Towards European Conflict Rules in Matters of Personal Status

In a judgment of 2 October 2003 the European Court of Justice gave an important incentive to the rethinking and restructuring of the conflict of law rules in force in the Member States of the European Union concerning personal status issues. The case involved was referred to the Court by the Belgian Conseil d’État for a preliminary ruling in a proceeding concerning the refusal by the Belgian state of an application to change a surname. At first glance the central issue of the case seems to be of modest importance. However, the consequences of the ruling of the Court could prove to be revolutionary for developments within the European Union regarding private international law in respect of family issues.

A Spanish national, Mr Carlos García Avello, was married to a Belgian national, Ms Isabelle Weber. The couple lived in Belgium with their children Esmeralda and Diego, who were also born there. According to Art. 8 of the Act on Belgian Nationality the children acquired Belgian nationality at birth and, according to Art. 17 of the Código Civil Español, they also acquired Spanish nationality at birth. The parents wanted to enter in the children’s birth certificates as their surname the name García Weber in conformity with the Spanish tradition regarding surnames. The Belgian Registrar of Births, Marriages and Deaths refused permission for this and, pursuant Art. 335 (1) Belgian Civil Code, entered in the birth certificates the complete surname of the father: García Avello. This precedence of the Belgian rule was based on a general practice in Belgian Private International Law to consider the Belgian nationality as the effective nationality of a Belgian national who also possesses one or more other nationalities.1 The parents disagreed with this decision and applied to the competent Belgian authorities for a change of the surname of their children to García Weber. It must be

1. This is also in accordance with Art. 3 of the Hague Convention on certain questions relating to the conflict of nationality laws of 12 April 1930 (LNTS 179, 89), under which a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.
stressed that they obviously did not challenge the primary decision of the registrar to enter the full surname of the father in the birth certificates. The children were registered at the Spanish consulate with the surname García Weber. The application made to the Belgian authorities to change the surname of the children to García Weber was rejected. The parents brought an application for annulment of that decision before the Conseil d'État, which referred a question for a preliminary ruling to the Court of Justice.

The Court concluded:

Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.

It is important to realize that the ruling of the Court refers to the concept of European citizenship (Art. 17 EC). The Court considered under par. 22 that this citizenship is 'destined to be the fundamental status of nationals of the Member States'. European citizenship is not intended to extend the scope ratione materiae of the Treaty to internal situations (par. 26), but a link with Community law exists:

in regard to persons in a situation such as that of [.....] nationals of one Member State lawfully resident in the territory of another Member State.

This conclusion is inter alia a response to the submission of the Belgian, Danish and Netherlands Governments that the case did not fall within the sphere of Community law, because only the children were affected by the refusal of the change of surname and they were Belgian nationals residing in Belgium who had never exercised their right of free movement. The Opinion of AG Jacobs (par. 46-53) on this point is also relevant (par. 50):

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.

The immediate consequence of the ruling of the Court of Justice is of course that, in situations similar to that of the children of Garcia Avello, a change of surname must be
granted. As far as I understand, the competent Belgian authorities subsequently allowed the change of surname and gave an instruction to do the same in similar cases. But it seems to be obvious that the ruling of the Court of Justice will also have consequences for the costs of a procedure to change a surname in such circumstances: if the costs are significant, these costs could constitute an infringement of Community law. In the Netherlands, the costs would be € 226,89 Euro. I have serious doubts whether that is in conformity with Community law, in particular because of the fact that the discretion of the competent authorities is reduced to zero in cases similar to that of the Garcia Avello children. Moreover, there is an obvious alternative to a change of surname by authorities upon application: to create the possibility of a choice of law by the parents on the occasion of the registration of the birth of a child by the Registrar.

It is in my opinion likely that the lack of a possibility for parents to choose which law should be applied in order to determine the surname of their children possessing dual nationality also constitutes a violation of Community law. It was already mentioned above that Garcia Avello was confronted with such a lack of a choice of law. However, he did not complain about that, but took another route: he applied on behalf of his children for a change of surname and went to court only after this application was rejected. Garcia Avello could have started court proceedings against the refusal of the Registrar to enter the name Garcia Weber in the birth certificates of the children. If he had done that, and had the court referred a question for a preliminary ruling to the Court of Justice, it seems to me certain that the Court would have come to the conclusion that a choice of law had to be allowed in such circumstances.

The conclusion that parents must be given the possibility to make a choice of law in respect of the determination of the surname of a child possessing more than one nationality of a Member State of the European Union has already been reached by the Court of Appeal of 's Hertogenbosch (Netherlands) in a decision of 27 January 2004! The case that had to be decided by this Court of Appeal had many similarities to the Garcia Avello case. Two Spanish nationals, both born in the Netherlands, married in the Netherlands and residing in the Netherlands, had a child in the Netherlands. This child acquired both the Spanish and Netherlands nationality at birth. The parents wanted to register the birth of the child with a surname determined by applying Spanish law. The Registrar refused, and determined the surname by applying the law of the Netherlands, with the consequence that the child was registered under the double family name of the father. The parents initiated court proceedings against the Registrar's decision. The

---

2. The government of the Netherlands decided to do the same and announced that the rules on the change of surnames will be modified. See Press bulletin of the Council of Ministers of 5 March 2004 on <www.minaz.nl>.
3. The decision has not yet been published. The author has received a copy of the decision of the Registry of Births, Marriages and Deaths of the city of Eindhoven.
4. The Spanish nationality is acquired according to Art. 17 Código civil; Netherlands nationality is acquired according to Art. 3 (3) Netherlands Nationality Act.
court of 's-Hertogenbosch (*Arrondissementsrechtbank*) ordered on 11 June 2003 modification of the surname on the birth certificate pursuant to the Spanish law. The core argument of the court was that Art. 8 of the United Nations Convention on the Rights of the Child (New York, 20 November 1989), requires respect for the identity of the child. Not to allow application of Spanish law to determine the surname of the child was considered to constitute a deprivation of the Spanish identity of the child. The Registrar appealed against this decision of the court. The Court of Appeal affirmed the decision of the court of first instance, but added the ruling of the Court of Justice in *re Garcia Avello* as a main argument.

The necessity for the introduction of a choice of law possibility is not restricted to the determination of a surname on birth certificates. Such a possibility must also be given with respect to the consequences of a parental recognition, establishment of paternity or adoption for the surname of children. Furthermore, one must also conclude that a choice of law must be possible with respect to consequences of the conclusion or dissolution of a marriage for the surname of (ex-) spouses. This must be stressed because of an international convention dealing mainly with the issue of the surname of (ex-) spouses which is being prepared by the International Commission on Civil Status (*Commission Internationale de l'État civil*; hereinafter: CIEC). The final text of a draft convention was adopted in September 2003 in a session of the CIEC in Madrid. This draft convention does not recognize a general possibility of a choice of law in cases where a spouse possesses more than one nationality. As a result of the more restrictive approach of the draft convention, one must conclude that the rules of the draft convention are partly incompatible with Community law. The Netherlands section of the CIEC (the official Advisory Commission on matters of Civil Status and Nationality)\(^5\) has already decided that it cannot advise the government to sign the draft convention because the content conflicts with the ruling of the Court of Justice in *re Garcia Avello*. In December 2003 the German and Netherlands section officially applied for a ‘relecture’ (new reading) of the draft in view of the judgment of the Court of Justice.

The recent decision of the Court of Appeal of 's-Hertogenbosch and the difficulties with the draft CIEC-convention demonstrate that the judgment in *re Garcia Avello* will have great consequences for conflict rules in matters of names. But not only will conflict rules have to be adapted, the same applies for the rules on recognition of decisions on names made in other Member States of the European Union. If the children of Garcia Avello had been born in Spain and would have been registered with a double family name according to the rules of Spanish law, it would then certainly violate Community law if Belgium would have refused to register them later under the same family name, in spite of the fact that they also possess Belgian nationality. In view of the ruling in

---

Garcia Avello, decisions concerning names registered in other Member States must be accepted as 'faits accomplis'. It is not permitted to change the result of the foreign decision by applying one's own conflict rules. This development is compatible with the growing support for the idea of giving full faith and credit to the decisions of courts and other authorities of other Member States in the European Union.

There is, furthermore, no reason to assume that the importance of the decision in re Garcia Avello will be limited to conflicts in the field of names. Similar decisions can be expected with respect to the conflict and recognition rules in other matters of personal status, like affiliation, adoption, transsexuality, marriage and divorce. This is not only important for European citizens moving from one Member State to another, and in particular for those who possess the nationality of more than one Member State. It is also of paramount importance for third country nationals who enjoy a right guaranteed by Community law to settle in other Member States of the European Union. At the moment, the most important category of these third country nationals with free movement rights consists of the non-European spouses of European citizens. In the near future many more third country nationals will acquire the right to move to other Member States under Community law due to the implementation of the new Council Directive 2003/109/EC of 25 November 2003. This implementation must be realized before 23 January 2006. If some aspects of the civil status of a third country national are established or recognized into one Member State, it is not acceptable under Community law for a second Member State to refuse recognition, because it wants to apply its own conflict rules and rules of recognition. The same applies for the rules on the legalization and verification of foreign documents. This area of the law is not a part of private international law, but is in practice intimately linked to conflicts of law.

The message of the ruling in re Garcia Avello is clear: the conflict and recognition rules of the Member States in all matters of civil status have to be restructured. This is a real challenge for all specialists in this field. The question is also justified whether each Member State should reinvent the wheel alone? If Member States do so, one can be sure that several of these wheels will have to be checked by the Court of Justice again to determine compatibility with Community law. It will prove to be more effective if the European Union takes this occasion to create uniform European conflict and recognition rules in the field of civil status.

Gerard-René de Groot

6. [2004] O.J. 1,16/44.