satisfied with the specificity of the applicants' bill. Having regard to all the circumstances, the Court awards them EUR 15,000 for compensation under this head.

C. Default interest

66. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court unanimously

1. *Holds* that there has been a violation of Article 10 of the Convention;
2. *Holds* that the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained;
3. *Holds*

a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention EUR 22,155 (twenty-two thousand one hundred and fifty-five euros) in respect of pecuniary damage;

b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention EUR 14,190 (fourteen thousand one hundred and ninety euros) in respect of pecuniary damage;

c) that the respondent State is to pay to the applicants jointly EUR 29,000 (twenty-nine thousand euros) in respect of costs and expenses; and

d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

7

Europees Hof voor de Rechten van de Mens
16 november 2004, nr. 29865/96
(Bratza (President), Pellonpää, Türmen, Strážnická, Casadevall, Pavlovschi, Borrego Borrego)
Noot Kiiver

Naamrecht. Naamswijziging in verband met huwelijk. Ongelijke behandeling.

[EVRM art. 8, 14, 41]

In 1990 trad klaagster in het huwelijk. In overeenstemming met het Turkse naamrecht nam zij daarbij de familienaam van haar man aan. Omdat zij in haar werkomgeving reeds onder haar meisjesnaam Ünal bekend was, bleef zij informeel deze naam naast haar nieuwe civiele naam gebruiken. In officiële registers werd zij echter alleen onder haar civiele naam, Tekeli, aangeduid. Zij spande een gerechtelijke procedure aan om uitsluitend haar meisjesnaam te mogen gebruiken. Tevergeefs. Sinds een wetswijziging in 1997, bevestigd in 2001, kan klaagster haar meisjesnaam officieel gebruiken wanneer deze geplaatst wordt vóór de naam van haar man: Ünal Tekeli. Dit vond klaagster evenwel onbevredigend, aangezien zij uitsluitend haar meisjesnaam wilde gebruiken.

Voor het Straatsburgse Hof stelt klaagster een schending van haar privé-leven onder art. 8 EVRM en discriminatie op grond van geslacht (art. 8 jo. art. 14 EVRM). Het Hof stelt in overeenstemming met zijn eerdere rechtspraak vast dat de naam onder de bescherming van art. 8 EVRM valt. De vrouw moest onder Turks recht haar naam wijzigen, terwijl de man zijn naam mocht blijven gebruiken. De door de regering naar voren gebrachte rechtvaardigingsgronden voor dit onderscheid, in het bijzonder de bescherming van de eenheid van het gezin door naamseenheid, worden door het Hof afgewezen. Turkije is de enige Verdragstaat die de naam van de man, zelfs tegen de wil van de echtgenoten in, als gezamenlijke familienaam opdringt. Dit is onverenigbaar met de doelstelling van het waarborgen van de gelijke behandeling van man en vrouw. Naamseenheid binnen het gezin kan daarenboven net zo goed worden bereikt door te kiezen voor de naam van de vrouw of een combinatie van namen. De moeilijkheden die een

verandering van het naamrecht in een nationaal rechtsstelsel met zich brengt, moeten in het belang van de individuele waardigheid worden aanvaard. Schending art. 14 jo. 8 EVRM.

Ünal Tekeli
tegen
Turkije

The law

I. The Government's preliminary objections
32. The Government raised two preliminary objections based, respectively, on the applicant's lack of victim status and the failure to comply with the six-month time-limit.

A. Applicant's victim status
33. The Government disputed that the applicant was a victim within the meaning of Article 34 of the Convention. They observed that at the time of her marriage the applicant, who was a trainee lawyer, was not qualified to practise as a lawyer. When she began practising she had already taken her husband's name. The Government therefore maintained that the applicant's change of name following her marriage could not have created problems in her professional life.
34. The applicant contended that it was during their legal training that trainees established their first professional links and that this period could not be dissociated from the rest of their career. She also submitted that, beyond the professional aspect, a person's name was particularly important in the construction of their identity. The obligation on the applicant to change her maiden name as a result of her marriage had thus given rise to an irreversible severance with her past.
35. The Court is not required to determine whether the obligation on the applicant to change her surname as a result of marrying when she was a trainee lawyer may adversely affect her subsequent professional life. It reiterates that besides professional or business contexts, the surname concerns and identifies a person in their private and family life regarding the ability to establish and develop social, cultural or other relationships with other human beings (see, *mutatis mutandis*, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, § 29). The Court considers that in the instant case the refusal to allow the applicant to use just her own surname, Ünal, by which she claimed to have been known in private circles and in her cultural or political activities may have considerably affected her non-professional activities.
The applicant is therefore a victim of the impugned decisions (see, to the same effect, *Burghartz v. Switzerland*, judgment of 22 February 1994, series A no. 280-B, § 18).

B. Compliance with the six-month rule
36. The Government pleaded failure to comply with the six-month rule. In their submission, given that the situation complained of flowed from the domestic law the national courts were not in a position to accede to the applicant's request. In these conditions the application should have been lodged within six months of the date of her marriage, that is, by 25 June 1991 at the latest.
37. The Court reiterates that where no domestic remedy is available in respect of an act alleged to be in violation of the Convention, the six-month time-limit in principle starts to run from the date on which the act complained of took place or the date on which an applicant was directly affected by such an act. However, special considerations might apply in exceptional cases where applicants first avail themselves of a domestic remedy and only at a later stage become aware of the circumstances which make that remedy ineffective. In such a situation, the six-month period might be calculated from the time when the applicant becomes aware of these circumstances (see *Aydın v. Turkey* (dec.), nos. 28293/95, 29494/95 and 30219/96, ECHR 2000-III (extracts)).
38. In the instant case it is true that the position complained of before the Court was actually in conformity with the provisions of Article 153 of the Civil Code. However, the Court notes that in the proceedings before them the domestic courts could have directly applied the provisions of the Convention, which forms an integral part of the domestic law by virtue of Article 90 of the Constitution, or raised an objection that Article 153 of the Civil Code was unconstitutional (under Article 152 of the Constitution) and, lastly, they could have granted the applicant's request.

Consequently, even if it is accepted that the remedy offered only a remote prospect of success, as alleged here, it was not a futile step. Accordingly, it had the effect at least of postponing the beginning of the six-month period (see, *mutatis mutandis*, *A. v. France*, judgment of 23 November 1993, Series A no. 277-B, § 30).
This preliminary objection of the Government must therefore be rejected.

II. Alleged breach of Article 14 of the Convention taken in conjunction with Article 8

39. The applicant submitted that the national authorities' refusal to allow her to bear only her maiden name after her marriage amounted to a breach of Article 8 of the Convention, read alone and in conjunction with Article 14.
Article 8 of the Convention 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 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."
40. In view of the nature of the allegations made, the Court considers it appropriate to examine the case directly under Article 14 of the Convention taken together with Article 8.

A. Applicability

41. The Government disputed the applicability of Article 8 of the Convention in the present case. They maintained that the choice of name was not entirely a matter of a person's individual choice and that the States had a wide margin of appreciation in the area. In their submission, the legislation on assigning names had to remain within the State's domain and did not come within the scope of the Convention.
42. The Court reiterates that Article 8 of the Convention does not contain any explicit provisions on names, but 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 there may exist a public interest in regulating the use of names is not sufficient to remove the question of a person's name from the scope of private and family life, which has been construed as including, to a certain degree, the right to establish relationships with others (see *Burghartz*, cited above, § 24).
The subject-matter of the complaint thus falls within the scope of Article 8 of the Convention.

B. Compliance with Article 14 of the Convention read in conjunction with Article 8

1. The parties' submissions

43. The applicant complained that the authorities had refused to allow her to bear only her own surname after her marriage whereas Turkish law allowed married men to bear their own surname. She submitted that this resulted in discrimination on grounds of sex and was incompatible with Article 8 taken together with Article 14 of the Convention.
44. The Government acknowledged that it amounted to a difference in treatment on grounds of sex but argued that this was based on objective and reasonable grounds which prevented it from being in any way discriminatory.
45. Referring to the *Burghartz* judgment cited above, they submitted that there was a link between family unity and the family name and that by providing that families should take the husband's surname the Turkish legislature had opted for a traditional arrangement whereby family unity was reflected in a joint name. In the Government's submission, family unity was a public policy consideration and private life ceased where the individual entered into contact with public life.
46. Referring to the Constitutional Court's decision of 29 September 1998 (E 1997/61, K 1998/59, see above), the Government argued

that the difference of treatment on grounds of sex was justified in view of the social reality in Turkey. Pointing out that "68.8% of women had very limited economic freedom", the Government argued that a joint surname – reflected through the husband's surname – was designed to strengthen the wife's position in the family.
47. The Government reiterated that since Article 153 of the Civil Code had been amended on 14 May 1997 married women could now keep their maiden name in front of their family name.
48. The Government also pointed out that major difficulties would be occasioned by a change in the system of keeping registers of births, marriages and deaths.
2. The Court's assessment
a. Applicable principles
49. The Court reiterates that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see, for example, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, judgment of 23 October 1997, *Reports of Judgments and Decisions* 1997-VII, § 88).
50. According to the Court's case-law a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for example, *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, § 30, and *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, § 177).
51. In other words, the notion of discrimination includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 82). Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (see, among other authorities, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001).
52. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background (see *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87, § 40, and *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, § 41).
53. However, very weighty reasons have to be put forward before a difference of treatment based on the ground of sex alone can be regarded as compatible with the Convention (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, § 67).
54. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV).
b. Whether there has been a difference in treatment between persons in similar situations
55. The applicant's complaint concerns the fact that, legally, married women cannot bear their maiden name alone after they marry whereas married men keep the surname they

had before they married. This is undoubtedly a "difference in treatment" on grounds of sex between persons in an analogous situation.

56. The factual differences between the two categories (married men and married women) to which the Government refer, that is, those relating to their social situation and their economic independence respectively, do not lead the Court to a different conclusion.

It is precisely this distinction which is at the heart of the issue whether the difference in treatment complained of is justifiable.

c. Whether there is objective and reasonable justification

57. In the Government's submission, the interference in question pursued the legitimate aim of reflecting family unity through the husband's surname and thereby ensuring public order. The applicant refuted that argument.

58. The Court reiterates that although the Contracting States have a certain margin of appreciation under the Convention regarding the measures to be taken in reflecting family unity, Article 14 requires that any such measure, in principle, applies even-handedly to both men and women unless compelling reasons have been adduced to justify a difference in treatment.

In the present case the Court is not persuaded that such reasons exist.

59. The Court reiterates in the first place that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. Two texts of the Committee of Ministers, namely, Resolution (78) 37 of 27 September 1978 on equality of spouses in civil law and Recommendation R (85) 2 of 5 February 1985 on legal protection against sex discrimination, are the main examples of this. These texts call on the member states to eradicate all discrimination on grounds of sex in, among other things, choice of surname. This objective has also been stated in the work of the Parliamentary Assembly (see paragraphs 19–22 above) and the European Committee on Legal Co-operation (see paragraphs 23–27 above).

60. On an international level, developments in the United Nations concerning the equality of the sexes are heading in this specific area towards recognition of the right of each married partner to keep his or her own surname or to have an equal say in the choice of new family name (see paragraphs 23–27 above).

61. Moreover, the Court notes the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing. Of the member states of the Council of Europe Turkey is the only country which legally imposes – even where the couple prefers an alternative arrangement – the husband's name as the couple's surname and thus the automatic loss of the woman's own surname on her marriage. Married women in Turkey cannot use their maiden name alone even if both spouses agree to such an arrangement. The possibility made available by the Turkish legislature on 22 November 2001 of putting the maiden name in front of the husband's surname does not alter that position. The interests of married women who do not want their marriage to affect their name have not been taken into consideration.

62. The Court observes, moreover, that Turkey does not position itself outside the general trend towards placing men and women on an equal footing in the family. Prior to the relevant legislative amendments, particularly those of 22 November 2001, the man's position in the family was the dominant one. The reflection of family unity through the husband's surname corresponded to the traditional conception of the family maintained by the Turkish legislature until then. The aim of the reforms of November 2001 was to place married women on an equal footing with their husband in representing the couple, in economic activities and in the decisions to be taken affecting the family and children. Among other things the husband's role as head of the family has been abolished. Both married partners have acquired the power to represent the family. Despite the enactment of the Civil Code in 2001, however, the provisions concerning the family name after marriage, including those obliging married women to take their husband's name, have remained unchanged.

63. The first question for the Court is whether the tradition of reflecting family unity through the husband's name can be regarded as a decisive factor in the present case. Admittedly, that tradition derives from the man's

primordial role and the woman's secondary role in the family. Nowadays the advancement of the equality of the sexes in the member states of the Council of Europe, including Turkey, and in particular the importance attached to the principle of non-discrimination, prevent States from imposing that tradition on married women.

64. In this context it should be recalled that while family unity can be reflected by choosing the husband's surname as the family name, it can be reflected just as well by choosing the wife's surname or a joint name chosen by the couple (see *Burghartz*, cited above, § 28).

65. The second question that the Court is asked to address is whether family unity has to be reflected by a joint family name and whether, in the event of disagreement between the married partners, one partner's surname can be imposed on the other.

66. The Court observes in this regard that, according to the practice of the Contracting States, it is perfectly conceivable that family unity will be preserved and consolidated where a married couple chooses not to bear a joint family name. Observation of the systems applicable in Europe supports this finding. The Government have not shown in the present case that concrete or substantial hardship for married partners and/or third parties or detriment to the public interest would be likely to flow from the lack of reflection of family unity through a joint family name. In these circumstances the Court considers that the obligation on married women, in the name of family unity, to bear their husband's surname – even if they can put their maiden name in front of it – has no objective and reasonable justification.

67. The Court does not underestimate the important repercussions which a change in the system, involving a transition from the traditional system of family name based on the husband's surname to other systems allowing the married partners either to keep their own surname or freely choose a joint family name, will inevitably have for keeping registers of births, marriages and deaths. However, it considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen (see, *mutatis mutandis*, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 91, ECHR 2002-VI).

68. Consequently, the objective of reflecting family unity through a joint family name cannot provide a justification for the gender-based difference in treatment complained of in the instant case.

Accordingly, the difference in treatment in question contravenes Article 14 taken in conjunction with Article 8.

69. Having regard to that conclusion, the Court does not consider it necessary to determine whether there has also been a breach of Article 8 taken alone.

III. Application of Article 41 of the Convention

70. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

71. The applicant alleged that she had sustained non-pecuniary damage which she assessed at 15,000 euros (EUR).

72. The Government disputed that claim.

73. The Court considers that it is for the Turkish State to implement in due course such measures as it considers appropriate to fulfil its obligations to secure to each married partner, including the applicant, the right to keep their own surname or to have an equal say in the choice of their family name in compliance with this judgment.

While there is no doubt that the applicant has suffered distress and anxiety in the past, it is the inability of married women under Turkish law to keep their maiden name which lies at the heart of the complaints in the instant case. The Court does not therefore find it appropriate to make an award to the applicant, seeing that in the circumstances of the present case the finding of a violation, with the consequences which will ensue for the future, may be regarded as constituting just satisfaction.

B. Costs and expenses

74. The applicant also claimed EUR 1,750 for the costs and expenses incurred before the

domestic courts and the Court. She referred to resolution no. 36 of 24 June 2003 of the executive committee of the İzmir Bar (rate applicable from 1 July 2003 to 31 December 2003).

75. Having regard to the information before it and to its relevant case-law, the Court awards the applicant EUR 1,750.

C. Default interest

76. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court unanimously

1. *Dismisses* the Government's preliminary objections;
2. *Holds* that the applicant may claim to be a "victim" for the purposes of Article 34 of the Convention;
3. *Holds* that there has been a violation of Article 14 of the Convention in conjunction with Article 8;
4. *Holds* that it is unnecessary to consider the application under Article 8 of the Convention taken alone;
5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
6. *Holds*

a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,750 (one thousand seven hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable and to be converted into Turkish liras at the rate applicable at the date of settlement;

b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

NOOT

1. De bovenstaande zaak vormt een logisch vervolg op 's Hofs uitspraak in de zaak *Burghartz t. Zwitserland* (EHRM 22 februari 1994, nr. 49/1992/294/472, Series A., vol. 280-B), waarin de familienaam binnen het bereik van art. 8 EVRM werd gebracht. De Zwitserse autoriteiten hadden een in Duitsland getrouwd koppel onder de familienaam van de man (Schnyder) geregistreerd, terwijl het koppel de naam van de vrouw (Burghartz) als gezamenlijke familienaam had gekozen, en de man een dubbele naam (Schnyder Burghartz) wilde gebruiken. Onder Zwitsers recht kon echter alleen de naam van de man de civiele familienaam worden, en kon alleen de vrouw vervolgens haar meisjesnaam daaraan toevoegen. In *Burghartz* vonden de echtgenoten deze regeling discriminatoir. In bovenstaande zaak wordt een vergelijkbare Turkse regeling nu door een vrouw betwist. Anders dan de heer Schnyder heeft de heer Tekeli, de echtgenoot van klaagster, kennelijk geen probleem met het behoud van zijn naam als dwangmatig opgelegde gezamenlijke familienaam. Zijn vrouw daarentegen wil haar meisjesnaam niet kwijt. Zij wil noch Tekeli heten, zoals haar man, noch Ünal Tekeli, een dubbele naam die zij sinds 1997 kon gebruiken, maar uitsluitend Ünal. Het Hof stelt haar in het gelijk door een schending van art. 14 jo. 8 EVRM vast te stellen, en door onomwonden te verklaren dat Turkije nu maar het geldende naamrecht moet wijzigen (par. 73). Beide echtgenoten moeten de mogelijkheid hebben om hun eerdere naam te behouden of om met gelijke rechten een gezamenlijke familienaam te kiezen. Een oplegging van de naam van de man van rechtswege kan niet, aldus het Hof.

2. De door Turkije gevoerde verweren lijken sterk op de toen door Zwitserland in *Burghartz* naar voren gebrachte rechtvaardigingsgronden voor de discriminatoire regeling. Beide staten beklemtonen het belang van de zichtbare eenheid van het gezin door naamseenheid der echtgenoten. De door de wetgever gemaakte keuze ten gunste van de familienaam van de man zou onder meer maatschappelijke tradities weerspiegelen. Het effect van deze keuze zou worden gematigd door de vrouw de mogelijkheid te bieden om een dubbele naam te gebruiken. Het Hof wijst dan ook in beide

gevallen de gevoerde verweren met betrekking tot het naamregime af. In *Ünal Tekeli* verwijst het Hof naar voor de Raad van Europa relevante documenten, naar VN-rechtsbronnen, naar nationale regelingen binnen de Verdragstaten en de andere, door Turkije zelf ondernomen hervormingen van het familierecht ter bevordering van de gelijkheid tussen man en vrouw (par. 59–62). Naamseenheid en traditie rechtvaardigen geen seksuele discriminatie. De naam valt namelijk onder de bescherming van mensenrechten, persoonlijkheidsrechten, privé-leven, morele integriteit of individuele waardigheid, onder verscheidene internationale en nationale constitutionele rechtsbronnen, ook al is de naam zelf, zoals in art. 8 EVRM, niet expliciet genoemd. Voor een overzicht over relevante bepalingen zie par. 17–31 (niet opgenomen) van de bovenstaande zaak, par. 22–24 van *Burghartz*, alsmede de conclusie van Advocaat-generaal Jacobs bij de zaak *Konstantinidis* (nr. C-168/91, [1993] ECR I-01191), waarin het Europese Hof van Justitie een verband moest leggen tussen de juiste spelling van de familienaam van een individu en diens beschermde vrijheden onder EG-recht. Jacobs anticipeerde toen al onder meer op een brede uitleg van art. 8 EVRM, zodat de naam eronder zou vallen, en deze benadering werd door het EHRM ook inderdaad toegepast in *Burghartz*, en nu weer in *Ünal Tekeli*. Discriminatie op grond van geslacht is in deze samenhang strijdig met art. 14 EVRM.

3. Zowel *Ünal Tekeli* als ook *Burghartz* worden als casus mogelijk gemaakt door nationale regelingen die in een naamswijziging in verband met het huwelijk voorzien. Waar de civiele naam, zoals die staat vermeld in officiële documenten, bijvoorbeeld het paspoort, in verband met huwelijk kan of moet worden gewijzigd, begint de gelijkheid van de geslachten een rol te spelen. De ontwikkelingen op dit terrein kunnen goed met het Duitse voorbeeld worden geïllustreerd. Volgens § 1355 van het Duitse Burgerlijke Wetboek (BGB) van 1900 werd, net als volgens de Turkse wet van vóór 1997, de familienaam van de man automatisch de gezamenlijke huwelijksnaam. De naam van de vrouw werd aangepast. Een van de rechtvaardigingen hiervoor was de bescherming van echtgenoten tegen *Konkubinatsverdacht*, het vermoeden dat een stel met verschillende namen kennelijk buiten huwelijk samenwoonde. Vanaf 1957 mocht de getrouwde vrouw haar meisjesnaam met een streepje aan haar nieuwe familienaam voegen, ongeveer zoals nu in Turkije het geval is. Vanaf 1976 konden de echtgenoten in Duitsland vervolgens óf de naam van de man, óf de naam van de vrouw als gezamenlijke naam kiezen, en degene wiens naam niet werd gekozen kon een dubbele naam aannemen. Indien er geen expliciete keuze werd gemaakt, werd de naam van de man de gezamenlijke naam. In 1991 vond het Duitse constitutionele hof deze subsidiaire oplossing in strijd met de grondwet: de man hoefde geen inspanningen te verrichten om zijn naam te laten prevaleren, maar de vrouw moest wel de man overtuigen om haar meisjesnaam aan te nemen. Sinds een wetswijziging in 1993 behouden beide echtgenoten gewoon hun oude naam indien zij tegenover de ambtenaar van burgerlijke stand geen verklaring tot naamswijziging maken. De Duitse wetsbepaling, § 1355 BGB, laat nog steeds de voorkeur van de wetgever zien dat koppels een gezamenlijke naam kiezen, maar een dergelijke keuze kan niet worden afgedwongen, en een weigering om een keuze te maken hoeft door de echtgenoten niet te worden gemotiveerd.

4. Dergelijke dogmatische problemen spelen in Nederland niet omdat het Nederlandse naamrecht met betrekking tot het huwelijk tot de Frans-Romaanse rechtsfamilie behoort. Net zoals in Frankrijk blijven de civiele namen van personen in Nederland door het sluiten van een huwelijk ongewijzigd. Art. 1:9 BW verleent evenwel een beschermd naamgebruiksrecht, vergelijkbaar met de Franse *nom d'usage*, aan echtgenoten: de man mag de naam van zijn vrouw, en de vrouw de naam van haar man in de sociale sfeer gebruiken, uitsluitend of als dubbele naam, waarin de volgorde irrelevant is. Men mag de gemeente ook laten weten dat men, bijvoorbeeld in brieven, voortaan met de naam van de partner wenst te worden aangesproken, terwijl de naam zoals vermeld in de gemeentelijke basisadministratie dezelfde blijft. Het mag allemaal wel, maar het hoeft niet. De discrepanties tussen traditionele voorkeuren van de wetgever omtrent naamswijziging enerzijds en het beginsel van non-discriminatie anderzijds worden door deze regelingen zeker vermeden. Griekenland is

daarom bijvoorbeeld in 1983 geheel van een Duits model naar een Frans model, met ongewijzigde civiele namen maar wel met gebruiksrechten, overgegaan. Binnen de Romaanse rechtsfamilie bestaan wel verschillen of en zo ja, wanneer de toestemming van de drager van de naam voor naamgebruik door de partner is vereist, en of naamgebruik door de partner, of ex-partner, mag worden verboden. Het beginsel van ongewijzigde civiele namen blijft echter hetzelfde. Turkije hoeft naar aanleiding van de bovenstaande uitspraak niet noodzakelijkerwijs meteen een Frans model over te nemen, zoals Griekenland dat heeft gedaan. Het kan ook een meer liberale oplossing binnen het bestaande stelsel vinden, zoals Duitsland heeft gedaan. In dat geval geldt echter voor landen als Frankrijk en Nederland dat een eenmaal gemaakte keuze van Turkse of Duitse echtgenoten om wél een gezamenlijke huwelijksnaam te kiezen, dient te worden gerespecteerd. Helaas is het nog steeds een behoorlijke rompslomp om Nederlandse en Franse ambtenaren ervan te overtuigen dat huwelijk elders tot naamswijziging kan leiden, en dat de naamsgegevens in de relevante bestanden moeten worden aangepast. Niet alleen de wens om de meisjesnaam te *behouden* verdient namelijk gehoor, zoals voor mevrouw Ünal Tekeli. Ook de keuze om de meisjesnaam *af te leggen* dient te worden beschermd. Dat gold voor de heer Schnyder in de zaak *Burghartz* en, zo zou ik hier willen bepleiten, dat geldt tevens voor mensen die in Nederland wonen en die ter gelegenheid van het huwelijk onder bijvoorbeeld Duits recht een nieuwe naam hebben aangenomen. De Nederlandse Wet conflictenrecht namen respecteert deze keuze, en schrijft terecht erkenning van dergelijke naamswijzigingen in Nederland voor. De daadwerkelijke kennis van deze wet in de Nederlandse praktijk moet evenwel nog groeien. Dit in het belang van het vrije grensoverschrijdende personenverkeer binnen Europa, en uiteindelijk ter waarborging van de naam als fundamenteel recht.

Ph. Kiiver

8

Europees Hof voor de Rechten van de Mens
18 november 2004, nr. 58255/00
(Rozakis (President), Tulkens, Vajić, Botoucharova, Kovler, Zagrebelsky, Steiner)
Noot Adriaansens

Onschendbaarheid van de woning. Huurbescherming. Uitzetting uit appartement.

[EVRM art. 35 lid 1, 8, 41]

Klaagster en haar partner woonden samen in een appartement. De huurovereenkomst van de woning stond op naam van de man. Kort na terugkomst uit haar buitenverblijf vernam zij dat haar partner overleden en ook al begraven was. De zoon van de man, een politieagent, had nagelaten haar van het overlijden op de hoogte te brengen en had inmiddels ook alles in het werk gesteld om de huurovereenkomst op naam van zijn superieur te zetten. Dat lukte. Binnen een week werd de woning ontruimd en klaagster met geweld eruit gezet. Gerechtelijke procedures bleven voor haar zonder succes.
Het Hof stelt een schending van art. 8 EVRM (onschendbaarheid van de woning) vast. Klaagster mocht de gezamenlijke woning als "home" in de zin van art. 8 beschouwen, ook al was zij niet met haar partner getrouwd. De inbreuk op haar recht was niet voorzien bij wet, die in een rechterlijke tussenkomst voor de uitzetting uit een woning voorzag, dit om willekeur te vermijden.

Prokopovich
tegen
Rusland

The law

I. The Government's preliminary objection

27. The Government, in their additional observations of 23 March 2004 following the Court's decision as to the admissibility of the application on 8 January 2004, contended for the first time that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention in respect of her complaint under Article 8 of the Convention. They submitted that it had been