CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 36797/97
by G.M.B. and K.M.
against Switzerland

The European Court of Human Rights, sitting on 27 September 2001 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr L. WILDHABER,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr V. ZAGREBELSKY, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 14 June 1997 and registered on 7 July 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants are Swiss nationals, born in 1953 and 1951, respectively, and living in Zürich in Switzerland. The respondent Government are represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicants married in 1989. They have a daughter L.G.M. born on 14 August 1995. As the daughter's surname the parents wished to give her the mother's, *i.e.* the first applicant's surname B. This was refused on 18 November 1995 by the Zürich Registry Office. Based on Section 270 § 1 of the Swiss Civil Code (*Zivilgesetzbuch*, henceforth referred to as CC; see below, Relevant domestic law), the Office found that the child would obtain the family name which in the present case was the second applicant's, *i.e.* the father's surname M.

The applicants' appeal against this decision was dismissed by the Directorate for the Interior (*Direktion des Inneren*) of the Canton of Zürich on 15 July 1996. The decision stated:

> "1. If the parents of the child are married, the child obtains the family name (Section 270 § 1 CC). As a rule this is the name of the husband, exceptionally it will be the name of the mother if the parents have chosen this name as the family name according to Section 30 § 2 CC. If the mother puts her name first according to S. 160 § 2 CC, this will have no effect on the name of the common child ...
>
> 2. There is agreement with the parents that there would be discrimination contrary to Article 14 of the Convention if the family name was based solely on the name of the husband. But no right can be deduced for the parents freely to chose the family name of their common child. The applicants overlook in their argumentation that the reform of matrimonial law considered the equality of man and woman to the extent that the spouses may obtain, according to S. 30 § 2 CC, the authorisation to have the woman's name as the family name, following an administrative procedure to change the name, if there are commendable grounds. This possibility to change names in case of commendable grounds, in respect of which only minor conditions (*geringe Anforderungen*) may be attached, is more easily attained than the one stated in Section 30 § 1 CC. Justification herefor is that marriage in any event will oblige one partner to renounce her/his name, for which reason there is less public interest in the irreversibility of a family name than in the case of Section 30 § 1 CC ... A commendable ground can be seen in every, even only remotely understandable, not clearly unlawful or immoral reason ... Even if Section 160 CC continues to uphold the principle of the unity of the family name, the spouses are free to apply, with the Government of their Canton of residence, for the authorisation to employ the woman's

name as the family name. The legislator thus enabled the spouses to choose as a family name the woman's name and to pass this name on to any common children ... The only difference in Section 30 § 2 CC to a complete freedom of choice lies in the envisaged administrative procedure which, according to Section 179 § 1(2) of the Civil States Ordinance is free of costs. Contrary to the applicants' opinion, this merely formal difference cannot amount to a breach of the prohibition of discrimination within the meaning of Article 14 of the Convention.

3. Upon announcing their marriage the applicants renounced filing a request within the meaning of Section 30 § 2 CC. As a result, they have opted for the name of the husband as the family name. According to Section 270 § 1 CC, their common daughter L.G.M. obtains the family name of the parents ..."

The applicants' further appeal was dismissed on 7 November 1996 by the Federal Court (*Bundesgericht*), the decision being served on 24 December 1996. In its decision the Court recalled that the applicants had not opted for the possibility to choose the wife's name as the family name. The case concerned not only the interests of the parents but, above all, the interests of the child who had an independent right to a family name and to be attached to the family. It would not be possible to grant parents with more than one child the right freely to choose the family name for every child. It was not clear why a child's right to identity and individuality should demand the free choice of name for the parents, and Article 8 of the Convention did not grant such a freedom of choice. Insofar as the applicants pointed out that there would be discrimination in respect of whichever name was chosen as the family name - that of the husband or that of the wife - , the Court considered that it lay in the nature of things that parents had to agree on one name for the child.

B. Relevant domestic law and practice

Section 30 §§ 1 and 2 of the Swiss Civil Code state:

"(1) The Government of the Canton of residence may grant a person the change of name, if there are important reasons herefor.

(2) The request of the spouses to have the name of the wife as the family name is to be granted if there are commendable reasons (*achtenswerte Gründe*, *intérêts légitimes*). ...."

In practice, such "commendable reasons" are assumed if they are worthy of consideration and reasonable. The procedure envisaged under § 2 is free of charge (see BGE [*Bundesgerichtsentscheid*] 126 I p. 1). After marriage, the name may only be changed if the conditions of § 1 of Section 30 have been met.

Section 160 §§ 1 and 2 CC state:

> "(1) The name of the husband is the family name of the couple.
>
> (2) The bride may, however, declare before the Civil Registrar that she wishes to place her previous name before the family name. ..."

Section 270 § 1 CC provides:

> "(1) If the parents are married, the child obtains their family name. ...

Section 177a § 1 of the Ordinance on Civil Status (*Zivilstandsverordnung*), which was introduced after the Court's Burghartz v. Switzerland judgment of 22 February 1994, Series A no. 280-B, states:

> "(1) The bride may declare to the Civil Registrar that she wishes to keep her previous name, followed by the family name (Section 160 §§ 2 and 3 CC). The bridegroom has the same possibility, if the spouses file the request to have the wife's name as the family name after the marriage. ..."

According to 179 § 1(2) of the Ordinance, no costs will be imposed if, upon marriage, bride and bridegroom issue declarations as to their names.

COMPLAINTS

The applicants complain under Article 8 of the Convention, and under Articles 14 of the Convention taken together with Article 8, that their daughter, who has her father's name M., was not authorised to have her mother's name B. as the family name. A public interest can no longer be seen in this solution which amounts to a serious discrimination of the wife. This is a grave interference with the autonomy of a family according to Article 8 § 1 of the Convention which today can no longer be justified under Article 8 § 2. In more and more married couples the wife decides to keep her previous name. Modern society operates with electronic registering, and there is no longer a necessity for the unity of the family. In fact, if the wife's name is chosen as the family name, the inverse discrimination would arise. Only the parents' free choice of name in all its possibilities upon marriage and for children secures individuality without discrimination.

THE LAW

1. The applicants complain under Article 8 of the Convention that their daughter, who has her father's name M., was not authorised to have her mother's name B. as the family name. They submit that this is a grave interference with the autonomy of a family.

Article 8 of the Convention states, insofar as relevant:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government consider that the complaint is inadmissible as being manifestly ill-founded. They recall that Section 30 § 2 of the Swiss Civil Code enables a couple to choose, upon marriage, the wife's name as the family name. The "commendable interests" stated in this provision are not examined too strictly. In practice no authority will examine whether such interests exist. As a result, a future married couple has in fact the right to choose the name of either spouse as the future family name. The wife's name which has become the family name will also be transmitted to any children of the couple. Thus, the present applicants had the possibility, upon marrying, of obtaining the name B. as their family name. They chose not to do so for reasons of their own, and the Government cannot be made responsible herefor.

Based on a detailed analysis of the domestic legal situation in various member States of the Council of Europe, the Government refer to a lack of uniformity among the different laws. A number of States permit the spouses each to keep their former names upon marriage as well as choosing a common family name. However, no State in Europe permits a couple to have one of the spouses' names as the family name, and their child to have the other name as its family name. Common denominator among the various solutions proposed is that, if there is a common family name for the couple, this name will be given to the couple's child. In this respect, it is submitted that Swiss law is comparable to the situation in particular in Germany and Austria.

The Government consider that the present case falls to be distinguished from other cases decided by the Court, for instance from the case of Burghartz v. Switzerland (judgment of 22 February 1984, Series A no. 280-B) or the case of Guillot v. France (judgment of 25 November 1994, Series A no. 299-B). Thus, the present applicants had the possibility to choose either spouse's name and in particular the first applicant's name as the common family name which would then have become their child's family name - which is precisely the name they wish their child to have today. The inconvenience arising for the parents would have been all the less as the second applicant could have put his previous name before the family name, *i.e.* M. B. The Government also refer to the Stjerna v. Finland case (judgment of 25 November 1994, Series A no. 299-B, p. 61, § 39) according to which in matters of changing one's name there is little

common ground between the domestic systems of the Convention countries, and State authorities enjoy a wide margin of appreciation. With reference to the Cossey v. the United Kingdom case (judgment of 27 September 1990, Series A no. 184, p. 15, § 37), the Government recall that there is no direct obligation for a State "to alter the very basis of its system for the registration of births".

The Government submit that, clearly, it is in the public interest in registering persons of the same family under the same family name. The applicants underestimate the importance for a child to be united, by means of its name, with the family. Switzerland has chosen the system of a common family name, while enabling the spouses upon marriage flexibility as to the choice of names. The Government do not consider that such legislation goes beyond the margin of appreciation left to the domestic authorities.

If the Court were to consider that the present case amounted to an interference with the applicants' rights under Article 8 of the Convention, the Government contend that the measure would be justified under § 2 of this provision. In view of Sections 30 § 2, 160 § 1 and 270 § 1 CC, the measures are "in accordance with the law" within the meaning of § 2 of Article 8. The measure furthermore served the aim of the "protection of the rights and freedoms of others" within the meaning of this provision, in particular of the child concerned. Finally, the measure was "necessary in a democratic society ", as stipulated in Article 8 § 2 of the Convention in view of the margin of appreciation falling to the domestic authorities and the comparatively slight inconvenience arising out of this situation for the parents.

The applicants submit that, had they chosen the former name of the wife, *i.e.* the first applicant, as the family name, the second applicant, the husband, could not have put his former name before the family name. At the time of the applicants' marriage in 1989, there was a discrimination between men and women which was only eliminated following the Court's decision in the Burghartz v. Switzerland case of 1994 (cited above).

In the applicants' opinion, Article 8, as well as Articles 12 and 14 of the Convention and Article 5 of Protocol No. 7 will be breached, if one spouse has to give up his or her identity when the family name is chosen. The Swiss Government considered this violation justified under Article 8 § 2 of the Convention by the legitimate public interest in the recognisability of the family unit. This interest is marginal in view of the actual social situation prevailing in Switzerland and Europe as a whole. For instance, the register in the new civil status databank will no longer be based on the family but on individuals, without regard to their gender. The Swiss Parliament is currently aiming at abolishing existing discriminations in this respect.

The applicants do not understand why the respondent Government resist the changes in this area. It has long been a reality in Scandinavia and in Britain as well as in such countries as France, Italy, Portugal and Spain that the spouses are able to continue to use their own surname after getting married. This possibility should also apply in Switzerland and the other German-speaking countries. This is an essential precondition for the autonomy of the individual and the equality of the sexes. A change of name as envisaged in Section 30 § 2 CC does not imply an adequate right to choose, compared with the rule that the father's name can be used. The fiancée must not only state her choice together with her future husband before the wedding, but she must also make a formal application stating "commendable reasons". This is no easy task since it presupposes writing skills and a certain knowledge of the law. It is a further deterrent that the application has to be made to the Government. As a result, not even 1% of those wishing to get married have made the wife's former name their family name. Consequently, there can be no question at all of the wife having the same right to use her own name as the family name.

In the applicants' submissions, the choice of the wife's name as the family name (and consequently as the child's name) is not a right analogous to that of the husband under Sections 160 and 270 CC. Rather, it only constitutes the right to make an application, involving a procedure. Furthermore, all cantonal Governments insist on their cantonal sovereignty in respect of defining the term "commendable reasons". The applicants wrote letters to different cantonal Governments, not one clearly replied that the spouses' wish to be able to give the mother's surname to a child born later constituted for them a "commendable reason". As a result, it is uncertain whether an application to change one's surname for "commendable reasons" is approved.

In the applicants' view, objections on the grounds of practicability lack justification. Today, specialised judges in the European countries give rulings in simple and expeditious proceedings to protect the marriage, and any disagreement between the spouses on the choice of the family name and the children's surname can be easily integrated into these proceedings. If the interests of the spouse clash, the child's welfare must be paramount when the choice of surname is made. Indeed, as a logical continuation of this autonomy, the principle must apply that the children's wish regarding the choice of the surname must be taken into account as soon as they are able to express this wish and want to decide themselves. Thus, the children will ultimately decide in the future on the question of patrilinearity or matrilinearity, if it should still be necessary to choose between the mother's or the father's name. In the applicants' view, the time has come to ensure that both spouses can freely choose both the family name (if the Convention States still wish to retain it) and the children's family name together. This

follows from the need to respect personal and family autonomy in free democracies.

The Court recalls that Article 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 nonetheless 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 (see the Burghartz v. Switzerland judgment cited above, p. 28, § 24).

The refusal of the Swiss authorities to allow the applicants to adopt a particular surname for their child cannot, in the Court's view, necessarily be considered an interference in the exercise of their right to respect for their private and family life, as would have been, for example, an obligation for them to change the family name. However, as the Court has held on a number of occasions, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities with his or her exercise of the right protected, there may in addition be positive obligations inherent in an effective "respect" for private and family life (see the Stjerna v. Finland judgment of 25 November 1994, Series A no. 299-A, pp. 60-61, § 38).

The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (see the Stjerna v. Finland judgment cited above, p. 61, § 38).

Turning to the present case, the Court notes the submissions of the respondent Government, based on an analysis of the domestic laws in various Convention States, according to which in Europe, as a rule, it is not permitted for a married couple to choose *one* of the spouses' names as the family name, and their child to have the *other* name as its family name. The common denominator among the various solutions proposed is that, if there is a common family name for the couple, this name will be given to the couple's child. These conclusions demonstrate in the Court's opinion that there is no uniformity among the different laws in Europe in respect of the applicants' proposals.

Since the issues in the case concern areas where there is little common ground amongst Convention States and the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation (see *mutatis mutandis* the X., Y. and Z. v. the United Kingdom judgment of 22 April 1997, *Reports* 1997-II, p. 633 § 44). The Court's task is not to substitute itself for the competent Swiss authorities in determining

the most appropriate policy for the attribution of family names to children in Switzerland, but rather to review under the Convention the grounds adduced in respect of the decisions taken in the present case (see *mutatis mutandis* the Stjerna v Finland judgment cited above, p. 61, § 39).

Before the Court the applicants claimed that a choice of the family name of their daughter was called for in view of the personal autonomy of the individual in a free democracy. However, the Court can see no particular inconvenience, and indeed the applicants have not claimed such inconvenience, in the fact that their daughter was obliged to carry as her family name that of the parents, which was the name of her father (see *mutatis mutandis* the Stjerna v. Finland judgment cited above, p. 63, § 42; the Guillot v. France judgment cited above, p. 1604, § 27).

The Court furthermore notes the decision of the Federal Court of 7 November 1996 according to which Section 30 § 2 CC enabled the applicants, upon their marriage, to choose the first applicant's former name as the family name, in which case their daughter would have also obtained the family name her parents now wish her to have. The Court notes that such a choice is possible according to this provision if the spouses concerned claim "commendable reasons". The Government have stated that such a choice of family name is handled liberally in Switzerland, and indeed, the Court notes the decision in the present case of the Directorate for the Interior of the Canton of Zürich of 15 July 1996 according to which "only minor conditions may be attached" to the request to change names according to Section 30 § 2 CC. The applicants have contested this conclusion, maintaining that every Canton applies these terms differently. In the Court's opinion, it suffices to point out that the applicants have not made out any particular difficulties having existed for them upon their marriage to obtain the wife's former name as the family name.

Finally, the Court notes the emphasis placed by the Government and the Federal Court on the importance for a child to be united, by means of its name, with the family name, and that the system chosen in Switzerland served the purpose of maintaining the unity of the family. In this respect, the Court recalls its case-law according to which "the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront" (see the X., Y. and Z. v. the United Kingdom judgment cited above, p. 633, § 47).

Bearing in mind in particular the flexibility which Swiss law affords to couples in the choice of their family name and that the applicants have not maintained any particular inconvenience as to their concrete situation, the Court considers, in the light of the margin of appreciation left to the domestic authorities in such matters, that in the present case there has been no failure to respect the applicants' private and family life under Article 8 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

2. Under Article 14 of the Convention taken together with Article 8 the applicants complain that the situation of their daughter amounts to a serious discrimination of the wife. In more and more married couples the wife decides to keep her previous name. In fact, if the wife's name is chosen as the family name, the inverse discrimination would arise. Only the parents' free choice of name in all its possibilities upon marriage and for children secures individuality without discrimination.

Article 14 of the Convention states:

> "The enjoyment of the rights and freedoms set forth in this 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 do not contest the applicability of Article 14 of the Convention taken together with Article 8, however, they consider the complaint to be manifestly ill-founded. It is submitted that complete equality, as requested by the applicants, would imply abandoning the principle of family unity, which is reflected in the notion of a common family name. Such equality has limits since the parents must agree on a first name and a family name for the child, and difficulties arise if they cannot agree.

In the Government's opinion, it is clear that in the present case there was an "objective and reasonable justification" within the meaning of the Court's case-law (see the Petrovic v. Austria judgment of 27 March 1998, *Reports* 1998-II, p. 586 § 30). Discrimination was inevitable since the Swiss legislator chose to uphold the unity of the family name - a choice which other Convention States have equally undertaken. The unity of the family name reflects towards the outside world the unity of the family, which is in itself a perfectly legitimate justification. It should not be overlooked that the applicants did not wish their child to have both parents' family names before the marriage; rather they wished the child to have the name of the first applicant, the mother. The applicants themselves there admit that complete equality is impossible to achieve.

The applicants reply that the obligation to use a single family name would not amount to discrimination if both spouses were able to choose between the two surnames. However, this is not the case in Switzerland. A double name is, from the outset an inappropriate means of remedying the injustice, especially as a glance at the name combinations employed in Switzerland today reveals that the loss of the surname is not even balanced by the number of double names used. On the contrary, the husband always continues to use his name alone in the family register. The fact that today the husband can give up his own surname and the child receives the wife's

name which is the family name, cannot restore the balance of the interests of the two spouses in such a way as to make it impossible to speak of discrimination against one party in the exercise of the right to private and family life.

In the applicants' opinion, in today's Europe a provision such as S. 160 CC is highly discriminatory within the meaning of Article 14 of the Convention. The Convention takes precedence over national law. It is unlikely that anybody would seriously claim that this discrimination, by forcing a person to give up his or her family name, with all its traditional, social and economic significance, remains a marginal issue.

Under the Court's case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see the Petrovic v. Austria judgment cited above, p. 586, § 30).

In the present case, the Court has just found that Swiss legislation places importance on the child being united, by means of its name, with the family name, and that the system chosen in Switzerland serves the purpose of maintaining the unity of the family. In addition, in such cases domestic authorities enjoy a large margin of appreciation.

On the other hand, the Court notes that in such situations whatever family name is chosen for the child, other family names will be excluded. In the present case the applicants themselves chose to employ the husband's name as the family name, rather than the wife's former name.

The Court considers that this cannot be considered as a difference in treatment which is discriminatory within the meaning of Article 14 of the Convention.

It follows that the remainder of the application is also manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President