

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 22 May 2003¹

1. This case concerns the surname borne by children born in Belgium to a married couple resident there. The father is a Spanish national, the mother Belgian, and the children have dual nationality.

4. The Belgian Conseil d'État (Council of State) now wishes to know whether such a refusal might be precluded by principles of Community law such as those relating to citizenship of the European Union and freedom of movement for citizens.

2. On registration of their births in Belgium, the children were given the double surname borne by their father — Garcia Avello — composed in accordance with Spanish law and custom of the first element of his own father's surname and the first element of his mother's surname.

Personal naming systems

3. The parents subsequently applied to the Belgian authorities to have the children's surname changed to Garcia Weber so that it reflected the Spanish pattern and comprised the first element of their father's surname, followed by their mother's (maiden) surname. That application was refused as contrary to Belgian practice.

5. In Europe, people generally bear names of two kinds.² There are what I shall call given names, which are seen (however common they may be) as a personal, intimate and individual identification, and there are surnames (I use the term in a broad sense), which almost always identify a person by reference to his or her family or lineage and are in that connection often viewed as an essential part of an inalienable

¹ — Original language: English.

² — It is also possible — as, for example, in Sweden — for a person to bear a 'middle name' which partakes to a certain extent of both categories.

birthright. Yet beyond that basic categorisation, there is considerable variety.

relevant in the present case that in Spain children do not bear the same surname as either of their parents but that each generation forges a new surname incorporating parts of each parent's surname.

6. The very 'naming of names' reveals differences and difficulties. In Dutch, French and German, for example, the general word for 'name' designates the surname, the given name being referred to as a forename. Yet that seems inappropriate for Hungarians, who are expected shortly to become citizens of the Union and who place the surname before the given name.³ In Italian and Spanish (and to a large extent in English), the general word for 'name' is reserved for the given name, a different word being used for the surname. To refer to the surname as the 'family name' may be misleading since not all members of the same family necessarily bear the same surname. For example, in Iceland (not a Member State of the Union but within the EEA), most people are identified by a given name and an indication that they are the son or daughter of their father (or mother), similarly identified by given name alone.⁴ Nor however is 'patronymic' necessarily accurate: a surname may be a 'metronymic', and it is

7. In order to appreciate the significance of the present case, it may be helpful to consider briefly the range of rules in the Member States governing the ways in which surnames are determined and may be changed. For the sake of simplicity, I shall look essentially at the type of situation involved in the main proceedings, that of the surname given to a child born to a married couple. In other cases — for example where the parents are not married at the time of the child's birth, where a parent's surname is later changed through marriage, divorce and/or remarriage, or where the child is adopted — the position may differ.

Applicable law

8. In the event of a conflict between legal systems governing a person's surname, most Member States give priority to the law of his or her nationality as the law governing personal status. Denmark and Finland however apply their own law to persons domiciled in their territory; in Sweden, Swedish law applies to all Nordic citizens domiciled there, the law of the

3 — Indeed even the French, who refer to the given name as a 'prénom', regularly place it after the surname in official or semi-official contexts.

4 — Siblings thus usually bear different 'surnames' depending on their sex — the Icelandic word for a surname actually means an identification name — and in Icelandic name lists and directories, it is usual to proceed by alphabetical order of given name. However, a minority of families in Iceland do have a family surname which can be passed on unchanged from generation to generation.

nationality to all other nationals.⁵ In Ireland and the United Kingdom, there is no specific rule governing a conflict of laws; essentially, there is little need for such a rule since the laws of those Member States are sufficiently flexible to allow the attribution or use of a name formed in accordance with any system.

9. In Belgium, where the person in question has more than one nationality, one of which is Belgian, then Belgian law prevails. Spanish law adopts the same solution, *mutatis mutandis*,⁶ so that in the present case Belgian law would prevail in Belgium and Spanish law in Spain.

Determination of the surname given to a child

10. In most Member States, children in fact bear the same surname as their father, although the degree to which that is dictated by law rather than tradition varies.

5 — It is interesting to note that, at least in Finland and Sweden, the 'domicile' rule does not apply to Icelandic nationals, precisely because of the difference between naming systems.

6 — At least in a case such as that of the children concerned here, where the foreign nationality was acquired at birth by virtue of the law of the foreign country. In certain other situations, other rules may apply the law of the most recent habitual residence or of the nationality most recently acquired.

11. In Italy, it appears that a child born to a married couple must always bear the father's surname, although that rule derives from custom rather than from enacted law, and legislation has been proposed to allow greater flexibility. In most other Member States, a degree of choice is available to the parents, though the choice is generally restricted to the parents' own surnames.

12. One rule commonly found is essentially that, if the parents use the same surname (usually that of one or other spouse), then the child will bear that surname but that otherwise they may choose either the father's or the mother's surname for the child. Another rule in several Member States is that all children of a couple must bear the same surname, so that any choice is in fact available essentially for the eldest child alone.

13. The possibility of combining both parents' surnames in the child's surname is the subject of conflicting rules in different Member States. In some, it is specifically allowed or even imposed, in others specifically prohibited. In Denmark, it appears to be possible to hyphenate the two surnames but not to combine them without a hyphen.⁷ The rule in Portugal appears to be considerably more flexible: a child may

7 — Although, as in Sweden, there is provision for the personal use of a 'middle name' which may be the surname of the parent whose surname is not borne as such. Such a middle name cannot however be passed on to subsequent generations.

bear a surname composed of up to four elements chosen among the surnames borne by either or both parents or, in effect, by one or more grandparents, although it seems that surnames are in fact generally formed along lines which mirror the Spanish system (literally, in that the order of the paternal and maternal elements is usually reversed).

14. The greatest liberty of choice within the European Union seems to be in the United Kingdom, where (as in many other common-law jurisdictions worldwide) there is essentially no legal rule determining the surname to be borne by a child. Consequently, on registration of a birth, the parents may in theory choose any surname they wish even if, as a matter of social reality, the father's surname overwhelmingly prevails.

15. In Belgium the rule established in Article 335 of the Civil Code is at present essentially that a child bears only the father's surname unless either paternity is not established or the father is married to a woman other than the mother, in both of which cases the child bears the mother's surname.

16. A number of proposed changes to the law have been placed before the Belgian federal legislature. If adopted, those changes would allow greater freedom in the choice of surnames, possibly including the possibility of following principles similar to those used in Spain. However, at the hearing the representative of the Belgian Government pointed out that those proposals were made on the initiative of individual legislators rather than by the government, and that their examination had been postponed *sine die* in the light of forthcoming parliamentary elections.

17. In Spain, the relevant rules are to be found essentially in Articles 108 and 109 of the Civil Code. As I have already explained, the general and traditional rule is that each child born to a married couple bears a double surname, composed of the first element of the father's surname followed by the first element of the mother's surname.

18. In 1999, Article 109 was amended to allow parents the possibility to choose, before the birth of their first child, to give all their children a surname comprising those same elements but in reverse order, so that the first element of the mother's surname comes first.

Change of surname

19. As with the determination of surnames, there is wide variation between the Member States as regards the circumstances in which a person may acquire or use a surname other than that which appears on his or her birth record. For the most part, the connection between an individual and his or her surname is regarded as lifelong, both in law and as a matter of social practice (with the exception of changes occurring on the creation and/or dissolution of marriage). Exceptions to the general principle are however possible.

20. Again, the most liberal position is to be found in the United Kingdom, where it is possible either simply to use a different name in daily life, without going through any formality whatever, or to change one's name officially by deed poll or statutory declaration, a process which in general requires no authorisation. In most other Member States, however, an official change of name must be approved by the authorities and some good cause for the change must be shown.

21. In Belgium, a change of surname is authorised only exceptionally and upon

proof that there are serious grounds for the change.⁸ Such grounds may include the fact that the current surname gives rise to ridicule or is a foreign name which makes it more difficult for the holder to integrate into Belgian society. One specific ground considered to be serious is where children of the same parents bear different surnames, one determined by Spanish law and the other by Belgian law. In Spain too, good cause must be shown. In both countries, the possibility of applying for a change of surname is confined to the State's own nationals.

22. In some Member States — for example, France — although the provisions governing a change of name in the registers of civil status are strict, it is possible and lawful to use pseudonyms or aliases in daily life and even on some official documents. Such names are purely personal and cannot be passed on to descendants. There does not, however, appear to be any such tolerance in Belgium.

Relevant Treaty provisions

23. The principal Treaty provisions which have been referred to in this case are

⁸ — Law of 15 May 1987 on surnames and forenames, Article 3, second paragraph. It appears that prior to the adoption of that Law conditions were less strict; the reason adduced required only to be 'valid' rather than 'serious' for a change to be authorised.

Articles 17 and 18 EC,⁹ which provide: ...'

'Article 17

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.¹⁰

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Article 18

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

9 — Until 30 April 1999 (thus at the time when the decision contested in the main proceedings was adopted and at the time when those proceedings were commenced) Articles 8 and 8a of the EC Treaty; however, it is more convenient to refer, as the national court does in its question, to the present numbering.

10 — The last sentence of this paragraph was added by the Treaty of Amsterdam, with effect from 1 May 1999.

24. As the Commission in particular has pointed out, Article 12 EC may also be relevant. Its first paragraph reads:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

25. In addition, Articles 39 and 43 EC have been mentioned. Article 39 guarantees freedom of movement for workers and Article 43 prohibits restrictions on the freedom of establishment of nationals of one Member State in the territory of another. Limitations on those freedoms may however be justified on grounds of public policy, public security or public health (Articles 39(3) and 46(1) EC).

European Convention on Human Rights

26. Article 8 of the Convention has been cited in the course of the proceedings. It reads as follows:

'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.'

27. In a number of cases, in particular *Burghartz* and *Stjerna*, the European Court of Human Rights has held that, whilst Article 8 of the Convention does not explicitly refer to names, an individual's name does concern his or her private and family life since it constitutes a means of personal identification and a link to a family.¹¹

Other international instruments

28. The type of situation giving rise to the problem in this case is not new (although

likely to be increasingly common), and a number of attempts have been made to deal with it in the context of international agreements concerning rules on conflict of laws.

29. Article 1 of the ICCS (International Commission on Civil Status) Convention on the law applicable to surnames and forenames¹² provides:

'1. The surnames and forenames of a person shall be determined by the law of the State of which he or she is a national. For this purpose exclusively, the situations on which surnames and forenames depend shall be assessed in accordance with the law of that State.

2. In case of a change of nationality, the law of the State of the new nationality shall apply.'

¹¹ — *Burghartz v Switzerland*, judgment of 22 February 1994, Series A No 280-B, p. 28, paragraph 24; *Stjerna v Finland*, judgment of 25 November 1994, Series A No 299-A, p. 60, paragraph 37.

¹² — ICCS Convention No 19, signed at Munich on 5 September 1980 ('the Munich Convention'). The ICCS is an inter-governmental organisation whose members include 11 Member States of the European Union, two countries likely to accede to the Union in the near future and three other countries. Of the current Member States of the Union, Denmark, Finland, Ireland and Sweden are not ICCS members.

30. Under Article 2, the law designated by the convention is to apply even if it is not the law of a Contracting State and, under Article 4, the application of that law may be excluded only if it is manifestly incompatible with public policy.

31. That convention does not cover cases of dual nationality. The explanatory report acknowledges the problem but explains that it was decided that 'the subject of names was too limited in scope for a rule to be laid down'.

32. Article 3 of the Hague Convention on certain questions relating to the conflict of nationality laws¹³ provides that a person who has two or more nationalities may be regarded as its national by each of the States whose nationality he possesses. Although Spain has not ratified that convention, both Belgium and Spain apparently follow that approach as regards the choice of law determining the attribution of a surname to a child having plural nationality — that is to say Belgian or Spanish nationality, as the case may be, and one or more other nationalities.¹⁴

13 — Of 12 April 1930, League of Nations Treaty Series, vol. 179, p. 89 ('the 1930 Hague Convention'); ratified in Belgium by a Law of 20 January 1939; signed by Spain with one reservation but not ratified.

14 — But see note 6 above.

33. The type of problem arising in the present case is addressed in a different way by another ICCS Convention on the issue of a certificate of differing surnames,¹⁵ Article 1 of which provides:

'1. The certificate of differing surnames created by this Convention is intended to facilitate proof of identity for persons who, owing to differences between the laws of certain States, particularly regarding marriage, filiation or adoption, are not designated by one and the same surname

2. The sole purpose of this certificate is to record that the various surnames it mentions designate, under different laws, the same person. It cannot have the effect of overriding legal rules governing names.'

34. Under Article 2, such a certificate 'must, on production of supporting documents, be issued to any person concerned, either by the competent authorities of the Contracting State of which he or she is a national or by the competent authorities of the Contracting State whose law has attributed to that person, although a national of another State, a surname different from the one resulting from the application of his or her national law.'

15 — ICCS Convention No 21, signed at The Hague on 8 September 1982 ('the 1982 Hague Convention').

Article 3 requires such certificates to be accepted in each Contracting State ‘as evidencing the correctness of the particulars they contain concerning the different surnames of the person designated therein, unless and until the contrary is proved’.

is to be ‘registered immediately after birth and shall have the right from birth to a name’; and under Article 8(1): ‘States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference’.

35. Both of the ICCS conventions mentioned have been signed by a number of the Member States of the European Union, including both Belgium and Spain. However, although Spain has also ratified both and they are in force as between it and the other Contracting States which have also ratified, Belgium has not yet done so.¹⁶

The main proceedings

36. Finally, mention may be made of the United Nations Convention on the Rights of the Child.¹⁷ Article 3(1) of that convention provides: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ Article 7(1) provides, *inter alia*, that a child

37. Carlos Garcia Avello, a Spanish national, married Isabelle Weber, of Belgian nationality, in 1986. They had two children born in Belgium in 1988 and 1992 respectively, who have dual Spanish and Belgian nationality. On their Belgian birth certificates those children were given the surname Garcia Avello, in accordance with Belgian law and practice. The children have also been registered with the consular section of the Spanish Embassy in Brussels, under the surname Garcia Weber in accordance with Spanish law and practice.

16 — A further ICCS Convention on changes of surnames and forenames, Convention No 4 signed in Istanbul on 4 September 1958 (and again ratified by Spain but not Belgium), does not contain any provisions relevant to the present case, except to the marginal extent that each Contracting State undertakes not to authorise name changes for nationals of another Contracting State unless they are also nationals of the first-mentioned State.

17 — Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; ratified by Spain on 6 December 1990 and by Belgium on 16 December 1991 and entered into force in those States on the 30th day following the respective dates of ratification.

38. In 1995, the parents formally requested the Belgian authorities to change their children’s surname from Garcia Avello to Garcia Weber. They pointed out that the Spanish system of surnames was deeply rooted in Spanish law, tradition and custom to which the children felt more intimately related. For the children to bear the surname of Garcia Avello suggested, under

that system, that they were siblings rather than children of their father and deprived them of any link by name to their mother. The requested change would mean that the children could bear the same surname in Belgium as in Spain; it was in no way likely to cause harm to anyone else or to give rise to confusion, and the stable presence of the element 'Garcia' was sufficient to meet any need for continuity of name in the paternal line.

39. In 1997, the Belgian Ministry of Justice suggested that the children's surname be simplified to 'Garcia'. The parents did not accept that suggestion¹⁸ and the ministry then informed Mr Garcia Avello that the Government considered there was no adequate reason to propose acceptance of their original request because 'any request for the mother's surname to be added to the father's, for a child, is usually refused on the ground that, in Belgium, children bear their father's surname'.

40. Mr Garcia Avello challenged that refusal before the Conseil d'État on a number of grounds, in particular that it infringed both the Belgian Constitution and Article 18 EC because it treated two different situations (that of children with purely Belgian nationality and that of those

with dual nationality) in the same way without any objective justification.

41. The Belgian State countered with the arguments that

- (i) surnames are governed by the rules relating to the personal status of the persons concerned, that is to say their national law; where they have dual nationality, the 1930 Hague Convention¹⁹ provides that the law of the forum — in this case Belgian law — is to prevail;
- (ii) the administrative practice in issue is not intended for all Belgian citizens, but for those with dual nationality, so that different situations are not in fact treated in the same way;
- (iii) since Belgian children take the surname of their father alone, the grant of a different surname may, in Belgian society, raise questions as to a child's parentage;
- (iv) to reduce the difficulties associated with dual nationality, applicants are asked if they wish to adopt only the father's first surname; exceptionally, where there are few connecting factors to Belgium or it is appropriate to

18 — On the grounds, it was stated at the hearing, that such a change would not reflect either the Spanish or the Belgian system and that Garcia was an extremely common surname.

19 — Cited above in note 13.

re-establish the same surname among siblings, a favourable decision may be taken but in this case those conditions were not met;

Court of Justice for a preliminary ruling:

- (v) finally, for the purposes of Article 18 EC, freedom of movement entails principally the disappearance of frontiers and the abolition of frontier controls, and freedom to reside means the possibility of establishing oneself in the Member States of the European Union; the contested measure cannot infringe that provision since the exercise of those freedoms is not in any way subject to the bearing of a particular surname.

‘Are the principles of Community law relating to European citizenship and to the freedom of movement of persons, enshrined particularly in Articles 17 and 18 [EC], to be interpreted as precluding the Belgian administrative authority, to which an application to change the surname of minor children residing in Belgium who have dual Belgian and Spanish nationality has been made on the ground, without other special circumstances, that those children should bear the surname to which they are entitled according to Spanish law and tradition, from refusing that change by stating that that type of application “is habitually rejected on the ground that, in Belgium, children bear their father’s surname”, particularly where the position usually adopted by the authority results from the fact that it considers that the grant of a different surname may, in the context of social life in Belgium, arouse questions as to the parentage of the child concerned, but that, in order to reduce the difficulties associated with dual nationality, it is suggested to applicants in that situation that they adopt only the father’s first surname, and that, exceptionally, where there are few connecting factors to Belgium or it is appropriate to re-establish the same surname among siblings, a favourable decision may be taken?’

42. The Conseil d’État agrees that the administrative practice in issue concerns only dual nationals and does not treat them in the same way as those with only Belgian nationality. It considers however that Article 18 EC may be relevant — although not Article 43 EC, which concerns freedom of establishment, a matter obviously not in issue with regard to minor children concerned by an application for a change of surname.

44. Written observations have been lodged by Mr Garcia Avello, the Belgian, Danish and Netherlands Governments and the Commission, all of whom also presented oral argument at the hearing.

43. It has therefore stayed the proceedings and referred the following question to the

Assessment

45. The Belgian, Danish and Netherlands Governments contend that the situation in the main proceedings does not fall within the sphere of Community law at all. That question must be examined first, before it can be considered whether the type of refusal in issue may infringe the rights of European Union citizens and, if so, whether it may none the less be justified.

Does the situation fall within the sphere of Community law?

46. In this regard it is relevant to identify who is affected by the refusal to change the children's surname.

47. The three governments submit that only the children are concerned by the refusal, and that they are Belgian nationals residing in Belgium who have never exercised their right to freedom of movement; the situation is thus wholly internal to Belgium and falls outside the scope of Community law. The Commission on the other hand argues that it is above all Mr Garcia Avello who has been refused the right to have his children's surname changed; he is a Spanish national who has exercised his right to freedom of movement by coming to live and work in Belgium, so that Community law comes into play. In any event, the Commission submits, the

situation of the children itself falls within the sphere of Community law.

48. The context of that difference of views is the Court's consistent case-law to the effect that no rights are conferred by the Treaty unless there is a sufficient connection with Community law to justify the application of its provisions. Where freedom of movement is concerned, there is no such connection when the situation in issue concerns relations between a Member State and one of its own nationals who has never exercised such freedom.²⁰ In *Uecker and Jacquet*²¹ the Court confirmed that 'citizenship of the Union, established by Article [17 EC], is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law.... Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State.'

49. I agree however with the Commission.

50. First, it seems to me clear that the contested refusal does indeed concern Mr Garcia Avello. The original application for a change of surname in 1995 was made by

20 — See for example Case 180/83 *Moser* [1984] ECR 2539.

21 — Joined Cases C-64/96 and C-65/96 [1997] ECR I-3171, at paragraph 23 of the judgment. See also for example Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16, and Case C-361/97 *Nour* [1998] ECR I-3101 at paragraph 19 of the order.

him and his wife acting ‘as parents and legal representatives of their minor children’, but the Ministry of Justice’s two responses to that application were addressed to Mr Garcia Avello alone and it is Mr Garcia Avello who is the applicant in the annulment proceedings before the Conseil d’État. More importantly, the issue is not the choice of a surname for the children viewed independently but the way in which the surname borne by one generation is to be determined by the name or names borne by the previous generation; indeed, the Belgian Government lays great stress on this aspect of the case. Clearly such an issue concerns both generations and it is just as much in the father’s interest to ensure that his surname is passed on in accordance with the principles on which it was formed as it is in the children’s interest to inherit a surname in the appropriate manner and form.

52. Second, I cannot in any event agree that the situation of the children themselves is wholly internal to Belgium. Even if they have Belgian nationality, were born in Belgium and have never resided outside that country, they none the less also possess the nationality of another Member State. That fact is inseparable from the exercise by their father, whose dependants they are, of his right to freedom of movement. Whilst the 1930 Hague Convention entitles the Belgian authorities to treat the children as Belgian nationals within Belgium, it does not require those authorities to ignore their other nationality. If their mother had not had Belgian but Spanish nationality, their situation as dependent children of nationals of a Member State having exercised freedom of movement within the Community would clearly have fallen within the sphere of Community law. From the point of view of that law, the fact that they possess the nationalities of two Member States is relevant and it cannot be acceptable that one nationality should eclipse the other depending on where they happen to be.²⁴

51. Since Mr Garcia Avello is a national of one Member State who has exercised his right to move to and work in another Member State,²² and a citizen of the Union who has exercised his right to move and reside freely within the territory of the Member States, his situation falls well within the sphere of Community law.²³

53. I therefore take the view that the situation in the main proceedings falls within the sphere of Community law.

22 — He apparently works as an engineer in Belgium, although it is not clear from the case-file whether he is employed and has thus exercised his freedom of movement as a worker under Article 39 EC or whether he is self-employed and is therefore covered by Article 43 EC.

23 — See, for example, Case C-224/98 *D’Hoop* [2002] ECR I-6191, paragraphs 27 to 29 of the judgment.

24 — See, for comparable situations concerning workers and self-employed persons, Case 292/86 *Gullung* [1988] ECR 111, in particular at paragraphs 10 to 13 of the judgment; the Opinion of Advocate General Tesaro in Case C-369/90 *Micheletti* [1992] ECR I-4239, paragraph 6; and Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 19 to 22.

Is there an infringement of a right conferred by Community law?

possession of an educational qualification issued in Belgium in a name not recognised as that of the holder in Spain; others are given in the Explanatory Report to the 1982 Hague Convention.

54. Here, it must be considered what adverse effects are produced by the refusal in issue. There appear to be two aspects.

55. First, as I have stated, both Mr Garcia Avello and his children may object to the fact that he cannot pass his surname on to them — and they cannot inherit it from him — in accordance with the principles on which it was formed. That is no mere abstract objection since, as has been pointed out, application of the Belgian system to a Spanish surname is liable to present a distorted image of family relationships to those familiar with the Spanish system: Mr Garcia Avello's children appear to be his siblings.²⁵

56. Second, obvious practical difficulties may ensue for the children from the fact that their surname as recorded by the Belgian authorities differs from that recorded by the Spanish authorities. One example, pointed out by counsel for Mr Garcia Avello at the hearing, might be the

57. There is no doubt that Community law does not itself regulate the registration, or any change to the registration, of names in registers of births, marriages, deaths or civil status. Such matters are in principle for the Member States to regulate, in compliance with any applicable provisions governing private international law aspects, provided that in doing so they do not act in any way which is incompatible with their obligations under Community law.

58. The question of such registration in a Community-law context has arisen in one previous case before the Court: *Konstantinidis*.²⁶ In that case a Greek national working in Germany in a self-employed capacity had found his name transliterated in Roman characters in the German register of civil status in a form which was both strikingly unexpected and, from most points of view, strikingly inappropriate but none the less in accordance with a prescribed system of transliteration from the Greek to the Roman alphabet.

²⁵ — An even more striking example, outside the scope of Community law, would be the daughter, born in Belgium, of an Icelandic father and a Belgian mother. If the Belgian rule were applied, she would appear to an Icelandic to be her grandfather's son rather than her father's daughter.

²⁶ — Case C-168/91 [1993] ECR I-1191.

59. In my Opinion in that case, I considered primarily that his rights under Community law had been violated because he had suffered discrimination, prohibited by the joint provisions of what are now Articles 12 and 43 EC, on account of the fact that essentially only Greek nationals were obliged to accept in Germany a transliteration of their names likely to cause both loss of dignity and inconvenience in daily and professional life. Secondly, I took the view that the transliteration in question could infringe his fundamental rights as set out in, *inter alia*, the European Convention on Human Rights and as guaranteed to any Community national exercising his right of freedom of establishment.

60. The Court in its judgment stressed²⁷ that the prohibition of discrimination on grounds of nationality in what is now Article 43 EC seeks to ensure that, as regards the right of establishment, each Member State accords nationals of other Member States the same treatment as its own nationals. It went on, however,²⁸ to state that rules of the kind in issue are incompatible with that provision only in so far as their application causes such inconvenience as to interfere with a person's right of establishment, and that such interference occurs if a Greek national is obliged

to use, in the pursuit of his occupation, a transliteration of his name used in the registers of civil status which modifies its pronunciation and if the resulting distortion entails the risk that potential clients may confuse him with other persons.

61. In the present case, the Commission submits that the introduction of citizenship of the Union, with its attendant enjoyment of all the rights conferred by the Treaty — including, thus, the right to be free from any discrimination on grounds of nationality — is a new factor enabling the Court to reach a decision in this case on a rather broader basis than it did in *Konstantinidis*. I agree that Article 17 makes clearer the applicability of the principle of non-discrimination to all situations falling within the sphere of Community law, without there being any need to establish a specific interference with a specific economic freedom.

62. That being so, it is still necessary to establish whether the refusal in issue discriminates according to nationality. Discrimination in Community law involves treating objectively similar situations differently or objectively different situations in the same way. The Belgian Government argues that the administrative practice on which the refusal was based applies to a single category of persons who can be objectively distinguished from others — children of dual Belgian and Spanish

²⁷ — At paragraph 12.

²⁸ — At paragraphs 15 to 17.

nationality, born in Belgium — and that it is therefore not discriminatory.

themselves have another nationality in addition to Belgian and the change of whose surname is requested.

63. I disagree. What is at issue is a refusal to change a surname so that it (i) reflects the paternal surname in accordance with the way that surname itself was formed and (ii) avoids any discrepancy between the forms of surname registered by the authorities of two Member States both of whose nationalities are held by the bearer of the surname. It appears that the Belgian authorities will not consider themselves competent to make any change to the name of a person who is not a Belgian national, whether that person possesses any other nationality or not. The first aim described above would appear to be relevant above all, and the second aim only, when another nationality is also present. Since a change of surname may be accorded under Belgian law when serious grounds are given for the application, a systematic refusal to grant a change when the grounds given are linked to or inseparable from the possession of another nationality must be regarded as discriminating on grounds of nationality. Such a practice in fact accords the same treatment both to those who, as a result of possessing a nationality other than Belgian, bear a surname or have a parent who bears a surname not formed in accordance with Belgian rules and to those who possess only Belgian nationality and bear a surname formed according to those rules, despite the fact that their situations are objectively different.

64. That discrimination clearly affects those — in this case the children — who

65. It also however affects those in the position of Mr Garcia Avello, since it is their surname, formed according to the law of their nationality, which is being passed on to their children in a form inappropriate to the way in which it was itself formed. The refusal to allow Mr Garcia Avello's surname to be passed on in accordance with its method of formation is a consequence of his exercise of the right of freedom of movement since, had he not exercised that right, the situation in which the refusal was made would not have arisen. The existence of an administrative practice leading systematically to such a refusal is thus likely to render the exercise of that right less attractive.

66. Having reached the view that the circumstances of the case reveal a discrimination on grounds of nationality prohibited by Articles 12 and 17 EC, read together, I do not consider it necessary to examine whether there is an infringement of any other fundamental right guaranteed by Community law, in particular as regards freedom from interference in private and family life in accordance with Article 8 of the European Convention on Human Rights. In that regard, it may be noted that the European Court of Human Rights has

stressed that legal restrictions on the possibility of changing surnames may be justified in the public interest and that Contracting States enjoy a wide margin of appreciation in that area, particularly where there is little common ground between the rules applied in different States and the law appears to be in a transitional stage.²⁹ However, the existence of a wide margin of appreciation in the context of the Convention does not, in my view, have any direct bearing on the breadth of margin available in the different context of citizenship of the European Union.

Can the infringement be justified?

67. Discriminatory treatment may be justified if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national rule or practice.³⁰

68. The Belgian Government argues that the administrative practice in question is

justified. The immutability of surnames is, it asserts, a founding principle of social order in Belgium, dating from a Decree of 6 Fructidor Year II³¹ and reiterated in the most recent legislation. Nor do the effects of the practice extend unreasonably far, since Mr Garcia Avello's children may use the surname Garcia Weber, and any Spanish documents indicating that surname, anywhere in the Community outside Belgium. Within Belgium, it is in their interest to use the surname Garcia Avello since otherwise, in the context of the Belgian system, doubts might be raised as to their relationship to their father. At the hearing, the Danish Government argued that the prohibition of discrimination was intended to facilitate integration into the host Member State, and a rule denying derogations from the system used in that State helps rather than hinders such integration. The Netherlands Government stressed the need in a democratic society for a stable and coherent system of surnames to avoid any danger of confusion as to identity or lineage.

69. I would accept that the aim of preventing confusion over identity by placing limitations on the right to change surnames is a legitimate one. It is desirable to avoid such confusion both in relations between the individual and the authorities and in relations among individuals. Excessive freedom in such matters might well offer opportunities for criminal or dishonest behaviour.

29 — See, for example, the decisions on admissibility of 27 April 2000 in *Bijleveld v Netherlands* and of 27 September 2001 in *GMB and KM v Switzerland*.

30 — See, for example, *D'Hoop*, cited above in note 23, at paragraph 36.

31 — 23 August 1794, in the French Revolutionary Calendar then in force.

70. However, such dangers should not be exaggerated. It has not been found necessary in other Member States, for example the United Kingdom, to restrict changes of surname on this ground. In any event, the very existence of official registration of a change of name is likely to reduce the chances of confusion, whether intentional or otherwise, going undetected. And in order to establish lineage, identity of surname seems unlikely to be either sufficient or necessary in most legal systems.

71. As regards social order in the broader sense, it does not seem to me that there is any overriding public interest in ensuring that one particular pattern of surname transmission should always prevail for the citizens of a Member State within its territory. This is a field in which both legal rules and social practice have been changing in recent years, and continue to change, throughout the European Union. Increases in numbers of divorces and remarriages, together with a significant decrease in the social stigma of illegitimacy, have considerably reduced the rigidity of expectations as to identity of surname between father and child. Increased mobility for citizens of the Union has led to increased familiarity with other naming systems. Thus, whilst conformity with the norm in the home Member State remains one factor to be taken into consideration when deciding whether it is in the interest of a child — or of society — for his or her surname to be changed, it is neither the only nor the preponderant factor in that regard.

72. I would moreover take issue with the argument that the principle of non-discrimination seeks essentially to ensure the integration of migrant citizens into their host Member State. The concept of 'moving and residing freely in the territory of the Member States' is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly repeated or even continuous, movement within a single 'area of freedom, security and justice', in which both cultural diversity and freedom from discrimination are ensured.³²

73. Nor does it seem to me that the fact that the effects of the refusal may be limited to Belgium in any way limits their seriousness for those concerned. From the point of view of the cultural objection to seeing the surname passed on in a manner other than that in which it was designed to be passed on, the effects are felt for as long as the family is resident in Belgium. From the point of view of the practical difficulties which arise, the effects may be felt throughout the European Union since the children in fact bear two different surnames.³³

32 — See the preamble to the Treaty on European Union and Articles 3(1)(q) and 151(4) EC.

33 — Such difficulties might, it is true, be attenuated if Mr Garcia Avello's children were to obtain from the Spanish authorities a certificate of differing surnames in accordance with the 1982 Hague Convention. However, the position under Community law cannot be affected by an intergovernmental convention binding (at present) on only four Member States. Indeed, the approach of Community law should be to prevent such situations from arising within its sphere of application, rather than to lessen their effects.

74. Finally, as the Commission has pointed out, the fact that — as stated in the national court's question itself — the Belgian authorities are willing to contemplate a change of surname, bringing it in line with the Spanish pattern, in circumstances only slightly different from those of Mr Garcia Avello and his family tends to render the Belgian Government's argument considerably less compelling on this aspect.

cism of the Belgian or any other rules governing the attribution of surnames. The point is rather that such rules should not be applied in such a way as to infringe the Community-law principle of non-discrimination. Belgium has a procedure whereby surnames can be changed if sufficiently serious grounds are present. The only point on which Belgian practice appears to conflict with Community law lies in the systematic refusal to consider a situation such as that of Mr Garcia Avello and his children as constituting such grounds.

75. I would stress that none of what I have said above should be construed as a criti-

Conclusion

76. I am therefore of the opinion that the Court should answer the national court's question as follows:

Articles 12 and 17 EC, read together, preclude the application of a rule or administrative practice of a Member State under which an application for a change of surname is systematically refused to that State's nationals when the reason for the application is that the applicant also has the nationality of another Member State, bears a different surname in accordance with the laws of that other State and wishes to bear in all circumstances a surname formed in accordance with the latter laws.