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Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Communication No. 74/2014

Decision on admissibility adopted by the Committee at its sixty-fifth session (24 October – 18 November 2016)

Submitted by:	N. K.(represented by her son, F.K.)
Alleged victim:	The author
State party:	Norway
Date of communication:	27 December 2013 (initial submission)
References:	Transmitted to the State party on 13 November 2014 (not issued in document form)
Date of adoption of decision:	7 November 2016

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Decision on admissibility*

1.1 The author of the communication is Mrs N. K., a Norwegian citizen born in 1935. She claims a violation, by Norway, of article 11, paragraphs d), e) and 16 c) of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by her son, Mr F. K. The Convention and Optional Protocol entered into force for the State party on 21 May 1981 and on 5 March 2002, respectively.

1.2 On 19 March 2015, the Working Group on Communications under the Optional Protocol decided, pursuant to Rule 66 of its Rules of Procedure, to have the issue of admissibility examined separately from the merits.

Facts as presented by the author

2.1 The author was married to Mr. M. from 1953 to 1979, when they divorced. During their marriage she had accrued a right to her husband"s pension under the Public Service Pension Fund at a rate of 39.6% as stipulated by the Public Service Pension Act. Under the Marriage Act 1918, the author"s right to a widow"s pension as a divorcée was equal to that of a widow who remained married. In 1973, the Marriage Act was amended to introduce two conditions to a divorcée receiving the accrued pension right: 1) That she had attained the age of 35 at the time of divorce; and 2) the marriage must have lasted a minimum of 5 years. These conditions would not apply if the couple had children. This law was in force at the time of the divorce in 1979. The author met the conditions and the expectation of receiving the pension was taken into account in the divorce settlement.

2.2 In 1991 the law was again amended to tighten the conditions under which the widow"s pension would be payable. These were: 1) the divorcée must have attained the age of 45 at the time of the divorce; and 2) the marriage must have lasted for a minimum of 10 years. The exemption in cases where the couple had children was annulled. The amendment was given retroactive effect, which, the author states, is in breach of the Norwegian Constitution.

2.3 The author"s ex-husband died in 1996 and one year later the author"s application to the Public Service Pension Fund (PSPF) for the survivor"s pension was rejected on the grounds that she had not reached the age of 45 years at the time of her divorce (under the new rules). Therefore the author lost part of her pension.

2.4 The author complained to the Social Security Tribunal (Trygderetten) asking for reversal of the PSPF"s decision but her claim was rejected on 17 September 1999. She then lodged a complaint with the Sivilombudsmannen (the Ombudsman), which concluded, in a letter dated 23 December 2002, that the Social Security Tribunal was correct in upholding the decision of the PSPF.

2.5 On 22 September 2003, the author filed a civil suit against the State to the Court of Appeal which, on 21 February 2005, confirmed the decision of the Social Security Tribunal. That decision was further appealed to the Supreme Court with the claim that the decision of the Social Security Tribunal was invalid because the Marriage Act amendment under which the decision was made had been applied retroactively, contrary to section 97 of the Norwegian Constitution. The author had also pleaded that the denial of pension rights was in breach of article 1 of Protocol 1 to the European Convention on Human Rights

* The following members of the Committee took part in the consideration of the present communication: Gladys Acosta Vargas, Magalys Arocha Dominguez, Barbara Bailey, Niklas Bruun, Louiza Chalal, Náela Gabr, Hilary Gbedemah, Ruth Halperin-Kaddari, Yoko Hayashi, Dalia Leinarte, Lia Nadaraia, Theodora Nwankwo, Pramila Patten and Xiaoqiao Zou.

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(hereinafter „ECHR"), together with the prohibition of discrimination enshrined in article 14 of the ECHR comparing those women who met the criteria under the Marriage Act to those who did not, rather than women in comparison to men. On 8 March 2006, the Supreme Court held that the retroactivity had not been unreasonable or unfair and that the author did not belong to a discriminated-against group, her difficulties being of specific and individual character.

2.6 The author applied to the European Court of Human Rights (hereinafter „ECtHR") on 8 September 2006. The author asserts that no claim of direct or indirect sex discrimination or of equal pay for equal work was ever pleaded before the ECtHR.[1] The Court rejected her application on 4 April 2008 as manifestly ill-founded. Claims of sex discrimination were, however, made before the Equal Opportunities Commissioner, in letters dated 30 April, 7 May and 12 June 2008, who rejected the case on 30 August 2008. Consequently the author brought the case before the Equal Opportunities Committee, which upheld the Commissioner"s decision.

2.7 The author finally complained to the EFTA Surveillance Authority on grounds of sex discrimination in December 2008. The EFTA Surveillance Authority rejected the case on 13 October 2010. It concluded that the case was outside of the temporal scope of the EEA but decided to assess whether the rules on entitlement to the pension constituted an infringement of article 69(1) EEA nonetheless. It concluded that it did not appear to the Authority that the Marriage Act constituted indirect discrimination. After requesting the author"s comments on the decision, which were not found to be relevant, the matter was closed and not referred to the EFTA Court by the Surveillance Authority.

Complaint

3.1 The author claims that she is a victim of direct and indirect discrimination, as prohibited by article 1, 11(d) and (e) and 16 (c) of CEDAW owing to the amendment with retroactive effect to the Marriage Act, which annulled the right to the non-means tested widow"s pension for those who had not reached the age of 45 or had not been married for 10 years at the time of divorce and also repealed the exemption to those conditions where there were children of the marriage. The author was 44 years of age at the time of the divorce.

3.2 The author claims three types of discrimination. 1) The right to a non-means tested widow"s pension was reserved to women only, until 1993 (when the 1991 law came into effect) and this right was accrued by looking after minor children. The pension was made available because of the gender roles assigned to men and women at that time, encouraged by the authorities. It was equivalent to three pension points to look after minor children for that period. The fact that only women are affected by the amendment makes it discriminatory; 2) Only divorced women are deprived of their rights under the marriage act because men were not given a non means-tested widower"s pension. The author believes that the change in the law is to encourage women to go out to work and accrue their own pension points. However, when the law was passed the author was already too old to accrue her own pension. Moreover she asserts that her right to her husband"s pension was denied to her because she had suffered a traffic accident and received compensation in relation thereto since 1984. Nevertheless, losing her husband"s pension aggravated her economic conditions. She claims that had she been aware of the fragility of her pension right, she

[1] In fact, the complaint was based on ECHR protocol 1 (P1-1) taken together with ECHR article 14 i.e. discrimination as to „other status", that is: 1) age and 2) different treatment between two sub-classes of divorced women i.e. those for whom the ex-husband"s death was after 1993 and those whose ex-husbands died before 1993 and finally 3) between divorced and still married women.

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would have waived that right and secured herself a larger lump sum settlement at the time of the divorce. She is therefore being discriminated against based on her marital status; 3) The authorities are depriving only older divorced mothers of their widow�were s pension, being those who had looked after their children before 1967. Therefore she is being discriminated against as to the enjoyment of social benefits owing to her age and gender.

3.3 In conclusion, the author requested that the State‟s violation of her Convention rights be recognized and that she be awarded compensation for her loss of pension and subsidiary insurance.

State party's observations on admissibility (split request)

4.1 By note verbale of 13 January 2015, the State party challenged the admissibility of the communication. 4.2 The State party submitted that the author‟s complaint is inadmissible on the basis of article 4, §2 (a) of the Optional Protocol as an identical complaint had been considered and dismissed by the ECtHR. It asserted that this fact had been accepted by the author.

4.3 The State party submits that individual proceedings before the ECtHR had been accepted by the Committee as constituting proceedings of international investigation or settlement.[2] The author‟s complaint had been made to the ECtHR under Article 14 of the ECHR (protection against discrimination) in relation to Article 1 of the First Protocol of the ECHR (protection of property). The State party asserted in this regard that the Committee should take note of the fact that the Supreme Court of Norway had found that ECHR Protocol 1 Article 1 was applicable but that the author had not been subjected to discrimination within the meaning of ECHR article 14.

4.4 The State party referred to the European Court‟s finding on admissibility under articles 34 and 35 of the ECHR that "in light of the material which the court has had accessible…it did not find under any circumstances anything which indicated that there had taken place a violation of the rights and freedoms described and protected under the Convention and its protocols." The State party argued that, even though on its face this was an admissibility decision, in fact the Court had "examined" the case within the meaning of Article 4§2 of CEDAW and had decided that there was no reason to go on with it.

4.5 The State party reiterated that Article 35 §3 of the ECHR provides the Court with the opportunity to declare complaints inadmissible even after having considered the merits of the complaint. Under the Court‟s case law „manifestly ill-founded‟ is interpreted to include instances in which the court, after considering the merits, sees no reason to go on with it.

4.6 The State party supported its request for a finding of inadmissibility by citing the decision of the Human Rights Committee in Wallmann v Austria,[3] whereby that Committee found that when the ECtHR went beyond an examination of purely procedural admissibility criteria then the matter can be accepted as having been examined under another procedure of international investigation or settlement within the meaning of equivalent admissibility criteria under the ICCPR.

4.7 The State party concluded that, as the author has already submitted a similar complaint to the European Court of Human Rights, the same matter has already been examined under another procedure of international investigation or settlement within the meaning of Article 4§2a) of the Optional Protocol. It emphasised that the Committee has

[2] CEDAW/C/34/D/8/2005 *Rahime Kayhan v Turkey*, at para 7.3, views adopted on 27 January 2006.

[3] CCPR/C/80/D/1002/2001, judgment on 1 April 2004.

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not yet stated its views on whether it follows the Human Rights Committee on this matter and invited it to do so.

4.8 The State party therefore requested the Committee to find the complaint inadmissible under article 4§2(a) of the Optional Protocol to the Convention.

Author's comments on the State party's submission on admissibility

5.1 The author‟s comments were received on 2 March 2015.

5.2 The author stated that she did not agree that the matters before the Committee in the present communication and those previously brought before the ECtHR are identical as asserted by the State party. She claimed that that she did not invoke the Equal Opportunities Act 1978 (now 2013) or CEDAW before the Supreme Court or ECtHR, and that sex discrimination was not mentioned in submissions to the Court of Appeal, the Supreme Court or the ECtHR.

5.3 The author conceded that sex discrimination was considered in her complaint to the EFTA Surveillance Authority and she stated that it is not clear to her whether this would qualify as an international investigation or settlement. The claim was dismissed on grounds that the infringement of EEA law was not clearly explained and in any case the matter was found to be outside the temporal scope of the EEA Agreement, as the periods of work took place prior to 1 January 1994 when the agreement came into force for the State party. The claimant noted in her complaint that, in the Authority‟s decision, it had stated that „it did not appear to the Authority that the Marriage Act constituted indirect discrimination‟.

5.4 The author stated that her complaint to the ECtHR was exclusively a demand to actualize a widow‟s pension on the basis that she had been deprived of the same on the grounds of age discrimination. In the present complaint she is claiming that only older women are disadvantaged by the retroactive law, which impinges upon a previously agreed contract. The basis for the current complaint is discrimination as to age, sex and disability and to review the government‟s encroachment upon the divorce settlement in order to put the author on an equal footing with her husband.

5.5 The author claimed therefore that the State party was in error in both of the above cases and referred to the pertinent paragraphs in her initial submission where she stated that discrimination on grounds of sex was not brought before either court.

5.6 The author reiterated that the matter before the ECtHR pertained to age discrimination and the right to property as between two different classes of divorcées and between divorcées and married women, whereas the present communication relates to age, sex and disability discrimination. Even though discrimination would be covered under the same article of the ECHR, article 14, the fact that she did not invoke these elements means that they were not considered and called on the State party to show that the Court undertook such analysis on its own initiative. The statement "did not find under any circumstance that there has been a violation" does not indicate that all types of discrimination were considered, as the court would limit itself to those elements invoked. Further, since the pleading were in Norwegian and only one judge understood that language she doubts that the other two could possibly have considered the matter.

5.7 The author explained that in fact sexual discrimination was mistakenly not invoked as part of her complaint to the European Court in 2006 and therefore the two complaints do not cover the same substantive rights. Further, she claimed that the statement by the Court that the claim is manifestly ill-founded does not necessarily imply that a review on the merits took place and instead this was a pro forma response. Consequently, she asserted that the matter before the Committee is not the same matter within the meaning of the CEDAW protocol 4§ 2 a).

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5.8 She further stated that in relation to the State party‟s reference to the case of Wallmann v Austria, that matter rested on whether a reservation was applicable to the ECtHR as it had been to the European Commission and a linguistic difference in the right to freedom of association as between the ECHR and the ICCPR. This therefore was therefore not relevant to her case as the matter under consideration rests on whether a claim on grounds of sex discrimination is the same as the claim for age discrimination.

5.9 The author therefore requested that the case be considered on the merits.

5.10 The author sent a further submission on 21 September 2015.

5.11 The author reiterated that the ECtHR examined the author‟s case as to „other status‟ only and not sex discrimination. Since discrimination on grounds of sex was not explicitly invoked, it could not have formed part of the reasoning on which basis the court found there to have been no prima facie violation. Also the author stated that in any case it is impossible to know whether any consideration of the merits took place from the pro forma decision on admissibility provided by the Court.

5.12 The author also contends that ECHR article 14 as it pertains to sex discrimination is not commensurate with articles 11 d), e) and 16 c), h) and general recommendations 21 and 29 of CEDAW, allowing a much more detailed consideration of sex discrimination, as, if these were covered by the ECHR, there would have been no need for Norway to ratify CEDAW.

5.13 The author restated that the first time she invoked sex-discrimination was before the Equal Opportunities and Anti-discrimination Commission, after her case had been found inadmissible before the ECtHR.

5.14 As to the State party‟s reference to Wallmann v Austria the author stated that this case did not turn on whether the same matter had been heard by the ECtHR but rather focussed on whether an the State party‟s reservation as to the European Commission on Human Rights applied to the ECtHR. Although as the author stated in her previous submission, the issue of „same matter‟ had been considered, it was not the main point, as none of the parties disputed the fact that both pleadings had been on the same substantive rights.

5.15 The author cited the CEDAW case of NSF v UK,[4] that of an asylum seeker, in which the issue of the same matter being brought before the ECtHR was raised. The author said that in that case the Committee had stated that they would not have dismissed her case under article 4 §2 (a) (had that ground had been considered) as she had not invoked substantive rights covering sex discrimination before the ECtHR, which was the matter before the Committee in that case.

5.16 The author further referred to an analogous case which had been before the Committee on the Elimination of Racial Discrimination, Koptova v Slovak Republic,[5] in which she asserts that the Committee‟s principle statement shows that it might be prepared to examine the „same matter‟ as had been before the ECtHR because, and she quotes point at 5.7 of that decision, “the simultaneous filing of claims involving similar matters with the Committee and the European Court are founded on different legal bases and seek different legal remedies.” She states that the assessments reached by the two different bodies would be very different in her own case and again asserts that should they be exactly the same there would have been no reason for Norway to ratify CEDAW.

[4] CEDAW/C/38/D/10/2005,views adopted on 30 May 2007.

[5] CERD/C/57/D/13/1998, views adopted on 8 August 2000.

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5.17 The author offered an alternative assertion in the event that the Committee finds her communication is inadmissible on grounds that the ECtHR considered sex discrimination on its own motion under article 14, which she disputes. The alternative assertion is that two decisive new facts have come to light since the ECtHR decision, which means that the same matter could not have been before the ECtHR.

5.18 The author stated that in a written pleading of 16 May 1960 in the „Case of State Pensioner‟ before the Supreme Court it was asserted that the pensioner‟s widow whose entitlement had crystallized, has a constitutionally protected right to a pension on equal conditions with old age pensioners as she claims that, it is explicitly stated in that case that, „both come in the same position‟. The Supreme Court endorsed this position for the main part stating that there was only a difference in extent but no significant difference between pensioners and active civil servants who by contribution and work have accrued certain pension rights. The author therefore claimed that the Supreme Court‟s finding in her case was erroneous as it held that the judges in 1962 preserved the privilege to old age pensioners only and described the pensioners‟ widows as having a derived right, which is weaker than a right accrued in accordance with a contract. The author claimed that the comments of the Attorney General in a written pleading in a 2015 case, where he states that the widow‟s pension is „indirectly positive discrimination‟, show that the pension is seen as a social benefit for needy widows, which is not covered by the term possession under ECHR protocol 1, article 1. She stated that this is not in keeping with comprehensive documentation from 1916 - 2006 (not specified), the Convention, EEA treaty article 69 no.1 or the EEA Court‟s judgment against Norway in Norway v PSPF.[6] The author claims therefore that this error of law on the part of the Supreme Court is a new fact which was not before the ECtHR in 2008.

5.19 The Supreme Court‟s erroneous reversal of the protection of the widow‟s pension right only came to the author‟s attention in 2015, when her representative visited the state archive. The author cited three cases, two ECtHR cases and one before the Human Rights Committee which, she asserted, corroborate her position by showing that the Supreme Court‟s ruling conflicts with ECtHR case law. These cases were not presented in her claim before the ECtHR in 2008. The first, Neill and others v UK confirmed the legitimate expectation to a husband‟s pension as a pecuniary right, unrelated to contribution, as the member‟s work agreement and contribution were the deciding factors as to the existence of the right. In the second case, N.K.M. v Hungary, the court found that a severance payment (for which no prior contribution had been made) was not a mere ex-gratia entitlement but an acquired right that is statutorily guaranteed in exchange for service rendered. The author asserted that neither of these cases support the position that the right to a widow‟s pension is affirmative action or indirect positive discrimination and therefore the author claims that since the ECtHR did not have a chance to review these cases in 2006 when her case was before it, as they were not submitted or had not been decided, the facts before the committee are not the same as those before the ECtHR.

5.20 The author also referred to a case, Pauger v Austria,[7] in which the Human Rights Committee considered the matter of the right to a widower‟s pension. The Committee found in favour of the author, agreeing that he had been treated in a discriminatory manner. The author in that case reapplied to the Committee when his circumstances changed and the Committee found the second claim admissible, despite the second claim having been dismissed as inadmissible by the ECtHR, and considered the merits afresh.[8] This, the

[6] EFTA Surveillance Authority v Kingdom of Norway, Case E-2/07, judgment on 30 October 2007.
[7] CCPR/C/44/D/415/1990, views adopted on 26 March 1992.
[8] CCPR/C/60/D/716/1996, views adopted on 25 March 1999.

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present author claimed, is supportive of her position that when new facts come to light, by which she means the above mentioned case-law, in the time between one decision and another, the matter at hand cannot be held to be the same as that considered previously. Therefore she asserted that the facts now before the Committee are new and have never been considered before.

5.21 Therefore the author claimed that, as per her initial submission, neither the Supreme Court nor the European Court considered her case under the rubric of sex-discrimination and therefore the same matter cannot be said to have been before those courts as sex-discrimination is the primary basis on which she now brings her complaint to the Committee. Further, she claimed that, even in the event that it is decided that the ECtHR considered sex discrimination of its own motion, the above case law shows that the Supreme Court erred in its decision in her case and that since she had not been aware of this error, and so did not cite this case-law, it was not reviewed by the ECtHR. Consequently the author submitted that there are fresh facts before the Committee which were not considered by the ECtHR and reiterates her request the Committee to find the matter admissible and to proceed to an examination of the merits.

Issues and proceedings before the Committee concerning admissibility

6.1 In accordance with rule 64 of its Rules of Procedure, the Committee must decide whether the communication is admissible under the Optional Protocol.

6.2 The Committee takes note of the author‟s claim that the State party has violated her rights under the Convention by implementing a retroactive law, which impinged upon her right to a widow‟s pension, only available to women, without making provision for the fact that she is not able to regain those pension points earned by looking after small children, as encouraged by the state. She claims that this constitutes direct and indirect discrimination.

6.3 In this regard, the Committee notes the author‟s own consistent contention, in her initial complaint and in both sets of comments on the State party‟s submission, that no allegation of sex discrimination was ever formulated or presented by, or on behalf of, the author before the State party‟s domestic courts. The author herself argues that the first time she brought such claims was before the Equal Opportunities Commissioner in 2008. The Committee also notes that there is nothing on file to suggest that any allegations of sex discrimination were, in fact, considered at any time by the State party‟s courts. The author did bring administrative proceedings based on sex discrimination before the Equal Opportunities Commissioner and challenged that decision before the Equal Opportunities Committee but did not appeal the final administrative decision before the domestic courts as is provided for under that body‟s constitutive legislation. The Committee recalls that, under article 4(1) of the Optional Protocol, authors must exhaust all available domestic remedies. It also recalls its jurisprudence, according to which the author must have raised in substance at the domestic level the claim that she wishes to bring before the Committee, so as to provide the domestic authorities and/or courts with an opportunity to deal with such a claim. Therefore, in this case, domestic courts have not had such an opportunity.

6.4 In light of this conclusion, the Committee will not examine admissibility on any other grounds.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 4, paragraph 1, of the Optional Protocol on the basis that all available domestic remedies have not yet been exhausted;

(b) That this decision shall be communicated to the State party and to the author.

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