HUMAN RIGHTS COMMITTEE

Müller and Engelhard v. Namibia

Communication No. 919/2000

26 March 2002

CCPR/C/74/D/919/2000

VIEWS

Submitted by: Mr. Michael Andreas Müller and Imke Engelhard, (represented by The Legal Assistance Centre, by Mr. Clinton Light)

State party: Namibia

Date of registered communication: 29 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of communication No. 919/2000, submitted to the Human Rights Committee by Mr. Michael Andreas Müller and Imke Engelhard, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 8 November 1999, are Mr. Michael Andreas Müller (hereinafter called Mr. Müller), a German citizen, born on 7 July 1962, and Imke Engelhard (hereinafter called Ms. Engelhard), a Namibian citizen, born on 16 March 1965, who claim to be victims of a violation by Namibia [1] of articles 26, 23 paragraph 4, and 17, paragraph 1, of the International Covenant on Civil and Political Rights (the Covenant). They are represented by counsel.

The facts as submitted by the author

2.1 Mr. Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken up with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms. Engelhard. The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of adopting Ms. Engelhard's surname. A legal practitioner informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2 The Aliens Act No. 1 of 1937 (hereinafter named the Aliens Act) Section 9, paragraph 1 as amended by Proclamation A.G. No. 15 of 1989, states that it is an offence to assume another surname than a person has assumed, described himself, or passed before 1937, without the authorisation by the Administrator General or an officer in the Government Service, and such authority has been published in the Official Gazette, or unless one of the listed exceptions apply. The listed exception in the Aliens Act Section 9, paragraph 1 (a), is when a woman on her marriage assumes the surname of her husband. Mr. Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (article 10), his and his family's right to privacy (article 13, paragraph 1), his right to equality as to marriage and during the marriage (article 14 paragraph 1), and his right to have adequate protection of his family life by the State party (article 14 paragraph 3).

2.3 Mr. Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms. Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich were he comes from, contained several pages of the surname Müller, and that there were 11 Michael Müller alone in the phonebook for Munich. He contends that Engelhard is a far more unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr. Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr. Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr. Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about him not being the father.

2.4 Mr. Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that Section 9, paragraph 1 of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the marriage, and with regard to the right to family life.

2.5 Ms. Engelhard filed an affidavit with her husband's complaint, in which she stated that she

supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

2.6 Mr. Müller's appeal to the Supreme Court of Namibia was dismissed with costs on 21 May 1999. The Supreme Court being the highest court of appeal in Namibia, the authors submit that they have exhausted domestic remedies.

The Complaint

3.1 Mr. Müller claims that he is the victim of a violation of article 26 of the Covenant, as the Aliens Act Section 9, paragraph 1 (a) prevents Mr. Müller from assuming his wife's surname without following a described procedure of application to a government service, whereas women wanting to assume their husbands' surname may do so without following this procedure. Likewise, Ms. Engelhard claims that her surname may not be used as the family surname without complying with these same procedures, in violation of article 26. They submit that this section of the law clearly differentiates in a discriminatory way between men and women, in that women automatically may assume the surnames of their husbands on marriage, whereas men have to go through specified procedures of application. The procedure for a man wanting to assume his wife's surname requires that:

> (i) he must publish, in two consecutive editions of the Official Gazette and two daily newspapers in a prescribed form, an advertisement of his intention and reasons to change his surname, and he must pay for these advertisements;
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> (ii) he must submit a statement to the Administrator-General or an officer in the Government Service authorised thereto by him;
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> (iii) the Commissioner of Police and the magistrate of the district must furnish reports about the author;
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> (iv) any objection to the person assuming another surname must be attached to the magistrate's report;
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> (v) the Administrator-General or an officer in the Government Service authorised thereto by him, must on the basis of these statement and reports be satisfied that the author is of good character and that there is sufficient reason for his assumption of another surname;
>
> (vi) the applicant must pay prescribed fees and comply with such further requirements as may be prescribed by regulation.

3.2 The authors refer to a similar case of discrimination of the European Court of Human Rights, *Burghartz v. Switzerland*[2]. In that case, the European Court held that the objective of a joint surname reflecting the family unity, could be reached just as effectively by adopting the surname of the wife as the family surname, and allowing the husband to add his surname, as by the converse arrangement.

The Court, before finding a violation of articles 14 and 8 of the European Convention on Human Rights, also stated that there was no genuine tradition at issue, but that in any event the Convention must always be interpreted in the light of present day conditions, particularly regarding the importance of the principle of non-discrimination. The authors further refers to the Committee's General Comment No. 18 [3], were the Committee explicitly stated that any distinction based on sex is within the meaning of discrimination in article 26 of the Covenant, and that the prohibited discrimination includes that the content of a law should not be discriminatory. The authors submit, that by applying the Committee's interpretation of article 26 of the Covenant, as stated in General Comment No. 18, Aliens Act Section 9, paragraph 1 (a) discriminates against both men and women.

3.3 The authors claim that they are victims of a violation of article 23, paragraph 4 of the Covenant, as Section 9, paragraph 1 of the Aliens Act infringes their right to equality as to marriage and during their marriage, by allowing a wife's surname to be used as the common family name only if specified formalities are applied, whereas a husband's surname may be used without applying these formalities. The authors refer to the Committee's *General Comment No. 19* [4], were the Committee notes in respect of article 23, paragraph 4 of the Covenant, that the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of the family name, should be safeguarded.

3.4 The authors refer to the jurisprudence of the Committee in the case *Coeriel et al v. the Netherlands* [5], and allege a violation of article 17, paragraph 1, in that a person's surname constitutes an important component of one's identity and that the protection against arbitrary and unlawful interference with one's privacy includes the protection of the right to choose and change one's surname.

3.5 With regard to a remedy, the authors seek the following:

(a) a statement that the authors' rights under the Covenant have been violated;

(b) that Aliens Act Section 9, paragraph 1 (a) is in violation of, in particular, articles 26, 23, paragraph 4, and 17, paragraph 1 of the Covenant;

(c) that Namibia should immediately allow Mr. Müller to assume Ms. Engelhard's surname without complying with the provisions of the Aliens Act;

(d) that the respondents in the High Court of Namibia and in the Supreme Court of Namibia should not recover costs awarded in their favour in these courts;

(e) and that Namibia should amend the Aliens Act Section 9, paragraph 1, to comply with its obligations under the Covenant.

The State party's observations on the admissibility and the merits of the communication

4.1 By submission of 5 June 2000, the State party made its observations on the admissibility of the communication and by submission of 17 October 2000, it made its observations on the

admissibility and the merits.

On admissibility

4.2 With regard to Mr. Müller, the State party confirms that he has exhausted domestic remedies in that his claim was brought to the High Court of Namibia and appealed to the Supreme Court of Namibia. However, the State party points out that the author brought his claim directly to the courts, without complying with the terms of the Aliens Act. The State party further contends that the Committee has neither the power nor the authority to consider the author's claim of a specific remedy as in paragraph 3.5 (d) above, since the author in the national proceedings did not claim that the Supreme Court was incompetent to award costs, nor did he contend that Namibian laws on the award of costs by the national courts violated the Namibian Constitution or Namibia's obligations under the Covenant.

4.3 With regard to Ms. Engelhard, the State party submits that she has not exhausted domestic remedies and has not provided any explanation for not doing so. It is therefore contended that Ms. Engelhard's communication is not admissible under article 5(2)(b) of the Optional Protocol, and the State party's response to the merits does not relate to her claims.

On the merits

4.4 With regards to the author's claim of a violation of article 26 of the Covenant, the State party submits that it does not dispute that Aliens Act Section 9, paragraph 1, differentiates between men and women. However, it is submitted that the differentiation is reasonably justified by its object to fulfil important social, economic and legal functions. Surnames are used to ascertain an individual's identity for such purposes as social security, insurance, licenses, marriage, inheritance, voting, and being voted for, passports, tax, and public records, and constitutes therefore an important component of one's identity, see *Coeriel et al v. The Netherlands*. Aliens Act, Section 9 gives effect to a long-standing tradition in the Namibian community that the wife normally assumes the surname of her husband, and no other husband has expressed a wish to assume his wife's surname since the Aliens Act entered into force in 1937. The purpose of differentiation created by the Aliens Act was to achieve legal security and certainty of identity, and are thereby based upon reasonable and objective criteria.

4.5 It is further submitted that Section 9, paragraph 1 of the Aliens Act does not restrict Mr. Müller from assuming his wife's name, but provides a simple and uncomplicated procedure, which would enable the author to fulfil his wish. The present case distinguishes from *Burghartz v. Switzerland* by that the author in that case had no remedy to assume his surname in a hyphenated form to his wife's surname.

4.6 The State party contends that article 26 of the Covenant is characterised by an element of unjust, unfair and unreasonable treatment, which is not applicable to the author's case, nor has it been contended that the purpose of Aliens Act Section 9, paragraph 1 was to impair males in Namibia individually or as a group.

4.7 In response to the author's claim under article 23, paragraph 4 of the Covenant, the State party contends that in accordance with this article, and the Committee's interpretation in *General Comment 19*, Namibian law permits the author to participate on equal basis with his spouse in choosing a new name, although he must proceed in accordance with laid down procedures.

4.8 Regarding Mr. Müller's claim under article 17, paragraph 1 of the Covenant, the State party contends that this right only protects the author from arbitrary, meaning unreasonable and purposelessly irrational, or unlawful interference with his privacy. Viewing the purpose of Aliens Act Section 9, paragraph 1 as described above, inasmuch the author may change his surname if he so wishes, the law is not unreasonable, and does not violate the State party's obligations under article 17, paragraph 1.

4.9 The State party contests the remedies sought by the author.

Comments by the author

5.1 By submission of 5 March 2001, the authors responded to the State party's observations.

5.2 Mr. Müller does not dispute that he could have made an application to change his surname in the terms of the Aliens Act. However, he contends that it is the procedure required for men who wish to change their surname, which is discriminatory. It would therefore have been contradictory to comply with the prescribed procedure.

5.3 With regard to the State party's allegation that Ms. Engelhard has not exhausted domestic remedies, the authors submit that it would have been futile for her to bring a claim to court separately of her husband's case, since her claim would not have been different from the first claim, which the Supreme Court of Namibia dismissed. The authors refer to the Committee's jurisprudence, *Barzhig v. France* [6], where the Committee stated that domestic remedies need not be exhausted if it is inevitable that the claim will be dismissed or if a positive result is precluded by established jurisprudence of the highest domestic court. It is further submitted that throughout the national legal proceedings, Ms. Engelhard had supported her husband's application, and that, as such, her legal and factual situation was known to the domestic courts.

5.4 In relation to article 26, it is submitted that once there is a differentiation based on sex alone, there would have to be an extremely weighty and valid reason therefor. It should be considered whether the objectives enunciated by the State party are of sufficient importance to justify this differentiation based on sex. It is not disputed that a person's surname constitutes an important component of one's identity, but it is submitted that, as a consequence thereof, the equal right of partners in a marriage to choose either surname as the family name is worthy of the highest protection.

5.5 Furthermore, the State party's notions of a "long-standing tradition" does not justify the differentiation, since it only occurred in the mid-nineteenth century, and, with reference to the European Court decision *Burghartz v. Switzerland*, the interpretation must be made in the light of present day conditions, especially the importance of the principle of non-discrimination. To exemplify

that tradition should not support discriminatory laws and practices, the authors refer to *Apartheid* as South Africa's former traditional approach to promulgate laws to perpetuate a racially discriminatory process.

5.6 It is submitted that the State party's allegations that keeping the differentiation in Aliens Act Section 9, paragraph 1 in the interest of public administration and the public at large, is not a rational objective, since this interest would not be lesser served should a couple contracting in a marriage have the choice of which of their surnames is to be used as their family name.

5.7 The authors contend that the procedure set out for a man who would like to assume his wife's surname are not as simple as contended by the State party, and refers to the procedure as described above (paragraph 3.1).

5.8 The authors also refer to the European Court of Human Rights' decision, *Stjerna v. Finland*[7], where the Court stated that "For the purposes of article 14[of the European Convention on Human Rights], a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim …", and they submit that there is no reasonable justification for the differentiation complained of. They contend that the Aliens Act Section 9, paragraph 1 perpetuate the "long-standing tradition" of relegating a woman to a subservient status within marriage.

5.9 In relation to the State party's allegations regarding General Comment 19 on article 23 of the Covenant, it is submitted that it should be interpreted to include not only the choice of a family surname, but also the method in which such choice is effected. In this connection, the authors submit that a husband's application to change his surname, may or may not be approved by the Minister of Home Affairs, for example where the costs of advertising or prescribed fees are out of reach for the applicant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 In relation to all the alleged violations of the Covenant by Mr. Müller, the Committee notes that the issues have been fully raised under domestic procedures, and the State party has confirmed that Mr. Müller has exhausted domestic remedies. There are therefore no obstacles for finding the communication admissible under the Optional Protocol article 5, paragraph 2 with regard to Mr. Müller.

6.3 In relation to the claims by Ms. Engelhard, the State party has contested that domestic remedies have been exhausted. Even if Ms. Engelhard could have pursued her claim through the Namibian court system, together with her husband or separately, her claim, being quite similar to Mr. Müller's, would inevitably have been dismissed, as Mr. Müller's claim was dismissed by the highest court in Namibia. The Committee has established jurisprudence, (*Barzhig v. France*), that an author

need not pursue remedies that are indisputably ineffective, and concludes therefore that Ms. Engelhard's claims are not inadmissible under the Optional Protocol article 5, paragraph 2. Although the State party has abstained from commenting on the merits of Ms. Engelhard's claims, the Committee takes the view that it is not precluded from examining the substance of the case also with regard to her claims, as completely identical legal issues concerning both authors are involved.

6.4 The Committee has also ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.5 The Committee therefore decides that the communication is admissible as far as it may raise issues under articles 26, 23, paragraph 4, and 17, paragraph 1, of the Covenant.

6.6 The Committee has examined the substance of the authors' claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26[8]. A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient

importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

6.9 In the light of the Committee's finding that there has been a violation of article 26 of the Covenant, the Committee considers that it is not necessary to pronounce itself on a possible violation of articles 17 and 23 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Notes

[1] The Optional Protocol entered into force for Namibia on 28 November 1994 by accession.

[2] See European Court of Human Rights, judgement A280-B of 22 February 1994.

[3] See General Comment No. 18 of 10 November 1989, para. 7 and 12.

[4] See General Comment No. 19 of 27 July 1990, para. 7.

[5] See Views in Case No. 453/1991 of 31 October 1994.

[6] See Views in Case No. 327/1988 of 11 April 1991.

[7] See European Court of Human Rights, judgement A299B of 25 November 1994, para. 48.

[8] See Views Danning v. The Netherlands, Case No. 180/1984.