OPINION OF ADVOCATE GENERAL JACOBS
delivered on 20 November 2003 [1]

1. This case concerns a Finnish national, in receipt of a Finnish invalidity pension, who lives and pays income tax in Spain. As a result of a debt owed by him in Finland, there is an attachment order on his pension. Under the applicable Finnish legislation, the amount attached is calculated so as to leave him a minimum income, but in that calculation no account is taken of his Spanish income tax. Since Finnish income tax, had it been due and deducted at source, would have been taken into account, the Korkein oikeus (Finnish Supreme Court) wishes to know whether the difference of treatment is precluded by Community law, in particular in the light of the Treaty provisions on citizenship of the Union.

Treaty provisions

2. Articles 17 and 18 EC provide:

'Article 17

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.

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

Article 18

1. 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.

...'

1 — Original language: English.

National provisions

3. Under the Ulosottolaki (Law on enforcement), a debtor's income may be attached following a court decision imposing an obligation to pay. The law endeavours however to guarantee a minimum subsistence level. The relevant provisions are to be found essentially in Paragraphs 6, 6a, 6b and 7 of Part 4 of the Ulosottolaki.

4. Where wage or pension income paid in Finland is attached for debt, there is a 'protected part', which is a fixed amount defined from time to time by decree as sufficient for subsistence,[2] and a 'part excluded from attachment', a varying amount calculated proportionally in relation to both the total income and the protected part but always greater than the latter. As its name suggests, the part excluded from attachment remains at the debtor's disposal. It is calculated after compulsory deduction of tax at source.

5. In addition, where the debtor's ability to pay is substantially reduced because of illness, unemployment or other special reason, the part excluded from attachment is to be redetermined, until further notice or for a specified period, at a higher level than would otherwise have been applicable; the attachment may also be suspended for a period in similar circumstances, once it has been in effect for a year.

6. Under the 1967 Convention between Finland and Spain for preventing double taxation, Finnish pensions of the kind in issue in the present case are taxable only in the Contracting State in which the recipient lives.

The proceedings

7. Heikki Antero Pusa is a Finnish national. In 1998 he moved from Finland to Spain, where he still lives. He receives a Finnish invalidity pension, paid into his account in Finland. He is also in debt in

2 — At the material time in the present case, the amount of that protected part was FIM 97 (about EUR 16.25) per day for a single person.

Finland, on the basis of a loan, and a claim for repayment has been upheld by a court decision.

8. Pursuant to that decision, Mr Pusa's pension was attached in 2000 for the purpose of recovering the debt. In conformity with the national provisions outlined above, the paying institution was required to withhold for payment to the creditor one third of the net amount of the pension or, if the net amount was not more than FIM 5 238 a month, three-quarters of the difference between the net amount and the protected part of FIM 97 per day.

9. In proceedings against the creditor, a banking organisation, Mr Pusa submits *inter alia* that the attachment infringes his rights under the Ulosottolaki. Because he lives in Spain, he is not liable to tax in Finland on his pension income. The pension institution therefore does not deduct tax at source. The amount which it must withhold each month for the purposes of the attachment is thus calculated on the basis of his gross — not net — pension, no account being taken of the fact that he pays 19% tax in Spain. Consequently, Mr Pusa argues, he is left each month with less disposable income than the amount guaranteed by the Ulosottolaki.

10. The Korkein oikeus, now hearing the case on appeal, takes the view that application of the Finnish provisions might conflict with the right of a citizen of the European Union, guaranteed by Article 18 EC, to move and reside freely within the territory of the Member States. Having ordered that the amount withheld from Mr Pusa's pension should be calculated until further notice to take account of the 19% tax paid in Spain, it therefore seeks a preliminary ruling by the Court on the following question:

'Does Article 18 EC or any other rule of Community law preclude national legislation under which, in an attachment carried out for the purpose of enforcing a judgment concerning a money debt, that part of the pension payable at regular intervals to the debtor which the attachment may concern is determined by deducting from the pension the income tax prepayment levied in the Member State in question, whereas the income tax which a debtor resident in another Member State is obliged to pay in his State of residence is not taken into account as a deduction, so that the attachable part is greater in the latter case in being determined on the basis of the gross and not the net amount of the pension?'

11. The Finnish Government and the Commission have both presented written observations and oral argument; the Italian Government has submitted written observations.

Assessment

12. It is quite true, as the Finnish Government points out, that national rules on the attachment of income for the recovery of debts do not as such fall within the sphere of Community law but are the responsibility of the Member States.

13. However, in exercising their powers in such matters, Member States must respect Community law, particularly when the exercise impinges on Treaty freedoms. [3]

14. Mr Pusa is a Finnish national residing in Spain. He is a citizen of the European Union who has exercised his right to move and reside within the territory of the Member States. The treatment of which he complains is inseparable from the fact that he has lived and worked, and receives a pension, in one Member State but now lives and is taxed in another.

15. His situation and the circumstances giving rise to the national court's question therefore fall clearly within the sphere of Community law and Mr Pusa may rely directly on the rights which it confers upon him, in particular those embodied in Article 18 EC. [4]

16. It might however be misleading here to assume, as the Commission appears to do, that discrimination on grounds of nationality must be established in order for Article 18 EC to apply.

17. It is true that the issue in this case can be presented in terms of discrimination on the basis of residence, and that discrimination on the basis of residence has been a

3 — See, for example, Case 186/87 *Cowan* [1989] ECR 195, paragraph 19 of the judgment; Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 17 et seq.; and, very recently, the two judgments of 2 October 2003 in Case C-12/02 *Grilli*, paragraph 40, and in Case C-148/02 *Garcia Avello*, paragraph 25, with the case-law cited there.

4 — See in particular Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27 et seq. of the judgment, and Case C-413/99 *Baumbast* [2002] ECR I-7091, paragraph 80 et seq.

recurrent theme in the Court's case-law as a form of indirect discrimination on grounds of nationality.

18. But discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article 18 to apply. In particular, it is not necessary to establish that, for example, a measure adversely affects nationals of other Member States more than those of the Member State imposing the measure.

19. The Treaty provisions on freedom of movement originally concerned workers and those exercising their freedom to provide services or their freedom of establishment. Since then, that freedom has been extended and is now conferred by Article 18 EC on all citizens of the European Union.

20. Furthermore, freedom of movement was originally guaranteed by a prohibition of discrimination on grounds of nationality but there has been a progressive extension of that freedom in the Court's case-law so that non-discriminatory restrictions are also precluded. Article 39 EC, which explicitly secures freedom of movement for workers through 'the abolition of any discrimination based on nationality', has been interpreted as precluding also certain non-discriminatory measures. [5] And the wording of Article 18 EC, for its part, is clearly not limited to a prohibition of discrimination; paragraph 1 simply sets out the right of a citizen of the Union to move and reside freely within the territory of the Member States, subject only to any limitations or conditions laid down in the Treaty or implementing measures.

21. It is also clear that freedom of movement entails more than simply the abolition of restrictions on a person's right to enter, reside in or leave a Member State. Such freedom cannot be assured unless all measures of any kind which impose an unjustified burden on those exercising it are also abolished. Whatever the context in which it may arise — including leaving or returning to the home Member State, or

5 — See for example Case C-415/93 *Bosman* [1995] ECR I-4921, at paragraphs 103 and 104 of the judgment; see also Case C-190/98 *Graf* [2000] ECR I-493, paragraph 18 and the case-law analysed by Advocate General Fennelly in his Opinion in that case.

residing or moving elsewhere within the Union — no such burden may be imposed. [6]

22. The conclusion — which is consistent with and complementary to the Court's judgments in *D'Hoop* and *Baumbast* [7] — must thus be that, subject to the limits set out in Article 18 EC itself, no unjustified burden may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence. Provided that such a burden can be shown, it is immaterial whether the burden affects nationals of other Member States more significantly than those of the State imposing it.

23. The questions to be addressed are thus whether the Finnish legislation in issue does in fact impose a burden on those exercising the right to freedom of movement and residence and whether, if so, it may none the less be justified on the ground that it is based on objective considerations and is proportionate to a legitimate aim. [8]

24. If a person receives a pension subject to an attachment order in one Member State, and the rules of that Member State mean that less will be withheld from his pension if he resides there than if he resides in another Member State, it is clear that such treatment may deter him from moving to take up such residence.

25. As the Commission has pointed out, there is nothing in the order for reference to suggest any justification for the treatment in issue. The Finnish Government however puts forward a number of considerations, based on its explanation of how the national rules operate in a case such as Mr Pusa's, arguing essentially that if any difference of treatment exists — and that on one view there is none — it is objectively justified.

26. It explains, first, that tax paid abroad may be taken into account, upon proof of

6 — The right in Article 18(1) could not be fully effective if a citizen could be deterred from exercising it by the prospect of obstacles raised on his return (*D'Hoop*, cited in note 4, paragraphs 30 and 31 of the judgment; Case C-224/01 *Köbler*, judgment of 30 September 2003, paragraph 74). In the context of Article 39 EC, provisions which deter a national from leaving his Member State to exercise his right to freedom of movement constitute an obstacle to that freedom (Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 77 et seq. and the case-law cited there; Case C-232/01 *Van Lent*, judgment of 2 October 2003, at paragraph 16).

7 — Cited in note 4.

8 — See, for example, *D'Hoop*, at paragraph 36 of the judgment.

payment,[9] by the official administering the attachment. That possibility flows from the provision in the Ulosottolaki which allows recalculation where the debtor's ability to pay is substantially reduced because of illness, unemployment or other special reason. If the terms of that provision do not refer specifically to tax paid abroad, that is because such situations were not common at the time of its enactment.[10] In practice however it is used for that purpose and a proposed amendment will clarify the point in future.

27. Thus, essentially, the system allows income tax to be taken into account in all cases — automatically wherever possible or, when that is impossible, in a way which does not impose any greater adverse effect on the debtor than is inevitable, given that impossibility.

28. At the hearing, the Finnish Government stressed the overall aim of ensuring that debts are paid as promptly as possible without placing the debtor in an intolerable financial position — in other words of safeguarding in so far as possible the interests of both the creditor and the debtor. It pointed out that any prolongation of the period of payment is detrimental to the creditor, who may himself be an individual in difficult financial circumstances.

29. It also stated that the official body which administers attachments has to deal with a vast number of cases each year — 2.7 million in 2002 — a task which requires simplicity of operation and reliability of information. The information to which that body has automatic access is however limited. It includes any income tax deducted at source, which appears on the document showing the amount of wages or pension paid, but not other taxes. The amount of such other taxes can only be taken into account on the production of proof that they have been paid; such proof must be provided by the debtor who may, however, produce it at any time in order to seek a recalculation of the part of his income which is excluded from attachment.

30. Of those considerations, it seems to me that the most important is that all tax may be taken into account upon proof of its payment. A requirement that the debtor must provide such proof where it is not automatically available seems justified,

9 — The Finnish Government also asserts that the unfavourable treatment of which Mr Pusa complains is due at least in part to the fact that, instead of providing proof of his payment of tax in Spain, he has merely submitted a declaration to that effect.

10 — Apparently 1973.

provided that the requirement does not operate in such a way as to make it impossible in practice, or excessively difficult, for debtors resident in another Member State to obtain adjustment of the attachable portion on that basis, to the same extent as if tax had been deducted at source. [11]

31. In that regard, I am not persuaded by the Commission's contention that the Finnish authorities could and should themselves obtain any relevant information from their counterparts in the other Member State. Whilst such cooperation is no doubt conceivable and would certainly be commendable, the quickest and most effective channel of communication, in the debtor's own interest, is the debtor himself, who can reasonably be required to provide proof of payment.

32. However, such a justification can be accepted only if debtors residing in another Member State who have submitted the necessary proof are in all cases ensured treatment equivalent to that of debtors residing in Finland. An entitlement to equivalent treatment must be clear from the legislation. A mere discretion on the part of the Finnish authorities is not sufficient. [12] The proposed amendment to the legislation may remove any such defect if it guarantees equivalent treatment.

33. Moreover, the national court, in its question, specifically asks about a situation in which 'that part of the pension ... which the attachment may concern is determined by deducting from the pension the income tax prepayment levied in the Member State in question, whereas the income tax which a debtor resident in another Member State is obliged to pay in his State of residence is not taken into account as a deduction, so that the attachable part is greater in the latter case ...'.

34. Clearly the way in which Finnish law operates is a matter for the national court. If the description given in its question is correct, subject merely to a discretion on the part of the national authorities to take account of income tax proved to have been paid in another Member State, then the Finnish legislation goes beyond what is required to advance the aim propounded by the Finnish Government and is therefore not objectively justified.

11 — See, in a slightly different context, the Court's case-law on the principle of effectiveness with regard to the protection of rights arising for individuals from Community law: for example, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, at paragraph 12 of the judgment.

12 — Such a situation would not provide a defence in Treaty-infringement proceedings; see, for example, Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 34 et seq. of the judgment.

Conclusion

35. I am therefore of the opinion that the Court should give the following answer to the question raised by the Korkein oikeus:

Legislation of a Member State under which the proportion of a pension which may be attached for debt is calculated after deduction of income tax when the debtor is resident in that Member State but not when he is resident in another Member State, so that the amount excluded from attachment is smaller in the latter case, creates in principle an obstacle to freedom of movement and residence, contrary to Article 18 EC.

However, a rule that any income tax not deducted at source in the first Member State will be taken into account on production of proof of payment by the debtor is objectively justified, provided that it does not operate in such a way as to make it impossible in practice, or excessively difficult, for debtors resident in another Member State to obtain adjustment of the attachable portion on that basis, to the same extent as if the tax had been deducted at source.