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PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
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The Secretary General of the United Nations (Office of the High Commissioner for Human Rights) presents his compliments to the Permanent Representative of the Netherlands to the United Nations Office at Geneva and has the honour to transmit herewith the final text (advance unedited) of the Views adopted by the Committee on the Elimination of Discrimination against Women on 17 February 2014, concerning communication No. 36/2012, which was submitted for consideration under the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, on behalf of Ms. Elisabeth de Blok et al.

The Secretary General has the honour to draw the attention of the State party to the Committee's determination in paragraph 9 of the Views that article, 11, paragraph 2 (b) of the Convention has been violated. Pursuant to the Committee's request in paragraph 10, the State party is requested to inform the Committee, within six months of the transmittal of the Views, of all measures taken to give effect to the Views.

As per the Committee's decision, the text of the Views will be made public.

19 March 2014

INGEKOMEN
25 MARS 2014
PV Genève

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United Nations CEDAW/C/57/D/36/2012

Convention on the Elimination of All Forms of Discrimination against Women

Advance unedited version

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Committee on the Elimination of Discrimination against Women
Fifty-seventh session
10-28 February 2014

Communication No. 36/2012

Views adopted by the Committee at its fifty-seventh session, 10-28 February 2014

Submitted by:	Elisabeth de Blok et al. (represented by counsel, Marlies S. A. Vegter)
Alleged victims:	The authors
State party:	The Netherlands
Date of communication:	24 November 2011 (initial submission)
References:	Transmitted to the State party on 13 January 2012 (not issued in document form)
Date of adoption of decision:	17 February 2014

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Annex

Views of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-seventh session)

Communication No. 36/2012, Elisabeth de Blok et al. v. the Netherlands*

Submitted by:	Elisabeth de Blok et al. (represented by counsel, Marlies S. A. Vegter)
Alleged victims:	The authors
State party:	The Netherlands
Date of communication:	24 November 2011 (initial submission)
References:	Transmitted to the State party on 13 January 2012 (not issued in document form)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 17 February 2014,

Adopts the following:

Views under article 7 (3) of the Optional Protocol

1. The authors of the communication are six Dutch nationals: Ms Bettina Gerarda Elisabeth de Blok (born in 1972), Ms Jolanda Huntelaar (born in 1974), Ms Titia Helena Spreij (born in 1969), Ms Jacqueline Antoinette Andrews (born in 1971), Ms Henriette Sophie Lesia Koers (born in 1975) and Ms Maria Johanna Hendrika den Balvert (born in 1970). They claim to be victims of a violation, by the Netherlands, of their rights under article 11 (2) (b) of the Convention on the Elimination of All Forms of Discrimination against Women. They are represented by counsel, Ms Marlies S. A. Vegter from the "BoschAdvocaten". The Convention and the Optional Protocol entered into force for the Netherlands on 22 August 1991 and 22 August 2002, respectively.

The facts as submitted by the authors

Preliminary remarks regarding the general context, as submitted by the authors

* The following members of the Committee took part in the consideration of the present communication: Ayse Feride Acar, Olinda Barsiro-Bobaditta, Niklas Bruun, Nácta Gabr, Hilary Gbedemah, Nahla Haidar, Yoko Hayashi, Ismat Jahan, Datia Leinarte, Violeta Neubauer, Theodora Nwankwo, Pramila Patten, Silvia Pimentel, Maria Helena Pires, Biancamaria Pomeranzi, Patricia Schulz, Xiaoqiao Zou.

2.1 On 1 January 1998, the Incapacity Insurance Self-employed Persons Act WAZ entered into force. This act provided for a public mandatory insurance for self-employed workers, professional workers and co-working spouses against the risk of loss of income due to inability to work. Those insured owed a premium for this purpose.

2.2 Under article 22, paragraph (2), of the WAZ, insured women were entitled to a maternity allowance during at least 16 weeks around the date of the delivery. No additional premium was owed for this provision by the insured women. The allowance was 100 % of the applicable basis for determining the allowance, but did not exceed the statutory minimum wage (article 24, read in conjunction with article 8 of the WAZ). The applicable basis for calculating the allowance depended on the income earned by those insured during a period (laid down in the WAZ) preceding the delivery.

2.3 On 1 December 2001, the Work and Care Act became effective. It incorporated different statutory leave arrangements regarding the labour and care combination. The arrangement on maternity allowance for self-employed women (including professional workers and co-working spouses) became part of the Work and Care Act under article 3 (19). The funding of this arrangement remained unchanged.

2.4 On 1 August 2004, the public mandatory incapacity insurance for self-employed workers, professional workers and co-working spouses ceased to exist following the entry into force of the Act on Termination of the Entitlement to WAZ Allowances. Thus, self-employed women (including professional workers and co-working spouses) were no longer entitled to receive public insurance maternity benefits and self-employed workers would have to take private insurance if they wanted to be covered for loss of income.

2.5 When the public law arrangement of pregnancy and delivery insurance for self-employed workers ended on 1 August 2004, self-employed women had no choice but to turn to private insurance companies to cover the loss of income because of pregnancy and delivery. The private insurers covered this risk in a number of cases. For self-employed women, however, such incapacity insurance came with restrictions. As a matter of fact, near all policy conditions had a clause to the effect that the right to maternity allowance could only be exercised if the anticipated date of delivery was at least two years after the starting date of the insurance.

2.6 In its Explanatory Memorandum to the Dutch parliament regarding the draft Act on the Termination of Entitlements to WAZ Allowances, the government said the following on the maternity allowance for self-employed women: "The government has asked itself whether these benefits must be the subject of a public law arrangement. International treaties do not give an obligation to do so. Privatisation of this insurance is in line with the privatisation of the insurance for self-employed workers regarding loss of income due to incapacity. As a result, the burden is carried by the self-employed workers themselves, as is the case with the burden of the incapacity to work. Self-employed workers can assess the risk themselves and, if they want to, provide for it (reservation). Furthermore, there are insurers who insure the risk of pregnancy and delivery as supplement to the benefits resulting from the Work and Care Act under certain conditions as part of the incapacity insurance". "Following the above, the government does not see any reason why it should retain a public law arrangement for a maternity allowance for

self-employed workers". "This means that from the date on which the WAZ insurance is terminated, no new maternity allowance will be supplied"; and "Pregnancy during the first two years after taking out the insurance is usually not covered".[1]

2.7 When the Act on the Termination of Entitlement to WAZ Allowances became effective, reinsurance of the risk of pregnancy and delivery with a private insurer was not an option for the authors because of the two years' qualifying period; they would not receive any benefits during that two years' period. As far as the reinsurance is concerned, the cost of private incapacity insurance, including maternity allowance, was substantially higher than the one due by self-employed women under the WAZ.

2.8 Women other than the authors have taken legal action in a number of court cases against the insurers with respect to the restrictive conditions in connection with the risk of pregnancy and delivery. They argued that insurers were not entitled to apply conditions, such as a two years' qualifying period, as it violated a prohibition of gender-based discrimination. This argument has been rejected by the highest State party's courts. The Dutch Supreme Court considered that it was up to insurance companies to offer insurance coverage for incapacity that was the same for men and women and that the same insurance might also provide coverage for loss of income due to pregnancy[2]. The Dutch Supreme Court was of the view that a margin of appreciation included the possibility to set out deviating conditions in the policy. The authors submit that this ruling leaves no doubt as to the need for a public law insurance that existed for self-employed women, since private insurances (if available at all) do not provide an adequate alternative.

2.9 The termination of the public law insurance and its consequences for the maternity allowance for self-employed women created strong commotion in the society and, as a result, the Act on Benefits in respect to Pregnancies and Delivery for Self-Employed Persons became effective on 4 June 2008. Since then, the Work and Care Act provides for a right to maternity allowance for self-employed women during a period of at least 16 weeks. Pursuant to article VI of the relevant transitional provisions, however, self-employed women who gave birth prior to 4 June 2008 could not make any claims for a benefit under this new Act which has no retroactive effect.

2.10 Prior to the start of the legal proceedings, the authors applied to their union, which is a member of the Federative Nederlandse Vakbeweging (Netherlands' Trade Union Confederation, FNV). The FNV and other organisations received numerous complaints from self-employed women unable to insure the risk of loss of income during the period surrounding pregnancy with a private insurer when the public law insurance was cancelled. The authors state, therefore, that this issue does not only affect them but also many other women in the Netherlands.

Authors' specific situation

2.11 All authors were self-employed after August 2004 and gave birth to a child during the period between June 2005 and March 2006. As a result of the entry into force of the Act on the Termination of Entitlement to WAZ Allowances on 1 August

[1] Informat translation provided by the authors.
[2] Dutch Supreme Court, 11 July 2008, LJN BD1850, NJ 2008.

2004, they did not receive a (social security) benefit during the period around the delivery of their child when they were unable to work.

2.12 On 7 May 2004, Ms De Blok took a private incapacity insurance, which provided for maternity allowance. The insurers, however, refused to pay any benefit to her as her maternity leave was before the end of the qualifying period laid down in the terms and conditions of the contract. Eventually, she received a compensation of EUR 1818.76 from her insurer (being the allowance she would have been entitled to had there not been a qualifying period, minus the deductible of two months as she threatened to take the matter to court).

2.13 Ms Huntelaar and Ms Sprcij made inquiries on the cost of a private incapacity insurance after reports in the media on the Act on the Termination of Entitlement to WAZ Allowances. Yet, the premium proved to be too high for them to be able to afford it. The monthly insurance premium for Ms Huntelaar was so high that it nearly equalled her income. Furthermore, she did not want to take a private insurance against a premium she could not afford, as she did not wish to wait until after the qualifying period had passed with having a second child considering the date of birth of her first born. At the time, Ms Huntelaar requested offers from at least five private insurers, but they all applied a two years' qualifying period.

2.14 Ms Andrews, Ms Koers and Ms Den Balvert also renounced their plan to take a private incapacity insurance due to the amount of the premium and the qualifying period.

2.15 On 12 December 2005, the authors demanded a declaratory decision by the District Court of The Hague (first-instance court), claiming that the State authorities have violated, inter alia, article 11 (2) (b) of the CEDAW Convention because of their failure to provide a statutory arrangement entitling self-employed women to a maternity allowance. They argued that the wording of this article shows that the State has a clear and concrete obligation to achieve a narrowly defined result, which is to give all women who carry out paid work the right to maternity leave with compensation for their loss of income. Article 11 (2) (b) of the Convention, lays down an obligation to achieve a specific result. They further argued that the State party failed to comply with the principle that pregnant women must be protected against health risks and loss of income. This, therefore, was a case of direct gender-based discrimination as a result of which the authors suffered damage. They claimed compensation from the State and the payment of an advance of the compensation.

2.16 On 25 July 2007, the District Court of The Hague rejected the authors' claim. According to the court, article 11 (2) (b) of the Convention was not directly applicable as it merely contained "an instruction" for States parties to introduce maternity leave, but left the States parties the freedom to determine how concretely to achieve this. The article therefore did not have direct effect and could not form the basis of the authors' claim against the State.

2.17 On 21 July 2009, The Hague Court of Appeal upheld the District Court's ruling. It found that article 11 (2) (b) of the Convention was too general to be applied in a court of law, as this article only required the State to take appropriate measures without prescribing what exact measures were to be taken. The Court of Appeal established that the duration of the maternity leave, its form and amount of the benefit have not been specified and that, therefore, it was unable to apply this

article. On 1 April 2010, the Dutch Supreme Court confirmed the Court of Appeal's ruling.

Complaint

3.1 The authors claim that their rights under article 11 (2) (b) of the Convention have been violated, as the State party did not take any measures, regarding the period from 1 August 2004 until 4 June 2008, to provide for maternity leave with compensation for loss of income for self-employed women. They ask the Committee to recommend the State party to compensate for the disadvantage suffered by them. Furthermore, they request the Committee to recommend the State party to take appropriate measures which meet the requirements of article 11 (2) (b) of the Convention.

3.2 The abolition of the maternity allowance from 1 August 2004 until its reintroduction on 4 June 2008 caused damage to the authors, as they did not receive any benefit during their maternity leaves. Taking a private insurance was not an option[3] because (a) the premiums were prohibitive and (b) their respective maternity leaves were before the expiry of the qualifying period applied by insurers. The damage suffered by the authors equals the amount they would have received had the WAZ not been cancelled with effect of 1 August 2004. They provide a detailed calculation of the damage incurred by each of them[4].

3.3 The authors refer to paragraph 10.2 of the Committee's Views in Communication No. 3/2004, *Nguyen v. the Netherlands*, and argue that (a) an arrangement providing for maternity leave with pay or with comparable social benefits for all women who do paid work must comply with the obligations of article 11 (2) (b) of the Convention; and (b) it is the State party's duty to achieve that result and to do this in such a way as to create enforceable rights for women. The State party's margin of appreciation is, therefore, to determine what an appropriate allowance is and also to create different systems for women who are self-employed workers and for salaried workers. However, determining that no allowance is appropriate falls outside the scope of the State party's margin of appreciation.

3.4 The authors submit that the matter of paid maternity leave was addressed in the State party's 4th and 5th periodic reports to the Committee. Back in 2007, the Committee took the following position in its concluding observations on the absence of the provision of income to self-employed women: "29. The Committee is further concerned about the repeal of the Invalidity Insurance (Self-Employed Persons) Act in 2004, which resulted in the termination of maternity allowance for independent entrepreneurs. The Committee calls upon the State party to reinstate maternity benefits for all women in line with article 11 (2) (b) of the Convention".

3.5 The authors note that, prior to the examination of the Dutch 5th periodic report, the Committee requested the State party to provide written replies to the List of Issues, which included the following: "19. The Committee, in its previous

[3] In fact, as explained by the authors, Ms De Blok did take out private insurance.

[4] The authors claim the following amounts: Ms Andrews, 2080.08 Euro; Ms Den Batvert, 4086.60 Euro; Ms De Blok, 3003.27 Euro (but in fact she claimed only 1184.51 Euro because she had received 1818.76 Euro from her insurer); Ms Huntelaar, 1756.73 Euro; Ms Koers, 4021.23 Euro; and Ms Spreij, 2213.08 Euro.

concluding observations (CEDAW/C/NDL/CO/4, para.30), called upon the State party to reinstate maternity benefits for all women, including the self-employed and entrepreneurs. This was done in July 2008 after the entry into force of the Work and Care Act. In this regard, please indicate whether the Government has considered introducing a compensation arrangement for those self-employed women who were pregnant in the period between the revocation of the Invalidity Insurance Act in 2004 and July 2008".

3.6 These considerations lead the authors to the conclusion that in the Committee's view, article 11 (2) (b) of the Convention makes a clear and unambiguous provision that all women who do paid work are entitled to a period of paid leave and that this right also existed for self-employed women in the period from August 2004 until July 2008. The authors, however, have been denied this right and the State party must therefore compensate the loss of income suffered by them.

3.7 The State party's answer to the question raised in paragraph 3.5 was, however, the following[5]: "The Dutch government does not consider that the reinstatement of maternity benefits for self-employed women should be a ground for introducing a compensation arrangement for those women who were not entitled to a benefit in the intervening period. As it would be retroactive, such an arrangement would not enable the women concerned to stop working or to work less during the pre-natal or post-natal periods, which is the sole purpose of maternity benefit. An appeal court ruling on this subject is expected in October 2009"..

3.8 The authors conclude that the State party is unwilling to recognise its obligations under article 11 (2) (b) of the Convention and that it continuously argues in domestic proceedings that this provision does not have a direct effect and that the authors cannot derive any right from it. The Dutch Supreme Court has rejected the authors' claim against the State party.

State party's submission on admissibility and merits

4.1 On 12 July 2012, the State party submitted its observations on the admissibility and merits of the communication. Preliminarily, the State party takes note that the issue before the Committee is whether article 11 (2) (b) has been violated in this case.

4.2 It recalls that all the authors are self-employed and they gave birth in 2005 - 2006. Until 31 July 2004, self-employed were compulsorily insured against the risk of loss of income due to incapacity to work under the Incapacity Insurance Self-employed Persons Act, WAZ. Under the Work and Care Act, WAZO, self-employed women were also entitled to a State maternity benefit, up to the value of the statutory minimum wage, for at least 16 weeks. The benefit was funded through WAZ contributions. The Access to Incapacity Insurance Self-employed Persons Act was discontinued on 1 August 2004. It ended self-employed women's entitlement to maternity benefit. Thereafter, they could join a private insurance scheme; one author did so, the others not.

4.3 The authors complained to The Hague District Court, claiming that the State should have ensured an adequate maternity benefit scheme in keeping with, inter alia, its obligations under the Convention. The district court declared their claim

[5] See, UN document CEDAW/C/NLD/Q/5/Add.1.

unfounded. On appeal, The Hague Appeal Court upheld the district court's judgement. The Supreme Court examined the case on cassation, and dismissed the cassation appeal, ruling that the provisions of article 11 (2) (b) of the Convention are insufficiently precise, thus making them unsuitable for direct application by national courts.

4.4 The State party adds that in the Netherlands, social insurance has always been aimed at protecting persons in paid employment against the risk of loss of income. Initially, employees were only protected only against loss of income due to incapacity to work. Subsequently, protection was extended to cover invalidity, sickness, unemployment or old age. Since the 1950s, non-employees have also been protected and national insurance was established. In 1970, the General Invalidity Act, AAW, entered into force, providing for insurance of both employees and self-employed against incapacity to work. In 1998, the legislation governing incapacity to work was changed to allow more individual responsibility and initiative. Public schemes were retained where risks were very high and thus impossible to be borne by individuals. The AAW was repealed and replaced by a number of acts for employees, young disabled people and self-employed. The WAZ was one of these acts and it introduced compulsory incapacity insurance for self-employed, professionals and spouses working in family business.

4.5 Prior to the adoption of the WAZ, no public maternity scheme for self-employed women existed and under certain conditions, self-employed women could choose to take out insurance under the Sickness Benefits Act, which included maternity benefit; a small proportion of self-employed women opted for this. The WAZ put in place a separate insurance scheme, funded by the target group itself, which included maternity benefit for 16 weeks for self-employed women.

4.6 In 2001, the WAZO was adopted in reply to the case law of the European Court of Justice to the effect that pregnancy may not be seen as sickness; the maternity provisions under WAZ lapsed. The WAZO also compiled existing statutory provisions on leave into a single statutory framework. The benefits continued to be funded from contributions of those insured.

4.7 During the subsequent years, independent entrepreneurship was deemed to entail acceptance of the associated opportunities and risks. Furthermore, self-employed could contract private insurances against incapacity. A State scheme was thus considered no longer necessary. Neighbouring countries also considered that self-employed insurance was not a State responsibility. Self-employed themselves were not satisfied with the WAZO system because of the level of the contributions and the fact that they were based on the income. For these reasons, in August 2004, the Discontinuation of Access to Incapacity Insurance Self-employed Persons Act was introduced, abolishing the public incapacity insurance scheme for self-employed and the WAZO maternity scheme for self-employed. In 2008, the WAZO was amended, introducing a State maternity scheme to protect the health of mother and child. Since then, self-employed mothers can claim maternity benefits up to the minimum wage for 16 weeks. Unlike the previous scheme, benefits are funded through public funds and not by contributions.

4.8 Regarding the merits of the present communication, the State party disagrees with the authors' allegation of a violation of article 11 (2) (b) of the Convention. It believes that this provision of the Convention has no direct effect. It acknowledges to be bound by the Convention, but considers that this does not necessarily mean

that the Convention's specific provisions have direct effect. It further notes that neither the text of the Convention nor its drafting history indicates that the provision in question was intended to have direct effect. According to the State party, the question of whether it has direct effect needs to be assessed in the light of national law. The question was raised in the Dutch Parliament when it debated the act approving the Convention. The Government then affirmed that article 7 has direct effect but that it doubted that national courts would attribute direct effect, for example, to article 11 (2) of the Convention.

4.9 Under article 93 of the Constitution, provisions of treaties which may be binding on all persons by virtue of their content become binding after their publication in the State party. Such provisions have a direct effect in the Dutch legal system without any national legislation being required. To decide whether such provisions may be binding on all persons by virtue of their content, it is necessary to verify whether they impose obligations or assign rights and whether they are unconditional and clear enough to be applied by the courts in individual cases.

4.10 The State party considers that article 11 (2) (b) of the Convention is not unconditional and it is not sufficiently clear to be applied by national courts in individual cases. The article requires States parties to take "appropriate measures" to prevent discrimination against women on grounds of maternity, i.e. it constitutes a best-efforts obligation and does not lay down clear rules on how to pursue this objective. It does not say what priorities States parties must set and what rights must be given precedence and does not specify what form maternity leave must take or the associated conditions. According to the State party, this provision of the Convention does not require the establishment of a particular maternity leave scheme but to ensure women's effective right to work, including in the event of pregnancy and maternity. This right is not sufficiently specific as to be applied directly by the national courts. The national courts have upheld this position on three occasions in the present communication. In addition, in two judgements, the Central Appeals Court for Public Service and Social Security Matters has emphasised that this provision is a best-efforts obligation, without direct effect.

4.11 The State party finds the authors' reference to the Committee's Views in *Nguyen v. the Netherlands* irrelevant to the present case, pointing out that there the Committee has explained that, under article 11 (2) (b) of the Convention, States parties must ensure maternity leave with pay or comparable social benefits. It also stated, however, that the provision leaves States parties free to decide what form the benefit scheme should take. In addition, the Committee indicated that States parties are allowed to take different measures for women in paid employment on the one hand, and self-employed women, on the other.

4.12 The State party adds that its acceptance of the Optional Protocol to the Convention does not mean, as claimed by the authors, that all the Convention's provisions are so specific that they have direct effect. The issue of whether a State party has taken sufficient measures to implement a provision is different from the one of whether the provision has direct effect. If it were otherwise, the Convention would have assigned different obligations to States that are also parties to the Optional Protocol than to those which are not. The Optional Protocol only provides a procedure, and does not elaborate on the provisions of the Convention.

4.13 According to the State party, the authors' interpretation of article 11 (2) (b) is too broad when they claim that it applies not only to paid employees but also to self-

employed. The State party believes that this provision applies only to women in paid employment, The text states that maternity leave must be introduced with retention of "pay"; "pay" refers to paid employment. The text cannot be interpreted as meaning protection for self-employed. Self-employed persons are not in a dependent relationship and enjoy the right to take leave and return to work after pregnancy on the basis of their self-employed status. Such persons can take measures to cover the risk of loss of income themselves by saving or taking out insurance. This is a fundamental difference between self-employed and paid employees.

4.14 The State party adds that the authors' broad interpretation of article 11 is not obvious also when comparing to other international treaties. The European Social Charter and the ILO conventions contain provisions similar to article 11. The parallel with ILO conventions is recognised not only by the State party, but also by the ILO itself,[6] The ILO conventions on maternity protection focus exclusively on protecting employees with an employment contract and not on protecting self-employed persons.

4.15 On the authors' argumentation that the authorities should have compensated self-employed women for loss of income due to maternity and that the conditions for private maternity insurance were less favourable than those of the earlier, compulsory public insurance scheme, the State party notes, first, that even if it had an obligation to make provision for self-employed persons, it is free to decide what form this should take. When taking "appropriate measures", the authorities are free to determine the details of its maternity policy and benefits. They can introduce a public scheme or leave it to the private sector. The drafting history of the Convention also shows that a deliberate decision was made to leave open the manner in which the costs of the measures referred to in article 11 (2) (b) are to be funded[7]. The authorities' involvement is unnecessary if, as in the present case, the risk for self-employed can be adequately insured privately. Furthermore, the State party has facilitated private insurance by making the premiums tax deductible. Some self-employed persons were able to voluntarily insure themselves under the Sickness Benefits Act, which provides entitlement to maternity benefit for a period of 16 weeks. In the State party's opinion, an adequate maternity scheme for self-employed women therefore existed.

4.16 The State party adds that the fact that the authors found the conditions offered by private insurers, including the existence of a waiting period, less attractive, does not permit to conclude that the authorities have failed to make adequate provision. Insurance companies are in principle free to determine the extent of the risk, the level of benefit and the conditions under which cover is provided. The reason insurers apply a waiting period in case of pregnancy is that, unlike sickness and incapacity for work, pregnancy does not involve an unforeseeable risk. The Equal Treatment Act guarantees that insurance companies, too, do not make an impermissible distinction on the grounds of sex and maternity.

4.17 The State party concludes that in light of the above considerations, no violation under article 11 (2) (b) of the Convention has occurred in this case.

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[6] Reference is made, inter alia, to Lars Adam Rehof, *Guide to the Travaux préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Dorecht, the Netherlands, Martinus Nijhoff Publishers, 1993), p. 128-130.

[7] Idem, p. 139-140.

Authors' comments on the State party's submission

5.1 On 24 September 2012, the authors presented their comments to the State party's observations on the admissibility and merits. Regarding the issue of direct effect, they argue that the words of article 11 (2), first sentence, and article 11 (2) (b), of the Convention clearly impose a concrete duty on the State party to achieve a certain result, which is to give women who do paid work the right to receive compensation for loss of income during maternity. The authors' understanding of this provision is that States parties must ensure that women who do paid work are entitled to maternity leave. According to the authors, States parties are not allowed to decide not to create an arrangement for maternity leave for women workers.

5.2 The authors further disagree with the State party's argumentation regarding the lack of detail in the Convention's obligation to take "appropriate measures" regarding maternity leave leading to lack of direct effect, Whereas States parties are required to take appropriate measures to introduce maternity leave, the authors note that this does not mean that States parties have the freedom not to take any measures. In their opinion, article 11, paragraphs (2), first sentence, and (2) (b), of the Convention impose a duty to States parties to introduce maternity leave, In the present case, no provision whatsoever was in place for the authors. The provision in question is sufficiently detailed and unconditional to be applied in court. Even if one could argue as to the extent of the maternity leave to be established, in the authors' opinion, nothing suggests that the State party has no duty to create a provision. The authors contend that the wording of article 11, paragraphs (2), first sentence, and (2) (b) is sufficient and as detailed as possible, as it would have been impossible for a treaty like CEDAW to describe in detail what maternity leave should look like in all States parties, given the diversity of legal systems among States parties.

5.3 The authors further qualify as incorrect the State party's explanation that under the Dutch legal system, a provision has direct effect only when no domestic legislation is required. They contend that the State party's legal system recognises three types of provisions in conventions: (a) provisions serving as instructions which cannot be invoked directly in court; (b) sufficiently detailed provisions which can be invoked directly in court, even though their implementation requires further legislative actions; or (c) provisions of such clarity, which can be relied on in court by individuals. The authors add that the Dutch Supreme Court has qualified article 7 of CEDAW as a provision of the second type in the Staatkundig Gereformeerde Partij (SGP) case, holding "that the State party must take further measures which will result in women actually being granted the right to stand for election by the SGP and that the State must use instruments that are both effective and affect the fundamental rights of the SGP (members) as little as possible"[8]

5.4 In the authors' opinion, article 11, paragraphs (2), first sentence, and (2) (b), of the Convention falls within the same category as article 7 of the Convention. According to them, with respect to article 11, paragraph 2, first sentence, and 2 (b) of the Convention, the Supreme Court should have considered that (1) this provision also has direct effect, as the goal to be realised is sufficiently clear and (2) this provision compels the State to take further measures to realise this goal. They ignore the reasons as to why the Supreme Court has a different approach when dealing with

[8] Supreme Court, 11 July 2008, LJN BD1850, NJ 2008, 578, juridical consideration 4.6.1

article 11 compared to the one it had regarding article 7, and do not understand why the court did not explain its reasoning in a greater detail.

5.5 The authors note that when the Act of Approval of CEDAW was created, the Government considered that article 7 would have a direct effect. No such remarks, however, were made regarding article 11. This, according to the authors, does not mean that a court has no duty to decide that article 11 (2) (b) has a direct effect as well. In the authors' opinion, in the State party, courts decide which provisions have direct effect or not. Courts, according to the authors, should take into account the considerable time passed since the adoption of the Convention and the fact that the Convention is a living instrument. Provisions which in the past may have been strictly regarded as having no direct effect may be seen differently today.

5.6 The authors consider the State party's reference to the decisions of the Central Appeals Tribunal of January 2000 and April 2003 irrelevant to their case. They do not share the tribunal's conclusion that the first sentence of article 11 (2) and article 11 (2) (b) have no direct effect, They point out that the January 2000 case related to an enrolment to a study programme while on benefit; it was in an only general sense that Central Appeals Tribunal has ruled that article 11 had no direct effect. The other decision, of April 2003, relates to the decision submitted to the Committee in *Nguyen v. the Netherlands*. In this case, the Committee decided that the article 11 (2), first sentence, and 11 (2) (b), of the Convention orders States parties to introduce maternity leave with retention of salary or other social security benefit; in the authors' view this means that States are obliged to introduce a maternity leave scheme even if its shape remains open.

5.7 The authors consider that the Committee's findings in the *Nguyen* case are relevant to their case. According to them, the Supreme Court should have taken the Committee's views in *Nguyen* into account when deciding with the issue on whether article 11, paragraphs (2), first sentence, and (2) (b) has a direct effect in the context of the present case.

5,8 They refer to the Committee's concluding observations adopted following the examination of the fifth periodic report of the Netherlands, where the Committee regretted that the question of the direct applicability of the Convention's provisions continues to be determined by domestic courts and is therefore subject to divergent opinions and that the State party has argued in court the non-direct applicability of substantive provisions of the Convention. The Committee reiterated its concern that as a consequence of the position of the State party, the judiciary is left with the responsibility of determining whether a particular provision is directly applicable and that consequently, insufficient measures have been taken to address discrimination against women and to incorporate all of the Convention's substantive provisions into domestic laws[9]. The authors contend that the State party ignores the Committee's concluding observations regarding the direct effect of article 11, paragraphs (2), first sentence, and (2) (b). They emphasise that the interpretation of a supervisory and judiciary body must be part of the assessment and that the courts have wrongly failed to include such interpretation in their case.

5.9 In light of the Committee's decision in the *Nguyen* case, the State party is aware that under article 11 (2), first sentence, and article 11 (2) (b), it is obliged to arrange maternity leave for working women. According to the authors, this

[9] See CEDAW/C/NLD/CO/5, para. 12, 5 February 2010.

provision should have direct effect, requiring the authorities to take further measures. The compensation claimed by the authors is based on the statutory system for self-employed women which applied until August 2004 and which was reintroduced in June 2008. This system, in the authors' opinion, may be regarded as an implementation of the State party's obligation under article 11 of the Convention.

5.10 The authors add that the State party cannot ignore its international obligations by invoking national law and note that States parties are liable for their judiciary. The State party has accepted article 11 of the Convention as a source of binding obligations. The Committee has a supervisory role and it has given a wide interpretation of the scope of this article, which is binding on the State party.

5.11 As to the State party's argumentation that article 11 does not apply to self-employed women as "pay" focuses on salaried women[10], the authors argue that article 11 (2), first sentence and 11 (2) (b) not only refers to retention of salary with "pay" but also to "pay or comparable social benefits". According to them, the State party's argumentation is incorrect. The meaning of "pay" is wider than salaried employment. They note that, in the *Nguyen* case, the history of the development of the Convention was reflected and the Committee has concluded that the first sentence of article 11 (2) and 11 (2) (b) applies to self-employed women. In addition, the State party has not addressed the authors' arguments thereon in their initial submission.

5.12 Regarding the State party's argumentation that self-employed women should made the necessary arrangement for maternity leave, they reiterate that they had no option to arrange for a maternity leave, given that, after the abolition of the statutory arrangement in 2004, the majority of the private insurance policies had a two-year exclusion period. In addition, the authors could not afford the cost of private insurance due to their relatively low income; this was not refuted by the State party even if it observed that the premium payments were tax deductible. Accordingly, self-employed women particularly needed an arrangement for maternity leave; the State party was aware of this when reintroducing the maternity leave scheme for self-employed workers' maternity leave in 2008.

5.13 As to the State party's argumentation that it has complied with its obligations under article 11 as the authors could have taken out a private insurance, the authors note that they have complained in court regarding the discriminatory against women nature of the two-year exclusion period imposed by the insurers but the courts disagreed. Thus, according to the authors, the law on gender equality was ineffective.

5.14 The authors add that taking out voluntarily a sickness private insurance is only open to women who have worked as employees and became self-employed afterwards.

5.15 In conclusion, the authors indicate that when re-introducing the maternity leave scheme in 2008, the State party could have been expected to offer adequate compensation to the self-employed women who had given birth between 1 August 2004 and 4 June 2008,

[10] The authors note the State party's argument that the ILO Conventions do not apply to self-employed women but claim that they would not address it as ILO treaties are not being discussed in the present proceedings.

5.16 Finally, the authors qualify as incorrect the State party's reference to the situation in neighbouring countries. In substantiation, they refer to a recommendation by the Dutch Equal Treatment Commission to the State party's government in 2007 based on a comparative study, to the effect that the Netherlands was the only among the (then) 29 members of the European Economic Area where no maternity leave scheme for self-employed women was financed by public funds.

State party's additional submission

6.1 On 10 April 2013, the State party challenges the authors' contention that it, i.e. the State party, has claimed that the Convention's provisions have direct effect only if they do not require further implementation. It refers to its previous submissions and explains that a treaty provision must be examined in order to determine whether it has direct effect, i.e. to assess whether the provision grants rights to or imposes obligations on citizens and whether it is unconditional and sufficiently precise to be applied by the courts in individual cases.

6.2 As to the authors' reference to the case law of the Dutch Supreme Court whereby the court accepted the direct effect of article 7 CEDAW (see para. 5.3 above), the State party confirms that in the SGP case, the court held that the State must take measures which will result in women actually being granted the right to stand for election by the SGP and that the State must use instruments that are both effective and affect the fundamental rights of the SGP (members) as little as possible". The State party, however, disputes any suggestion that its Supreme Court had meant statutory measures in this respect. According to it, it is evident from the judgment in question that the quoted passage relates to taking enforcement measures against the SGP, and not statutory ones.

6.3 As to the authors' suggestion that the 2008 self-employment and pregnancy scheme was introduced to implement the obligation under article 11 (2) (b) of the Convention, the State party reiterates its argumentation that there is no obligation to establish such a scheme under this provision; instead, the scheme was introduced to protect the health of mothers and children.

6.4 Regarding the authors' contention that, in the *Nguyen* case, the Committee has emphasized that article 11 (2) (b) of the Convention applies to self-employed women, the State party notes that the case in question concerned the accumulation of rights under the schemes for women with salaried employment on the one hand and the one regarding self-employed women on the other hand, as existing at the time. In the *Nguyen* case, the Committee decided that the State party may operate different schemes for salaried and self-employed women. It did not, however, explicitly rule that article 11 (2) (b) applies to self-employed women.

6.5 The State party finally qualifies as incorrect the authors' contention that the government has stated that a maternity scheme for self-employed women is not regarded as a State responsibility in neighbouring countries either. In its previous submissions, the State party has observed that incapacity insurance for the self-employed is not regarded as a State responsibility in neighbouring countries; that was one of the reasons to terminate the WAZ system.

Issues and proceedings before the Committee

Consideration of the admissibility

7.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 72, paragraph 4, of its rules of procedure, it shall do so before considering the merits of the communication.

7.2 In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the same matter has not already been and is not being examined under another procedure of international investigation or settlement.

7.3 The Committee further notes that the State party has not challenged the admissibility of the communication. Thus, it has no reason to find the communication inadmissible on any ground, and, accordingly, it declares it admissible.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the authors and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

8.2 The Committee has noted the authors' claim that because they had received no maternity leave benefits as a result of the 2004 reform of the system, they are entitled to compensation equal to the benefits they would have received under the WAZ prior to the reform. It has also noted the State party's argumentation that article 11 (2) (b) applies only to women in paid employment and cannot be interpreted as meaning protection for self-employed; that self-employed can cover the risk of loss of income themselves by saving or taking out private insurance; that no State party's intervention is necessary as the risk for self-employed can be adequately insured privately; and that an adequate maternity scheme existed as some self-employed women were able to voluntarily insure themselves under the Sickness Benefits Act, which provides entitlement to maternity benefit for a period of 16 weeks and that, furthermore, the State party had even facilitated recourse to private insurance to self-employed by making such insurance premiums tax deductible.

8.3 The issue before the Committee, therefore, is whether, by removing the existent maternity leave scheme applicable also to self-employed women up to 2004, the State party has violated the authors' rights under article 11 (2) (b), of the Convention, given that they were left with, de facto, no maternity leave benefits when giving birth in 2005 and 2006.

8.4 Concerning the State party's argumentation that article 11 (2) (b) of the Convention does not apply to self-employed women, the Committee notes that nothing in the wording of article 11 generally or article 11 (2) (b), specifically, supports such a narrow interpretation. It observes on the contrary, that both during its constructive dialogue with States parties' representatives when examining periodic reports, in its concluding observations and in its jurisprudence, the Committee systematically has dealt with self-employed with reference to a number of subparagraphs of article 11, and article 11 (2) (b), in particular. In addition, the

Committee recalls that in the *Nguyen*[11] case to which both the authors and the State party refer, it based its conclusion on the clear assumption that in the context of article 11 (2) (b), the notion of "all employed women" covers not only women in an employment relationship but also those self-employed. Thus, in the Committee's view, article 11 (2) (b) is applicable also to self-employed women and not to female employees exclusively.

8.5 The Committee further takes note of the judgment of the District Court of The Hague of 25 July 2007, whereby the court concluded that article 11 (2) (b) of the Convention was not directly applicable as it contained a mere "instruction", for States parties, to introduce maternity leave, leaving to States parties the freedom to determine how concretely to achieve this in practice. It also notes the State party's contention that the obligation to take "appropriate measures" to prevent discrimination against women on grounds of maternity constitutes a "best efforts obligation" only. The Committee recalls that in its concluding observations in the context of the State party's fourth periodic report[12] it held the view that this Convention's provision is directly applicable. It reiterated its deep concern about the status of the Convention in the legal system of the State party, and in particular about the fact that the authorities continue considering that not all of the Convention's substantive provisions are directly applicable.

8.6 The Committee notes that in this context, the State party was called upon to reconsider its position that not all the substantive provisions of the Convention are directly applicable within the domestic legal order and, in particular, to ensure that all of the Convention's provisions are fully applicable. It further recalls that by ratifying the Convention and its Optional Protocol, the State party had engaged itself to provide remedies to individuals, victims of violations of their rights under the Convention. It also recalls its concern at the repealing of the Invalidity Insurance Self-employed Persons Act in 2004 by the authorities, resulting in the termination of maternity allowance for self-employed women; the Committee specifically had called upon the State party to reinstate maternity benefits for all women, to include self-employed, in line with article 11 (2) (b) of the Convention[13]. The Committee furthermore refers to its General Recommendation Nr 28 which provides that the question of direct applicability of the Convention at national level is a question of constitutional law and depends on the status of treaties in the domestic legal order[14]. Under the Convention, the State party has thus an obligation to "give effect to the provisions of the present Convention" (Convention, article 18), or to fulfil or ensure the application of the Convention's provisions, and thus the State party cannot invoke lack of direct applicability or qualifications such as "instructions" or "best efforts" obligations in order not to fulfil its obligations under article 11 (b) (2).

8.7 The Committee further notes that, notwithstanding of the existence of a certain margin of appreciation of the States parties in respect to the application in practice of their obligations under article 11 (2) (b), of the Convention, in the circumstances of the present case, after having initially introduced a compulsory public maternity

[11] See, *Dung Thi Thuy Nguyen v. the Netherlands*, Communication No. 3/2004, Views adopted on 14 August 2006, CEDAW/C/36/D/3/2004.

[12] See CEDAW/C/NLD/CO/4, 2 February 2007, paras 11 and 12.

[13] Idem, paras 29 and 30.

[14] See, CEDAW/C/GC/28, 16 December 2010, para 31.

leave scheme applicable to all, including self-employed women even if the latter were financed through a specific allotment, in 2004, the State party abolished the system in question without introducing any transitory measures and decided that self-employed women will not be covered by the public insurance scheme but could contract private insurances for loss of income during maternity instead. As a result, the authors were left with no maternity leave insurance on 1 August 2004. The authors tried to contract such insurance privately but, and this remains unrefuted by the State party, all but one were dissuaded to do so by the costs of the insurance in light of their relatively low income. In addition, and this also remained unchallenged by the State party, private insurers applied a two-year exclusion qualification period for new subscribers, during which no maternity benefits for loss of income could be paid in case of maternity leave.

8.8 The Committee notes that the State party has not challenged the authors' allegations, but has merely explained that it was within the national authorities' margin of appreciation to decide on the exact manner in which a maternity leave scheme is to be applied; that the payments for such insurances were tax-deductible; and that, in any event, private insurers were free to determine the exact financial parameters regarding risks coverage. In these circumstances, the Committee considers that the reform introduced in 2004 by the State party did negatively affect the authors' maternity leave benefits, as protected under article 11 (2) (b), if compared to those existing under the previous public coverage scheme.

8.9 The Committee notes that in these circumstances, the authors received no benefits for loss of income after having given birth in 2005 and 2006, with the exception of Ms De Blok who had contracted a private insurance and received a one-time lump sum payment from her insurer and only when she notified the insurance company that she intended to pursue the matter in court. Thus, the State party's failure to provide maternity benefits affected pregnant women adversely and constitutes therefore direct sex and gender-based discrimination of women and a violation of the obligation of the State party to take all appropriate measures to eliminate discrimination under article 11 of the Convention. Accordingly, the Committee considers that, by abolishing the initially existing public maternity leave scheme without putting in place an adequate alternative maternity leave scheme to cover loss of income during maternity leave immediately available to the self-employed authors when they gave birth, the State party has failed in its duties under article 11 (2) (b), of the Convention.

9. Acting under article 7, paragraph 3, of the Optional Protocol to the Convention, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the authors' under article 11, paragraph 2 (b), of the Convention. The Committee makes the following recommendations to the State party:

(1) Concerning the authors of the communication:

To provide reparation, including appropriate monetary compensation for the loss of maternity benefits.

(2) General:

The Committee notes that the State party has amended its legislation in June 2008 (with the entry into force of the Work and Care Act) and has ensured a maternity leave scheme also to self-employed women, thus not permitting similar violations to

reoccur in the future. It notes, however, that no compensation is possible for self-employed women, such as the authors, who had given birth between 1 August 2004 and 4 June 2008. The State party is accordingly invited to address and redress the situation of such women.

10. In accordance with article 7 (4) of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken thereon. The State party is also requested to publish the Committee's views and recommendations and to have them widely disseminated in order to reach all relevant sectors of society.

[Adopted in Arabic, Chinese, English, French, Russian and Spanish, the English text being the original version.]