23 July 1997
Communication No. 658/1995; U.N. Doc. CCPR/C/60/D/658/1995

HUMAN RIGHTS COMMITTEE
Sixty Session
14 July – 1 August 1997

JACOB AND JANTINA HENDRIKA VAN OORD
v.
NETHERLANDS

DECISION

BEFORE: CHAIRPERSON: Ms. Christine Chanet (France)
VICE-CHAIRPERSONS: Mr. Prafullachandra Natwarlal Bhagwati (India), Mr. Omran El Shafei (Egypt), Ms. Cecilia Medina Quiroga (Chile)
RAPPORTEUR: Ms. Elizabeth Evatt (Australia)
MEMBERS: Mr. Nisuke Ando (Japan) , Mr. Thomas Buergenthal (United States), Lord Colville (United Kingdom), Mr. Eckart Klein (Germany), Mr. David Kretzmer (Israel), Ms. Pilar Gaitan De Pombo (Colombia), Mr. Rajsoomer Lallah (Mauritius), Mr. Fausto Pocar (Italy), Mr. Julio Prado Vallejo (Ecuador), Mr. Martin Scheinin (Finland), Mr. Danilo Turk (Slovenia) , Mr. Maxwell Yalden (Canada), Mr. Abdallah Zakhia (Lebanon)

Mr. Omran El Shafei did not attend the sixtieth session.

PermaLink: http://www.worldcourts.com/hrc/eng/decisions/1997.07.23_Van_Oord_v_Netherlands.htm

Citation: Van Oord v. Neth., Comm. 658/1995, U.N. Doc. A/52/40, Vol. II, at 311 (HRC 1997)

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

Meeting on 23 July 1997,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Jacob van Oord and Jantina Hendrika van Oord née de Boer, American citizens, living in the United States of America. They claim to be victims of a violation by the Netherlands of articles 2, 3, 5, 6, 7, 12, 14, 15, 16, 17, 23 and 26 of the International Covenant on Civil and Political Rights, as well as of its preamble.

THE FACTS AS PRESENTED BY THE AUTHORS

2.1 The authors were born in the Netherlands on 16 January 1920 and 13 December 1924, respectively. They married in 1949 and emigrated to the United States of America; in 1954 they became naturalized American citizens and lost their Dutch citizenship. They continued to live in the USA.

2.2 In 1972, Mr. van Oord entered into an agreement with the Sociale Verzekeringsbank (SVB) (Social Security Bank), the body implementing Dutch social security insurances. According to the agreement, he joined the Dutch retirement pension scheme (AOW, Algemene Ouderdomswet) by voluntary contributions. He made retroactive premium payments as from 1957, the year the pension scheme was established by the Netherlands, and would consequently be entitled to a Dutch pension as of age 65. The entitlement to a pension was set at 62% of a full benefit for a married man, since, according to the law, the years of absence from the Netherlands between his and his wife's fifteenth birthday and 1 January 1957 had to be deducted percentage wise. Dutch citizens living in the Netherlands who had their fifteenth birthday before 1 January 1957 are entitled to a full benefit under the AOW as of their 65th birthday.

2.3 Mr. van Oord became entitled to his pension benefits on 1 January 1985. On 25 June 1985, he was granted a provisional pension, pending a final assessment of his pension entitlements, and on 7 February 1991, his pension was fixed on 58% of the pension benefits for a married man, plus a supplement for his wife, fixed at 66% of the maximum supplement.

2.4 On 1 April 1985, the AOW was amended to reflect the changing role of women. Whereas before pension benefits for married couples had been based on the premiums paid by the man and on his entitlements, as of 1 April 1985, the right to pension benefits for married women was calculated on the basis of their own entitlements.

2.5 On 12 February 1991, the authors were informed that, because Mrs. Van Oord had turned 65 on 13 December 1989, the supplement, which was only intended for wives who had not yet reached the pensionable age, was retroactively withdrawn as of December 1989. Mrs. van Oord was granted a pension benefit, retroactive to 1 December 1989, based on 58% of the full pension benefit of a married woman, on the account that she had not paid premiums over the years 1985 to 1988 (inclusive). The SVB offered Mrs. vanOord the possibility to pay the premiums over the period 1985 to 1988, which she failed to do.

2.6 On 16 April 1991, Mr. van Oord was informed that, following a treaty between the Netherlands and the USA, which entered into force on 1 November 1990, his pension was now revised on the basis of the treaty and raised to 86% of the full benefit for a married person. Mrs. Van Oord's pension benefit was raised to 76% of the full benefit for a married person.

2.7 Following a revision of the social security scheme in the Netherlands, benefits paid under the AOW, including those paid following a voluntary agreement, became taxable as income as of 1 January 1990. On 31 March 1992, the authors were informed that they had to pay an amount of Fl 1152.00 on the

benefits paid out to them in 1990. They refused to pay and the Tax Office, on 12 October 1993, issued a warrant against them. On 6 July 1994, however, the warrant was withdrawn and the tax assessment was annulled, as it was found that according to the law, the premiums paid by the authors in the eight years prior to 1990 had to be taken into account as negative income, thereby balancing out the income over 1990, so that no taxes were due.

2.8 The authors disagreed with the assessment of their pension benefits, arguing that since they had entered into a contract with the SVB, this could not be unilaterally changed on the basis of amendments in the law. On 27 March 1992, the Raad van Beroep (Board of Appeal) in Amsterdam rejected the authors' appeal, considering that the SVB's determination of the authors' pension had been according to the law. The part of the authors' appeal relating to the taxation of their pension benefits was declared inadmissible by the Board since it is not competent to handle matters of taxation.

2.9 The authors then appealed this decision to the Centrale Raad van Beroep (Central Board of Appeal), which, on 22 April 1994, rejected their appeal. The Central Board considered that the authors voluntarily acceded to the Dutch national pension scheme, and that this pension scheme was subject to legal provisions which could be amended without the authors' prior consent. The Board considered that this condition was implicitly contained in the agreement between SVB and the authors, and noted in this connection that the authors had benefitted from the increase in pension following the treaty between the Netherlands and the USA, which was not expressly part of the pension agreement either.

2.10 On 31 August 1994, the European Commission of Human Rights declared the authors' complaint inadmissible, since the matters complained of did not disclose any appearance of a violation of the rights and freedoms set out by the European Convention or its protocols.

2.11 In a further letter, the authors state that they have learned that Australians, New Zealanders and Canadians, who as ex-citizens of the Netherlands purchased voluntary AOW old age retirement insurance, are awarded non-reduced benefits, whereas benefits for citizens of the USA are reduced proportionately for the years spent outside the Netherlands after their 15th birthday and before 1 January 1957. They further state that no taxes are withheld from the others. According to the authors, they were told by Dutch authorities that this was the consequence of different treaty obligations between the Netherlands and Canada, New Zealand and Australia on the one hand, and the USA on the other hand.

THE COMPLAINT

3. The authors claim that the above violates their Covenant rights, since they have been arbitrarily deprived of their property in violation of the preamble of the Covenant which refers to the Universal Declaration of Human Rights. Furthermore, they claim to be victims of a violation of:

- article 2 of the Covenant, since they have been discriminated against on ground of nationality and no effective remedy is provided;

- article 3, since married women do not have equal rights;

- article 5, since human rights have been restricted by the Dutch Government;

- article 6, since the decrease in pension, contrary to the contract obligation, is said to cut down on the author's lives;

- article 7, since the partial confiscation of the pension benefits to which the authors are entitled constitutes cruel and degrading treatment or punishment;

- article 12, since they have been penalized for emigrating to the USA;

- article 14, since independent and impartial tribunals are outlawed by article 120 of the Dutch constitution, which precludes the constitutional review of legislation by the judiciary; in this context, it is also alleged that assistance in finding legal counsel was withheld and the use of an interpreter denied, that penalties were imposed without due process and that undue delays were caused by courts by referring them to other courts;

- article 15, because they were penalized after they had fully paid their part of the agreement, and the punishment was imposed in the absence of any criminal offence;

- article 16, since Mrs. van Oord was retroactively not recognized as a person before the law until she reached age 65 and then penalized by confiscating from her five years of pension coverage which she had purchased as a partner in marriage;

- article 17, since the Dutch Tax Department issued a warrant for the payment of 1990 taxes; although this warrant was later withdrawn and the tax assessment annulled, the authors claim that the damage to their reputation had already been done;

- article 23, since the authors' status as a married couple has been denied;

- article 26, since the Dutch Government has failed to protect the authors' equal rights and discriminates them on the basis of their nationality.

THE STATE PARTY'S OBSERVATIONS AND THE AUTHORS' REPLY

4. By submission of 22 November 1995, the State party notes that the authors have not raised the breach of their Covenant rights before the Dutch courts and argues that the communication is thus inadmissible for failure to exhaust domestic remedies.

5.1 In their reply of 7 February 1996, the authors claim that the Dutch reply lacks sincerity, and that they have brought up the elements of violation of human and constitutional rights in their appeals to the Courts, but that the Courts completely ignored this. They further state that, although they invoked the Constitution, they could not invoke the rights of the Covenant since at the time they did not have a copy of the text. They add that they continue trying to find a remedy within the Dutch system, but that all their appeals to the authorities have been ignored.

5.2 In a further letter, dated 22 February 1996, the authors claim that the Court system in the Netherlands is neither independent nor impartial.

6.1 By a further submission, dated 9 October 1996, the State party acknowledges that the authors, although they have not invoked the specific articles of the Covenant, did in fact raise the substance of the rights protected by articles 2, 3, 14, 23 and 26 before the Courts and that domestic remedies in this respect have thus been exhausted.

6.2 The State party maintains, however, that the authors' claims under articles 5, 6, 7, 12, 15, 16 and 17 have not been raised in substance before the Courts and appropriate authorities, nor have the authors initiated proceedings before a civil court, in which they could have invoked these rights. The State party argues therefore that domestic remedies have not been exhausted in this respect.

6.3 The State party further contends that the communication, as far as it relates to claims under articles 5, 6, 7, 12 , 14, 15 and 16 is inadmissible for incompatibility with the provisions of the Covenant. As regards the authors' claim under article 5, the State party argues that there is no question of destruction or excessive limitation of the rights guaranteed in the Covenant. As regards articles 6 and 7, the State party submits that changes in the amount of money received by the authors under the pension scheme in no way interferes with their right to life or their right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and that another interpretation would run counter to the clear wording of these provisions.

6.4 As regards the authors' claim under article 12, the State party submits that it has never interfered with the authors' right to leave any country. The legal consequences of the authors' freely made decision to emigrate to the United States cannot be seen as the Government's unlawful interference under article 12. As regards the claim under article 14, the State party submits that the authors have failed to substantiate their claim that they did not receive a fair hearing. The State party explains that article 120 of the Constitution relates to the fact that Acts of Parliament cannot be challenged before the Courts for alleged unconstitutionality and in no way infringes upon the independence of the judiciary.

6.5 As regards the authors' claim under article 15, the State party notes that this relates only to criminal law provisions, whereas the instant case deals with social security issues. As regards article 16, the State party submits that it has not been substantiated in what way it might have violated these provisions.

7.1 In their reply to the State party's submission, the authors argue that if article 15 guarantees even to criminals that deprivation of rights should not take place retroactively, it should certainly apply to law abiding citizens. As regards the State party's argument concerning article 6 of the Covenant, the authors contest that a violation of the right to life only occurs once someone dies and argue that to "shortchange clients whose money has been taken in exchange for a written promise for certain benefits to sustain them in old age" is an infringement of life.

7.2 The authors submit that they have brought all the points raised in their communication to the attention of the Dutch courts and authorities, even if they may not have quoted the exact article. The authors state that they have been exhausting domestic remedies for seven years and that they are getting nowhere. They claim that seven years exceed any reasonable time frame. The authors note that they continue trying to obtain a local remedy, not because they believe that they will achieve anything, but because they want to give the Dutch authorities and the judiciary an opportunity to save face with dignity.

ISSUES AND PROCEEDINGS BEFORE THE COMMITTEE

8.1 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.

8.2 The Committee considers that the authors' claims under articles 6, 7, 12, 15, 16, 17 and 23 of the Covenant show an erroneous interpretation which is in contradiction with the wording and the purpose of the provisions. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as being incompatible with the provisions of the Covenant.

8.3 The Committee considers further that the authors have failed to substantiate their claim, for purposes of admissibility, that the hearings concerning the determination of their pension rights were not fair. In this context, the Committee notes that the authors have not adduced any substantiation for their claim that article 120 of the Constitution affects the independence and impartiality of the Courts. This claim is therefore inadmissible under article 2 of the Optional Protocol.

8.4 The Committee has noted the authors' claim that they have been discriminated against on the basis of their nationality, because (a) their benefits are reduced for the period between their 15th birthday and 1 January 1957 that they were not living in the Netherlands, whereas they are not reduced for Dutch citizens living in the Netherlands, and (b) their benefits are reduced and they are required to pay taxes on them whereas other former citizens of the Netherlands, now citizens of Canada, Australia or New Zealand do not suffer similar reductions.

8.5 With regard to this claim, the Committee observes that it is undisputed that the criteria used in determining the authors' pension entitlements are equally applied to all former Dutch citizens now living in the USA, and that the authors also benefit from a treaty concluded between the Netherlands and the USA, which has the effect of raising their pension to a higher level than originally agreed. According to the authors, the fact that former Dutch citizens now living in Australia, Canada and New Zealand benefit from other privileges, entails discrimination. The Committee observes, however, that the categories of persons being compared are distinguishable and that the privileges at issue respond to separately negotiated bilateral treaties which necessarily reflect agreements based on reciprocity. The Committee recalls its jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 Inter alia the Committee's Views with regard to communication No. 182/1984, Zwaan-de Vries v. the Netherlands, adopted by the Committee on 9 April 1987..

8.6 The Committee finds therefore that the facts as presented by the authors do not raise an issue under article 26 of the Covenant and that the authors have not, therefore, presented a claim under article 2 of the Optional Protocol. This part of the communication is therefore inadmissible.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and to the authors.