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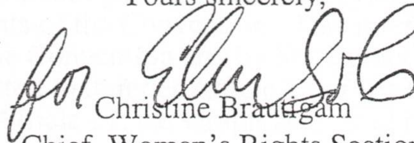
29 August 2006

Dear Mr. Knotter,

I have the honour to transmit to you herewith, the text of the dissenting opinion on communication No. 3/2004, which you submitted on behalf of Ms. Dung Thi Thuy Nguyen to the Committee for consideration under the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women.

Yours sincerely,



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Advance unedited version

Individual opinion of Committee members, Ms. Naela Mohamed Gabr, Ms Hanna Beate Schöpp-Schilling and Ms. Heisoo Shin (dissenting)

Consideration of the Merits

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

10.2 The question before the Committee is to determine whether the concrete application of section 59 (4) of the WAZ vis-à-vis the author insofar as it concerns the author's later maternity leave in 2002 constituted a violation of her rights under Article 11, paragraph 2(b), of the Convention, because it resulted in her receiving less benefits than she would have received had the provision not been in operation and had she been able to claim benefits as an employee and as a co-working spouse independently of each other.

10.3 The aim of Article 11, paragraph 2, in general, and Article 11, paragraph 2(b), in particular, is to address discrimination against women working in gainful employment outside the home on grounds of pregnancy and childbirth. Article 11, paragraph 2(b), obliges States parties in such cases to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances. Article 11, paragraph 2(b), does not use the term "full" pay. A certain margin of discretion is left to States parties to devise a system of maternity leave benefits which fulfills the requirements of the Convention. This interpretation is bolstered by the "travaux préparatoires" of the Convention and by State practice as presented to the Committee in reports submitted to it under Article 18 of the Convention. It can be argued that the explicit wording of Article 11, paragraph 2(b), read in conjunction with the other sub-paragraphs of Article 11, paragraph 2, aims primarily at women as salaried employees in the public or private labor market sectors. On the other hand the provision can also be interpreted to mean that States parties are also obliged to provide for a maternity leave with pay for self-employed women. We have seen that the State party has made some provision for this category of women. The manner in which States parties do so is left to their discretion - subject to their obligations under the Convention to achieve results.

10.4 Acting under Article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, we are of the following view: Based on the reasoning set forth above, we conclude that the law of the Netherlands which provides for a financially compensated maternity leave for women who are both salaried women and self-employed, albeit with the restriction of the so-called anti-accumulation clause in article 59WAZ, is compatible with the obligations of the State party under article 11, paragraph 2(b) of the Convention in the sense that it does not reveal a violation of the author's rights under this Article as concerns a direct form of discrimination based on sex.

10.5 At the same time, we are concerned at the fact, that the so-called "equivalence" principle does not seem to take into account the potential situation of a woman working in a situation of both salaried part-time and self-employment, in which the number of her

working hours in both categories of work equal or even may go beyond the hours of a full-time salaried female employee, who, in the Netherlands, to our knowledge, receives a maternity benefit which equals full pay for a certain period of time. In addition, the 1996 Equal Treatment (Full-time and Part-time Workers) Act (WOA) requires full-time and part-time employees to be treated equally. Therefore, we are of the view that the so-called anti-accumulation clause in article 59WAZ may constitute a form of indirect discrimination based on sex. This view is based on the assumption, that an employment situation, in which salaried part-time work and self- employment is combined, as described by the complainant, is one which mainly women experience in the Netherlands, since, in general, it is mainly women who work part-time as salaried workers in addition to working as family helpers in their husbands' enterprises. However, no information was requested by the Committee or given by the State party under this communication procedure to substantiate this assumption with facts. However, in the State party's fourth report under the CEDAW Convention, which has been in general distribution since 10 February 2005 and which is to be discussed at the 37th CEDAW session in 2007, the State party admits that part-time work is particularly common among women (CEDAW/C/NLD/4, page 62) . In addition, in the same report, the State party refers to the fact that in 2001, under a new Invalidity Insurance Act (WAO) for self-employed persons, 55% of the applicants were women (p.61).

10.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, we, therefore, make the following recommendation to the State party:

a) Collect data on the number of women working in the combination of part-time salaried employment and as self-employed persons as compared to men in order to assess the percentage of women versus men in this situation and, if this data shows a preponderance of women in such situations of employment

b) review the "anti-accumulation clause" (section 59(4) of the WAZ), in particular its principle of "equivalence," which does not seem to take into account the overall amount of hours of work in such combined employment situations, as constituting a possible form of indirect discrimination for women in such employment situations when pregnant and giving birth,

c) accordingly amend the WAZ or,

d) consider in the design of any new insurance scheme for self-employed persons, which includes maternity benefits, and which covers those who combine self-employment with part-time salaried employment, as referred to in the State party's fourth report (CEDAW/C/NLD/4, p.61), that integration of provisions ensure full harmony of Dutch law with the Convention on the Elimination of All Forms of Discrimination against Women in the area of maternity leave benefits for all women, working in various forms of employment in the Netherlands.