Ms. Dung Thi Thuy Nguyen v The Netherlands (Communication No. 3/2004)

1) Reference Details

Jurisdiction: United Nations Committee on the Elimination of Discrimination against Women
Date of Decision: 14 August 2006
Link to full case:
http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%203-2004%20-%20English.pdf

2) Facts

The author was a resident of the Netherlands, and worked as a part-time salaried employee as well as a co-working spouse in her husband's enterprise. She took maternity leave in 1999 and in 2002. She was insured under the Sickness Benefits Act (Ziektewet – "ZW") for her salaried employment and received benefits to compensate for her loss of income. She was also insured under the Invalidity Insurance (Self-Employed Persons) Act ("WAZ") for her work in her husband's enterprise but was denied benefits under this scheme by the "LISV", the benefits agency, as s. 59(4) (the "anti-accumulation clause") of the WAZ allowed payment of benefits only insofar as they exceeded benefits payable under the ZW.

She therefore received only partial compensation for loss of income during her maternity leave. The author lodged an objection to the decision, which was rejected. Her appeals were rejected by the District Court and the Central Appeals Tribunal which found that s. 59(4) of the WAZ did not result in unfavourable treatment of women as compared to men.

3) Law

International Law

- UN Convention on the Elimination of All Forms of Discrimination against Women, article 11(2)(b).

National Law

- Invalidity Insurance (Self-Employed Persons) Act, s. 59(4).

4) Legal Arguments

The Author

The author contends that article 11 of the Convention entitles women to maternity leave with full compensation for loss of income from their work. She claims that women whose income stems from both salaried and other forms of employment only receive partial compensation for their loss of income during their maternity leave. In this respect, the author submitted that pregnancy has a negative effect on the income of this group of women. She argued, through an analysis of the Conventions Travaux Préparatoires that article 11 applies to any professional activity carried out for payment.

She maintained that all domestic remedies had been exhausted when she brought proceedings before the highest administrative court against the refusal to award

benefits under the WAZ. She informed the Committee that she withdrew her appeal in connection with her second pregnancy after she lost her final appeal in connection with her first pregnancy.

State

The State party submitted that the communication was inadmissible *ratione temporis* pursuant to article 4(2)(e) as the alleged violation arose when the implementing body took the decisions affecting the author, namely on 19 February 1999 and 4 June 2002. Both dates were prior to the entry into force of the Protocol for the Netherlands on 22 August 2002. The State party argued that an individual can only be regarded as a victim under the article at the moment at which there has been some failure to respect his or her rights. In the author's case, this would have been the dates on which she was notified that all or part of the benefits were to be withheld. To ensure that those who were insured under both ZW and WAZ schemes would not be disadvantaged, the principle of equivalence was applied in relation to contributions. The State party shared the views expressed by the Central Appeals Tribunal that the "anti-accumulation clause" did not constitute sex discrimination as it applied in the event of concurrence between a WAZ benefit and some form of benefit other than a maternity benefit – without any distinction according to sex. The State party also asserted that article 11 did not require the provision of benefits equal to income lost.

5) Decision

The Committee held the communication to be admissible with respect to the second period of maternity leave, finding that the provisions concerning maternity leave instituted by the Netherlands satisfied its obligations under the Convention, and therefore found that there had been no violation of article 11.

A dissenting opinion added by Committee members Ms. Naela Mohamed Gabr, Ms. Hanna Beate Schöpp-Schilling and Ms. Heisoo Shin found that although the benefits scheme was compatible with the obligations of the State party under article 11 in the sense that it did not violate the author's rights under this article as concerns a *direct* form of discrimination based on sex, the "equivalence" principle may constitute a form of *indirect* discrimination based on sex. This view was based on the assumption that an employment situation in which salaried part-time work and self-employment is combined, as described by the complainant, as one which mainly women experience in the Netherlands, since in general, it is mainly women who work part-time as salaried workers in addition to working as family helpers in their husbands' enterprises. They went on to recommend a review of the "anti-accumulation clause", in particular its principle of "equivalence" and accordingly amend the WAZ; or consider in the design of any new insurance scheme for self employed persons, which includes maternity benefits and which covers those who combine self-employment with part-time salaried employment.