F. H. Zwaan-de Vries v. The Netherlands, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990).

Communication No. 182/1984

Submitted by: F. H. Zwaan-de Vries on 28 September 1984
Alleged victim: The author
State party: The Netherlands
Date of adoption of views: 9 April 1987 (twenty-ninth session) (see footnote 1)

Subject matter: Cessation of payment of unemployment benefits

Procedural issues: Competence of HRC to examine communications concerning rights also set out in ICESCR, via article 26 of ICCPR-Relevance of travaux preparatoires-Supplementary means of interpretation-Vienna Convention on the Law of Treaties, articles 31 and 32Examination of general issues "not same matter" under article 5 (2) (a) -Non-participation of Committee member in decision

Substantive issues: Scope of application of article 26 of ICCPRDiscrimination based on sex-Unreasonable differentiation-Objective and reasonable criteria-Unemployment benefits-"Breadwinner" concept-Marital status-Right to social security

Legislative remedy taken by State party

Article of the Covenant: 26

Article of the Optional Protocol: S (2) (a)

Rule of Procedure: 85

1. The author of the communication (initial letter dated 28 September 1984 and subsequent letters of 2 July 1985, 4 and 23 April 1986) is Mrs. F. H. Zwaan-de Vries, a Netherlands national residing in Amsterdam, the Netherlands, who is represented before the Committee by Mr. D. J. van der Vos, head of the Legal Aid Department (Rechtskundige Dienst FNV), Amsterdam:

2.1. The author was born in 1943 and is married to Mr. C. Zwaan. She was employed from early 1977 to 9 February 1979 as a computer operator. Since then she has been unemployed. Under the Unemployment Act she was granted unemployment benefits until 10 October 1979. She subsequently applied for continued support on the basis of the Unemployment Benefits Act (WWV). The Municipality of Amsterdam rejected her application on the ground that she did not meet the requirements because she was a married woman; the refusal was based on section 13, subsection 1 (1), of WWV, which did not apply to married men.

2.2. Thus, the author claims to be a victim of a violation by the State party of article 26 of the International Covenant on Civil and Political Rights, which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The author claims that the only reasons she was denied unemployment benefits are her sex and marital status and contends that this constitutes discrimination within the scope of article 26 of the Covenant.

2.3. The author pursued the matter before the competent domestic instances. By decision of 9 May 1980 the Municipality of Amsterdam confirmed its earlier decision

of 12 November 1979. The author appealed against the decision of 9 May 1980 to the Board of Appeal in Amsterdam, which, by an undated decision sent to her on 27 November 1981, declared her appeal to be unfounded. The author then appealed to the Central Board of Appeal, which confirmed the decision of the Board of Appeal on 1 November 1983. Thus, it is claimed that the author has exhausted all national legal remedies.

2.4. The same matter has not been submitted for examination to any other procedure of international investigation or settlement.

3. By its decision of 16 October 1984, 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 obervations relevant to the question of admissibility of the communication.

4.1. In its submission dated 29 May 1985, the State party underlined, *inter* alia, that:

(a) The principle that elements of discrimination in the realization of the right to social security are to be eliminated is embodied in article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights;

(b) The Government or the Kingdom *of* the Netherlands has accepted to implement this principle under the terms of the International Covenant on Economic, Social and Cultural Rights. Under these terms, States parties have undertaken to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized in that Covenant (art. 2, para. l);

(c) The process of gradual realization to the maximum of available resources is well on its way in the Netherlands. Remaining elements of discrimination in the realization of the rights are being and will be gradually eliminated;

(d) The International Covenant on Economic, Social and Cultural Rights has established its own system for international control of the way in which States parties are fulfilling their obligations. To this end States parties have undertaken to submit to the Economic and Social Council reports on the measures they have adopted and the progress they are making. The Government of the Kingdom of the Netherlands to this end submitted its first report in 1983.

4.2. The State party then posed the question whether the way in which the Netherlands was fulfilling its obligations under article 9 in conjunction with articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights could become, by way of article 26 of the International Covenant on Civil and Political Rights, the object of an examination by the Human Rights Committee. The State party submitted that that question was relevant for the decision whether the communication was admissible.

4.3. The State party stressed that it would greatly benefit from receiving an answer from the Human Rights Committee to the question mentioned in paragraph 4.2 above. "Since such an answer could hardly be given without going into one aspect of the merits of the case-i.e. the question of the scope of article 26 of the International Covenant on Civil and Political Rights-the Government would respectfully request the Committee to join the question of admissibility to an examination of the merits of the case."

4.4. In case the Committee did not grant the request and declared the communication admissible, the State party reserved the right to submit, in the course of the proceedings, observations which might have an effect on the question of admissibility.

4.5. The State party also indicated that a change of legislation had been adopted recently in the Netherlands, eliminating section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV), which was the subject of the author's claim. This is the Act of 29 April 1985, S 230, having a retroactive effect to 23 December 1984.

4.6. The Stare party confirmed that the author had exhausted domestic remedies.

5.1. Commenting on the State party's submission under rule 91, the author, in a letter dated 2 July 1985, contended that the State party's question to the Committee as well as the answer to it were completely irrelevant with regard to the admissibility of the communication, because the author's complaint "pertains to the failure of the Netherlands to respect article 26 of the International Covenant on Civil and Political Rights. As the Netherlands signed and ratified the Optional Protocol to that Covenant, the complainant is by virtue of articles I and 2 of the Optional Protocol, entitled to file a complaint with your Committee pertaining to the nonrespect of article 26. Therefore her complaint is admissible ".

5.2. The author further pointed out that, although section 13, subsection 1 (1), of WWV had been eliminated, her complaint concerned legislation in force in 1979 (see footnote 2).

6.1. Before considering any claims contained 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 observes that the examination of State reports, submitted under article 16 of the International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5, paragraph 2 (a), constitute an examination of the "same matter" as a claim by an individual submitted to the Human Rights Committee under the Optional Protocol.

6.3. The Committee further observes that a claim submitted under the Optional Protocol concerning an alleged breach of a provision of the international Covenant on Civil and Political Rights is not necessarily incompatible with the provisions of that Covenant (see art. 3 of the Optional Protocol), because the facts also related to a right protected by the International Covenant on Economic, Social and Cultural Rights or any other international instrument. It still had to be tested whether the alleged breach of a right protected by the International Covenant on Civil and Political Rights was borne out by the facts.

6.4. Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. The parties to the present communication agree that domestic remedies have been exhausted.

6.5. With regard to the State party's inquiry Concerning the scope of article 26 of the International Covenant on Civil and Political Rights, the Committee did not consider it necessary to pronounce on its scope prior to deciding on the admissibility of the communication. However, having regard to the State party's statement (para. 4.4 above) that it reserved the right to submit further observations which might have an effect on the question of the admissibility of the case, the Committee pointed out that it would take into account any further observations received on the matter.

7. On 23 July 1985, the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4, paragraph 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 might have been taken by it.

8.1, In its submission under article 4, paragraph 2, of the Optional Protocol, dated 14 January 1986, the State party again objected to the admissibility of the communication, reiterating the arguments advanced in its submission of 29 May 1985.

8.2. In discussing the merits of the case, the State party first elucidates the factual background as follows:

When Mrs. Zwaan applied for WWV benefits in October 1979, section 13, subsection 1 (1), was still applicable. This section laid down that W W V benefits could not be claimed by those married women who were neither breadwinners nor permanently separated from their husbands. The concept of "breadwinner" as referred to in section 13, subsection 1 (1). of W W V was of particular significance, and was further amplified in statutory instruments based on the Act (the last relevant instrument being the ministerial decree of 5 April 1976, Netherlands Government Gazette 1976, 72). Whether a married woman was deemed to be a breadwinner depended, inter alia, on the absolute amount of the family's total income and on what proportion of it was contributed by the wife. That the conditions for granting benefits laid down in section 13, subsection 1 (1), of WWV applied solely to married women and not to married men is due to the fact that the provision in question corresponded to the then prevailing views in society in general concerning the roles of men and women within marriage and society. Virtually all married men who had jobs could be regarded as their family's breadwinner, so that it was unnecessary to check whether they met this

criterion for the granting of benefits upon becoming unemployed. These views have gradually changed in later years. This aspect will be further discussed below (see para. 8.4).

The Netherlands is a member State of the European Economic Community (EEC). On 19 December 1978 the Council of the European Communities issued a directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), giving member States a period of six years, until 23 December 1984, within which to make any amendments to legislation which might be necessary in order to bring it into line with the directive. Pursuant to this directive the Netherlands Government examined the criteria for the granting of benefits laid down in section 13, subsection 1 (1), of WWV in the light of the principle of equal treatment of men and women and in the light of the changing role patterns of sexes in the years since about 1960.

Since it could no longer be assumed as a matter of course in the early 1980s that married men with jobs should always be regarded as "breadwinners", the Netherlands amended section 13, subsection 1 (1), of WWV to meet its obligations under the EEC directive. The amendment consisted of the deletion of section 13, subsection 1 (1), with the result that it became possible for married women who were not breadwinners to claim WWV benefits, while the duration of the benefits, which had previously been two years, was reduced for people aged under 35.

In view of changes in the status of women-and particularly married women-in recent decades, the failure to award firs. Zwaan WWV benefits in 1979 is explicable in historical terms. If she were to apply for such benefits now, the result would be different.

8.3. With regard to the scope of article 26 of the Covenant, the State party argues, *inter alia, as follows:*

The Netherlands Government takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights. Civil and political rights are to be distinguished from economic, social and cultural rights, which are the object of a separate United Nations Covenant, the International Covenant on Economic, Social and Cultural Rights.

The complaint made in the present case relates to obligations in the sphere of social security, which fall under the International Covenant on Economic, Social and Cultural Rights. Articles 2, 3 and 9 of that Covenant are of particular relevance here. That Covenant has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations and deliberately does not provide for an individual complaints procedure.

The Government considers it incompatible with the aims of both the Covenants and the Optional Protocol that an individual complaint with respect to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, could be dealt with by the Human Rights Committee by way of an individual complaint under the Optional Protocol based on article 26 of the international Covenant on Civil and Political Rights.

The Netherlands Government reports to the Economic and Social Council on matters concerning the way it is fulfilling its obligations with respect to the right to social security, in accordance with the rel evant rules of the International Covenant on Economic, Social and Cultural Rights . . .

Should the Human Rights Committee take the view that article 26 of the International Covenant on Civil and Political Rights ought to be interpreted more broadly, thus that

this article is applicable to com plaints concerning discrimination in the field of social security, the Government would observe that in that case article 26 must also be in terpreted in the light of other comparable United Nations conventions laying down obligations to combat and eliminate discrimination in the field of economic, social and cultural rights. The Government would particularly point to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

If article 26 of the International Covenant on Civil and Political Rights were deemed applicable to complaints concerning discriminatory elements in national legislation in the field of those conventions, this could surely not be taken to mean that a State party would be required to have eliminated all possible discriminatory elements from its legislation in those fields at the time of ratification of the Covenant. Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society . . .

If the Human Rights Committee should decide that article 26 of the International Covenant on Civil and Political Rights entails obligations with regard to legislation in the economic, social and cultural field, such obligations could, in the Government's view, not comprise more than an obligation of States to subject national legislation to periodic examination after ratification of the Covenant with a view to seeking out discriminatory elements and, if they are found, to progressively taking measures to eliminate them to the maximum of the State's available resources. Such examinations are under way in the Netherlands with regard to various aspects of discrimination, including discrimination between men and women.

8.4. With retard to the principle of equality laid down in article 2b of the Covenant in relation to section 13, subsection 1 (1), of WWV in its unamended form, the State party explains the legislative history of WWV and in particular the social justification of the "breadwinner" concept at the time the law was drafted. The State party contends

that with the "breadwinner" concept "a proper balance was achieved between the limited availability of public funds (which makes it necessary to put them to limited, well-considered and selective use) on the one hand and the Government's obligation to provide social security on the other. The Government does not accept that the 'breadwinner' concept as such was 'discriminatory' in the sense that equal cases were treated in an unequal way by law." Moreover, it is argued that the provisions of WWV "are based on reasonable social and economic considerations which are not discriminatory in origin. The restriction making the provision in question inapplicable to men was inspired not by any desire to discriminate in favour of men and against women but by the *de* facto social and economic situation which existed at the time when the Act was passed and which would have made it pointless to declare the provision applicable to men. At the time when Mrs. Zwaan applied for unemployment benefits the *de* facto situation was not essentially different. There was therefore no violation of article 26 of the Covenant. This is not altered by the fact that a new social trend has been growing in recent years, which has made it undesirable for the provision to remain in force in the present social context."

8.5. With reference to the decision of the Central Board of Appeal of 1 November 1983, which the author criticizes, the State party contends that "The observation of the Central Board of Appeal that the Covenants employ different international control systems is highly relevant. Not only do parties to the Covenants report to different United Nations agencies but, above all, there is a major difference between the Covenants as regards the possibility of complaints by States or individuals, which exists only under the International Covenant on Civil and Political Rights. The contracting parties deliberately chose to make this difference in international monitoring systems, because the nature and substance of social, economic and cultural rights make them unsuitable for judicial review of a complaint lodged by a State party or an individual."

9.1. In her comments, dated 4 and 23 April 1986, the author reiterates that "article 13, subsection 1 (1) contains the requirement of being breadwinner for married women only, and not for married men. This distinction runs counter to article 26 of the Covenant . . . The observations of the Netherlands Government on views in society concerning traditional roles of men and women are completely irrelevant to the present case. The question . . . is in fact not whether those roles could justify the existence of article 13, subsection 1 (1), of WWV, but . . . whether this article in 1979

constituted an infraction of article 26 of the Covenant . . . The State of the Netherlands is wrong when it takes the view that the complainant's view could imply that all discriminatory elements ought to have been eliminated from its national legislation at the time of ratification of the Covenant . . . The complainant's view does imply, however, that ratification enables all Netherlands citizens to invoke article 26 of the Covenant directly . . . if they believe that they are being discriminated against. This does not imply that the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women have become meaningless. Those treaties in fact compel the Netherlands to eliminate discriminatory provisions from more specific parts of national legislation."

9.2. With respect to the State party's contention that article 26 of the Covenant can only be invoked in the sphere of civil and political rights, the author claims that this view is not shared by Netherland courts and that it also "runs counter to the stand taken by the Government itself during parliamentary approval. It then stated that article 26-as opposed to article 2, paragraph 1-'also applied to areas otherwise not covered by the Covenant' ".

9.3. The author also disputes the State party's contention that applicability of article 26 with regard to the right of social security, as referred to in article 9 of the International Covenant on Economic, Social and Cultural Rights, would be incompatible with the aims of both Covenants. The author claims that article 26 would apply "to one well-defined aspect of article 9 only, which is equal treatment before the law, leaving other important aspects such as the level of social security aside".

9.4. With regard to the State party's argument that, even if article 26 were to be considered applicable, the State party would have a delay of several years from the time of ratification of the Covenant to adjust its legislation, the author contends that this argument runs counter to the observations made by the Government at the time of [parliamentary] approval with regard to article 2, paragraph 2, of the International Covenant on Civil and Political Rights stating that such a terme *de* grdce would be applicable only with respect to provisions that are not self-executing, whereas article 26 is in fact recognized by the Government and court rulings as self-executing. The

author adds that "it can, in fact, be concluded from the travaux preparatoires of the International Covenant on Civil and Political Rights that according to the majority of the delegates 'it was essential to permit a certain degree of elasticity to the obligations imposed on States by the Covenant, since all States would not be in a position immediately to take the necessary legislative or other measures for the implementation of its provisions' " (see footnote 3).

10. The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The facts of the case are not in dispute.

11. Article 26 of the International Covenant on Civil and Political Rights provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

12.1. The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view 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, for example 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.

12.2. The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant travaux preparatoires of the International Covenant on Civil and Political Rights, namely the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a "supplementary means of interpretation" (art. 32 of the Vienna Convention on the Law of Treaties) (see footnote 4). The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3. For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4. Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact

legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5. The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. 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.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs. Zwaan-de Vries constituted discrimination within the meaning of article 26. The Committee notes that in Netherlands law the provisions of articles 84 and 85 of the Netherlands Civil Code imposes equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV) a married woman, in order to receive WWV benefits, had to prove that she was a "breadwinner"-a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable, and this seems to have been effectively acknowledged even by the State party by the enactment of a change in the law on 29 April 1985, with retroactive effect to 23 December 1984 (see para. 4.5 above).

15. The circumstances in which Mrs. Zwaan-de Vries found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights, because she was denied a social security benefit on an equal footing with men.

16. The Committee notes that the State party had not intended to discriminate against women and further notes with appreciation that the discriminatory provisions in the law applied to Mrs. Zwaande Vries have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Zwaan-de Vries at the time complained of, the Committee is of the view that the State party should offer Mrs. Zwaan-de Vries an appropriate remedy.

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1. Pursuant to rule 85 of the provisional rules of procedure, Committee member Mr. Joseph Mommersteeg, although participating in the consideration of the communication, did not take part in the adoption of the views.

2. The Covenant and the Optional Protocol entered into force on 11 March 1979 in respect of the Netherlands.

3. *Official Records of the General Assembly,* Tenth Session, Annexes, agenda item 28 (Part 11), document A12929, chap. V, para. 8.

4. United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. 13.71. V.4), p. 140.