EGMR 16213/90 vom 22. Februar 1994

Hudoc Ch, 1994-02-22, FR

Quelle: https://mcp.opencaselaw.ch/entscheid/hudoc_ch_16213_90

FR: CourEDH 16213/90 du 22 février 1994

IT: CorteEDU 16213/90 del 22 febbraio 1994

Regeste

Preliminary objection rejected (victim);Preliminary objection rejected (non-exhaustion);Violation of Art. 14+8;Not necessary to examine Art. 8;Costs and expenses partial award - domestic proceedings;Costs and expenses partial award - Convention proceedings; Violation: 14+8;14;8

Erwägungen

E. 22

The Government argued that these two provisions were not applicable. Since the entry into force of Protocol No. 7 (P7) on 1 November 1988, the equality of spouses in the choice of surname had been governed exclusively by Article 5 of that Protocol (P7-5), covering equality of rights and responsibilities of a private-law character between spouses, as a lex specialis. When ratifying that Protocol (P7), Switzerland had made a reservation providing, inter alia, that "[f]ollowing the entry into force of the revised provisions of the Swiss Civil Code of 5 October 1984, the provisions of Article 5 of Protocol No. 7 (P7-5) shall apply subject to ... the provisions of Federal Law concerning the family name (Articles 160 CC and 8a final section CC) ...". Examining the case under Articles 14 and 8 taken (art. 14+8) together would thus be tantamount to ignoring a reservation that satisfied the requirements of Article 64 (art. 64) of the Convention.

E. 23

The Court points out that under Article 7 of Protocol No. 7 (P7-7), Article 5 (P7-5) is to be regarded as an addition to the Convention, including Articles 8 and 60 (art. 8, art. 60). Consequently, it cannot replace Article 8 (art. 8) or reduce its scope (see, mutatis mutandis, the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, pp. 12-13, para. 26). It must nevertheless be determined whether Article 8 (art. 8) applies in the circumstances of the case.

E. 24

Unlike some other international instruments, such as the International Covenant on Civil and Political Rights (Article 24 para. 2), the Convention on the Rights of the Child of 20 November 1989 (Articles 7 and 8) or the American Convention on Human Rights (Article 18), Article 8 (art. 8) of the Convention does not contain any explicit provisions on names. As a means of personal identification and of linking to a family, a person’s name none the less concerns his or her private and family life. The fact that society and the State have an interest in regulating the use of names does not exclude this, since these public-law aspects are compatible with private life conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others (see, mutatis mutandis, the Niemietz v. Germany judgment of 16

December 1992, Series A no. 251-B, p. 33, para. 29). In the instant case, the applicant's retention of the surname by which, according to him, he has become known in academic circles may significantly affect his career. Article 8 (art. 8) therefore applies. B. Compliance

E. 25

Mr and Mrs Burghartz complained that the authorities had withheld from Mr Burghartz the right to put his own surname before their family name although Swiss law afforded that possibility to married women who had chosen their husbands' surname as their family name. They said that this resulted in discrimination on the ground of sex, contrary to Articles 14 and 8 (art. 14+8) taken together. The Commission shared this view in substance.

E. 26

The Government recognised that what was at issue was a difference of treatment on the ground of sex but argued that it was prompted by objective and reasonable considerations which prevented it from being in any way discriminatory. By providing that, as a general rule, families should take the husband's surname (Article 160 para. 1 of the Civil Code), the Swiss legislature had deliberately opted for a traditional arrangement whereby family unity was reflected in a joint name. It was only in order to mitigate the rigour of the principle that it had also provided for a married woman's right to put her own surname in front of her husband's (Article 160 para. 2 of the Civil Code). On the other hand, the reverse was not justified to the advantage of a married man who, like Mr Burghartz, deliberately and in full knowledge of the consequences, invoked Article 30 para. 1 of the Civil Code to change his surname to that of his wife. It was all the more unjustified as there was nothing to prevent a husband, even in those circumstances, from using his surname as part of a double-barrelled name or in any other way informally.

E. 27

The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention (see, as the most recent authority, the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, pp. 21-22, para. 67).

E. 28

In support of the system complained of, the Government relied, firstly, on the Swiss legislature's concern that family unity should be reflected in a single joint surname. The Court is not persuaded by this argument, since family unity would be no less reflected if the husband added his own surname to his wife's, adopted as the joint family name, than it is by the converse arrangement allowed by the Civil Code. In the second place, it cannot be said that a genuine tradition is at issue here. Married women have enjoyed the right from which the applicant seeks to benefit only since 1984. In any event, the Convention must be interpreted in the light of present-day conditions, especially the importance of the principle of non-discrimination. Nor is there any distinction to be derived from the spouses' choice of one of their surnames as the family name in preference to the other. Contrary to what the Government contended, it cannot be said to represent greater deliberateness on the part of the husband than on the part of the wife. It is therefore unjustified to provide for different consequences in each case. As to the other types of surname, such as a double-barrelled name or any other informal manner of use, the Federal Court itself distinguished them from

the legal family name, which is the only one that may appear in a person's official papers. They therefore cannot be regarded as equivalent to it.

E. 29

In sum, the difference of treatment complained of lacks an objective and reasonable justification and accordingly contravenes Article 14 taken together with Article 8 (art. 14+8).

E. 30

Having regard to this conclusion, the Court, like the Commission, deems it unnecessary to determine whether there has also been a breach of Article 8 (art. 8) taken alone. III. APPLICATION OF ARTICLE 50 (art. 50)

E. 31

Under Article 50 (art. 50), "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

E. 32

The applicants claimed only the costs of legal representation before the national authorities and the Strasbourg institutions in the sum of 31,000 Swiss francs (CHF). The Government found this amount exorbitant and suggested reducing it to CHF 10,000. The Delegate of the Commission also regarded it as inflated.

E. 33

The Court has considered the matter in the light of observations by those appearing before it and of the criteria laid down in its case-law. Making its assessment on an equitable basis, it awards the applicants CHF 20,000 for costs and expenses. FOR THESE REASONS, THE COURT 1. Dismisses unanimously the Government's preliminary objections; 2. Holds by six votes to three that Article 8 (art. 8) applies in this case; 3. Holds by five votes to four that there has been a breach of Article 14 taken together with Article 8 (art. 14+8); 4. Holds unanimously that it is unnecessary to determine whether there has also been a breach of Article 8 (art. 8) taken alone; 5. Holds unanimously that Switzerland is to pay the applicants, within three months, 20,000 (twenty thousand) Swiss francs in respect of costs and expenses; 6. Dismisses unanimously the remainder of the claim for just satisfaction. Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 February 1994. Rolv RYSSDAL President Marc-André EISSEN Registrar In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment: (a) dissenting opinion of Mr Thór Vilhjálmsson; (b) dissenting opinion of Mr Pettiti and Mr Valticos; (c) partly dissenting opinion of Mr Russo. R.R. M.-A.E. DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON The rules of domestic law dealt with in this case had no prejudicial effect on the applicants of a sufficient severity to bring it within the proper scope of international protection of human rights. In my opinion Article 8 (art. 8) of the Convention is not, in the circumstances, applicable and there was accordingly no violation. DISSENTING OPINION OF JUDGES PETTITI AND

VALTICOS (Translation) 1. We consider that Article 8 (art. 8) of the Convention, on which the Court’s reasoning mainly rests, is not applicable to the assignment of married couples’ family names, at least in circumstances such as those in the instant case. Not only does this Article (art. 8) not expressly refer to this issue, or even to naming in general, but political, legal, social and religious conceptions still vary so much from one country to another in this field, which is still in the process of change, that to claim to impose in this instance this or that view concerning the rules that should be followed in the matter of married or divorced couples’ family names would certainly to be to go beyond the scope of Article 8 (art. 8) and of the undertakings entered into by the States. While, as the majority of the Court hold, the principle of the equality of the sexes admittedly is today "a major goal in the member States of the Council of Europe" and while the Court cannot ignore changes of views in this field, it does not follow that an extension of the scope of Article 8 (art. 8) of the Convention is justified, as the Court considers. 2. As in the determination of nationality, the legislation on assigning names must remain within the State’s domain and does not come within the ambit of the Convention. It is well known that views on the assignment and choice of surnames and first names vary within each national system, both as regards births and as regards marriages and divorces. In different countries it would be possible to find hundreds of variants. Creating a right to choose names freely on the basis of such a minimal case as Mr and Mrs Burghartz’s would have undue consequences and might lead to numerous applications lacking any proper justification. The couple had already been authorised to substitute the name "Burghartz" for the name "Schnyder". 3. In the present case, having regard to the fact that the couple had been allowed to change their name, the Swiss authorities’ refusal cannot, in our view, be regarded as amounting to a discriminatory infringement of the equality of the sexes. Basically, we are emphasising that in this instance the Chamber’s interpretation is an extreme one, especially as, while the case is admittedly not of major importance in itself, the principle could lead too far in a Europe that is becoming more and more varied and in a field in which legal provisions, like opinions, are still very varied. PARTLY DISSENTING OPINION OF JUDGE RUSSO (Translation) I share the majority’s opinion as to the applicability of Article 8 (art. 8) in this case. As to the merits, on the other hand, I conclude that there has been no breach, for the same reasons as Mr Pettiti and Mr Valticos in point 3 of their dissenting opinion. [■] Note by the Registrar: The case is numbered 49/1992/394/472. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission. [■] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 280-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

Export aus OpenCaseLaw (CC0). Verbindlich ist allein der vom erlassenden Gericht veröffentlichte Originaltext. Quellen-URL siehe oben.