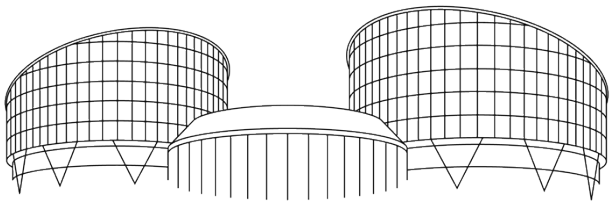

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GARNAGA v. UKRAINE

(Application no. 20390/07)

JUDGMENT

STRASBOURG

16 May 2013

FINAL

16/08/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Garnaga v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Helena Jäderblom,
Aleš Pejchal, *judges,*
Myroslava Antonovych, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 9 April 2013,Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 20390/07) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Ms Nataliya Volodymyrivna Garnaga ("the applicant"), on 2 April 2007.

2. The applicant was represented by Mr I.Y. Garnaga, a lawyer practising in Bila Tserkva. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr N. Kulchytskyy, from the Ministry of Justice.

3. The applicant alleged that the domestic authorities had interfered with her private life by refusing her request to change her patronymic (a patronymic can be defined as a second given name derived from the father's forename with the appropriate gender suffix).

4. On 6 February 2012 the application was communicated to the Government.

5. Ms G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Ms M. Antonovych to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1968 and lives in the town of Bila Tserkva, Ukraine.

7. According to the applicant, for many years she had been living as part of a family with her stepfather, mother and half-brother and wanted to associate herself more closely with them by taking the surname of her stepfather and also a patronymic derived from his forename.

8. On 24 March 2004 the applicant lodged a request with the Civil Status Registration Office in Bila Tserkva (hereinafter "the Registration Office") seeking to change her patronymic from Volodymyrivna (*Володимирівна*) to Yuriyivna (*Юріївна*).

9. By a letter of 27 March 2004 the Registration Office refused the applicant's request, referring to the Rules on Civil Status Registration in Ukraine, approved by the Ministry of Justice, which provided that the patronymic of a physical person could only be changed in the event of a change of forename by his or her father.

10. On 23 April 2004 the applicant challenged this refusal in the Bila Tserkva Local Court. She complained that her patronymic, along with her forename and family name, was part of her full name and she had the right to change it. She maintained that the refusal violated her constitutional rights, was unconstitutional and was not based on law. She further contended that she had good reasons for changing her patronymic - to disassociate herself from her biological father and associate herself more closely with her stepfather and half-brother.

11. On 5 May 2004 the applicant changed her original surname from Glazkova to the surname of her stepfather, Garnaga, which was also the surname of her mother and half-brother.

12. On 10 June 2004 the Bila Tserkva Local Court found that the Registration Office had acted in accordance with the law, in compliance with Article 149 of the Family Code of 2002, and so dismissed the applicant's complaint. It found that a change of patronymic was only legally possible when the father of the person concerned had previously changed his forename. Therefore, given that the applicant's father had not changed his forename, the applicant's request for change of her patronymic had not been in compliance with the law. The court also noted that the Rules on Civil Status Registration provided more detailed regulation of the relevant provisions of the Constitution, the Civil Code and the Family Code and did not conflict with them.

13. On 3 December 2004 the Kyiv Regional Court of Appeal upheld the decision of the first-instance court, holding that its conclusions were based on law.

14. On 31 October 2006 the Higher Administrative Court dismissed an appeal lodged by the applicant on points of law. It held, in particular, that the argument put forward by the applicant that the new Family Code limited the right to change a patronymic was based on an incorrect interpretation of the provisions of Article 191 of the Family Code of 1969.

II. RELEVANT DOMESTIC LAW

A. Constitution

15. The relevant provision of the Constitution reads as follows:

Article 22

"... The content and scope of existing rights and freedoms shall not be diminished as a result of the enactment of new laws or in the amendment of laws that are in force."

B. The Family Code 1969 (no longer in force)

16. The relevant provisions of the Code read as follows:

Article 191

Place and procedure for registration of a change of surname, forename or patronymic

"Registration of a change of surname, forename or patronymic of a citizen of Ukraine shall be conducted by civil status registration offices at his or her place of residence.

Registration of a change of surname, forename or patronymic shall be notified to those civil status registration offices in Ukraine which keep the records of births, marriages and divorces of those who have changed their surname, forename, or patronymic."

C. The Civil Code 2003 (in force since 1 January 2004)

17. The relevant provisions of the Code read as follows:

Article 28

An individual's name

"1. An individual acquires rights and responsibilities and exercises them under his or her own name.

The name of an individual who is a citizen of Ukraine consists of his or her surname, forename and patronymic, unless the law or custom of the national minority to which they belong provides otherwise ..."

Article 294
Right to a name

"1. An individual has the right to a name ..."

Article 295
The right to change a name

"1. An individual who has reached the age of sixteen has the right to change his or her surname and forename in accordance with the procedure prescribed by law.

...

3. An individual's patronymic can be changed if his or her father changes his forename ..."

D. The Family Code 2002 (in force since 1 January 2004)

18. The relevant provisions of the Code read as follows:

Article 10
Use of analogy of statute (*аналогія закону*) and analogy of law (*аналогія права*)

1. Where family relations are not regulated by this Code or by agreement (contract) between the parties, the rules of this Code governing similar relations shall apply to them (analogy of statute).

2. Where the analogy of statute cannot apply to the regulation of family relations, these are governed by the general principles of family law (analogy of law).

Article 147
Determining the patronymic of a child

1. The patronymic of a child shall be determined by the forename of her or his father.

2. The patronymic of a child who was born to an unmarried woman, where the paternity of the child is not recognised, shall be determined by the forename of the person who the child's mother called his or her father.

Article 149
Change of patronymic

"1. If a father changes his name, the patronymic of his child who has reached the age of fourteen years shall be changed with the latter's consent."

19. In her commentary on the Family Code (*Ромовська З. В. Сімейний кодекс України: Науково-практичний коментар. – 2-ге вид., перероб. і доп. – К.: Видавничій Дім Ін Юре, 2006. Стор. 310, 312*), Professor Z. V. Romovska, a drafter of the Code, noted, in particular, in respect of Articles 147 and 149:

Article 147

"1. ... The forename of the person recorded as the child's father automatically defines the patronymic of the child ...

3. Every child, must, in all circumstances, have a "patronymic" even when the identity of his or her real father is not established. In that case, the "patronymic" can be invented."

Article 149

"2. A child who has attained the age of fourteen, already has his or her place in society, is preparing for independent life and associates his or her name with the patronymic which appears in his or her documents. Therefore, his or her consent or objection to the change of patronymic will be crucial. A situation may thus arise in which the father has changed his forename, while the patronymic in the documents of his son or daughter remains [the old one].

3. Can the patronymic be changed when the forename of the father has not been changed? There is no response to this question in Article 149. However, Article 10 of the F[amily] C[ode] allows the analogy of statute and law and can help in finding a solution in such a situation."

E. Presidential Decree no. 23 of 31 December 1991 on the procedure for changing surnames, forenames and patronymics by citizens of Ukraine (invalidated by Presidential Decree no. 803/2007 of 31 August 2007)

20. The Decree provided *inter alia*:

"1. Citizens of Ukraine are allowed to change their surname, forename and patronymic when they attain the age of sixteen.

2. ... A refusal to change a surname, forename or patronymic can be challenged before the court in accordance with the established procedure."

F. Resolution of the Cabinet of Ministers no. 233 of 27 March 1993 on approval of the procedure for the examination of requests by the citizens of Ukraine for a change of surname, forename or patronymic (invalidated by Resolution of the Cabinet of Ministers no. 915 of 11 July 2007)

21. As with the Presidential Decree, the procedure approved by this Resolution provided that any citizen who had reached the age of sixteen could apply for a change of surname, forename and patronymic and that a refusal of such a change could be appealed against to the courts. The procedure further provided that:

"15. change of surname, forename or patronymic shall not be allowed if

a) the applicant is under investigation or trial or has been convicted;

b) there are objections from the police."

G. Resolution no. 915 of 11 July 2007 of the Cabinet of Ministers on the procedure for examination of applications for change of name (surname, forename, patronymic) of an individual

22. This Resolution replaced the Government's Resolution of 27 March 1993. It set forth a procedure for changing all parts of the individual's name (surname, forename, patronymic). Only one provision refers exclusively to patronymics:

"3. ...The application of an individual for a repeated change of patronymic shall be lodged and examined in accordance with this procedure."

23. The procedure further provides for the circumstances in which an application for change of name can be refused:

"11. The grounds for refusal to allow the change of name are:

(i) the applicant is under investigation, trial or administrative supervision;

(ii) the applicant has a criminal record which has not been cancelled or overturned in accordance with the procedure established by law;

(iii) there is an official request from the law-enforcement agencies of foreign countries for the applicant's placement on a list of wanted persons;

(iv) the applicant submits false information.

Refusal to allow the change of name can be appealed against to the court."

H. Rules on Civil Status Registration in Ukraine, approved by Decree of the Ministry of Justice of Ukraine of 18 October 2000 no. 52/5 (as worded at the material time).

24. The relevant provisions of the Rules, in the wording at the material time, read as follows:

"6. Registration of change of name

6.1. ... The name of an individual who is a citizen of Ukraine consists of a surname, forename and patronymic, unless the law or custom of the national minority to which he or she belongs provides otherwise.

6.2. A change of surname and forename by individuals who are citizens of Ukraine shall be allowed once they have reached the age of sixteen.

...

The patronymic of an individual can be changed in the event of a change of forename by his or her father.

If the father changes his forename, the patronymic of his child who has reached the age of fourteen years may be changed with the latter's consent."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the domestic authorities had interfered in her private life by refusing to change her patronymic. She relied on Article 8 of the Convention, which provides, in so far as relevant, as follows:

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

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."

A. Admissibility

26. The Government maintained that the domestic legislation contained clear provisions which did not allow a change of patronymic at one's own discretion and that the national courts could not render a decision contrary to the law. Therefore, in their opinion, it was not an effective remedy for the applicant to challenge the refusal of 27 March 2004 before the domestic courts and she had no other effective remedy in such circumstances. The Government observed that the six-month time-limit ran, in principle, from the date of the act complained of, if no remedies were available or if they were judged to be ineffective. Accordingly, the applicant should have applied to the Court within six months after the Registration Office rejected her request to change her patronymic on 27 March 2004.

27. The applicant disagreed. She considered that she had had a right of access to the domestic courts with her civil - law dispute and since such remedy had been available to her she had had to use it. Furthermore, she maintained that the domestic legislation did not prohibit her change of patronymic and that the decisions of the domestic courts were not based on law.

28. The Court reiterates that the six-month time-limit runs, in principle, from the date of the act complained of, if no remedies are available or if they are judged to be ineffective (see *Hazar and Others v. Turkey* (dec.), no. 62566/00, 10 January 2002).

29. The Court reiterates that for the remedy to be effective it must be independent of any action taken at the authorities' discretion directly available to those concerned (see Gurepka v. Ukraine, no. 61406/00, § 59, 6 September 2005); able to prevent the alleged violation from taking place or continuing; or provide adequate redress for any violation that had already occurred (see *Kudła v. Poland* [GC], no. 30210/96, § 158, ECHR 2000-XI).

30. The Court observes that in a number of cases against Ukraine it has found that the courts of general jurisdiction in Ukraine, including the Supreme Court, did not have power to overrule the law. Moreover, in the Ukrainian legal system an individual has no right of individual petition to the Constitutional Court of Ukraine, which is the only jurisdiction empowered to repeal a statutory provision. Therefore, where the applicant's complaint directly concerned a statutory provision which was clear and unambiguous, the Court would conclude that such applicant had no remedy which could be considered effective in the circumstances of his or her case (see, for example, *Myroshnychenko v. Ukraine* (dec.), no. 10205/04, 3 April 2007).

31. The Court notes that, in the instant case, the applicant did have direct access to the domestic courts with her civil - law dispute. Moreover, such an opportunity had been clearly provided by the domestic legislation for this type of dispute (see paragraphs 20 and 21 above). It remains to be examined

whether, as the Government have suggested, national legislation was so clear on the disputed issue that any attempts by the applicant to challenge the refusal of the Registration Office before the domestic courts would clearly be futile. In this connection, the Court notes that at the time of the events which gave rise to the present application Ukrainian legislation had been recently amended and the provisions of the new Civil Code and Family Code had limited the possibility for changing the patronymic to situations in which the father of the person concerned had changed his forename from which that patronymic derived. In this connection, it should be pointed out that the relevant decree and resolution of the President and the Cabinet of Ministers respectively (see paragraphs 20 and 21 above) which allowed such change without demanding change of the father's forename as precondition remained valid for another three years after the disputed refusal, and even the provision of Article 149 of the Family Code was not considered to impose such restriction. In this connection, the Court takes note of the commentary published by a drafter of the new Family Code, who considered that the said Article did not regulate situations such as that of the applicant and believed that a solution could be found in such circumstances by using the analogy of law or statute (see paragraph 19 above). These findings are sufficient to satisfy the Court that at the material time the regulation of the impugned matter in question, namely the possibility for an individual to change his or her patronymic without a change of forename by his or her father, was not set out with sufficient clarity to indicate to a person concerned that recourse to the domestic courts against the refusal of an application to change patronymic would be completely futile.

32. Therefore, the Court considers that the applicant could not be reproached for using remedies which could arguably be deemed effective in her situation. Given that the applicant lodged her application on 2 April 2007, that is, less than six months after the final judicial decision in her case given by the Higher Administrative Court on 31 October 2006, the Court dismisses this objection by the Government.

33. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is also not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

34. The applicant stated that for many years she had lived as part of a family with her stepfather, mother and half-brother and wished to associate herself more closely with them by taking the surname of her stepfather and a patronymic derived from the stepfather's forename. Although she was allowed to change her family surname, the domestic authorities refused her

request for a change of patronymic - having interpreted new legislation as prohibiting such a change. She disagreed with that interpretation, maintaining that the change of patronymic at one's own discretion had been allowed under the relevant Presidential decree and the Governmental resolution (see paragraphs 20 and 21 above). She considered that the restriction of her right to change her patronymic was unlawful and unjustified.

35. The Government did not submit their observations on the merits, considering the application inadmissible.

36. Neither of the parties sought to question the applicability of Article 8 of the Convention in the instant case, and the Court sees no reason to do so. The Court recalls that in many similar cases concerning choice or change of forename or surname it established that this issue fell within the ambit of Article 8 of the Convention, since the forename and surname concerned the private and family life of an individual (see, among many other authorities, *Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280-B; *Stjerna v. Finland*, 25 November 1994, § 37, Series A no. 299-B; and *Guillot v. France*, 24 October 1996, §§ 21 and 22, *Reports of Judgments and Decisions* 1996-V). The case of *Bulgakov v. Ukraine* (no. 59894/00, § 42, 11 September 2007) also concerned the applicant's patronymic as part of his name. The subject matter of the application thus falls within the ambit of Article 8 of the Convention.

37. The Court further reiterates that, while an obligation to change one's name would be regarded as interference in the private life of the individual, the refusal to allow an individual to adopt a new name cannot necessarily be considered as an interference. It reaffirms that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference, there may be, in addition, positive obligations inherent in effective respect for private and family life. If the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, the applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance which has to be struck between the competing interests of the individual and of the society as a whole (see *Stjerna*, cited above, § 38; and *Johansson v. Finland*, no. 10163/02, § 29, 6 September 2007).

38. Whilst recognising that there may exist genuine reasons prompting an individual to wish to change his or her name, the Court accepts that legal restrictions on such a possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family (see *Stjerna*, cited above, § 39).

39. The Court further recalls that the Contracting States enjoy a wide margin of appreciation in the sphere of regulation of changing names by

individuals, and its task is not to substitute itself for the competent domestic authorities in determining the most appropriate policy in that sphere, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see *Stjerna*, cited above, § 39). It is for the domestic authority to provide relevant and sufficient reasons in support of its refusal to allow the change of name by an individual for this restriction be considered "necessary in a democratic society" (see *Güzel Erdagöz v. Turkey*, no. 37483/02, §§ 50 to 55, 21 October 2008)

40. The patronymic as a part of a personal name is traditionally derived from the name of the father of the person concerned. Ukrainian legislation recognises, however, that when individuals become mature enough to make their own decisions concerning their names they may keep or change the name given to them at birth. It is particularly noteworthy, that a person may preserve his or her patronymic, even when his or her father no longer holds the forename from which that patronymic derives. In this way, a possible rupture of the traditional link between the person's patronymic and the forename of his or her father is recognised. The new Civil Code enacted on 1 January 2004 provides that an individual can change the patronymic if his or her father has changed his forename. The domestic authorities interpreted that provision as a clear indication that the change of name by his or her father was the only ground possible for changing the patronymic by the person concerned. The applicant argued that the impugned provision did not prohibit a change of patronymic in other situations and that the other normative acts (see paragraphs 20 and 21 above) did not contain similar limitations. In the applicant's opinion, such refusal had, in any event, been unjustified and was an unnecessary restriction to her right to a name, as a part of her personal and family identity.

41. Thus, the Court notes that it is disputed between the parties whether the restriction of the applicant's right is based on law or on an incorrect interpretation of the law. At the relevant time various provisions (see paragraphs 17, 20, 21 and 24 above) were in existence, which suggests that the issue of change of patronymic had not been formulated with enough clarity. Even if there is a controversy about the right interpretation of the law, it is undisputed that the right of the individual to keep his or her name is recognised in Ukrainian legislation, as well as the right to change it. It should be observed that the Ukrainian system of changing names appears to be rather flexible and a person can change his or her name through following a special procedure with only minor restrictions, which are applicable in very specific circumstances, mainly related to criminal justice considerations (see paragraph 22 above). At the same time, no broader considerations, like an accurate population registration or linking the bearers of a given name to a family, seem to be advanced by the authorities to pose restrictions on the change of name by an individual. In this situation of

almost complete liberty of a person in changing his or her forename or surname, the restrictions on changing the patronymic do not appear to be properly and sufficiently reasoned by the domestic law. Furthermore, no justification for denying the applicant her right to decide on this important aspect of her private and family life was given by the domestic authorities and no such justification has otherwise been established. As the authorities have not balanced the relevant interests at stake (see paragraph 38 above) they have not fulfilled their positive obligation of securing the applicant's right to respect for her private life. Accordingly, the Court considers that in the present case there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

44. The Government considered this claim unsubstantiated.

45. The Court considers that the finding of a violation, constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

46. The applicant also claimed 103.17 Ukrainian hryvnias (UAH) (around EUR 10) for the costs and expenses incurred before the domestic courts and UAH 2,178.68 (around EUR 212) for those incurred before the Court. She further requested the Court to adjust these amounts to reflect any increase in the rate of inflation.

47. The Government considered that the claim for expenses incurred before the domestic courts should be rejected as they did not concern the proceedings before the Court. As to the expenses incurred before the Court, the Government considered that only postal expenses in the amount of UAH 142.22 were proved to be related to the proceedings before the Court, while the receipts for the remaining expenses claimed were not specific as to their relevance to those proceedings. Therefore, the Government proposed that they should be rejected as groundless.

48. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to the above-mentioned criteria, the Court awards the claimed amounts in full. As to adjusting the award of costs in accordance with the rate of inflation, the Court notes that the applicant did not submit any relevant calculations or supporting documents, so it dismisses this request.

C. Default interest

49. The Court considers it appropriate that the default interest rate 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

1. *Declares* the application admissible unanimously;

2. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

3. *Holds* by four votes to three that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 222 (two hundred and twenty-two euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State 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;

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

Done in English, and notified in writing on 16 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President