfer, the Netherlands guaranteed entitlements as they existed at the time of the transfer. Entitlements for a widow's pension at the time were to the woman to whom the deceased was married before age 65 and to whom he was still married at the time of his death. The State party thus argues that its obligations with regard to widow's pensions under these schemes are therefore limited to rights and entitlements accrued some time ago. An amendment of the regulations in line with the revised divorce law would have entailed a departure from the policy followed hitherto and moreover infringed the rights of the last wife/widow, who no longer would have been entitled to the full pension. According to the State party, the problem of sharing entitlements among previous wives was not an issue in the introduction of divorce law into Dutch pension schemes. The State party thus argues that in this sense the widows/wives of former civil servants of overseas territories were not in the same position as the widows/wives of civil servants covered by a Dutch pension scheme. The State party adds that it was recognised that the court establishing the financial arrangements in a divorce case could take this situation into account.

² The State party refers to a recent judgement by the ECHR (*Kleyn and others v. the Netherlands*, 6 May 2003) where a complaint about the alleged lack of impartiality of the Administrative Jurisdiction Division of the Council was declared manifestly unfounded.

4.4 When considering the author's case, the Judicial Division of the Council of State accepted the Minister's arguments that the difference in treatment did not infringe the right to equality since the cases in question were not the same as they related to different categories of civil servants. Moreover, it was considered relevant that, when the author's marriage was dissolved, the loss of entitlement to a widow's pension under the PRNG was taken into account in that her husband made provision for her, which the court considered to be reasonable.

4.5 The State party explains that the Minister's decision in 1999 to award the author a special widow's pension did not stem from the above arguments ceasing to be valid, but was rather prompted by the fact that the prevailing attitudes towards married women's pension entitlements had moved on to such an extent as to be incompatible with the lack of entitlement to special widow's pension. The basis of the award was not the principle of equal treatment but the hardship clause in the PRNG.

4.6 The State party therefore concludes that there has been no breach of the principle of equality contained in article 26 of the Covenant.

Author's comments

5.1 By letter of 14 September 2004, the author comments on the State party's observations and maintains that article 14 of the Covenant has been violated because the Judicial Division of the Council of State was not competent to decide on her appeal in 1993. She moreover maintains that it lacked objective impartiality.

5.2 As to the State party's arguments why the difference in treatment does not constitute a violation of the rights to equality, the author takes issue with the State party's reference to the situation of former civil servants in the Dutch East Indies. She explains that there is a difference in legal status between the former civil servants in the East Indies and the members of the Assistance Corps New Guinea. The former are subject to an agreement with Indonesia whereas the status of the latter was laid down in the Assistance Corps Act of 25 May 1962 and regulated by Dutch law. She argues therefore that the PRNG is a Dutch pension scheme and not, as the State party suggests an overseas pension scheme.

5.3 The author recalls that the PRNG was drafted in 1957-58 when the concept of special widow's pension had not yet been introduced into Dutch law. She states that the PRNG reflects Dutch law, and especially the Public Servants Superannuation Act, as it was at the time. According to the author, there was therefore no reason not to amend it accordingly when the special widow's pension was introduced into the Public Servants Superannuation Act in 1966 or at the latest in 1973 when the special widow's pension was made obligatory for all pension schemes. She states in this respect that a number of other amendments have been introduced in the PRNG to adapt it to developments in Dutch legislation, for instance to expand the notion of orphans entitled to a pension.

5.4 The author recalls that she was married throughout the period in which her husband worked in New Guinea and that all premiums were paid for the widow's pension, to which no one else could have been entitled than she. The adaptation of the PRNG would have had no

international consequences, unlike the adaptation of the pensions for the former Dutch East Indies civil servants. She maintains therefore that the failure to grant her a special widow's pension based on equality with all other divorced widows under Dutch law constitutes a violation of article 26 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5 paragraph 2(a) of the Optional Protocol.

6.3 The Committee has taken note of the State party's objection to the admissibility of the author's claim under article 14 of the Covenant, for failure to exhaust domestic remedies in this respect. The Committee further notes that the author in her comments has not raised any arguments to show that these domestic remedies were not available or not effective. The information before the Committee shows that the author has not raised the question of the lack of impartiality or the lack of competence of the Council of State at the time that her appeal was heard. The Committee finds therefore that this part of the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.4 In the absence of any further obstacles to the admissibility of the communication the Committee declares the communication admissible with regard to the remaining claim under article 26 of the Covenant.

Consideration of the merits

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

7.2 The author has claimed that the failure to grant her a special widow's pension over the years 1991 – 1998 is in violation of article 26 of the Covenant by the State party. The State party has argued that the distinction made in the relevant legal provisions relates to different categories of civil servants. It has moreover argued that the fact that the author would lose her entitlement to a widow's pension was taken into account at the time of her divorce and that arrangements were made to compensate this loss, which the Court at the time considered reasonable, and the author has not challenged this part of the State party's observations. The Committee recalls its jurisprudence that not every differentiation based on the grounds listed in Article 26 of the

Covenant amounts to discrimination, as long as it is based on reasonable and objective grounds³. In the circumstances of the present case, the Committee finds that the distinction between Dutch widows of former employees of the Assistance Corps of Netherlands New Guinea and widows of other former Dutch civil servants is not based on any of the relevant characteristics enumerated in Article 26 nor amounts to other status in the sense of this article. Furthermore, the material before the Committee, in particular references to the reasons presented to the legislator in 1971 why the PRNG should not be amended (para 4.3 above), does not disclose a lack of reasonableness and objectivity. Therefore, the failure to grant the author a pension from 1991 to 1998 does not constitute a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

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

³ See inter alia the Committee's jurisprudence in *Broeks v. the Netherlands* (CCPR/C/29/D/172/1984, para. 13), *Zwaan – de Vries v. the Netherlands* (CCPR/C/29/D/182/1984, para.13), *H. Vos v. the Netherlands* (CCPR/C/35/D/218/1986, para 11.3), *Pauger v, Austria* (CCPR/C/44/D/415/1990, para 7.3), *Müller and Engelhard v. Namibia* (CCPR/C/74/D/919/2000, para 6.7) and *Derksen v. the Netherlands* (CPR/C/80/D/976/2001, para. 9.2)