COURT (CHAMBER)

CASE OF BURGHARTZ v. SWITZERLAND

(Application no. 16213/90)

JUDGMENT

STRASBOURG

22 February 1994

In the case of Burghartz v. Switzerland*,
The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:
Mr R. Ryssdal, *President*,
Mr ThÃ³r VilhjÃ¡lmsson,
Mr F. GÃ¶lcÃ¼klÃ¼,
Mr L.-E. Pettiti,
Mr C. Russo,
Mr N. Valticos,
Mr J.M. Morenilla,
Mr A.B. Baka,
Mr L. Wildhaber,
and also of Mr M.-A. Eissen, *Registrar*, and Mr H. Petzold, *Deputy Registrar*,
Having deliberated in private on 25 August 1993 and 24 January 1994,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 December 1992 and by the Government of the Swiss Confederation ("the Government") on 8 January 1993, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 16213/90) against Switzerland lodged with the Commission under Article 25 (art. 25) by Mrs Susanna Burghartz and Mr Albert Burghartz, on 26 January 1990.
The Commissionâ€™s request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Governmentâ€™s application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 14 (art. 8, art. 14) of the Convention.
2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30), whom the President gave leave to use the German language (Rule 27 para. 3).
3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 29 January 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr ThÃ³r VilhjÃ¡lmsson, Mr F. GÃ¶lcÃ¼klÃ¼, Mr L.-E. Pettiti, Mr N. Valticos, Mr I. Foighel, Mr J.M. Morenilla and Mr A.B. Baka (Article 43 in fine of the Convention and Rule 21 para. 4 of the Rules of Court) (art. 43). Subsequently Mr C. Russo, substitute judge, replaced Mr Foighel, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).
4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicantsâ€™ lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicantsâ€™ and the Governmentâ€™s memorials on 16 June 1993.
5. In accordance with the Presidentâ€™s decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 August 1993. The Court had held a preparatory meeting beforehand.
There appeared before the Court:
- for the Government

Mr P. Boillat, Head of the European Law
and International Affairs Section, Federal Office of

Justice, *Agent*,
Mrs R. Reusser, Head of the Principal Private Law Division,
Federal Office of Justice,
Mr F. SchÃ¼rmann, Deputy Head of the European Law
and International Affairs Section, Federal Office of
Justice, *Counsel*;
- for the Commission
Mr E. Busuttil, *Delegate*;
- for the applicants
Ms E. Freivogel, RechtsanwÃ¤ltin, *Counsel*.
The Court heard addresses by Mr Busuttil, Mr Boillat and Ms Freivogel.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants, who are Swiss nationals, have both lived in Basle since 1975. They were married in Germany in 1984 and Mrs Burghartz has German citizenship also. In accordance with German law (Article 1355 of the Civil Code), they chose the wifeâ€™s surname, "Burghartz", as their family name; the husband availed himself of his right to put his own surname in front of that and thus call himself "Schnyder Burghartz".
7. The Swiss registry office (Zivilstandsamt) having recorded "Schnyder" as their joint surname, the couple applied to substitute "Burghartz" as the family surname and "Schnyder Burghartz" as the husbandâ€™s surname. On 6 November 1984 the cantonal government (Regierungsrat) of Basle Rural turned down the application.
8. On 26 October 1988 the applicants made a further application to the cantonal Department of Justice (Justizdepartement) of Basle Urban, following an amendment to the Civil Code as regards the effects of marriage, which had been made on 5 October 1984 and had come into force on 1 January 1988 (see paragraph 12 below).
On 12 December 1988 their application was again refused, on the ground that they had not pointed to any serious inconvenience arising from the use of the surname "Schnyder". Furthermore, in the absence of any transitional provisions the new Article 30 para. 2 of the Civil Code could not apply to couples married before 1 January 1988. Lastly, under the new Article 160 para. 2, only a wife could put her own surname before the family name (see paragraph 12 below).
9. The applicants then lodged an appeal (Berufung) with the Federal Court (Bundesgericht) in which they complained of, among other things, a breach of the new Articles 30 and 160 para. 2 of the Civil Code and Article 4 para. 2 of the Federal Constitution (see paragraphs 11 and 12 below).

On 8 June 1989 the Federal Court allowed the appeal in part. While refusing to apply paragraph 2 of Article 30, which concerned only engaged couples and had no retrospective effect, it held that in the particular case there were important factors which justified applying paragraph 1 in order to allow the applicants to call themselves "Burghartz"; apart from the coupleâ€™s age and profession, account had to be taken of the differences between the relevant Swiss and German systems, which were made more acute by the fact that Basle was a frontier city.
As to Mr Burghartzâ€™s application to be allowed to bear the name "Schnyder Burghartz", no support for it could be found in Article 160 para. 2 of the Civil Code; the drafting history showed that the Swiss Parliament, out of a concern to preserve family unity and avoid a break with tradition, had never agreed to introduce absolute equality between spouses in the choice of name and had thus deliberately restricted to wives the right to add their own surnames to their husbandsâ€™. This rule therefore could not avail by analogy a husband in a family known by the wifeâ€™s surname. There was, however, nothing to prevent Mr Burghartz from using a double-barrelled name (see paragraph 13 below) or even, informally, putting his surname before his wifeâ€™s.
10. According to the applicant, a large number of official documents, in particular the certificate of his doctorate in history, had not since then contained the "Schnyder" element of his surname.

II. RELEVANT DOMESTIC LAW

11. Article 4 para. 2 of the Swiss Federal Constitution provides:

> "Men and women shall have equal rights. Equality shall be provided for by law, in particular in relation to the family, education and work ..."

12. The relevant new Civil Code provisions that came into force on 1 January 1988 read as follows:

Article 30

> "(1) The government of the canton of residence may, if there is good cause, authorise a person to change his or her name.
>
> (2) Engaged couples shall be authorised, if they so request and if they prove a legitimate interest, to bear the wifeâ€™s surname as the family name once the marriage has been solemnised.
>
> ..."

Article 160

> "(1) Married couples shall take the husbandâ€™s surname as their family name.
>
> (2) A bride may, however, make a declaration to the registrar that she wishes to keep the surname she has borne to date, followed by the family name.
>
> ..."

Article 270

"(1) The children of married couples shall bear their family name.

..."

Article 8a of the final section

"Within one year of the entry into force of the new Act, a woman who was married under the old law may make a declaration to the registrar that she wishes to put the surname she bore before her marriage in front of the family name."

13. By a custom recognised in case-law, married couples may also put the wifeâ€™s surname after the husbandâ€™s surname, joining the two with a hyphen. This double-barrelled name (Allianzname), however, is not regarded as the legal family name (Federal Court, judgment of 29 May 1984, Judgments of the Swiss Federal Court, vol. 110 II 99).

PROCEEDINGS BEFORE THE COMMISSION

14. Mr and Mrs Burghartz applied to the Commission on 26 January 1990, relying on Articles 8 and 14 (art. 8, art. 14) of the Convention.
15. The Commission declared the application (no. 16213/90) admissible on 19 February 1992. In its report of 21 October 1992 (made under Article 31) (art. 31), it expressed the opinion by eighteen votes to one that there had been a breach of Article 14 taken together with Article 8 (art. 14+8), and by thirteen votes to six that there was no need to examine the case under Article 8 (art. 8) taken alone. The full text of the Commissionâ€™s opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment*.

AS TO THE LAW

I. THE GOVERNMENTâ€™S PRELIMINARY OBJECTIONS

A. Whether or not the first applicant is a victim

16. As before the Commission, the Government contested in the first place that Mrs Burghartz was a victim within the meaning of Article 25 (art. 25) of the Convention. No one but Mr Burghartz had been aggrieved by the refusal of his request, the only one in issue in the case as his wife had obtained satisfaction from the Federal Court, which had allowed her to keep her maiden name (see paragraph 9 above).
17. The applicants pointed to Mrs Burghartzâ€™s personal interest in the success of her husbandâ€™s action. Since, together with him, she had chosen "Burghartz" as their joint family

name, she considered herself directly responsible for her husbandâ€™s loss of his surname "Schnyder", and their married life might suffer from this. The Commission too thought that the question concerned both spouses.

18. The Court points out that the case originated in a joint application by Mr and Mrs Burghartz to change their joint family name and the husbandâ€™s surname simultaneously. Having regard to the concept of family which prevails in the Convention system (see, among other authorities and mutatis mutandis, the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, pp. 14-15, para. 31, and the Beldjoudi v. France judgment of 26 March 1992, Series A no. 234-A, p. 28, para. 76), it considers that Mrs Burghartz may claim to be a victim of the impugned decisions, at least indirectly.

The objection must therefore be dismissed.

B. Exhaustion of domestic remedies

19. The Government, who had already raised the issue before the Commission, submitted that the applicants had not exhausted domestic remedies as they had neither relied on Articles 8 and 14 (art. 8, art. 14) of the Convention in their appeal (Berufung - see paragraph 9 above) nor also lodged a public-law appeal.

20. The Court observes that the Federal Court is required by Article 113 para. 3 of the Swiss Constitution to apply the laws passed by the Federal Assembly. It is expressly forbidden to suspend the effects of any such laws which might prove to be incompatible with the Constitution. This prohibition seems to have been extended by current case-law to cases in which there is a conflict between such a law and a treaty. That being so, the applicants cannot be blamed for having founded their appeal solely on domestic law - Articles 30 and 160 of the Civil Code, 8a of the final section of that code and 4 para. 2 of the Constitution - seeing that their arguments were identical in substance with those they submitted to the Commission. As to a public-law appeal, its subsidiary nature prevents it from being considered in this instance an adequate remedy which Article 26 (art. 26) of the Convention would also have required the applicants to exhaust.

Accordingly, this objection likewise must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 8 (art. 14+8)

21. The applicants relied on Article 8 (art. 8), taken alone and together with Article 14 (art. 14 +8).

Article 8 (art. 8) provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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."

Article 14 (art. 14) provides:

"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."

Given the nature of the complaints, the Court, like the Commission, deems it appropriate to examine the case directly under Article 14 taken together with Article 8 (art. 14+8).

A. Applicability

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.
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.
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 personâ€™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 applicantâ€™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

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 husbandsâ€™ 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.
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 husbandâ€™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 womanâ€™s right to put her own surname in front of her husbandâ€™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.
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).
28. In support of the system complained of, the Government relied, firstly, on the Swiss legislatureâ€™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 wifeâ€™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 spousesâ€™ 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 personâ€™s official papers. They therefore cannot be regarded as equivalent to it.
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).
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)

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."

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.
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 Governmentâ€™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-AndrÃ© 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 ThÃ³r VilhjÃ¡lmsson;

(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 THÃ“R VILHJÃLMSSON

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 Courtâ€™s reasoning mainly rests, is not applicable to the assignment of married couplesâ€™ 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 couplesâ€™ 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 Stateâ€™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 Burghartzâ€™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 authoritiesâ€™ 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 Chamberâ€™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 majorityâ€™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.

CHAPPELL v. THE UNITED KINGDOM JUDGMENT

CHAPPELL v. THE UNITED KINGDOM JUDGMENT

BURGHARTZ v. SWITZERLAND JUDGMENT

BURGHARTZ v. SWITZERLAND JUDGMENT

BURGHARTZ v. SWITZERLAND JUDGMENT
DISSENTING OPINION OF JUDGE THÃ“R VILHJÃLMSSON

BURGHARTZ v. SWITZERLAND JUDGMENT
DISSENTING OPINION OF JUDGES PETTITI AND VALTICOS

BURGHARTZ v. SWITZERLAND JUDGMENT
PARTLY DISSENTING OPINION OF JUDGE RUSSO