

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 28 February 2008¹

1. Once again, the Court has been asked to give a ruling on the lawfulness of a residence condition imposed on the recipients of a social benefit provided for by the legislation of a Member State. The stumbling block arises out of citizenship of the European Union because the civil and social integration which, through the progressive development of the status of citizen of the Union, the Treaty seeks to promote² is limited purely by the external borders of the Union and thus encourages transcendence of the territorial framework of national communities.

court enquires whether that provision precludes national legislation which makes the payment of a disability pension for incapacity for work that is linked to a stay in a place of isolation subject to fulfilment of the condition that the person entitled be resident in the territory of the Republic of Poland.

I — Legal framework

Community legislation

2. In this case, the Court has been asked in a reference for a preliminary ruling from the Sąd Okręgowy w Koszalinie, IV Wydział Pracy i Ubezpieczeń Społecznych (Regional Court, Koszalin (Poland), Fourth Labour and Social Security Chamber) about the interpretation which must be given to Article 18 EC, which guarantees citizens of the Union the right to move and reside freely within the territory of the Member States. The national

3. Article 17 EC states:

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

¹ — Original language: French.

² — See on that point, Azoulai, L., ‘Le rôle constitutionnel de la Cour de justice des Communautés européennes tel qu’il se dégage de sa jurisprudence’, a forthcoming article in the *Revue trimestrielle de droit européen*.

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

6. Under Article 5 of the Law on provision for war and military invalids and their families, the benefits provided for by the Law are to be paid to the person entitled to them whilst he is resident in the territory of the Republic of Poland, unless the Law or an international Treaty stipulates otherwise.

4. Article 18(1) EC provides:

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

II — The dispute in the main proceedings and the question referred for a preliminary ruling

7. The reference for a preliminary ruling results from proceedings between Ms Halina Nerkowska and the Social Security Institution, Koszalin Branch.

National legislation

5. In essence, under the Polish Law on provision for war and military invalids and their families of 29 May 1974, as amended by Article 12(2) of the Law on combatants and certain persons who are the victims of wartime and post-war repression of 24 January 1991, people who have suffered a disability connected with a period spent in prison or in an internment camp during or after the war are entitled to benefits.

8. Ms Nerkowska was born on 2 February 1946 in the territory of present-day Belarus. At the age of three she lost her parents who were deported to Siberia pursuant to a court order. In April 1951 the insured person, Ms Nerkowska, together with her family (her brother and aunt) were themselves deported to the USSR where Ms Nerkowska lived under difficult conditions until January 1957. It was only after almost six years that she was permitted to return to Poland. After studying and working in Poland, she left her country in 1985 to settle in Germany.

9. Following an application by the applicant in the main proceedings, the Social Security Institution, Koszalin Branch, by decision of 4 October 2002, recognised her entitlement to a disability pension as a result of partial incapacity for work linked to her stay in places of isolation, but suspended payment of this benefit on the ground that her place of residence was outside Poland. The suspension of payment of the disability pension was confirmed by judgment of 22 May 2003.

10. In September 2006 the applicant in the main proceedings submitted a fresh application for payment of the benefit arising from her entitlement to the pension, arguing that the Republic of Poland had acceded to the European Union and had consequently incorporated Community law into national law. By decision of 14 September 2006, the Social Security Institution, Koszalin Branch, nevertheless again refused payment, on the ground that the applicant in the main proceedings did not have a place of residence in the territory of the Republic of Poland.

11. The applicant in the main proceedings then appealed against that decision before the Regional Court, Koszalin, requesting that it grant her payment of the disability pension and contending that on account of Poland's accession to the European Union her present place of residence could not be a ground for suspension of the benefit to which she is entitled.

12. Taking the view that the resolution of the dispute depends on the interpretation of Community law, the Regional Court, Koszalin, asks the Court whether the right of freedom of movement and of residence attached by Article 18 EC to citizenship of the Union precludes the application of national rules, such as those at issue in this case, under which the payment of benefits pursuant to a disability pension for incapacity for work linked to a stay in a place of isolation is subject to the condition that the person entitled to the benefits is resident in national territory.

III — Assessment

13. It must be stated at the outset that it is not disputed by any of the parties that social benefits such as a disability pension in respect of incapacity for work caused by a stay in a place of isolation, which is at issue in this case, are not covered by the Community instruments on the coordination of social security systems, which in principle prohibit that any residence condition be imposed on the recipient. In particular Regulation (EEC) No 1408/71, which lays down the principle of the exportability of social security benefits, expressly excludes from its scope 'benefits schemes for victims of war or

its consequences'.³ The disability benefit at issue must be viewed as a benefit for victims of the consequences of war, having regard to its purpose and the conditions subject to which it is granted: irrespective of status as a worker, it seeks to provide compensation for the suffering endured following deportation. It does not therefore appear to be a *quid pro quo* for contributions paid, but is by way of compensation.⁴

14. Since a pension such as that at issue in this case does not constitute a social security benefit, the Member States have competence to lay down the rules relating to it, in particular the conditions subject to which it is granted. They must nevertheless exercise the national competence which they retain in accordance with the provisions of the Treaty, in particular with those concerning the freedom given to every citizen of the Union to move and reside freely within the territory of the Member States.⁵ That freedom

of movement and residence constitutes a fundamental freedom⁶ which lies at the very heart of citizenship of the Union.

15. As a Polish national, Ms Nerkowska has the status of citizen of the Union under Article 17(1) EC. She may thus rely where relevant on the rights relating to such a status,⁷ and that includes with regard to her Member State of origin.

16. It is true that citizenship of the Union, even if it constitutes 'the fundamental status of nationals of the Member States',⁸ is not intended to extend the scope *ratione materiae* of the Treaty to internal situations which have no link with Community law.⁹ However, the situations falling within the scope *ratione materiae* of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18

3 — Article 4(4) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

4 — For identical reasoning also resulting in classification as a social security benefit being precluded, see: in respect of benefits in favour of prisoners of war, Case 9/78 *Directeur régional de la Sécurité sociale de Nancy* [1978] ECR 1661 and Case C-386/02 *Baldinger* [2004] ECR I-8411; in respect of war service invalidity pensions, Case 207/78 *Even and ONPTS* [1979] ECR 2019; and in respect of benefits provided for by legislation with the aim of alleviating certain situations which arose out of events connected with the national socialist regime and the Second World War, Case 79/76 *Fossi* [1977] ECR 667 and Case 144/78 *Tinelli* [1979] ECR 757.

5 — See, for example, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 25; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 33; and Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 22.

6 — The Court has expressly classified it as such (see Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 29).

7 — See, to that effect, most recently Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 22.

8 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 86.

9 — See *Tas-Hagen and Tas*, paragraph 23, and *Garcia Avello*, paragraph 26.

EC.¹⁰ Furthermore, by establishing her place of residence in Germany, Ms Nerkowska exercised her right to move and reside freely within the territory of a Member State other than that of which she is a national and it is precisely on account of her place of residence that the Polish authorities refused to pay to her the disability pension to which she had been found to be entitled. As the exercise of a right accorded by Community law has had an impact on the payment of a benefit under national legislation, such a situation cannot be considered to be a purely internal matter with no link to Community law.¹¹

host Member State by legislation in his State of origin penalising the mere fact that he has used them.¹² It would thus be incompatible with the right of freedom of movement were a citizen of the Union to receive, in the Member State of which he is a national, treatment less favourable than the treatment he would enjoy if he had not availed himself of those opportunities. In such a case, the citizen of the Union would not be granted in his State of origin the same treatment in law as that accorded to nationals of that State who find themselves in the same situation and he would be placed at a disadvantage by the mere fact of having exercised his freedom to move and to reside in another Member State.¹³

17. As Article 18(1) EC is applicable to a situation such as that at issue in the main proceedings, it must now be established whether it precludes national rules which make payment of a benefit granted in respect of harm suffered during a stay in a place of isolation subject to the condition that the victims thereof are resident in national territory.

18. It is settled case-law that the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles placed in the way of his stay in the

19. National rules such as those at issue in the main proceedings introduce a difference in treatment between deported Polish nationals who are now resident in Poland and those who, having exercised their freedom of movement, have established their place of residence in another Member State. By linking the payment of the disability pension for incapacity for work arising from a stay in a place of isolation to a condition requiring residence in national territory, those national rules place some nationals at a disadvantage by virtue of the mere fact of their exercising their freedom of movement by establishing their place of residence in another Member State and may thus deter them from doing

10 — See *Garcia Avello*, paragraph 24, and *Schwarz and Gootjes-Schwarz*, paragraph 87.

11 — For similar reasoning see *Tas-Hagen and Tas*, paragraphs 24 to 28, and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraphs 20 to 25.

12 — See *Schwarz and Gootjes-Schwarz*, paragraph 89 and the case-law cited.

13 — The status of citizen of the Union would thus be affected (see, for example, *D'Hoop*, paragraphs 28 and 30).

so. They therefore constitute a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union.

20. It is apparent from settled case-law that such a restriction ‘can be justified in the light of Community law only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and if it is proportionate to the legitimate objective pursued by the provisions of national law’, on the basis that ‘a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective’.¹⁴

21. As regards the existence of objective considerations of public interest, the Polish authorities’ main submission is that the national legislation in question has the aim of granting benefits to compensate for damage and suffering caused by wartime and post-war repression in general and, in particular, as regards the applicant in the main proceedings, by compulsory deportation to Siberia. In so doing, Polish society seeks to show its solidarity with regard to the victims. Having regard to that objective, it is, in the Polish authorities’ view, legitimate to restrict that obligation of solidarity only to those people who retain a sufficient degree of connection with Polish society.

22. It cannot be disputed that the objective of restricting the solidarity of a society to people who remain sufficiently integrated in that society may constitute, in certain cases, an objective consideration of public interest.¹⁵ As Community law now stands, a Member State may make the grant of certain social benefits subject to the existence of a connection linking recipients to that State. However, that connection may not always be in the form of a residence condition. The national measure laid down to that end must be appropriate for the attainment of the legitimate objective pursued and not restrict the freedom of movement of citizens of the Union beyond what is necessary for that purpose. In that regard, the Polish authorities submit that the residence condition allows the recipient to testify to his desire to retain a connection with the society which shows him its solidarity in this way.

23. I am not convinced by that argument. A residence condition such as that laid down by the Polish legislation, namely one which requires that the recipient of the benefit be resident in national territory throughout the period of payment of the benefit, does not to me seem appropriate for the purpose of establishing the existence of a necessary connection. To merit national recognition and solidarity in respect of suffering which

15 — See *Tas-Hagen and Tas*, paragraph 35. See also, with regard to benefits paid to students, *D’Hoop*, paragraph 38, and *Bidar*, paragraph 57, and, with regard to benefits paid to job-seekers, Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 67, and Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 30.

14 — *Morgan and Bucher*, paragraph 33 and the case-law cited.

has been endured and to which the grant of benefits testifies, it is sufficient that a person has been a victim of repression on account of his nationality and/or place of residence. It is the status of the victim as a member of the society, due to his place of residence and/or his nationality at the time of the repressive events, that establishes the connection which warrants a demonstration of solidarity by that society. With regard to the legitimate objective of solidarity, there is, in my view, nothing to distinguish a Polish national who was a victim of such deportation by the Soviet regime and who is still resident in Polish territory from another Polish national who was a victim of such deportation and who is now resident in another Member State. The difference in treatment seems to me to be even less acceptable given that citizenship of the Union is destined to be the fundamental status of Member State nationals to which the fundamental freedom to move and reside in the whole of the Community area is attached. It follows that, in principle, a Member State can no longer make an obligation of solidarity dependent on integration established by a condition requiring a connection with national territory. Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bounds of the national community, but also within the wider context of the society of peoples of the Union.¹⁶

also ruled on the compatibility with Community law of a residence condition applied to the grant of a benefit for victims of war or of its consequences, to rebut that finding and justify the condition that the recipient of the benefit must be resident in national territory throughout the period of payment of the benefit. It is true that in *Tas-Hagen and Tas* the Court held that a residence criterion is inappropriate for the purpose of attaining the objective of limiting the obligation of solidarity in so far as it is based solely on the date on which the application for the benefit is submitted and is thus liable to lead to different results for persons resident abroad whose degree of integration into the society of the Member State granting the benefit is in all respects comparable.¹⁷ That approach cannot, however, be interpreted as permitting a residence condition imposed over a longer period and capable of demonstrating a genuine difference with regard to the level of integration sought by the Member State. In the particular context of benefits for victims of war or its consequences, while a condition requiring a connection with national territory may be permissible, that is only in so far as the condition relates to the date of the harmful events and makes it possible to establish a person's status as a victim towards whom the national community may be called upon to show its solidarity.

24. The Polish authorities cannot rely on the judgment in *Tas-Hagen and Tas*, which

25. The Polish authorities also give the need to monitor whether the conditions for

16 — See, to the same effect, the Opinion of Advocate General Trstenjak in Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, points 82 to 84.

17 — *Tas-Hagen and Tas*, paragraphs 37 to 39.

granting the disability pension are met and continue to be met as a reason for the residence condition. They submit that the condition allows the competent medical services to establish the applicant's state of health, to determine the link between the harm found to exist and the deportation, to assess the incapacity for work and, in the event that they decide that it is temporary in nature, to make the recipient subject to further examinations at the end of the period decided upon.

26. However, although the demands of monitoring the conditions under which a social benefit is obtained constitute an objective consideration of public interest,¹⁸ the requirement of residence in national territory throughout the period of payment of the benefit clearly appears to exceed what is necessary in order to attain that objective. It is possible to envisage different means which are appropriate to attain the objective pursued, but are less of a restriction on the freedom of movement and residence of citizens of the Union. Clearly, it would be sufficient, for example, to require that the applicant appear for the purposes of a medical check before the competent national services when the application is examined.

27. In order to justify the residence condition at issue in the main proceedings, the Polish authorities submit lastly that they have the power to vary the amount and the nature

of the benefits according to the needs of recipients in terms of health and living conditions. In addition to a disability pension, the amount of which may vary in order to ensure that the recipient has a minimum standard of living, the national legislation at issue also provides for various benefits, such as, *inter alia*, reductions in respect of transport costs, vocational training, special provision of treatment and an electric wheelchair. Therefore, the aim of adapting to the recipient's situation the benefits intended to compensate for the harm suffered as a result of a stay in a place of isolation may not be properly taken into account if there is no condition requiring residence in Polish territory.

28. By that line of argument, the Republic of Poland implicitly refers to the Court's case-law permitting a residence condition, in derogation from the principle of the exportability of social security benefits, where the benefits are 'closely linked with the social environment'.¹⁹ The idea behind those decisions is that, where the amount and the nature of the benefit are based on the standard of living and living conditions in the Member State which grants it, the residence condition laid down in order to obtain the benefit appears to be legitimate, appropriate and necessary.²⁰

¹⁸ — See to that effect, with regard to an unemployment allowance, Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 41.

¹⁹ — See Case 313/86 *Lenoir* [1986] ECR 5391, paragraph 16; Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 42; Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 32; Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249, paragraph 33; and *Habelt and Others*, paragraph 81.

²⁰ — See the Opinion of Advocate General Léger in *Snares*, points 85 to 88.

29. The disability pension at issue in the main proceedings does not, however, seem to me to be one of the kinds of benefits that are closely linked with the social environment. Benefits which are classified in that way by the case-law are benefits for the grant of which the claimant's need is a fundamental criterion and which consequently seek to ensure that he has a minimum standard of living in the social and economic environment of the Member State which provides those benefits. The disability pension in the main proceedings is granted to compensate for damage to health caused by a stay in a place of isolation, irrespective of the recipient's financial situation; it is in the nature of compensation for suffering which has been endured. That has been confirmed by the defendant in the main proceedings, which has expressly stated in its observations that the grant of the pension at issue in the main proceedings is not subject to an assessment

of the personal needs of the recipient. At most, the amount of that pension can be adapted on the basis of the economic standard of living in Poland. It is true that other benefits provided for by the national legislation in question might be regarded as closely linked with the social environment. They cannot however, without infringing the principle of proportionality, justify a general requirement of residence throughout the period during which the benefit is granted, whatever the benefit may be. It would thus be for the national legislature to make a distinction, from the viewpoint of the criterion of residence, according to the nature of the benefits in question. In any event, as the disability pension at issue in the main proceedings does not appear to be closely linked with the social environment, there is no adequate reason to make payment thereof subject to compliance with a residence condition.

IV — Conclusion

30. In view of the foregoing considerations, I suggest that the Court should answer the question referred for a preliminary ruling in the following way:

'Article 18 EC, which guarantees citizens of the European Union the freedom to move and reside within the territory of the Member States, must be interpreted as precluding national legislation which makes payment of a disability pension that is linked to a stay in a place of isolation subject to a condition that the person entitled be resident in national territory throughout the period during which the benefit is paid.'