

G. Communication No. 218/1986, Hendrika S. Vos v. The Netherlands
(Views adopted on 29 March 1989 at the thirty-fifth session)

Submitted by: Hendrika S. Vos (represented by
M. E. Diepstraten)

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 23 December 1986 (date of initial letter)

Date of decision on admissibility: 24 March 1988

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

Meeting on 29 March 1989,

Having concluded its consideration of communication No. 218/1986, submitted to the Committee by Hendrika S. Vos 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 by the State party,

Adopts the following:

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

1. The author of the communication (initial letter dated 23 December 1986 and subsequent letters dated 5 and 26 March 1987 and 3 January 1989) is Hendrika S. Vos, a citizen of the Netherlands, residing in that country. She claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights by the Government of the Netherlands. She is represented by counsel.

2.1 The author states that since 1 October 1976 she had received an allowance from the New General Trade Association under the General Disablement Benefits Act (AAW), but that in May 1979, following the death of her ex-husband (from whom she had been divorced in 1957), payment of the disability allowance was discontinued, in accordance with article 32, subsection 1 (b), of AAW, because she then became entitled to a payment under the General Widows and Orphans Act (AWW). Under the latter, she receives some 90 guilders per month less than she had been receiving under AAW.

* The text of an individual option submitted by Messrs. Francisco Aguilar Urbina and Bertil Wennergren is appended.

2.2 The author states that she first challenged the decision of the New General Trade Association before the Arnhem Appeals Court, but her claim of being a victim of discrimination was rejected on 10 March 1980. Thereupon, she lodged an objection with the same Appeals Court, which rejected it as unfounded by decision of 23 June 1981. A further appeal was taken to the Central Appeals Court in which the author invoked the direct application of article 26 of the Covenant. The court decided against her claim on 1 November 1983. Thus domestic remedies are said to be exhausted.

2.3 The author had argued before the Netherlands Courts that, whereas a disabled man whose (former) wife dies retains the right to a disability allowance, article 32 of AAW makes an improper distinction according to sex, in that a disabled woman whose (former) husband dies does not retain the right to a disability allowance. Subsection 1 (b) of this article provides:

"1. The employment disability benefit will be withdrawn when:

"...

"(b) a woman, to whom this benefit has been granted, becomes entitled to a widow's pension or a temporary widow's benefit in compliance with the General Widows and Orphans Law."

In her specific case she claimed that the application of the law was particularly unjust because she had been divorced from her husband for 22 years and had been providing for her own support when she became disabled. Thus she claims that she should be treated primarily as a disabled person and not as a widow.

2.4 In rejecting the author's claim that she is a victim of discrimination under article 26 of the Covenant, the Central Appeals Court, in its decision of 1 November 1983, stated:

"From the wording of these two articles (articles 26 and 2 (1) of the Covenant), taken conjointly, it is apparent that article 26 is not solely applicable to the civil and political rights that are recognized by the Covenant. In answer to the question whether this article is also of significance in connection with a social security right, as in dispute here, the Court expresses the following consideration:

"In addition to the Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights was concluded at the same time and place. The Court is of the opinion that the text and the import of the two Covenants under consideration here, and the intentions of the States involved therein, must be taken conjointly, because from the history of the conclusion of these Covenants it is apparent that the initial plan to conclude a single covenant was abandoned on the grounds that economic, social and cultural rights - in contrast to civil and political rights - can generally speaking only gradually be realized by means of legislation and other executive measures. That the States involved in those Covenants proceed from this distinction is also apparent from the fact that the Covenant on Economic, Social and Cultural Rights merely provides for a so-called reporting system with respect to the fulfilment of the rights recognized therein, whereas the Covenant on Civil and Political Rights also includes an inter-State complaints system (regulated in article 41 et seq. of the Covenant) and an

individual complaints system (regulated in the Optional Protocol to the Covenant). Distinguishing criteria connected with existing social structures which appear also in social security regulations and which are possibly to be regarded as discriminatory, such as man/woman and married/single, can only gradually be done away with by means of legislation ... On the basis of the foregoing, the significance of article 26 of the International Covenant on Civil and Political Rights in connection with a social security right as in dispute here must be denied."

2.5 The author claims that the Central Appeals Court incorrectly interpreted the scope of article 26 of the International Covenant on Civil and Political Rights and asks the Committee to find that the cessation of the payment to her of an AAW allowance was a form of discrimination based on sex and marital status in contravention of article 26 of the Covenant.

3. By its decision of 18 March 1987, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication.

4. In its submission dated 25 June 1987, the State party reserved the right to submit observations on the merits of the communication which might turn out to have an effect on the question of admissibility. For this reason the State party suggested that the Committee might decide to join the question of the admissibility to the examination of the merits of the communication.

5. The author's deadline for comments on the State party's submission expired on 4 September 1987. No comments were received from the author.

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

6.2 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In this connection the Committee noted that the author's statement that domestic remedies had been exhausted remained uncontested.

7. On 24 March 1988, the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4 (2) of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it.

8.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 28 October 1988, the State party, before discussing the merits of the case, points out that it has taken note of the views of the Committee in communications

CCPR/C/29/D/172/1984, CCPR/C/29/D/180/1984 and CCPR/C/29/D/182/1984 with respect to the applicability of article 26 of the Covenant in the field of social security rights and that it reserves its position, notwithstanding the fact that this aspect is not addressed in its submission.

8.2 In discussing the merits of the case, the State party elucidates first the relevant Netherlands legislation as follows:

8.3 "Netherlands social security legislation consists of employee insurance schemes and national insurance schemes; as employee insurance schemes are not of relevance to the present case, they will be disregarded. The aim of national insurance schemes is to insure all residents of the Netherlands against the financial consequences of certain contingencies. The national insurance schemes concerning survivors, old age and long-term disability guarantee payment of a benefit related to the statutory minimum wage. The entitlements concerned are gross benefits. They are set at such a level that, after tax and social insurance premiums have been deducted from them, net benefits are sufficient to enable the beneficiary to subsist."

8.4 "The AAW of 11 December 1975 created a national insurance scheme concerning long-term disability; under the terms of the Act, anybody who has been disabled for longer than one year is entitled to a basic benefit. If the beneficiary was employed full-time before becoming unfit for work, full benefit is paid (equivalent to the subsistence minimum). If the beneficiary is only partially disabled, the benefit is reduced proportionately; the amount of benefit payable is also based on the number of hours per week worked before the beneficiary became disabled. If the amount of AAW benefit payable is less than the subsistence minimum, as will often be the case if the claimant is only partially disabled or was working part-time before becoming disabled, supplementary benefit can be paid under the National Assistance Act (ABW) or Supplements Act (TW)."

8.5 "The AWW of 9 April 1956 created a national insurance scheme which entitles widows and orphans to receive benefit related to the statutory minimum wage if their husband or father dies. The rationale underlying the Act is that after a married man dies his widow may well have insufficient means of subsistence. At the time when the Act was passed, it was felt that, if there were good reasons why the widow should not be expected to earn her own living (for example, because she still had children to look after or because she was too old), it was desirable to pay her benefit. In some cases, women are eligible for the AWW benefit even if they have been divorced from the deceased."

8.6 "At the time when the General Widows and Orphans Act was passed, it was customary for husbands to act as bread-winners for their families, and it was therefore desirable to make financial provision for dependants in the event of the bread-winner's premature death. In recent years more married women have been going out to work and households consisting of unmarried people have increasingly been granted the same status as traditional families. This being so, the Government has been studying since the early 1980s ways of amending the AWW; one of the questions being examined is whether the privileged position enjoyed by women under the Act is still justified nowadays."

8.7 "It is too early to say what provisions the future Surviving Dependents Act will contain. As the Netherlands is a member of the European Community, it will in all events comply with the obligations arising from a European Community directive

which is currently in preparation concerning sexual equality with regard to provision for survivors; it is expected to be many years before the directive enters into force. However, it is possible that the Netherlands Government may make proposals for new legislation on survivors before the European Community directive is finalized."

8.8 "In a social security system, it is necessary to ensure that individuals do not qualify for more than one benefit simultaneously under different social insurance acts, when each such benefit is intended to provide a full income at subsistence level. The various relevant acts therefore contain provisions governing entitlements for the eventuality of overlapping entitlements. The clause of which Mrs. Vos complains - article 32, subsection 1 (b), of the AAW - falls into this category. The legislature had to decide whether claimants who were entitled to benefits under both the AAW and the AWW should receive benefits under the one or the other, and it was decided that in such cases the AWW benefit should be paid. The decision to opt for a rule on concurrence as laid down in article 32, subsection 1 (b), of the AAW is based, inter alia, on practical considerations with a view to the implementation of the legislation. It is necessary, for example, to avoid the necessity of entering the person concerned in the records of two different bodies responsible for paying benefits and to avoid having to levy income tax in arrears on income from two separate sources."

8.9 "From the point of view of widows, it is, generally speaking, more advantageous to receive AWW than AAW; if the legislature had decided that the AAW benefit should have precedence over the AWW benefit, many widows would have been worse off, because in most cases the AWW benefit exceeds the AAW benefit payable to married women. This is because most married women have worked part-time and therefore receive only a partial AAW benefit in the event of long-term disability. This is not to say that the rule on concurrence which gives precedence to the AWW is always advantageous to all widows: it merely benefits the majority of them. Cases are conceivable in which the award of the AWW benefit instead of the AAW benefit leads to a slight fall in income. This is evidently so in the case of Mrs. Vos."

8.10 "However, the fact that, in a particular case, the application of article 32, subsection 1 (b), of AAW leads to a disadvantageous result for a particular individual is irrelevant for purposes of assessing whether a form of discrimination has occurred which is prohibited by article 26 of the International Covenant on Civil and Political Rights. In this connection, reference may be made to the Committee's decision in case No. 212/1986 (P.P.C. v. The Netherlands), in which it was found, inter alia, that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits." a/

8.11 Lastly, the Netherlands Government observes that in the course of the review of the AWW (paras. 8.6 and 8.7), explicit consideration was given to the problem of overlapping entitlements under AAW and AWW.

9.1 With regard to the author's specific complaint in relation to article 26 of the Covenant, the State party contests the contention of Mrs. Vos "that article 32, subsection 1 (b), of AAW discriminates unjustifiably between the sexes, because a disabled man whose wife (divorced or otherwise) dies retains his right to disablement benefit whereas a disabled woman whose husband (divorced or otherwise) dies forfeits hers. The difference in position between a disabled widow and a

disabled widower can be explained as follows. The provision which is made for survivors is not available to men, and the problem of overlapping of benefits therefore does not arise. Precisely on account of the fact that a disabled man cannot be eligible for AWW benefit and that the death of his wife therefore does not affect his AAW benefit, it is impossible to compare the rules of concurrence."

9.2 "By way of illustration of the relative discrimination in favour of women, which is inherent in the AWW rules, the Netherlands Government would observe that the favourable treatment which women receive in the Netherlands under AWW has led some people to suggest that the Act discriminates against men. This is one of the reasons why a review of AWW is under consideration. Be that as it may, this is not the point of Mrs. Vos's complaint. In any case, it should be concluded that the cases to which the applicant refers are not cases which require equal treatment on the basis of article 26 of the Covenant."

10.1 In her comments, dated 3 January 1989, the author reiterates her view that the application of article 32, subsection 1 (b), of the General Disablement Act (AAW) violates article 26 of the Covenant. She also argues that, provided article 26 is found relevant, then it must be accepted that it has direct effect from the moment the International Covenant on Civil and Political Rights came into force. Although she acknowledges that not every inequality constitutes unlawful discrimination, she contends that since 1979 any existing inequality in the field of social security can be examined on the basis of article 26 of the Covenant.

10.2 Contesting the interpretation of article 26 of the Covenant by the Central Appeals Court, the author argues that it would be incompatible with article 26 to grant the Government additional time to eliminate unlawful discrimination, and that what is at issue in the communication under consideration is whether the distinction is acceptable or unacceptable, it being irrelevant whether the Government after 1979 needed some time to eliminate the alleged distinction.

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 Committee notes that the State party in its submission under article 4, paragraph 2, of the Optional Protocol has reserved its position with respect to the applicability of article 26 of the Covenant in the field of social security rights (para. 8.1 above). In this connection, the Committee has already expressed the view in its case law b/ 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, e.g. 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.

11.3 The Committee further observes that what is at issue is not whether the State party is required to enact legislation such as the General Disablement Benefits Act

or the General Widows and Orphans Act, but whether this legislation violates the author's rights contained in article 26 of the International Covenant on Civil and Political Rights. 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. Further, differences in result of the uniform application of laws do not per se constitute prohibited discrimination.

12. It remains for the Committee to determine whether the disadvantageous treatment complained of by the author resulted from the application of a discriminatory statute and thus violated her rights under article 26 of the Covenant. In the light of the explanations given by the State party with respect to the legislative history, the purpose and application of the General Disablement Benefits Act and the General Widows and Orphans Act (paras. 8.3-8.10 above), the Committee is of the view that the unfavourable result complained of by Mrs. Vos follows from the application of a uniform rule to avoid overlapping in the allocation of social security benefits. This rule is based on objective and reasonable criteria, especially bearing in mind that both statutes under which Mrs. Vos qualified for benefits aim at ensuring to all persons falling thereunder subsistence level income. Thus the Committee cannot conclude that Mrs. Vos has been a victim of discrimination within the meaning of article 26 of the Covenant.

13. 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 as submitted do not disclose a violation of any article of the International Covenant on Civil and Political Rights.

Notes

a/ CCPR/C/32/D/212/1986, para. 6.2.

b/ CCPR/C/29/D/172/1984, CCPR/C/29/D/180/1984 and CCPR/C/29/D/182/1984.

APPENDIX

Individual opinion: submitted by Messrs. Francisco Aguilar Urbina and Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 218/1986, Vos v. the Netherlands

1. Article 26 of the Covenant has been interpreted as providing protection against discrimination whenever laws differentiating among groups or categories of individuals do not correspond to objective criteria. It has also been interpreted in the sense that whenever a difference in treatment does not affect a group of people but only separate individuals, a provision cannot be deemed discriminatory as such; negative effects on one individual cannot then be considered to be discrimination within the scope of article 26.

2. It is self-evident that, as the State party has stressed, in any social security system it is necessary to ensure that individuals do not qualify for more than one benefit simultaneously under different social insurance laws. The State party has admitted that the rule on concurrence which gives precedence to the General Widows and Orphans Act (AWW) is not always advantageous to all widows. It might merely benefit a majority of them. Cases are conceivable in which the award of AWW benefits leads to a decrease in income after cessation of payments under the General Disablement Benefits Act (AAW); this is evidently what happened in the case of Mrs. Vos. The State party has also mentioned that, in most cases AWW benefits exceed AAW benefits payable to married women, and that this is attributable to the fact that most married women have worked only part-time and therefore receive only partial AAW benefit in the event of long-term disability. It follows that disabled women with full AAW benefits enjoy higher benefits than women, disabled or not, who receive full AWW benefits because of their status as widows.

3. In cases where women receive full pensions under the AAW (being disabled and having worked full-time previously), if the husband dies, they will be given the AWW pension instead. This may reduce the level of pension which their physical needs as disabled persons require and which the General Disablement Benefits Act had recognized.

4. Article 32 of AAW provides in its subsection 1 (b) that the employment disability benefit will be withdrawn when a woman to whom this benefit has been granted becomes entitled to a widow's pension or a temporary widow's benefit pursuant to the AWW. The State party contends that the legislature had to decide whether claimants who were entitled to benefits under both the AAW and the AWW should receive benefits under the one or the other. This is conceivable, but it is not justifiable that this necessarily should be solved by the introduction of a clause which does not allow for a modicum of flexibility in its implementation. An exception should, in our opinion, be made with regard to women who enjoy full AAW benefits, if such benefits exceed full AWW benefits. By failing to make such an exception the legislature has created a situation in which disabled women with full AAW benefits who become widows can no longer be treated on a par with other disabled women who enjoy full AAW benefits. The case cannot be considered as affecting only Mrs. Vos, but rather an indeterminate group of persons who fall in the category of disabled women entitled to full disability pensions. Moreover, the intention of the legislator to grant maximum protection to those in need would be violated every time the law is applied in the strict formal sense as it has been

applied in Mrs. Vos's case. The increasing number of cases such as this one can be inferred from the assertion made by the State party that it has seen the need to change the legislation since the early 1980s.

5. A differentiation with regard to full AAW benefits among disabled women on the sole ground of marital status as a widow cannot be said to be based on reasonable and objective criteria. It therefore constitutes prohibited discrimination within the meaning of article 26. We note that a review of AAW is under consideration and hope that the discriminatory elements will be eliminated and compensation given to those who have been the victims of unequal treatment.