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HUMAN RIGHTS COMMITTEE
Forty-sixth session

DECISIONS
Communications Nos. 406/1990 and 426/1990

Submitted by : Lahcen B. M. Oulajin and Mohamed Kaiss [represented by counsel]

Alleged victims : The authors

State party : The Netherlands

Date of communications : 24 April 1990 and 22 August 1990, respectively

Documentation references : Prior decisions
- Special Rapporteur's rule 91 decisions, transmitted to the State party on 30 July 1990 and 11 March 1991, respectively (not issued in document form)
- CCPR/C/41/D/406/1990 (decision on admissibility, dated 22 March 1991)
- CCPR/C/42/D/426/1990 (decision on admissibility, dated 4 July 1991)
- CCPR/C/42/D/406/1990 and 426/1990 (decision to deal jointly with the two communications, dated 4 July 1991)

Date of adoption of Views : 23 October 1992

On 23 October 1992, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in

respect of communications Nos. 406/1990 and 426/1990. The text of the Views is annexed to the present document.

[Annex]

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*/ 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
- Forty-sixth session -

concerning

Communications Nos. 406/1990 and 426/1990

Submitted by :	Lahcen B. M. Oulajin and Mohamed Kaiss [represented by counsel]
Alleged victims :	The authors
State party :	The Netherlands
Date of communications :	24 April 1990 and 22 August 1990, respectively
Date of decisions on admissibility :	22 March 1991 and 4 July 1991, respectively

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

Meeting on 23 October 1992,

Having concluded its consideration of communications Nos. 406/1990 and 426/1990, submitted to the Human Rights Committee by Messrs. Lahcen B. M. Oulajin and Mohamed Kaiss, respectively, 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 authors of the communications, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

*/ The text of an individual opinion submitted by Messrs. Kurt Herndl, Rein Müllerson, Birame N'Diaye and Waleed Sadi is appended.

The facts as presented by the authors :

1. The authors of the communications are Lahcen Oulajin and Mohamed Kaiss, Moroccan citizens born on 1 July 1942 and 7 July 1950 respectively, at present residing in Alkmaar, the Netherlands. They claim to be victims of a violation by the Netherlands of articles 17 and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 Mr. Oulajin's wife and two children live in Morocco. On 19 October 1981, the author's brother died, leaving four children, born in 1970, 1973, 1976 and 1979. Subsequently, the author's wife in Morocco assumed responsibility for her nephews, with the consent of their mother.

2.2 Mr. Kaiss' wife and child live in Morocco. On 13 July 1979 the author's father died, leaving two young children, born in 1971 and 1974. Subsequently, the author assumed responsibility for the upbringing of his siblings and the children were taken in by the author's family in Morocco.

2.3 The authors, who claim to be the only persons to contribute financially to the support of said relatives, applied for benefits under the Dutch Child Benefit Act (Algemene Kinderbijslagwet) claiming their dependents as foster [1] children. By letters of 7 May 1985 and 2 May 1984 respectively the Alkmaar Board of Labour (Raad van Arbeid) informed the authors that, while they were entitled to a benefit for their own children, they could not be granted a benefit for their siblings and nephews. It held that these children could not be considered to be foster children within the meaning of the Child Benefit Act, since the authors reside in the Netherlands and cannot influence their upbringing, as required under article 7, paragraph 5, of the Act.

2.4 Both authors appealed the decision to the Board of Appeal (Raad van Beroep) in Haarlem. On 19 February 1986 and 6 May 1986,

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[1] For the purposes of this decision, a foster child is considered to be a child whose upbringing has been left to persons other than his or her natural or adoptive parents.

the Board of Appeal rejected the appeals. They then appealed to the Central Board of Appeal (Centrale Raad van Beroep), arguing, inter alia , that because of lack of money, it had become impossible for them to support their foster children and that, as a result, their family life had suffered; they claimed that they formed a family with their foster children within the meaning of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They furthermore submitted that it would amount to discrimination if they were required to participate actively in the upbringing of the children concerned, as this requirement would be difficult to meet for migrant workers. They added that the requirement did not exist in respect of their own children.

2.5 By decisions of 4 March 1987, the Central Board of Appeal dismissed the appeals. It held, inter alia , that in case of the upbringing of foster children, it was necessary to prove the existence of close links between the children and the applicant for purposes of the entitlement to child benefit. The Central Board of Appeal held that the cases did not raise the question of two similar situations being treated unequally, so that the issue of discrimination did not arise. In holding that a close, exclusive relationship between the children concerned and the individual applying for a child benefit is necessary, it argued that such a close relationship is presumed to exist in respect of one's own children, whereas it must be made plausible in respect of foster children.

2.6 The authors appealed to the European Commission of Human Rights, invoking articles 8 (cf. article 17 of the Covenant) and 14 (cf. article 26 of the Covenant) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. By decision of 6 March 1989, the Commission declared their communications inadmissible ratione materiae , holding that the Convention does not encompass a right to family allowances. In particular, article 8 could not be construed as obliging a State to grant such allowances. The right to family allowances was a social security right that fell outside the scope of the Convention. With regard to the alleged discrimination, the Commission reiterated that article 14 of the European Convention has no independent existence and that it only covers the rights and obligations recognized in the Convention.

The complaint :

3.1 The authors contend that the authorities of the Netherlands have violated article 26 of the Covenant. They refer to the Human Rights Committee's General Comment on article 26, which states, inter alia , that the principle of non-discrimination constitutes a basic and general principle relating to the protection of human rights. The authors argue that an inadmissible distinction is made in their case between "own children" and "foster children", all of which belong to the same family in Morocco.

3.2 The authors point out that the actual situation in which the children concerned live does not differ, and that, de facto , both have the same parents. The Dutch authorities do pay child benefits for natural children separated from their parents and residing abroad, irrespective of whether the parent residing in the Netherlands is involved in the upbringing. The authors therefore consider it unjust to deny benefits for their foster children merely on the basis of the fact that they cannot actively involve themselves in their upbringing. In their opinion, the "differential treatment" is not based on "reasonable and objective" criteria.

3.3 The authors argue that not only "Western standards" should be taken into account in the determination of whether or not to grant child benefits. It was in conformity with Moroccan tradition that they had taken their relatives into their family.

3.4 The authors further allege a violation of article 17 of the Covenant. They state that they are unemployed in the Netherlands and depend on an allowance in accordance with the General Social Security Act. This allowance amounts to the social minimum. The child benefits are essential for them in order to support their family in Morocco. By refusing the child benefits for their foster children, the authors contend, a "family life with them is de facto impossible", thus violating their rights under article 17.

The Committee's admissibility considerations and decision :

4.1 At its 41st and 42nd session, respectively, the Committee considered the admissibility of the communications. It noted that

the State party had raised no objection to admissibility, confirming that the authors had exhausted all available domestic remedies. It further noted that the facts as submitted by the authors did not raise issues under article 17 of the Covenant and that this aspect of the communication was therefore inadmissible ratione materiae under article 3 of the Optional Protocol.

4.2 As to the authors' allegations that they were victims of discrimination, the Committee took note of their claim that the distinction made in the Child Benefit Act between natural and foster children is not based on reasonable and objective criteria, and decided to examine this question in the light of the State party's submission on the merits.

4.3 By decision of 23 March 1991, the Committee declared Mr. Oulajin's communication admissible insofar as it might raise issues under article 26 of the Covenant. By decision of 4 July 1991, the Committee similarly declared Mr. Kaiss' communication admissible. On 4 July 1991 the Committee decided to join consideration of the two communications.

State party's clarifications and the authors' comments thereon:

5.1 By submission of 30 March 1992, the State party explains that, pursuant to the Child Benefit Act, residents of the Netherlands, regardless of their nationality, receive benefit payments to help cover the maintenance costs of their minor children. Provided certain conditions are met, an applicant may be entitled to a child benefit, not only for his own children, but also for his foster children. The Act lays down the condition that the foster child must be (a) maintained and (b) brought up by the applicant as if he or she were the applicant's own child.

5.2 The State party submits that the authors' allegations of discrimination raise two issues:

(1) whether the distinction between an applicant's own children and foster children constitutes a violation of article 26 of the Covenant;

(2) whether the regulations governing the entitlement to child benefit for foster children, as applied in the

Netherlands, result in an unjustifiable disadvantage for non-Dutch nationals, residing in the Netherlands.

5.3 As to the first issue, the State party submits that to be entitled to child benefit for foster children, the applicant must raise the children concerned in a way comparable to that in which parents normally bring up their own children. This requirement does not apply to the applicant's own children. The State party argues that this distinction does not violate article 26 of the Covenant; it submits that the aim of the relevant regulations is to determine, on the basis of objective criteria, whether the relationship between the foster parent and the foster child is so close that it is appropriate to provide child benefit as if the child were the foster parent's own.

5.4 As to the second issue, the State party submits that no data exist to show that the regulations affect migrant workers more than Dutch nationals. It argues that the Act's requirements governing entitlement to child benefit for foster children are applied strictly, regardless of the nationality of the applicant or the place of residence of the foster children. It submits that case law shows that applicants of Dutch nationality, residing in the Netherlands, are also deemed ineligible for child benefit for their foster children who are resident abroad. Moreover, if one or both of the parents are still alive, it is assumed in principle that the natural parent has a parental link with the child, which as a rule prevents the foster parent from satisfying the requirements of the Child Benefit Act.

5.5 Furthermore, the State party argues that, even if proportionally fewer migrant workers than Dutch nationals fulfil the statutory requirements governing entitlement to child benefit for foster children, this does not imply discrimination as prohibited by article 26 of the Covenant. In this connection, it refers to the decision of the Committee in communication No. 212/1986, P.P.C. v. the Netherlands [2], in which it was held that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits.

5.6 In conclusion, the State party submits that the statutory regulations concerned are a necessary and appropriate means of

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[2] Declared inadmissible on 24 March 1988, paragraph 6.2.

achieving the objectives of the Child Benefit Act, i.e. making a financial contribution to the maintenance of children with whom the applicant has a close, exclusive, parental relationship, and do not result in discrimination as prohibited by article 26 of the Covenant.

6.1 In his comments on the State party's observations, counsel maintains his allegation that the distinction between own children and foster children in the Child Benefit Act is discriminatory. He argues that the authors' foster children live in exactly the same circumstances as their own children. In this connection, reference is made to article 24 of the Covenant, which stipulates that a child is entitled to protection on the part of his family, society and the State without any discrimination as to, inter alia, birth. According to counsel, no distinction can be made between the authors' own and foster children regarding the intensity and exclusivity in the relationship with the authors.

6.2 Counsel further argues that it is evident that this distinction affects foreign employees working in the Netherlands more than Dutch residents, since the foreign employees often choose to leave their family in the country of origin, while there is no such necessity for Dutch residents to leave their family abroad. In this connection, counsel contends that the State party ignores that the Netherlands is to be considered an immigration country.

The examination of the merits:

7.1 The Human Rights Committee has considered the present communications 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.

7.2 The question before the Committee is whether the authors are victims of a violation of article 26 of the Covenant, because the authorities of the Netherlands denied them a family allowance for certain of their dependents.

7.3 In its constant jurisprudence, the Committee has held that although a State party is not required by the Covenant on Civil

and Political Rights to adopt social security legislation, if it does, such legislation and the application thereof must comply with article 26 of the Covenant. The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. [3]

7.4 With respect to the Child Benefit Act, the State party submits that there are objective differences between one's own children and foster children, which justify different treatment under the Act. The Committee recognizes that the distinction is objective and need only focus on the reasonableness criterion. Bearing in mind that certain limitations in the granting of benefits may be inevitable, the Committee has considered whether the distinction between one's own children and foster children under the Child Benefit Act, in particular the requirement that a foster parent be involved in the upbringing of the foster children, as a precondition to the granting of benefits, is unreasonable. In the light of the explanations given by the State party, the Committee finds that the distinctions made in the Child Benefit Act are not incompatible with article 26 of the Covenant.

7.5 The distinction made in the Child Benefit Act between own children and foster children precludes the granting of benefits for foster children who are not living with the applicant foster parent. In this connection, the authors allege that the application of this requirement is, in practice, discriminatory, since it affects migrant workers more than Dutch nationals. The Committee notes that the authors have failed to submit substantiation for this claim and observes, moreover, that the Child Benefit Act makes no distinction between Dutch nationals

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[3] See Broeks v. the Netherlands, communication No. 172/1984, and Zwaan-de Vries v. the Netherlands, communication No. 182/1984, Views adopted on 9 April 1987, paragraphs 12.4; Vos v. the Netherlands, communication No. 218/1986, Views adopted on 29 March 1989, paragraph 11.3; Pauger v. Austria, communication No. 415/1990, Views adopted on 26 March 1992, paragraph 7.2; Sprenger v. the Netherlands, communication No. 395/1990, Views adopted on 31 March 1992, paragraph 7.2.

and non-nationals, such as migrant workers. The Committee considers that the scope of article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits.

8. 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 do not disclose a violation of any provision of the Covenant.

APPENDIX

Individual opinion of Messrs. Kurt Herndl, Rein Müllerson, Birame N'Diaye and Waleed Sadi pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's Views on Communications Nos. 406/1990 and 426/1990, L. Oulajin and M. Kaiss v. The Netherlands

We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. While referring to the individual opinion attached to the decision concerning Sprenger v. The Netherlands [4] (communication No. 395/1990), we consider it proper to briefly expand on the Committee's rationale, as it appears in these Views and in the Committee's Views on Communications Nos. 172/1984, Broeks v. The Netherlands and 182/1984, Zwaan-de-Vries v. The Netherlands [5].

It is obvious that while article 26 of the Covenant postulates an autonomous right to non-discrimination, the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.

Furthermore it would seem to us that it is essential to keep one's sense of proportion. With respect to the present cases, we

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[4] Views adopted on 31 March 1992 (44th session).

[5] Views adopted on 9 April 1987 (29th session).

note that the authors are asking for child benefits not only for their own children - to which they are entitled under the legislation of the Netherlands - but also for siblings, nephews and nieces, for whom they claim to have accepted responsibility and hence consider as dependents. On the basis of the information before the Committee, such demands appear to run counter to a general sense of proportion, and their denial by the government concerned cannot be considered unreasonable in view of the budget limitations which exist in every social security system. While States parties to the Covenant may wish to extend benefits to such wide-ranging categories of dependents, article 26 of the Covenant does not require them to do so.

[Done in English, French, Russian and Spanish, the English text being the original version.]

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