



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Seventy-first session
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VIEWS

Communication No. 846/1999

Submitted by: Mrs. Gertruda Hubertina Jansen-Gielen (represented by
Mr. B.W.M. Zegers)

Alleged victim: The author

State party: The Netherlands

Date of communication: 7 August 1998 (initial submission)

Prior decisions: Special Rapporteur's rule 91 decision, transmitted to the
State party on 21 January 1999 (not issued in document
form)

Date of adoption of Views: 3 April 2001

On 3 April 2001, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 846/1999. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

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**

Seventy-first session

concerning

Communication No. 846/1999

Submitted by: Mrs. Gertruda Hubertina Jansen-Gielen (represented by
Mr. B.W.M. Zegers)

Alleged victim: The author

State party: The Netherlands

Date of communication: 7 August 1998 (initial submission)

Date of decision on
admissibility and adoption
of Views: 3 April 2001

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

Meeting on: 3 April 2001

Having concluded its consideration of communication No. 846/1999 submitted to the
Human Rights Committee by Mrs. Gertruda Hubertina Jansen-Gielen, under the Optional
Protocol to the International Covenant on Civil and Political Rights,

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella, Mr. Maxwell Yalden.

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 1997, is Gertruda Maria Hubertina Jansen-Gielen, a Dutch citizen, born on 21 November 1940. She claims to be a victim of a violation by the Netherlands of articles 14, 17 and 19 of the Covenant on Civil and Political Rights. She is represented by Mr. B.W.M. Zegers, legal counsel.

The facts as submitted

2.1 The author used to work as a teacher at the Roman Catholic primary school Budschop in Nederweert. She was employed by a private association.

2.2 On 20 December 1989, the Director of the General Civil Pension Scheme (Algemeen Burgerlijk Pensioenfonds), which is a private scheme, declared the author 80 per cent disabled. This decision was based on a psychiatrist's report established in November 1989.

2.3 The author appealed this decision, but her appeal was dismissed by the District Court of the Hague on 24 September 1992. From the Court's decision, it appears that the author was frequently absent from work for reasons of health, from October 1987 to October 1988, and as of October 1988, did not report to work at all. The psychiatric report showed that her absence was caused by a serious work conflict, with which she could not cope.

2.4 The author then appealed to the Central Appeals Tribunal (Centrale Raad van Beroep), the highest instance in pension cases. In September 1994, she changed counsel. By letter of 26 September 1994, received by the Tribunal on 27 September 1994, the new counsel addressed to the Tribunal a psychological report, refuting the conclusions of the first expert report. The hearing at the Central Appeals Tribunal took place as scheduled on 29 September 1994. In its judgement of 20 October 1994, the Central Appeals Tribunal dismissed the author's appeal. It considered that it could not take into account the expert report submitted by the author because of its late presentation. It appears from the judgement that the Tribunal considered that the defending party would be unreasonably hindered in its defence if the document were to be allowed. In reaching its decision the Tribunal also referred to the provisions of article 8:58 of the (new) General Administrative Law.

2.5 According to the author, the General Administrative Law came into force on 1 January 1994, but, pursuant to article 1 (3) of the law, does not apply to the author's case, since she appealed before 1 January 1998¹. According to the old administrative procedure, no deadline for the submission of a report existed, and the report should thus have been considered as having been presented in time.

2.6 The author moreover points out that, in the summons for the hearing of 29 September 1994, the Tribunal did not advise her that she could submit new documents only up to ten days before the date of the hearing. Further, it is argued that in practice even under the new law, late submission of documents is accepted as long as it does not seriously affect the other party's rights.

The complaint

3.1 The author argues that the Tribunal's failure to take the expert report into account violates her right to provide evidence, since it prevented her from refuting the other party's arguments as to her ability to work. She claims that this constitutes a violation of article 14, since she did not receive a fair hearing.

3.2 She also claims a violation of article 17 of the Covenant, as the wrongful decision that she is more than 80 per cent disabled and cannot be appointed in any job, affects her private life (physical and moral integrity) as well as her reputation.

3.3 She further claims that the underlying reason to have her declared disabled was the fact that her traditional Roman Catholic attitude was not appreciated by the school management, in violation of article 18 of the Covenant.

The State party's submissions

4.1 By submission of 22 March 1999, the State party challenges the admissibility of the communication because the author has failed to refer in the domestic proceedings, even implicitly, to the Covenant rights she now claims violated. The State party argues that the communication should be declared inadmissible for non-exhaustion of domestic remedies.

4.2 Further, the State party argues that the author has failed to substantiate her complaint that the reason behind her being declared incapable of work was related to her traditional catholic beliefs, and that this part of her communication should be declared inadmissible under article 2 of the Optional Protocol.

5.1 By further submission of 1 September 1999, the State party explains that, in the course of the author's appeal against the Pension Fund's decision to declare her more than 80 per cent disabled, a hearing was scheduled before the Central Appeals Tribunal (Centrale Raad van Beroep) on 29 September 1994. On 26 September 1994, the author's present counsel notified the Tribunal that he was replacing the author's former counsel and he enclosed a further psychological report to challenge the psychiatric report upon which the Fund based its decision. The Tribunal, however, did not append the psychological report to the case file as it was submitted late.

5.2 With regard to the author's claim that the Tribunal's decision not to append the psychological report to the case file deprived her of a fair hearing, the State party recalls the Committee's jurisprudence that it is generally for the Courts of States parties and not for the Committee to review the facts and evidence presented to and evaluated by the domestic courts. The State party contests that the fact that the report was not taken into account made the

proceedings manifestly arbitrary or constituted a denial of justice. In this context, the State party explains that the introduction of the General Administrative Law on 1 January 1994 led to an amendment to procedural law. The old law did not mention a time frame and the new Act now provides that parties may submit documents up to 10 days before a hearing. In accordance with transitional law, the old law was applicable in the hearing of the author's case.

5.3 According to the State party, the registrar's office at the Central Appeals Tribunal received the letter and enclosure from the author's counsel only two days before the hearing. Counsel did not explain why the document was submitted so late. In the absence of a specific rule, the Tribunal judged the admissibility of the document in question in the light of the principles of procedural due process, one of which requires that proceedings be conducted in such a way that neither party is unreasonably obstructed in conducting its case. The Tribunal concluded that appending documents to the case file at that stage of the proceedings would constitute an unreasonable obstruction.

5.4 The State party submits that it is a general principle of the Dutch law of administrative procedure, and one that must have been known to counsel, that no document may be admitted in proceedings if the other party has had no opportunity to take note of it within a reasonable time. Counsel could have requested an adjournment to give the other party and the Tribunal time to study the document. He chose not to do so and thus intentionally took the risk that the report, being submitted late, would not be appended to the file.

5.5 The State party denies that the Tribunal's decision was based on the new Act. According to the State party, the Court made reference to the new Act only to illustrate the general rule of due process that parties should have time to prepare themselves properly for a hearing. The author's rights have thus not been violated in this respect.

5.6 With respect to the author's claim under article 17, the State party states that the review of the author's ability to work was lawful under the Superannuation Act, since the author had been absent due to illness. In respect to the author's claim that her absence was due to a labour conflict and not to illness, the State party refers to the psychiatric report on which the Fund based its decision. This report concludes that the author was unable to cope with the conflict that had arisen at work. According to the State party, the Fund's decision was thus not unlawful.

5.7 On the question of whether the alleged interference was arbitrary, the State party refers to the judgement of the Central Appeals Tribunal, which acknowledges that special care should be given to avoid abusing invalidity pensions in circumstances like the author's. The Tribunal concluded that the Fund's decision had been careful. On this basis, the State party denies that the interference was arbitrary.

5.8 Similarly, the State party denies that the declaration of invalidity constituted an unlawful attack on her reputation. In this context, the State party recalls that the decision was lawful and that it was not based on incorrect facts. According to the State party, a person's reputation can be impaired only by an attack accessible to the public². It states that the declaration of unfitness for work was only sent to the parties directly concerned.

5.9 In respect to the author's claim under article 18, the State party refers to its observations on admissibility and argues that this claim lacks any substantiation, and that no violation occurred.

Author's comments on the State party's submission

6.1 Counsel reiterates that the Tribunal's failure to append the report to the case file made the proceedings manifestly arbitrary and constituted a denial of justice. He notes that since the old administrative law was applicable, the documents were legally submitted in time. The fact that the Tribunal only received the documents two days before the hearing cannot be considered an unreasonable obstruction in conducting the case. According to counsel, there was enough time to read the report carefully. Further, the Tribunal has the competence to adjourn the hearing and could have done so if it considered that more time was needed to study the document. Moreover, counsel argues that the fact that the Tribunal quoted the new Act can only be seen as a pretext for not appending the report.

6.2 Counsel maintains that the author's absence from work was due to a labour dispute, not to illness. The report upon which the Fund's decision was based was refuted by the report which the Tribunal did not allow. The Superannuation Act was abused in order to settle a labour dispute and the interference was thus unlawful. Moreover, the new psychological report, which was not appended to the case file, shows that the declaration that the author was unfit for work was based on incorrect facts. The declaration thus interfered with the author's privacy and undermined her physical and moral integrity as well as her reputation. In this context, counsel argues that the declaration is accessible to the public, because the hearings in the Central Appeals Tribunal are public.

6.3 Counsel further argues that the State party allows a practice where healthy people who hold politically incorrect opinions, as in the author's case a traditional Roman Catholic opinion, are expelled from participating in the social-employment process. According to counsel, the new psychological report showed that the author was able to cope with the labour dispute and was not unfit for work. According to counsel, therefore, the only reason why she was declared unfit for work was the fact that her traditional Roman Catholic attitude was not appreciated by the Roman Catholic management and they wanted to get rid of her. Counsel alleges that the Dutch authorities systematically try to suppress the expression of the traditional Roman Catholic teaching, for example by starting criminal investigations against Roman Catholic laymen or priests when they publicly put forward the traditional Roman Catholic teaching. Counsel maintains that the labour law was abused in the author's case to suppress the expression of her Roman Catholic beliefs in violation of article 18 of the Covenant.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 With regard to the author's claims that she is a victim of a violation of articles 17 and 18 of the Covenant because she was allegedly wrongfully declared unfit for work, the Committee

notes that the author has not provided sufficient elements to substantiate her claims, for purposes of admissibility. The Committee notes that the author's statements and allegations in this respect have been very general and that she has not brought these issues to the attention of the domestic tribunals. This part of the author's communication is therefore inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

7.3 With regard to the author's claim under article 14, the Committee notes that all available domestic remedies have been exhausted and that there are no other objections to the admissibility of the claim. Accordingly, the Committee declares the communication admissible insofar as it may raise an issue under article 14 of the Covenant. It proceeds without delay to the consideration of the merits of this claim.

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

8.2 The author has claimed that the failure of the Central Appeals Tribunal to append the psychological report, submitted by her counsel, to the case file two days before the hearing, constitutes a violation of her right to a fair hearing. The Committee has noted the State party's argument that the Court found that admission of the report two days before the hearing would have unreasonably obstructed the other party in the conduct of the case. However, the Committee notes that the procedural law applicable to the hearing of the case did not provide for a time limit for the submission of documents. Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant.

9. 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 reveal a violation by The Netherlands of article 14, paragraph 1 of the Covenant.

10. Pursuant to article 2 paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

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

Separate, concurring, opinion of David Kretzmer and Martin Scheinin

While we agree with the Committee's conclusion, as set out in paragraph 8.2 of its Views, that there was a violation of article 14, paragraph 1, in the present case, we differ in the reasons for this decision.

It is generally for the domestic courts to decide on admissibility of documents in court proceedings and the procedure for their submission. While at the time of the author's case before the domestic courts there was no provision in the law setting time-limits for the submission of documents, the State party has argued that under the domestic law of administrative procedure no documents could be submitted in proceedings unless the other party would be afforded an opportunity to take note of them within reasonable time. This has not been contested by the author. However, the State party has offered no explanation why, given the centrality of the report to the author's case, the court did not take measures to allow consideration of the report by the other party rather than simply ignoring it. In these particular circumstances, we agree that the author's right to a fair determination of her rights in a suit of law, protected under article 14, paragraph 1, of the Covenant, was violated.

(Signed): David Kretzmer

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

Notes

¹ The Central Appeals Tribunal, at the beginning of its judgement of 20 October 1994, indicates that the appeal has been considered on the basis of the legal provisions in force before the entry into force of the General Administrative Law.

² The State party cites Nowak, CCPR commentary, page 306, paragraph 42.
