Annotation: EHRM 2005-01-06

Gerards, J.H.

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Europees Hof voor de Rechten van de Mens
6 januari 2005, 58641/00.
(Rozakis (President)
Tulkens
Steiner
Hajiyev
Spielman
Myjer
Jebens)
Noot Gerards

Hoogendijk
tegen
Nederland

Sociale zekerheid; Eigendomsrecht; Inkomenseis AAW; Indirect onderscheid naar geslacht; Objectieve rechtvaardiging; Ontvankelijkheidsbeslissing.

[EVRM art. 1; Eerste Protocol art. 14, art. 35 lid 3]

Klaagster raakte in 1960 gedeeltelijk arbeidsongeschikt, maar bleef nog enkele jaren werken op freelance basis. In 1962 trouwde zij, waarna zij in 1964 haar freelance activiteiten staakte. Na haar echtscheiding in 1972 vroeg zij een AAW-uitkering aan. Dit werd aanvankelijk geweigerd, maar na medisch onderzoek werd vastgesteld dat zij voor 80-100% arbeidsongeschikt was. In verband hiermee werd haar alsnog een AAW-uitkering toegekend. Op grond van de AAW-Reparatiewet van 3 mei 1989, later gewijzigd bij wet van 4 juli 1990, werd haar AAW-uitkering met ingang van 1 juli 1991 ingetrokken. Reden hiervoor was dat de wetgever had besloten om met terugwerkende kracht een inkomenseis in te voeren: personen in de positie van klaagster kwamen alleen nog in aanmerking voor een AAW-uitkering als zij in het jaar voorafgaand aan hun arbeidsongeschiktheid inkomen uit arbeid verworven hadden. Volgens klaagster had de invoering van de inkomenseis een indirect onderscheid op grond van geslacht tot gevolg, nu het voor vrouwen in haar positie aanzienlijk moeilijker was om aan de inkomenseis te voldoen dan voor mannen. De Centrale Raad van Beroep wees een beroep op art. 14 jo. art. 1 Eerste Protocol EVRM echter af onder verwijzing naar eerdere uitspraken in vergelijkbare zaken. In die zaken waren ook prejudiciële vragen gesteld aan het Europese Hof van Justitie, dat weliswaar had geoordeeld dat de inkomenseis een indirect onderscheid naar geslacht opleverde, maar dat ook had vastgesteld dat hiervoor een voldoende objectieve en redelijke rechtvaardiging aanwezig was.
Het Hof stelt t.a.v. art. 1 Eerste Protocol EVRM dat de invoering van de inkomenseis bedoeld was om een ontoelaatbare ongelijke behandeling uit het AAW-stelsel weg te nemen, zonder dat dit zou leiden tot een onaanvaardbare toename van de kosten van het stelsel. Het Hof acht deze doelstellingen toelaatbaar, mede in het licht van het feit dat de nationale autoriteiten op het gebied van sociale zekerheid een ruime margin of appreciation toekomt. Ook vindt het Hof dat de belangen van klaagster niet disproportioneel zijn aangetast, vooral nu er een sociaal vangnet bestaat in de vorm van de Algemene Bijstandswet. Om die reden acht het Hof het beroep op art. 1 Eerste Protocol kennelijk ongegrond. Ten aanzien van de klacht over art. 14 EVRM stelt het Hof dat, als een maatregel een bepaalde groep in disproportionele mate benadeelt, het niet is uitgesloten dat een dergelijke maatregel discriminerend is, ook al is de maatregel niet op de benadeling van de getroffen groep gericht. Als een klager in staat is om op basis van onbetwist en officieel statistisch bewijsmateriaal te laten zien dat de regel - hoewel neutraal geformuleerd - in feite een duidelijk hoger percentage vrouwen dan mannen treft, is het aan de regering om aan te tonen dat dit het resultaat is van objectieve factoren die geen verband houden met discriminatie op grond van geslacht. In dit geval is voldoende aangetoond dat vrouwen inderdaad in disproportionele mate zijn benadeeld. Hiervoor bestaat volgens het Hof echter een objectieve en redelijke rechtvaardiging, nu de invoering van de inkomenseis was ingegeven door de wens om de discriminatoire elementen uit het AAW-stelsel weg te nemen en tegelijkertijd de kosten van het stelsel binnen de perken te houden. Bovendien is het niet onredelijk dat de regering vanaf 1 juli 1991 een wijziging doorvoerde in het stelsel van de AAW, in die zin dat de AAW veranderde van een verzekering tegen verlies van de mogelijkheid om een inkomen uit arbeid te verwerven naar een verzekering tegen verlies van inkomsten uit arbeid. Hoewel deze verandering resulteerde in een statistisch grotere benadeling van vrouwen, is het stellen van een inkomenseis

daardoor niet in strijd met art. 14 EVRM. Ook het beroep op art. 14 is kennelijk ongegrond.

The facts

The applicant, Gine Wilhelmina Elisabeth Hoogendijk, is a Netherlands national, who was born in 1935 and lives in Zeist. She is represented before the Court by Ms M.I. Steinmetz, a lawyer practising in Amsterdam. The respondent Government are represented by their Agent, Ms J. Schukking, of the Netherlands Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.
In 1960, after having undergone two knee operations, the applicant resigned from her full-time job. Continuing to suffer from pain, she felt that she was no longer capable of working full-time. She subsequently started to work on a freelance basis. Having married in 1962, the applicant stopped her freelance professional activities in 1964. The applicant and her husband separated in 1971 and divorced in 1972.
On 5 August 1976, given its then imminent entry into force, the applicant applied for benefits under the General Labour Disablement Benefits Act (*Algemene Arbeidsongeschiktheidswe*t; "AAW") on account of her incapacity for work as a result of the medical problems which she had experienced with her knees since 1960.
Her request was rejected on 8 September 1977 by the competent occupational association (*bedrijfsvereniging*) which found that her incapacity for work did not exceed 25%, i.e. the minimum level of incapacity for entitlement to AAW benefits. The applicant filed an appeal with the Amsterdam Appeals Tribunal (*Raad van Beroep*), arguing that, in addition to knee problems, her incapacity was also due to psychiatric problems, for which she had begun treatment in March 1972.
Pending those appeal proceedings, the occupational association reconsidered its decision on the basis of the conclusions of psychiatric and orthopaedic examinations of the applicant. These examinations had been requested by the Appeals Tribunal and the results were submitted to the social security medical experts. According to the latter, the applicant was suffering from more severe psychiatric/social problems than had initially been assumed. On 23 May 1979 the occupational association informed the applicant that it had withdrawn its decision of 8 September 1977. Finding that the applicant was 80-100% incapacitated for work on 1 October 1976, i.e. the date on which the AAW entered into force, she was granted AAW benefits corresponding to that level.
On 18 January 1990 the social security authorities informed the applicant that, pursuant to the Act of 3 May 1989 (see below under "Relevant domestic law"), AAW benefits would be withdrawn if a beneficiary had become incapacitated for work before 1 January 1979 without having earned any income from work in the year preceding the occurrence of the incapacity. As the applicant's incapacity had occurred on 1 March 1972 and as it did not appear that she had received an income from work during the preceding year, her benefits would be withdrawn from 1 June 1990.
By a decision of 21 September 1990 the social insurance authorities informed the applicant that, in view of the provisions of the Act of 4 July 1990 (see below under "Relevant domestic law"), the decision to withdraw her benefits from 1 June 1990 had been annulled. She was further informed that, although her benefits would be continued to be paid for the time being, in view of measures announced by the Government it remained possible that her benefits would be withdrawn from 1 July 1991.
On 26 March 1991 the social insurance authorities informed the applicant that, in application of Article IV of the Act of 3 May 1989 as amended by the Act of 4 July 1990, her AAW benefits would be withdrawn from 1 July 1991. On 24 April 1991 the applicant filed an appeal against this decision with the Arnhem Regional Court (*arrondissementsrechtbank*).
On 14 September 1992 the Acting President of the Arnhem Regional Court informed the applicant that the examination of her appeal would be adjourned pending the outcome of proceedings before the Central Appeals Tribunal (*Centrale Raad van Beroep*) in a similar case. On 26 August 1994 the Regional Court informed the applicant that, in similar cases pending before the Central Appeals Tribunal, the tribunal intended to put preliminary questions to the Court of Justice of the European Communities (ECJ). As the answer to those questions could be of importance for the applicant's case, her appeal would be adjourned pending the determination by the Central Appeals Tribunal of those similar cases, and this could take some time.
On 1 February 1996, the ECJ gave its ruling on the preliminary questions put by the Central Appeals Tribunal (see below under "Relevant domestic law"). This ruling was published in the Social Security Law Reports (*Rechtspraak Sociaal Verzekeringsrecht* - "RSV") 1996/169.
On 26 March 1997, following a hearing held on 6 March 1997, the Arnhem Regional Court

dismissed the applicant's appeal. It rejected the applicant's argument that she should be considered as having become incapacitated for work in 1960 and that, having been gainfully employed in the preceding year, she was thus eligible to retain her AAW benefits. On this point the Regional Court held:
"It appears from [the case file] that until 1960 the [applicant] worked as an interior designer... and subsequently, until 1964, worked occasionally as a freelance interior designer. The [applicant] married in 1962, her daughter was born in 1971 and she divorced in 1972. On 5 August 1976 the [applicant] applied [for AAW benefits] indicating that she had been incapacitated for work since 1960. She appeared to have been suffering from knee problems for many years and had been operated on in 1960. It further appeared that she had been treated by a neurologist since 1972. In the course of the investigation [for AAW purposes] by the Joint Medical Examination Service (Gemeenschappelijke Medische Dienst) in 1977, the applicant told the social security medical officer that she had stopped working ... because her husband was providing the family income.
... Initially ... [the applicant's request for] benefits for incapacity for work was rejected because [the applicant] was considered fit to do work which spared her knees, but after a letter from [her] neurologist she was granted AAW benefits from 1 October 1976 (entry into force of AAW) on medical-psychological grounds. ... The Regional Court does not find it established ... that the [applicant] has been uninterruptedly incapacitated for work to a relevant degree since 1960. It considers that, from 1959 onwards, work which would spare her knees was indicated to [the applicant] but, apart from the period in 1960 during which she underwent a knee operation, [the applicant] has not been incapable of undertaking gainful employment. In this connection the Regional Court points out that the [applicant] worked until 1964, albeit irregularly, and ceased to work on grounds which were not medical.
This leads the Regional Court to conclude that the defendant has correctly considered 1 March 1972 as the first day of [the applicant's] incapacity for work.
The Regional Court further finds it established that the [applicant] has not had any income from employment or in connection therewith in the year preceding 1 March 1972." On 21 April 1997 the applicant filed an appeal with the Central Appeals Tribunal against the decision of 26 March 1997. She argued, *inter alia*, that the Regional Court had unjustly found that she had not been incapacitated for work since 1960. She further argued that the decision violated her rights under Article 1 of Protocol No. 1 and Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.
In its decision of 22 December 1999, following a hearing held on 1 December 1999, the Central Appeals Tribunal rejected the applicant's appeal. It noted that the applicant's AAW benefits had been withdrawn from 1 July 1991 because the applicant had not had any income from work in the year preceding the occurrence of her incapacity for work. It further noted that this decision was based on Article IV of the Act of 3 May 1989 as amended by the AAW Reparation Act (*Reparatiewet AAW*) of 4 July 1990. Under those provisions, eligibility for continued receipt of AAW benefits after 1 July 1991 by persons whose incapacity for work had occurred before 1 January 1979 was subject to the conditions set out in Article 6 of the AAW as worded following the entry into force of the Act of 20 December 1979. As regards the determination of the date on which the applicant's incapacity for work had occurred, the Central Appeals Tribunal accepted the Regional Court's ruling as correct and upheld its findings.
Relying, *inter alia*, on its findings in a decision of 11 April 1997 published in the Netherlands Administrative Law Reports 1997/242 (*Administratiefrechtelijke Beslissingen* - "AB"), in which it had examined the compatibility of Article IV of the AAW Reparation Act (see below under "Relevant domestic law") with Article 14 of the Convention, the Central Appeals Tribunal rejected the applicant's complaint that the withdrawal of her AAW benefits was contrary to her rights under Article 14, without giving any additional reasons. Insofar as the applicant complained that the withdrawal of her benefits also violated her rights under Article 1 of Protocol No. 1, the Central Appeals Tribunal accepted that this withdrawal constituted a deprivation of property within the meaning of the second sentence of this provision. It noted that, according to the criteria established in the Court's case-law, a deprivation of property must strike a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights, and that there must be a reasonable relationship of proportionality between the means employed and the aim pursued. Moreover, a State enjoys a wide margin of appreciation in applying these criteria. On this point the Central Appeals Tribunal considered:
"In answering the question whether those criteria have been met in the present decision, taken pursuant to the AAW Reparation Act, the Central Appeals Tribunal recalls the history of that Act as set out in the preliminary questions

to the ECJ which resulted in the *Posthuma-Van Damme* judgment [of 1 February 1996] (RSV 1996/169; the preliminary questions in RSV 1995/121):

'The AAW, in force since 1 October 1976, originally conferred on men and unmarried women, after one year of incapacity for work, entitlement to labour disability benefits, the amount of which did not depend either on any other income or on any loss of income by the beneficiary.

Entitlement to benefits under the AAW was extended to married women by the Act on the Introduction of Equal Treatment for Men and Women as to Entitlement to Social Security Benefits (Wet Invoering Gelijke Uitkeringsrechten voor Mannen en Vrouwen) of 20 December 1979. At the same time this Act made entitlement to benefits for all those insured, save for certain categories, subject to the condition that during the year preceding the occurrence of the labour incapacity the beneficiary had received from employment or in connection therewith a certain income which was initially set at no less than 3,423.81 Netherlands guilders (NLG) (hereinafter 'the income requirement'). The income requirement applied to all persons whose incapacity for work had occurred after 1 January 1979.

By virtue of the transitional provisions contained in the above-cited Act of 20 December 1979, men and unmarried women whose incapacity for work had occurred before 1 January 1979 continued to be entitled to benefits without having to satisfy the income requirement. Married women whose incapacity had occurred before 1 October 1975 were not entitled to benefits even if they satisfied the income requirement. Married women whose incapacity had occurred between 1 October 1975 and 1 January 1979 were entitled to benefits only if they satisfied the income requirement.

By several judgments of 5 January 1988 the Central Appeals Tribunal held that those transitional provisions constituted discrimination on the ground of sex, contrary to Article 26 of the International Covenant on Civil and Political Rights (ICCPR) ... and that married women whose incapacity for work arose before 1 January 1979 were entitled, with effect from 1 January 1980, the date on which the Act of 20 December 1979 entered into force, to AAW benefits on the same conditions as men, that is to say without having to satisfy the income requirement, even if their incapacity had occurred before 1 October 1975.'

The legislature's choice in the AAW Reparation Act to make an income requirement apply to all persons claiming entitlement to AAW benefits from 1 July 1991, subsequent to the development outlined above, was mainly inspired by two considerations:

- under the regime of a long-term benefits arrangement, namely until the age of 65 in the case of continuous labour disability, there was a significant difference in the conditions for benefits (the income requirement) that was solely determined by the date of occurrence of the labour disability (prior to, on or after 1 January 1979) and which as such raised serious concerns regarding the principle of equal treatment of similar cases;
- the case-law had considerably enlarged the group of persons incapacitated for work who, without having to comply with the income requirement, had a continued entitlement to benefits after 1 January 1980, which could result in unacceptable budgetary consequences.

In reconstructing the AAW to take account of these considerations, the legal norms on equal treatment also had to be respected for other reasons, in which connection a major role was played by the European Union legislation concerning equal treatment of men and women and the prohibition of direct and indirect discrimination of men and women in the field of social security as further elaborated in the ECJ case-law.

The balance struck by the legislature has led to full equality in the conditions for benefits as regards previous income from work for the entire group of persons entitled to AAW benefits. Although, for part of that group, as in [the applicant's] case, this means that, after receiving AAW benefits for a period of up to a (maximum) of 14 years, their benefits are withdrawn, a situation which must undoubtedly be considered as a serious interference with the right protected by Article 1 of Protocol No. 1, and although the construction opted for, through the retroactive introduction of an eligibility condition, meets with objections as formulated in the Central Appeals Tribunal's decision RSV 1996/170, the Central Appeals Tribunal is of the opinion that, given the [above] development and the limited options subsequently available to the legislature, the chosen measure must also be upheld when examined in the light of Article 1 of Protocol No. 1.

In reaching this finding, the Central Appeals Tribunal further notes that, for the group concerned, a statutory transitional period of, ultimately, 26 months has been created, within which the entitlement to benefits continues in full. In this limited compensation it deserves to be mentioned that, as regards measures that are (also) inspired by compelling considerations of a financial nature, full or even considerable compensation cannot come into play without (to

a large extent) annihilating the aim of those measures.
The Central Appeals Tribunal further takes into consideration that the additional condition was intended to affect only that group which, prior to the occurrence of the incapacity for work, did not depend for subsistence on AAW benefits.
The Central Appeals Tribunal finally considers it relevant that in the Netherlands system the General Welfare Act (Algemene Bijstandswet) functions as a social 'safety net' which therefore is also applicable to those who were dependent for their subsistence on AAW benefits.
The Central Appeals Tribunal concludes that on this point also the appeal cannot succeed and that the impugned decision must be upheld. ..."
As the applicant's assets, i.e. her personal savings and the value of the mortgage-free home that she owned, exceeded the exemption limit under the General Welfare Act (*Algemene Bijstandswet*), she was not entitled to general welfare benefits during the period between 1 July 1991, when her AAW benefits were withdrawn, and 1 February 2000, when - having turned 65 - she became entitled to benefits under the General Old Age (Pensions) Act (*Algemene Ouderdomswet*).

B. Relevant domestic law and practice

The General Labour Disablement Benefits Act

The AAW, as in force between 1 October 1976 and 1 January 1998, provided for a general labour disability insurance scheme under which all persons residing in the Netherlands between the ages of 18 and 65 were guaranteed index-based benefits if, owing to labour incapacity having lasted for more than 52 consecutive weeks, they were unable to generate income from work.
Given that, since 1967, employees were already insured against labour incapacity under the Labour Disablement Insurance Act (*Wet op de Arbeidsongeschiktheidsverzekering* - "WAO"), the AAW was primarily of importance for those groups who, until then, had been ineligible for WAO benefits, namely the self-employed and those who were disabled from birth or who had become disabled before completing their education.
Entitlement to AAW benefits was not linked to payment of contributions: contrary to social security schemes based on employment (*werknemersverzekering*) such as, for instance, the WAO, the AAW was a general social security scheme (*volksverzekering*). Until 1 January 1990 the AAW scheme was funded by employers on the basis of a percentage of paid wages. From 1 January 1990 AAW contributions were collected through income tax.
The level of AAW benefits was linked to the level of incapacity and did not depend on a person's personal savings or other property. Entitlement to benefits started when the level of incapacity exceeded 25%. Full incapacity for work entailed entitlement to AAW benefits equal to 70% of a base figure (*grondslag*) related to the statutory minimum wage in force in the Netherlands. The base figure applicable to married men and single persons caring for a child under 18 was higher than the base figure applicable to single men and women. Beneficiaries remained entitled to AAW benefits for as long as they were incapacitated for work, but not beyond the age of 65. Initially, married women were not eligible for AAW benefits on the basis of the then prevailing view that men were the breadwinners in the family.
On 19 December 1978 the Council of the European Communities issued Directive 79/7/EEC on the progressive implementation of equal treatment between men and women in the field of social security, granting member states a period of six years until 23 December 1984 within which to make any amendments to their legislation which might be necessary in order to bring it into conformity with the Directive.
This Directive led to the Act on the Introduction of Equal Treatment for Men and Women as to Entitlement to Social Security Benefits of 20 December 1979, which entered into force on 1 January 1980 and as a result of which married women also became entitled to AAW benefits in their own right. However, given the slowdown in economic growth in the Netherlands in the 1970s, and in order to avert major financial repercussions from granting an additional category of persons an entitlement to AAW benefits, an additional requirement for entitlement to benefits was simultaneously introduced. From 1 January 1980, anyone who had become incapacitated for work on or after 1 January 1979 (thereby taking into account the 52 consecutive weeks' waiting period) was required to have earned a fixed minimum amount of income from work in the year preceding the occurrence of the labour incapacity ("the income requirement"), thus rendering entitlement to AAW benefits dependent on the existence of a demonstrable link with actual income from work.
In accordance with the transitional provisions of the Act of 20 December 1979, married men and single persons who had become incapacitated before 1 January 1979 retained their entitlement to AAW benefits without having to comply with the newly introduced income requirement.
As regards married women a difference in treatment was made between those who had

become incapacitated before 1 October 1975 (more than 52 weeks before the entry into force of the AAW) and those who had become incapacitated between 1 October 1975 and 1 January 1979. The first group was not entitled to AAW benefits even if the persons concerned complied with the income requirement, whereas members of the second group were entitled to AAW benefits only if they complied with the income requirement.
In six decisions given on 5 January 1988, the Central Appeals Tribunal held that these AAW rules in respect of married women constituted discriminatory treatment on the basis of sex, contrary to Article 26 of the ICCPR, as the requirement that a person's incapacity had to have occurred on or after 1 October 1975 in order to be entitled to AAW benefits applied to married women but not to married men. According to those decisions, married women whose incapacity for work had arisen before 1 January 1979 were entitled, from 1 January 1980, to AAW benefits under the same conditions as married men, i.e. without having to comply with the income requirement and on the basis of the same base figure as that applicable to married men. It was further held in those decisions that married women who had become incapacitated for work before 1 October 1975 and who were not entitled to AAW benefits, even if they did comply with the income requirement, were entitled, from 1 January 1980, to AAW benefits.
This finding led to the AAW Reparation Act of 3 May 1989, which entered into force on 4 May 1989 and which created the following situation:
- married women who had become incapacitated for work before 1 January 1979 were entitled to AAW benefits. Married women who had applied for AAW benefits before 4 May 1989 did not have to comply with the income requirement in order to be entitled - with retroactive effect - to AAW benefits. Married women who had applied for AAW benefits on or after 4 May 1989 had to comply with the income requirement in order to be entitled to AAW benefits;
- married women who had become incapacitated for work before 1 January 1979 and who had already been granted AAW benefits obtained, from 3 May 1989, AAW benefits on the basis of the same base figure applied to married men; and
- all persons - men and women alike - who had become incapacitated for work before 1 January 1979 were to lose their entitlement to AAW benefits on 1 June 1990 if they did not comply with the income requirement.
By the Act of 4 July 1990 the date of withdrawal of AAW benefits, originally fixed at 1 June 1990 for those concerned, was postponed to 1 July 1991.
This resulted in numerous proceedings brought by persons whose AAW benefits had been withdrawn on the ground of non-compliance with the income requirement. In a judgment of 23 June 1992, the Central Appeals Tribunal held that, with regard to the income requirement, the fixed minimum income constituted indirect discrimination against women, in violation of Article 26 of the ICCPR and Article 4 (1) of Directive 79/7, and that the income requirement was to be regarded as being satisfied if, during the year prior to the occurrence of the incapacity for work, the beneficiary had earned "some income".
In other sets of appeal proceedings concerning the withdrawal of AAW benefits for failure to comply with the income requirement, in which it was argued that the income requirement under the AAW was contrary to Directive 79/7 and was discriminatory, the Central Appeals Tribunal decided on 7 October 1994 to seek a preliminary ruling from the ECJ on this point. On 1 February 1996 the ECJ handed down the requested preliminary ruling. This ruling, insofar as relevant, states:
"14. ...it should be recalled in the first place that the Court [has previously] ruled ... that Community law does not preclude the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4 (1) of Directive 79/7.
15. The Court also ruled that Article 4 (1) of Directive 79/7 precludes the application of national legislation which makes the grant of benefits for incapacity for work subject to the condition of having received some income during the year preceding the commencement of the incapacity, a condition which, although it does not distinguish on grounds of sex, affects far more women than men, even if the adoption of that national legislation is justified on budgetary grounds.
16. Next it should be observed that, when the Court examined whether Community law precluded the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4 (1) of Directive 79/7, it expressly reserved consideration of the question whether, as such, an income requirement of the kind at issue in the main proceedings complied with the

principle of equal treatment between men and women. ...
18. In view of the foregoing, the questions referred for a preliminary ruling by the Central Appeals Tribunal should be construed as seeking to establish whether Article 4 (1) of Directive 79/7 precludes the application of national legislation which makes receipt of a benefit for incapacity for work subject to the requirement of having received a certain income from or in connection with work in the year preceding the commencement of incapacity where it is established that that requirement affects more women than men. ...
21. [As to the question whether persons who did not receive a certain income from or in connection with work in the year preceding the commencement of incapacity fall within the scope ratione personae of Directive 79/7, the ECJ concludes] that such persons do not necessarily fall outside the scope ratione personae of Directive 79/7. ...
23. In order to reply to the national court's question, as reformulated in par. 18, it should be recalled that Article 4 (1) of Directive 79/7 prohibits in social security matters all discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns the scope of the social security schemes and the conditions of access thereto.
24. As the Court has consistently held, Article 4 (1) of the Directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so ....
25. ...the Netherlands Government essentially argue that, by introducing the income requirement in the AAW, the Law of 20 December 1979 caused the Netherlands scheme relating to incapacity for work to shift from being pure national insurance to insurance against loss of income guaranteeing a minimum income to insured persons and that, by providing that the income requirement was henceforward to apply to all insured persons, whether male or female, married or unmarried, who became unfit for work before or after 1 January 1979, the Law of 3 May 1989 accentuated the nature of that scheme as one providing insurance against loss of income. They consider that, in so doing, the Netherlands legislature pursued a legitimate social policy aim, inherent in numerous social security schemes, of restricting eligibility for a given benefit to persons who have lost income following the materialisation of the risk which the benefit is intended to cover.
26. As the Court has held [in its judgment of 24 February 1994] in De Weerd, née Roks, and Others [Case C-343/92] at par. 28, Directive 79/7 leaves intact the powers reserved by Articles 117 and 118 of the EC Treaty to the Member States to define their social policy within the framework of close co-operation organised by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented. In exercising that competence, the Member States have a broad margin of discretion....
27. It must be held that guaranteeing the benefit of a minimum income to persons who were in receipt of income from or in connection with work which they had to abandon owing to incapacity for work satisfies a legitimate aim of social policy and that to make the benefit of that minimum income subject to the requirement that the person concerned must have been in receipt of such an income in the year prior to the commencement of incapacity for work constitutes a measure appropriate to achieve that aim which the national legislature, in the exercise of its competence, was reasonably entitled to consider necessary in order to do so.
28. The fact that that scheme replaced a scheme of pure national insurance and that the number of persons eligible to benefit from it was further reduced to those who had actually lost income from or in connection with work at the time when the risk materialised cannot affect that finding.
29. It appears from the case-law of the Court (De Weerd, née Roks, and Others, at par. 29, confirmed in Case C-137/94 Richardson [1995] ECR I-0000, par. 24) that Community law does not prevent Member States from taking measures which have the effect of withdrawing social security benefits from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women as defined in Article 4 (1) of Directive 79/7. Subject to that proviso, Member States are also free to lay down, as part of their social policy, new rules which have the effect of reducing the number of persons eligible for a social security benefit.
30. The reply to the national court's questions must therefore be that Article 4 (1) of Directive 79/7 does not preclude the application of national legislation which makes receipt of a benefit for incapacity for work subject to the requirement of having received a certain income

from or in connection with work in the year preceding the commencement of incapacity, even if it is established that that requirement affects more women than men."
In other domestic proceedings the income requirement was challenged on grounds, *inter alia*, of its incompatibility with the prohibition of discrimination set out in, for instance, Article 14 of the Convention.
In a judgment given on 11 April 1997, the Central Appeals Tribunal rejected this argument. This judgment, insofar as relevant, reads:
"It has been argued that the withdrawal of the AAW benefits on grounds of [non-compliance with the income requirement] is in violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. On the assumption that AAW benefits, such as in issue in the present case, can be regarded as a 'possession' within the meaning of the latter provision, which assumption finds support in the [*Gaygusuz v. Austria*] judgment of the European Court of Human Rights of 16 September 1996, it must be examined whether Article IV of the Act of 3 May 1989 entails a violation of Article 14 of the Convention ...
The Central Appeals Tribunal is of the opinion that, insofar as Article IV links the (continuation of) entitlement to [AAW benefits] to the condition that prior to the occurrence of labour incapacity (some) income from or in connection with work must have been obtained, this is without any doubt an "objective and reasonable justification" in the sense of the Court's case-law which, in accordance with that same case-law, entails that a 'legitimate aim' must be pursued and that there must be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (see par. 42 of the *Gaygusuz* judgment).
In this connection the Central Appeals Tribunal points out that Article IV of the Act of 3 May 1989 has already passed a similar test on the basis of certainly no less strict criteria, as apparent from the above-cited ECJ judgment of 1 February 1996 (RSV 1996/169)."
The AAW was repealed on 1 January 1998 and replaced, as regards persons not employed by others, by the Self-employed Persons Disablement Benefits Act (*Wet Arbeidsongeschiktheidsverzekering Zelfstandigen*) and the Disablement Assistance Act for Handicapped Young Persons (*Wet Arbeidsongeschiktheidsverzekering voor jonggehandicapten*). Employees continued to be insured for incapacity for work under the WAO.

The General Welfare Act

Under the General Welfare Act, as in force at the material time, all persons between the ages of 18 and 65 and lawfully residing in the Netherlands were eligible for benefits under this Act if they had no other means of subsistence. General welfare beneficiaries who were younger than 57½ years were obliged to make demonstrable efforts to find work and had to be registered at an employment office (*arbeidsbureau*). Beneficiaries who were older than 57½ and mothers with children younger than 5 years were exempted from this obligation.
There were national norms under the General Welfare Act for different categories of beneficiaries. Married and cohabiting couples were entitled to welfare benefits equal to 100% of the statutory fixed minimum wage, single parents to welfare benefits equal to 70% of the minimum wage, and single persons to benefits equal to 50% of the minimum wage. For the latter two categories, supplementary welfare benefits of up to 20% could be granted under certain conditions, such as when the beneficiary was living alone. Special rules applied to welfare beneficiaries between the ages of 18 and 21.
Unlike the AAW, the General Welfare Act was not designed to insure against loss of income (opportunities) resulting from a certain risk materialising (e.g. incapacity for work) but was to serve as a last resort safety net, in that entitlement to welfare benefits only arose where there were no other possibilities for obtaining sufficient income for meeting basic needs.
In order to be eligible for welfare benefits, personal savings were not to exceed an annually defined limit. On 1 January 1991 this limit was set at 8,350 Netherlands guilders[i] (NLG) for a single person and at NLG 16,700[1] for a family. This limit was higher for home-owners, in that capital tied up in their home was taken into account. On 1 January 1991, the limit for a single home-owner was set at a maximum of NLG 68,350[2], and at a maximum of NLG 76,700[3] for a home-owning family.
On 1 January 2004, the General Welfare Act was replaced by the Work and Social Assistance Act (*Wet Werk en Bijstand*).

Complaints

The applicant complained that the withdrawal of her AAW benefits was in violation of her property rights under Article 1 of Protocol No. 1. She further complained that the withdrawal of

[1] EUR 7,578.13.
[2] EUR 31,015.88
[3] EUR 34,804.94.

her AAW benefits was also contrary to Article 14 in conjunction with Article 1 of Protocol No. 1, in that the amended AAW rules constituted an indirect discrimination on grounds of sex since the income requirement affected more women than men.

The Law

1. The applicant complained that the withdrawal of her AAW benefits was in violation of her rights under Article 1 of Protocol No. 1, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Government were of the opinion that the withdrawal of the applicant's AAW benefits was not contrary to her rights under Article 1 of Protocol No. 1 in that the measure complained of was provided for by law, was in accordance with the general interests of the community, and in that there was a reasonable relationship between the interference and the interests pursued.

The Government argued that the national authorities enjoy a wide margin of appreciation under Article 1 of Protocol No. 1 in assessing whether a measure is in the public interest and that it is in the first place for the national authorities to determine when a situation necessitates infringing property rights in the public interest, and what measures are required. In this respect the Government emphasised that, as the concept of "public interest" is a broad one and as the national authorities are better placed to appreciate the appropriateness and suitability of socioeconomic measures in a general area of policy shaped by sociopolitical choices on which opinions within a society differ widely, the Court has adopted a cautious approach in such cases when determining the intensity of its review in respect of socioeconomic policy choices, which approach stems partly from the subsidiary nature of the Court's oversight of such measures. This approach is, according to the Government, also appropriate in the instant case, which concerns a change in the AAW scheme which is a prime example of an area of socioeconomic legislation.

As to the applicant's claim that the amendment of the AAW rules, on the basis of which her AAW benefits were withdrawn, failed to satisfy the criterion of foreseeability required by the Convention, the Government considered that accepting the applicant's argument that she should be regarded as being entitled to AAW benefits for as long as she remained incapacitated or until she turned 65 would prevent any social security scheme from being amended once it had been introduced. In the Government's opinion, the criterion invoked by the applicant referred to a lack of foreseeability of the consequences of a measure. The present case concerned an amendment to an existing social security scheme that offered no scope whatsoever for differing interpretations as to its implementation and, therefore, could not be compared with the situation examined by the Court in the case of *Belvedere Alberghiera Srl v. Italy* (no. 31524/96, ECHR 2000-VI), which concerned an inconsistently applied rule. In the instant case, there was no arbitrary implementation or insufficient foreseeability, since the consequences of the amended AAW scheme were clear and unambiguous.

Although, on the basis of the applicable principle of legal certainty, the Government accepted that the consequences of the amended AAW rules for AAW beneficiaries must be assessed and that, if necessary, compensatory measures must be taken, they did not find that this principle extended to prohibiting any amendment to an existing social security scheme.

Referring to the Court's findings in the case of *Lithgow and Others v. the United Kingdom* (judgment of 8 July 1986, Series A no. 102, p. 50, par. 120), the Government argued that, in order to be compatible with Article 1 of Protocol No. 1, the degree to which a measure impinges upon individual interests must be in proportion to the objective pursued by the deprivation of property and that this provision does not guarantee a right to full compensation in all circumstances. Providing for compensation is relevant to the question whether a fair balance was struck between the public interest and the individual's interests and whether the measure imposed a disproportionate burden on the person concerned and, in this respect, proportionality must be observed.

As regards the proportionality of the consequences of the amended AAW rules, the Government submitted that the object of the Act of 3 May 1989, as amended by the Act of 4 July 1990, was properly to implement the principle of equal treatment. As the introduction of this principle in the social security system led to a substantial increase in the number of potential AAW benefit claimants, the income requirement was introduced in the Act of 20 December 1979 in order to avoid unacceptable

budgetary consequences. After the domestic courts had found that the transitional regime under this Act did not comply with the principle of equality, the Government had been obliged to amend the regime. To attain the object of equal treatment of men and women by waiving the income requirement altogether, which was indeed an option, would have had considerable budgetary repercussions which were considered unacceptable by the Government, as, given the way the AAW was funded, such an approach would imply a considerable increase in the burden on those contributing to the AAW scheme.

As to the question whether, in the applicant's personal circumstances, the consequences of the amended AAW rules should be regarded as disproportionate, the Government submitted that in the domestic proceedings the applicant's individual circumstances had been taken into due account. The Central Appeals Tribunal, in its assessment, dealt explicitly and extensively with the measure in relation to the applicant's rights under Article 1 of Protocol No. 1. The Government further submitted that, in order to offer some measure of assistance, partial compensation was granted to those who were no longer entitled to AAW benefits under the amended AAW rules in that, in those cases where the income requirement was not satisfied, benefit payments were only stopped after a period of 26 weeks. In this manner, not only was compensation in cash provided, but those concerned were also given considerable time in which to make provisions for the future.

The applicant submitted that the rule that States enjoy a wide margin of appreciation in assessing whether a measure is in the public interest does not apply where it concerns a measure that entails indirect discrimination on grounds of sex and/or marital status. According to the applicant, the measure at issue - although it concerned a neutrally formulated scheme - had the effect of more (married) women than men losing their right to AAW benefits, which in her opinion raised a presumption of discrimination based on sex and/or marital status.

On this point, the applicant pointed out that in a report published in June1991 on research into the implementation of the AAW Reparation Act of 3 May 1989, carried out between April 1989 and March 1991 by the Social Insurance Council (*Sociale Verzekeringsraad*)[4], it is stated:

"It appears from the research that the volume and financial effects achieved by the AAW Reparation Act are much smaller than projected by the Government:

- In the estimates it was assumed that 60,000 married women would apply for and obtain AAW benefits. However, in reality only 9,298 married women applied for benefits before 4 May 1989, of which approximately 4,300 applications have been granted. Of the 4,300 married women to whom benefits were granted, about 1,700 meet the income requirement. It follows that, per 1 July 1991, 1,700 benefit grants will be continued. The Government expected that at least 5,000 married women would retain their AAW benefits. ...
- The AAW benefits of approximately 5,100 persons (3,300 women and 1,800 men) will be withdrawn on 1 July 1991, whereas the estimated number was 2000.

As a result of the AAW Reparation Act, in particular as a result of the income requirement, a higher number of women will lose their AAW benefits (about 3,300) than the number of women who will retain their benefits (about 1,700)."

The applicant further submitted that the AAW Reparation Act of 3 May 1989 disrespected the principle of foreseeability as required by the Convention. Although its effects were clear from 1 July 1991, it had in fact a quasi-retroactive effect in that it included a new supplementary requirement for AAW benefits, namely the income requirement, which had not existed and had not been foreseeable in 1976 when the applicant was granted AWW benefits. The applicant considered that this was contrary to the principle of legal certainty, since the insured occurrence - becoming incapacitated for work - had taken place in the past and the new supplementary requirement could no longer be met. Therefore, the amendment to the AAW scheme could possibly be regarded as arbitrary. In the applicant's opinion, there was no reasonable relationship between the interference and the interests pursued in that the amended AAW rules had disproportionate consequences. Existing rights were not maintained, which affected women in particular, although the Government could have opted for an arrangement safeguarding such rights. On account of the withdrawal of her AAW benefits she had thus been obliged to bear an individual and excessive burden. In this respect, the applicant submitted, *inter alia*, that between 1

[4] A public body - comprised of representatives of the State, employers and employees - which at the material time monitored the implementation of a number of social security laws and issued instructions to the occupational associations on the implementation of these laws. It also advised the Minister for Social Affairs and Employment on proposed regulations.

July 1991 and 1 February 2000 the total amount of AAW benefits she had been deprived of amounted to EUR 78,085.91. The period of 26 weeks during which her AAW benefits had been continued was insufficient compensation for the period of 8 years and 7 months during which she had had to survive without any benefits at all. Moreover, having lived on a minimum subsistence income from 1976 to 1991, she had had no opportunity whatsoever during those 26 weeks to make provisions for the future. The applicant submitted that, at 56 years old and having been completely incapacitated for work since 1972, she had no chance whatsoever of finding employment for the period between 1 July 1991, when her AAW benefits were withdrawn, and 1 February 2000, when she turned 65.

Under the Court's case-law, Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see *Wittek v. Germany*, no. 37290/97, par. 41, ECHR 2002-X).

The Court has previously held that an entitlement to benefit pursuant to a national insurance scheme may constitute a pecuniary right for the purposes of Article 1 of Protocol No. 1 without it being necessary to rely solely on the link between entitlement to such benefit and the obligation to pay "taxes or other contributions". However, in order to establish such a pecuniary right, the person concerned must satisfy the various statutory conditions established by law (see *Willis v. the United Kingdom*, no. 36042/97, par. 32-34, ECHR 2002-IV; *Wessels-Bergervoet v. the Netherlands* (dec.), no. 34462/97, 3 October 2000; and *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X).

In the present case, the applicant lost her entitlement to AAW benefits on 1 July 1991 following a change in the statutory conditions for entitlement to such benefits by the introduction of a new and additional condition, namely the "income requirement", which the applicant did not meet.

The Court does not find it necessary to determine whether the applicant's loss of her entitlement to AAW benefits is to be considered a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. As the situation envisaged in that second sentence is only a particular instance of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set out in the first sentence, the Court will examine the facts of the instant case in the light of that general rule. In order to be compatible with Article 1 of Protocol No. 1, an interference with property rights must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Furthermore, the issue of whether a fair balance has been struck becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (see *Beyeler v. Italy* [GC], no. 33202/96, par. 106-107, ECHR 2000-I).

The Court notes that the withdrawal of the applicant's benefits for failure to comply with the "income requirement" criterion was directly based on the AAW Reparation Act of 3 May 1989 as amended by the Act of 4 July 1990. The Court further notes that the purpose of this Act was twofold, namely to remove the unlawful discriminatory effects on married women as regards entitlement to AAW benefits in their own right, by virtue of the Act on the Introduction of Equal Treatment for Men and Women as to Entitlement to Social Security Benefits of 20 December 1979 and, secondly, to secure that the extension of AAW beneficiaries, through the inclusion of married women, would not result in an unacceptable increase in the total costs of the AAW scheme.

In these circumstances, the Court is satisfied that the interference complained of pursued aims in the public interest. It finds that the removal of discriminatory regulations and the control of public expenses by the State are legitimate aims for the purposes of securing social justice and protecting the State's economic well-being. In this respect, the Court reiterates that, in implementing social and economic policies, the margin of appreciation enjoyed by the national authorities in determining what is in the general interest of the community is a broad one (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, par. 46, and *Bäck v. Finland*, no. 37598/97, par. 53, 20 July 2004).

The Court further considers that the alleged discriminatory effect of the amended rules on AAW entitlement falls to be examined under the applicant's separate complaint under Article 14 of the Convention rather than under Article 1 of Protocol No. 1.
However, an interference with property rights under Article 1 of Protocol No. 1 must not only pursue a legitimate aim "in the public interest"; there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" (see *James and Others v. the United Kingdom*, cited above, par. 50).
In this respect the Court observes that the applicant had been found to be incapacitated for work to a degree of 80-100% and that full incapacity for work entailed entitlement to AAW benefits equal to 70% of a base figure for a single person, which base figure was related to the statutory minimum wage. The applicant received those benefits until they were discontinued on 1 July 1991. The Court further notes that, at the material time, all persons between the ages of 18 and 65 and lawfully residing in the Netherlands were entitled to benefits under the General Welfare Act if they had no other means of subsistence and if their personal capital, i.e. personal savings and the value of an owned home, did not exceed an annually defined limit. Single persons, such as the applicant, were entitled to general welfare benefits equal to 50% of the statutory minimum wage and, if such a beneficiary lived alone, supplementary benefits of up to 20% could be awarded. In these circumstances, the Court cannot find that the discontinuation of AAW benefits in respect of persons who did not comply with the income requirement entailed an individual, excessive and disproportionate burden for those concerned in that, in so far as they had no other means of subsistence, they could apply for benefits under a different social security scheme. This finding is not altered by the fact that the applicant, given her personal capital, was not eligible for general welfare benefits since it cannot be regarded as contrary to Article 1 of Protocol No. 1 that personal savings and other capital are taken into account in the determination of entitlement to general welfare benefits designed to meet basic subsistence needs.
In view of the above, the Court concludes that, given the wide margin of appreciation enjoyed by the Contracting States in implementing social and economic policies, the decision complained of cannot be considered disproportionate to the legitimate aims pursued and, consequently, finds no appearance of a violation of Article 1 of Protocol No. 1.
It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 par. 3 and 4 of the Convention.
2. The applicant further complained that the withdrawal of her AAW benefits violated her rights under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 in that the implementation of the income requirement amounted to indirect discrimination against women, as it affected more women than men.
Article 14 of the Convention reads:
"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
The Government submitted that the AAW scheme initially covered only men and single women and that it was impossible to ascertain what proportion of each group had no income in the year preceding the onset of incapacity for work. However, given that many women entered the labour market from the 1960s onward due to considerable social changes, the Government considered it highly likely that, among the specific category of unmarried women, there were many who were in regular employment. The Government are therefore of the opinion that it cannot be asserted without further substantiation, which the applicant failed to produce, that more (unmarried) women than men lost their entitlement to AAW benefits on account of the introduction of the income requirement.
The applicant submitted that the aim of the AAW Reparation Act was to ensure that married women who, on the basis of the decisions of 5 January 1988 of the Central Appeals Tribunal, had become entitled to AAW benefits would be prevented from applying for such benefits or would be deprived of these benefits as quickly as possible, and that to this end the Government introduced with immediate effect the principle of equality in the form of the income requirement applicable to all. Although the amended rules were formulated in a neutral manner, it did in fact result in more (married) women than men losing their AAW benefits. Since Article 14 of the Convention not only requires that persons in a similar situation must be treated in an equal manner but also requires that persons whose situations are significantly different must be treated differently, the Netherlands Government should, in the applicant's view, have investigated whether all cases were equal or whether there were facts or

circumstances that made it necessary to make a distinction. On this point the applicant submitted that the situation of persons having received AAW benefits for many years was in no way equal to that of persons having become incapacitated for work on or after 1 July 1991. The first group involved married women who had become incapacitated for work before 1 January 1980 or even before 1 October 1975. These women, mainly married or divorced, belonged to the group of married women whose husbands, at the time of marriage, were still considered as the breadwinners in the Netherlands. In contrast, the second group consisted of younger persons who had become incapacitated for work after 1 January 1979 and who had grown up in a period when the concept of the breadwinner was gradually disappearing from Netherlands legislation. According to the applicant, this was illustrated by the fact that, of the group of 5,100 persons whose benefits were withdrawn on 1 July 1991 for failure to comply with the income requirement, 64.7% were women and only 35.3% were men. She herself had become incapacitated for work in 1972 while she was still married, in a period when the situation in the Netherlands was that men were often the breadwinners and women did not work but stayed at home and cared for children. Her case thus concerned the effect of the breadwinner principle which did not, as claimed by the Government, gradually disappear from the 1960s onward but continued to apply in the AAW scheme until the end of the 1980s. Therefore, the object of the AAW Reparation Act, namely equal treatment of everyone from 1 July 1999, did no justice to the positive substantive obligation under Article 14 to treat differently persons whose situations are significantly different.

The Court recalls that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention, but that not every difference in treatment will amount to a violation of this provision. An issue will arise under Article 14 when it is demonstrated that States treat differently persons in analogous situations without providing an objective and reasonable justification, or when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV, par. 44).

In so far as the applicant's claim of discrimination is based on the fact that the implementation of the income requirement under the AAW scheme affected more women than men, the Court considers that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group.

Although statistics in themselves are not automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14 of the Convention (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, par. 154, 4 May 2001), the Court cannot ignore that, according to the results of the research carried out by the Social Insurance Council on the effect of the implementation of the AAW Reparation Act of 3 May 1989 as submitted by the applicant, a group of about 5,100 persons lost their entitlement to AAW benefits on account of failure to meet the income requirement and that this group consisted of about 3,300 women and 1,800 men.

As to the Government's argument that, without further substantiation, these figures cannot be given the significance attributed to them by the applicant, the Court considers that where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule - although formulated in a neutral manner - in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination. As no such objective factors have appeared or have been submitted by the respondent Government, the Court accepts as sufficiently demonstrated that the introduction of the income requirement in the AAW scheme did in fact have an indirect discriminatory effect in respect of married or divorced women having become incapacitated for work at a time when it was not common in the Netherlands for married women to earn an own income from work.

The question therefore arises whether there is a reasonable and objective justification for the introduction of the income requirement under the AAW.

The Court notes that the income requirement - applicable to both men and women and irrespective of their marital status - was introduced in the AAW scheme in order to remove the discriminatory exclusion of married women from this scheme whilst seeking to keep the costs of the AAW scheme within acceptable

limits. The Court accepts that this constitutes a reasonable and objective justification. Furthermore, in view of the need to keep the costs of the AAW scheme within reasonable limits and the fact that AAW benefits are granted for incapacity for work, the Court further cannot find it unreasonable that the respondent Government decided to make entitlement to such benefits from 1 July 1991 dependent on a demonstrable link with income earned from or in connection with work, thus altering the nature of the AAW scheme from an insurance against loss of income opportunities to an insurance against loss of income.
Although it is true that the number of women whose AAW benefits were discontinued for failure to meet the income requirement was statistically higher than the number of men, the Court cannot find that the introduction of this requirement - having regard to its objective and reasonable justification - was contrary to Article 14 of the Convention.
It follows that this part of the application must also be rejected as manifestly ill-founded, pursuant to Article 35 paras. 3 and 4 of the Convention.
For these reasons, the Court by a majority *Declares* the application inadmissible.

Noot

1. In bovenstaande uitspraak geeft het EHRM voor het eerst duidelijk vorm aan het concept van indirect onderscheid. Het is daarmee een belangrijke uitspraak - zo belangrijk, dat verbazend is dat deze in het kader van een ontvankelijkheidsbeslissing is gedaan. Het zou beter zijn als aan dit soort wezenlijke veranderingen in juridische benadering een onderzoek ten gronde vooraf zou gaan, niet in het minst omdat dit een intern appel bij de Grote Kamer mogelijk zou maken. De keuze van het Hof voor de kennelijke ongegrondheid van de klachten doet echter geen afbreuk aan het belang van de uitspraak en de uitwerking van het concept. Hieraan zal in deze noot dan ook uitgebreid aandacht worden besteed.
2. Met de erkenning en uitwerking van het concept van indirect onderscheid schaart het EHRM zich achter het Europees Hof van Justitie en de Nederlandse rechterlijke instanties, die dit concept al veel langer erkenden. Het HvJ EG stelde al in 1976, in Defrenne II (HvJ EG 8 april 1976, zaak 43/75, Jurispr. 1976, 455, punt 18), dat onderscheid moet worden gemaakt tussen directe discriminatie en indirecte, meer verborgen vormen van onderscheid. Ook in tal van Europese richtlijnen, zoals RI. 76/207/EEG van 9 februari 1976, Pb. 1976 L 39/40, wordt het concept van indirect onderscheid genoemd. In reactie op de Europese ontwikkelingen is het concept ook zichtbaar in Nederlandse rechtspraak en wetgeving. Het concept komt bijvoorbeeld al tot uitdrukking in de Wet Gelijke Behandeling van Mannen en Vrouwen (daterend uit 1980) (zie art. 1) en het speelt een belangrijke rol in de Algemene wet gelijke behandeling (zie art. 1 en 2 lid 1).
3. Gezien de brede erkenning van het concept van indirect onderscheid in de Europese en Nederlandse context, zal het misschien verbazen dat het EHRM pas nu aanvaardt dat het concept betekenis heeft voor het EVRM. Dit is echter verklaarbaar vanuit de reden waarom het concept ontwikkeld is. Belangrijk is dat de Europese richtlijnen en de Nederlandse wetgeving een “gesloten”, limitatieve opsomming van gronden bevatten. De Europese richtlijnen verbieden bijvoorbeeld alleen maar onderscheid op grond van geslacht, terwijl de Nederlandse AWGB alleen betrekking heeft op gronden als geslacht, ras en godsdienst. Onderscheid dat is gebaseerd op andere dan de expliciet genoemde gronden wordt door de relevante regels niet gedekt en is dus ook niet verboden. Door deze beperking is het niet altijd gemakkelijk om achterstelling en ongelijke behandeling effectief te bestrijden. In de praktijk wordt een ongelijke behandeling nog maar zelden gebaseerd op één van de verboden gronden (bijv. geslacht, ras of godsdienst); in dat opzicht is de gelijkebehandelingswetgeving heel effectief geweest. Een veel groter probleem zijn tegenwoordig de “verborgen” vormen van onderscheid: maatregelen en handelingen die op het oog neutraal zijn, maar die tot feitelijk effect hebben dat bepaalde groepen (bijv. vrouwen of mensen van niet-Nederlandse komaf) worden achtergesteld ten opzichte van groepen die zich toch al in een relatief gunstige situatie bevinden (bijv. mannen of autochtone Nederlanders). Voorbeelden hiervan zijn regelingen waardoor parttimers worden benadeeld ten opzichte van fulltimers, of regelingen die benadelend zijn voor mensen die de Nederlandse taal niet machtig zijn. In deze gevallen wordt weliswaar geen direct en verboden onderscheid gemaakt naar geslacht of afkomst, maar is het duidelijk dat vooral vrouwen en allochtonen worden benadeeld. Indirect leveren deze vormen van benadeling dus wel degelijk een ongelijke behandeling op een verboden grond op. Met een stelsel van verboden van

direct onderscheid op een beperkt aantal gronden zijn dit soort indirecte, maatschappelijke vormen van ongelijke behandeling moeilijk te bestrijden. De verbodsbepalingen vergen immers dat wordt aangetoond dat een ongelijke behandeling daadwerkelijk en rechtstreeks op één van de genoemde gronden is gebaseerd. Precies in deze beperking is de waarde gelegen van het concept van indirect onderscheid: dit concept maakt het mogelijk om een ongelijke behandeling niet alleen ontoelaatbaar te achten als deze direct op een verboden grond is gebaseerd, maar ook als dit indirect het geval is.

4. Het voorgaande maakt ook duidelijk waarom het EHRM steeds weinig behoefte heeft gevoeld aan een concept van indirect onderscheid: anders dan de Europese en Nederlandse regelgeving bevat het EVRM geen gesloten opsomming van gronden. Art. 14 (en overigens ook art. 1 Twaalfde Protocol) noemt weliswaar enkele voorbeelden van gronden van onderscheid, maar stelt in zijn algemeenheid dat de EVRM-rechten moeten worden gewaarborgd "zonder enig onderscheid op welke grond ook". Alle vormen van onderscheid kunnen dus op basis van art. 14 worden bestreden, ongeacht de grond waarop zij gebaseerd zijn. Een onderscheid naar arbeidsduur of naar taalbeheersing kan bijvoorbeeld rechtstreeks worden aangevochten, net als een onderscheid tussen mensen die wel of niet voldoen aan een inkomenseis. Het EHRM heeft in het verleden dan ook gesteld dat er eigenlijk geen noodzaak bestaat om aan te geven op welke grond een ongelijke behandeling is gebaseerd. Zodra is aangetoond dat er onderscheid is gemaakt tussen personen of groepen, is dit voldoende om van de staat te verlangen dat deze hiervoor een rechtvaardiging aandraagt. Deze benadering van het Hof blijkt duidelijk uit het arrest Rasmussen (EHRM 28 november 1984, Series A, vol. 87), dat betrekking had op een verschil in procedureregels voor vaders en moeders bij ontkenning van vaderschap. Het Hof stelde hierover dat "/[f/]or the purposes of Article 14, the Court /[.../] finds that there was a difference of treatment as between Mr. Rasmussen and his former wife as regards the possibility of instituting proceedings to contest the former's paternity. There is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive" (par. 34). In een dergelijk open stelsel, waarin ook "neutrale" vormen van onderscheid toetsbaar zijn, bestaat weinig behoefte aan een concept van indirect onderscheid - zo'n concept maakt het immers slechts mogelijk om niet "toetsbare" vormen van onderscheid toch onder de reikwijdte van een verbodsbepaling te brengen.

5. Toch bestond er al geruime tijd reden om ook in het kader van het EVRM te pleiten voor erkenning van indirect onderscheid. In zijn rechtspraak heeft het Hof namelijk enkele specifieke gronden aangeduid als "verdacht", te weten geslacht, wettige geboorte, nationaliteit en seksuele geaardheid (zie nader EVRM Rechtspraak en Commentaar, hoofdstuk 3.14). Als een onderscheid op één van deze gronden is gebaseerd, kan de staat dit onderscheid alleen rechtvaardigen door "very weighty reasons" aan te voeren. In geen van de gevallen waarin zo'n very weighty reasons-test is toegepast heeft het Hof tot nu toe een ongelijke behandeling aanvaard (idem). De very weighty reasons-doctrine kan daarmee worden beschouwd als een equivalent van een gesloten opsomming van gronden: alleen als een onderscheid is gebaseerd op zo'n verdachte grond is de test van toepassing. Om die reden kan het voor een klager waardevol zijn om te proberen aan te tonen dat een neutrale ongelijke behandeling tot indirect gevolg heeft dat onderscheid op een verdachte grond is gemaakt. De veronderstelling daarbij is dat het Hof ook dan een zeer intensieve toets zal uitvoeren. Hoewel klagers wel eens geprobeerd hebben het Hof op deze manier te verleiden tot een intensieve toetsing, heeft het EHRM in het verleden laten zien afwijzend te staan tegenover het concept. Dit is vooral zichtbaar in de zaak Abdulaziz e.a. (EHRM 25 mei 1985, Series A, Vol. 94), waarin geklaagd werd over immigratieregels in het Verenigd Koninkrijk. Volgens klagers waren deze regels weliswaar gelijkelijk van toepassing op alle immigranten, maar raakten zij in disproportionele mate mensen die afkomstig zijn uit Pakistan of de New Commonwealth. Feitelijk maakte de regeling dan ook onderscheid naar ras of huidskleur, zo stelden zij, hetgeen een very weighty reasons-test zou moeten uitlokken. Het EHRM stelde echter het volgende: "That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an effect which derives not

from the content of the 1980 Rules but from the effect that, amongst those wishing to immigrate, some ethnic groups outnumbered others" (par. 85). Het Hof weigerde in deze zaak dus te erkennen dat ook indirecte effecten van regelgeving een "toetsbare" ongelijke behandeling kunnen opleveren: zolang een regeling niet rechtstreeks tussen raciale groepen onderscheidt, rijst er onder art. 14 EVRM geen enkel probleem. Pas in 2001 leek er enige beweging te komen in de benadering van het Hof. De zaken Kelly e.a. en Hugh Jordan (beide zaken van 4 mei 2001; Kelly is gepubliceerd in EHRC 2001/40, m.nt. Gerards) hadden betrekking op het geweld van de "security forces" in Noord-Ierland. Volgens klagers was bij het gebruik van geweld sprake van indirect onderscheid naar godsdienst, nu de grote meerderheid van de slachtoffers katholiek was. Het Hof stelde hierover het volgende: "Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14" (par. 148 in Kelly). Met deze overweging erkende het Hof feitelijk het concept van indirect onderscheid; in dat opzicht vormde de zaak een vernieuwing ten opzichte van Abdulaziz. Tegelijkertijd bleek uit deze overweging dat het Hof zeer hoge eisen stelt aan de bewijslast. Volgens de geciteerde overweging is het onvoldoende dat uit statistisch materiaal blijkt dat een bepaalde groep veel zwaarder wordt getroffen dan een andere; kennelijk moet dit materiaal met ander materiaal worden ondersteund. Waaruit dit materiaal zou moeten bestaan liet het Hof in het vage. Ook latere rechtspraak over dit onderwerp (EHRM 28 mei 2002, McShane, EHRC 2002/57, m.nt. Spronken en EHRM 26 februari 2004, Nachova, EHRC 2004/35, m.nt. Henrard) biedt hierover geen duidelijkheid. Het Hof definieert het concept van indirect onderscheid nu, blijkens Hoogendijk, op de manier waarop we dit gewend zijn vanuit de rechtspraak van het Europese Hof van Justitie en de oordelen van de Commissie Gelijke Behandeling. De precieze beweegreden voor de erkenning van het concept blijft echter onduidelijk. Zoals eerder aangegeven is het concept van indirect onderscheid onder het EVRM vooral nuttig omdat dit kan leiden tot toepasselijkheid van de very weighty reasons-test; anders dan in het Europese recht is het niet nodig om een beroep op dit concept te doen om een ongelijke behandeling onder de reikwijdte van het gelijkheidsbeginsel te kunnen brengen. Van een toepassing van de very weighty reasons-test is in Hoogendijk echter geen sprake. Integendeel: het Hof past zelfs een uiterst terughoudende test toe, omdat het gaat om onderscheid op het terrein van de sociale zekerheid en de staten daarbij een zeer ruime margin of appreciation toekomt. De toegevoegde waarde van het concept kan daarin dus niet zijn gelegen. Belangrijk is echter dat de zaak impliciet een andere waarde van het concept zichtbaar maakt. Het Hof toetst namelijk niet alleen of er een redelijke rechtvaardiging bestaat voor het maken van onderscheid tussen mensen die wel en niet aan de inkomenseis voldoen. Daarnaast gaat het Hof na of de nadelige effecten voor vrouwen in een redelijke verhouding staan tot de nagestreefde doelstellingen. Het gebruik van het concept heeft daarmee het voordeel dat rekening kan worden gehouden met maatschappelijke effecten van regelgeving en dat het Hof ook van staten kan vergen dat zij dit doen. Zeker nu in de huidige samenleving nog steeds grote verschillen bestaan tussen groepen, moet dit van groot belang worden geacht.

6. De zaak is verder interessant vanwege de manier waarop het Hof vorm heeft gegeven aan het concept. Hiervoor is aangegeven dat het probleem in de eerdere zaken over indirect onderscheid vooral was gelegen in het feit dat heel hoge en tegelijkertijd onduidelijke eisen werden gesteld aan het bewijs hiervan. In dit opzicht betekent bovenstaande uitspraak een belangrijke vernieuwing, ook al laat het Hof nog vragen open. In lijn met Kelly en Hugh Jordan stelt het bijvoorbeeld nog steeds dat statistisch bewijsmateriaal op zichzelf "not automatically sufficient" is om indirect onderscheid aan te tonen. Dit doet veronderstellen dat het Hof onder omstandigheden nog steeds additioneel bewijsmateriaal zal vergen, zoals het dit ook in Kelly deed. De vraag kan dan rijzen in welke omstandigheden dit zal gebeuren en waarin dit bewijsmateriaal zou moeten bestaan. De zinsnede kan echter ook anders worden gelezen. Uit het vervolg van de overweging kan worden afgeleid dat het

Hof vooral doelt op de kwaliteit van het statistische materiaal. De zinsnede moet dan zo worden gelezen dat alleen "undisputed official statistics" kunnen dienen om een vermoeden van indirect onderscheid te laten ontstaan. Ontbreekt dergelijk statistisch materiaal, dan kan niet automatisch een indirect onderscheid worden aangenomen. Onduidelijk is dan hoogstens nog waarom het Hof vereist dat sprake is van "officieel" bewijsmateriaal, en waarom een bewijs van indirect onderscheid niet zou kunnen worden gevonden in andere bronnen. De rechtspraak van het Europees Hof van Justitie en de nationale rechters laat zien dat ook feiten van algemene bekendheid of zelfs evidentie kunnen dienen als bronnen voor het vaststellen van een vermoeden van indirect onderscheid (zie nader Gerards, Rechterlijke toetsing aan het gelijkheidsbeginsel, Diss. Maastricht, Den Haag: Sdu 2002 , p. 247 e.v., p. 259 e.v. en p. 579 e.v.). Het is niet onwaarschijnlijk dat het EHRM hieraan door onervarenheid met het concept nog niet gedacht heeft en hierop in latere uitspraken terug zal komen. Daarin zal het dan ook duidelijkheid moeten geven over de vraag wanneer nu precies een "clearly higher percentage" van een bepaalde groep mensen wordt geraakt: ook dit is nog niet helder. Ook in dit opzicht kan het EHRM inspiratie ontlenen aan de rechtspraak van het HvJ EG en de Nederlandse Commissie Gelijke Behandeling. De laatste heeft bijvoorbeeld wel vastgesteld dat van een onevenredige benadeling sprake is als de negatieve maatregel minimaal 1,5 maal zoveel vrouwen als mannen raakt (zie reeds Oordeel 97-45), terwijl het HvJ EG heeft aangenomen dat zelfs een minder groot, maar aanhoudend en vrij contant verschil kan leiden tot de conclusie dat indirect onderscheid is gemaakt (HvJ EG 9 februari 1999, zaak C-167/97, Seymour-Smith, Jurispr. 1999, I-623, punt 61).

7. Erg onduidelijk is de uitspraak van het EHRM nog op het punt van de bewijslast van de regering. Het lijkt erop dat het EHRM voor de regering twee mogelijkheden ziet om zich te verdedigen. Allereerst ziet het Hof een mogelijkheid voor de staat om een vermoeden van indirect onderscheid te ontkrachten door te laten zien dat de benadeling "is the result of objective factors unrelated to any discrimination on grounds of sex". Het is niet duidelijk wat het EHRM hier precies mee bedoelt; het is bovendien niet gemakkelijk te bedenken waarin dergelijke objectieve factoren kunnen bestaan. Het lijkt er op dat het EHRM hier een verkeerde vertaling heeft gemaakt van een overweging uit de rechtspraak van het HvJ EG, die inhoudt dat een indirect onderscheid kan worden gerechtvaardigd door objectieve factoren die ongerelateerd zijn aan onderscheid naar geslacht (zie HvJ EG 1 februari 1996, zaak C-280/94, Posthuma, Jurispr. 1996, I-179, par. 24). Het gaat daarbij dus niet om het bestrijden van het bestaan van een indirect onderscheid, zoals het EHRM lijkt te impliceren, maar om het aanvoeren van objectieve redenen om zo'n onderscheid te rechtvaardigen. De bedoeling van het EHRM is echter duidelijk: zo mogelijk kan de regering met feitelijke gegevens proberen te bestrijden dat de beweerde indirecte effecten (die uit de statistische gegevens zijn af te leiden) zich voordoen. Naast de mogelijkheid om het bestaan van een indirect onderscheid te betwisten, heeft de staat in de tweede plaats de mogelijkheid om een objectieve en redelijke rechtvaardiging aan te voeren. Interessant hierbij is dat het Hof i.c. stelt dat de rechtvaardiging betrekking moet hebben op de introductie van de inkomenseis, en niet zozeer op het indirecte onderscheid naar geslacht. Kennelijk is het Hof van mening dat het directe onderscheid op een neutrale grond als zodanig voldoende gerechtvaardigd moet zijn. Pas als dat het geval is, zal het bezien of de kracht van deze rechtvaardiging opweegt tegen het nadelige effect van de regeling. In Hoogendijk gaat het Hof bijvoorbeeld na of de redenen die zijn gegeven voor het introduceren van de inkomenseis zodanig zwaarwegend zijn dat het negatieve effect daarvan voor vrouwen op de koop toe moet worden genomen. Dit is een fraaie invulling van de objectieve rechtvaardigingstoets bij indirect onderscheid, die het mogelijk maakt om een goede afweging te maken tussen het nagestreefde doel en de aangetaste belangen.

8. Bij de beoordeling van de rechtvaardiging voert het EHRM in Hoogendijk een terughoudende toets uit. Deze terughoudendheid is ingegeven door het feit dat het gaat om een ongelijke behandeling op het gebied van de sociale zekerheid; zoals eerder aangegeven wordt de lidstaten daarbij een zeer ruime margin of appreciation gelaten. Ook in rechtspraak van het Europese Hof van Justitie is dit gebruikelijk (zie Gerards, reeds aangehaald, p. 309 e.v.), zodat deze keuze nauwelijks verbaast. Toch is het jammer dat

het EHRM de keuze voor terughoudendheid zo gemakkelijk en zonder enige motivering maakt. Hoewel het beleidsterrein inderdaad pleit voor terughoudendheid, is het immers tegelijkertijd zo dat de maatregel een indirect onderscheid naar geslacht tot gevolg heeft. Juist bij onderscheid naar geslacht voert het EHRM normaal gesproken een very weighty reasons-test uit, omdat er in de verschillende lidstaten een dringende wens bestaat om tot grotere seksegelijkheid te komen (vgl. Abdulaziz, reeds aangehaald, en EHRM 21 februari 1997, Van Raalte, Reports 1997-I). Deze reden om kritisch te kijken naar ieder onderscheid naar geslacht geldt ook als het gaat om ongelijke behandeling op het terrein van de sociale zekerheid, en zelfs als het onderscheid vooral een onbedoeld neveneffect is van de betrokken regeling (hoewel dit laatste soms betwist wordt; zie daarover nader Gerards, reeds aangehaald, p. 314/315). In ieder geval zou het waardevol zijn geweest als het Hof de beide intensiteitbepalende factoren tegenover elkaar had gezet en had uitgelegd waarom in dit geval het beleidsterrein zwaarder weegt dan het streven naar gelijke behandeling op grond van geslacht.

9. Een laatste punt van aandacht is de inhoudelijke beoordeling van de aangevoerde rechtvaardiging. In dit licht is het interessant om de uitspraak van het EHRM te vergelijken met de rechtspraak van het Hof van Justitie over dezelfde casus. In het arrest Roks stelde het Hof van Justitie expliciet het volgende: “Ofschoon budgettaire overwegingen ten grondslag kunnen liggen aan de sociale beleidskeuzen van een lidstaat en de aard of de omvang van de sociale beschermingsmaatregelen die de Lid-Staat wenst vast te stellen, kunnen beïnvloeden, vormen zij evenwel niet een doelstelling van het beleid en kunnen zij dus ook niet een discriminatie ten nadele van een der geslachten rechtvaardigen” (HvJ EG 24 februari 1994, zaak C-343/92, Roks, Jurispr. 1994, I-571, punt 35). De reden hiervoor is volgens het Hof van Justitie dat de toepassing van een zo fundamenteel beginsel als dat van gelijke behandeling van mannen en vrouwen niet afhankelijk mag worden gesteld van de stand van de openbare financiën in de lidstaten op een bepaald moment (punt 36). In het licht van deze uitspraak is het opmerkelijk dat het EHRM zowel bij zijn toetsing aan art. 1 Eerste Protocol als bij zijn toetsing aan art. 14 stelt dat de reden van invoering van de inkomenseis was gelegen in de wens “to keep the costs of the AAW scheme within acceptable limits” en dat het dit als zodanig accepteert als een “reasonable and objective justification” voor de invoering van een inkomenseis. Deze afwijking van de rechtspraak van het HvJ EG is niet nader gemotiveerd en is misschien ook onbedoeld. Betoogd kan echter worden dat de keuze van het EHRM uiteindelijk een betere is. Er is geen goede reden aan te wijzen waarom het nastreven van kostenbeperkingen voor de overheid nooit een legitiem doelstelling van sociaal beleid zou kunnen vormen. Er zijn zeker omstandigheden denkbaar waarin overwegingen van financiële en puur budgettaire aard een ongelijke behandeling kunnen rechtvaardigen, ook al zal dit misschien niet vaak voorkomen. Wel moet worden benadrukt dat bij dit soort doelstellingen een goede proportionaliteitstoets moet worden uitgevoerd. Bekeken moet steeds worden of de financiële doelstellingen (eventueel ondersteund door andere doelstellingen) kunnen opwegen tegen het nadeel dat door het nastreven hiervan wordt veroorzaakt. Zo’n proportionaliteitstoets wordt door het EHRM echter op een goede manier toegepast (zij het terughoudend!), zodat in dit opzicht weinig kritiek op de Straatsburgse benadering te leveren valt.

10. Alles bij elkaar genomen is Hoogendijk een bijzonder waardevolle uitspraak. Weliswaar bevat deze enkele onduidelijkheden, met name met betrekking tot de beweegredenen van het Hof en het bewijs van indirect onderscheid, maar er zijn enkele interessante uitgangspunten in terug te vinden. Vooral de manier waarop het Hof vorm heeft gegeven aan de objectieve rechtvaardigingstoets bij indirect onderscheid kan positief worden gewaardeerd, ook al is de toets terughoudend en ook al is de uitkomst minimaal gemotiveerd. Het wachten is nu op verdere uitwerking van het concept. Nu het Twaalfde Protocol onlangs in werking is getreden en het Hof in de toekomst vrijwel zeker zal worden geconfronteerd met een groter aantal gelijkebehandelingszaken, zal daarvoor ongetwijfeld alle ruimte bestaan.

J.H. Gerards