

JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2004 \*

In Case C-224/02,

REFERENCE to the Court under Article 234 EC by the Korkein oikeus (Finland) for a preliminary ruling in the proceedings pending before that court between

**Heikki Antero Pusa**

and

**Osuuspankkien Keskinäinen Vakuutusyhtiö,**

on the interpretation of Article 18 EC,

\* Language of the case: Finnish.

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THE COURT (Fifth Chamber),

composed of: P. Jann, acting as President of the Fifth Chamber, C.W.A. Timmermans, A. Rosas, A. La Pergola (Rapporteur) and S. von Bahr, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar

after considering the written observations submitted on behalf of:

- the Finnish Government, by E. Bygglin, acting as Agent,
  
- the Italian Government, by I.M. Braguglia, acting as Agent, and A. Cingolo, avvocato dello Stato,
  
- the Commission of the European Communities, by C. O'Reilly and P. Aalto, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finnish Government, represented by T. Pynnä, acting as Agent, and of the Commission, represented by C. O'Reilly and P. Aalto, at the hearing on 25 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2003,

gives the following

### Judgment

- 1 By decision of 14 June 2002, received at the Court on 17 June 2002, the Korkein oikeus (Finnish Supreme Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 18 EC.
- 2 That question was raised in proceedings between Mr Pusa and Osuuspankkien Keskinäinen Vakuutusyhtiö (mutual association of cooperative banks) as regards calculation of the amount in which the latter is to be authorised to carry out an attachment on the pension which Mr Pusa receives in Finland.

### Legal framework

#### *Community legislation*

- 3 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.’

4 Under the first paragraph of Article 12 EC:

‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

### *National legislation*

5 Under the Ulosottolaki (Finnish Law on enforcement), a debtor’s assets, including wage or pension income which he receives at regular intervals, may be attached in order to meet his obligations.

6 However, the Law on enforcement provides that a part of the remuneration is excluded from attachment. Since this is a function, inter alia, of the interested party’s total income, the amount constituting the part excluded from attachment is variable.

7 Part 4 of the Law on enforcement provides, in Paragraph 6, third subparagraph:

‘If remuneration paid at fixed intervals is attached, there shall however always be excluded from attachment at least as much as the debtor is regarded, as defined by regulation, as requiring until the following payment date for his own subsistence and that of his spouse and his and his spouse’s children and adoptive children dependent on him [“the protected part”].’

8 The second subparagraph of Paragraph 6b of Part 4 states that the part of remuneration excluded from attachment ‘shall be calculated from the amount which remains after compulsory deduction of the income tax prepayment’.

9 Paragraph 6a, first subparagraph, of Part 4 states:

‘Where the debtor’s ability to pay is substantially reduced because of illness, unemployment or other special reason, the part of remuneration excluded from attachment may be determined, until further notice or with respect to the wage instalments due for a specified period, at a higher level than the exclusion from attachment under the provisions of Paragraph 6. The basis of that determination shall be set out in the attachment document or in a document drawn up under a special procedure for the purpose of making such a determination. ...’

10 Paragraph 7 of Part 4 of the Law on enforcement states that the provisions relating to remuneration are to apply to pensions.

11 In addition, the Kingdom of Spain and the Republic of Finland on 15 November 1967 entered into an agreement intended to prevent double taxation of income and property (hereinafter ‘the double taxation Convention’). Article 18 of the Convention states:

‘... pensions and other similar benefits resulting from past employment are taxable only in the Contracting State in which the recipient of the benefit lives.’

## Main proceedings and the question referred for a preliminary ruling

- 12 Mr Pusa is a Finnish national. Upon retirement, he left his country of origin and settled in Spain. He receives an invalidity pension in Finland, paid into a bank account in that Member State.
- 13 By decision of 27 October 2000, the official responsible for enforcement at the Riihimäen kihlakunnanoikeus (Court of First Instance of Riihimäki) (Finland) authorised an attachment on Mr Pusa's pension for the purpose of recovering a debt incurred by Mr Pusa *vis-à-vis* Osuuspankkien Keskinäinen Vakuutusyhtiö.
- 14 Since Mr Pusa is subject to income tax in Spain, in accordance with the provisions of the double taxation Convention, and is therefore not subject to any deduction at source in Finland, the part of his pension subject to attachment was calculated on the basis of his gross pension. Pursuant to the provisions of the Law on enforcement, the institution paying the pension was therefore required to withhold, for the purposes of repaying Mr Pusa's creditor, a sum equivalent to one third of the net amount of his pension or, if that net amount did not exceed FIM 5 238 a month, three-quarters of the difference between the net amount and the protected part of FIM 97 per day.
- 15 Mr Pusa brought an action against that decision. The Korkein oikeus found that if the 19% tax which Mr Pusa must pay *a posteriori* in Spain is not taken into account in determining the attachable part of his pension he will be left with only a monthly disposable sum less than that which he would have received had he

continued to reside in Finland. The national court was unsure whether such a situation is compatible with the freedom of movement and residence guaranteed to citizens of the European Union by the EC Treaty, and decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘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?’

### Question referred for a preliminary ruling

- 16 As may be seen from the Court’s case-law, Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-224/98 *D’Hoop* [2002] ECR I-6191, paragraph 28, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraphs 22 and 23).

- 17 The situations falling within the scope 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 EC (see, inter alia, as cited above, *Grzelczyk*, paragraph 33; *D'Hoop*, paragraph 29, and *Garcia Avello*, paragraph 24).
- 18 In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement (*D'Hoop*, paragraph 30).
- 19 Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them (see, by analogy, *D'Hoop*, paragraph 31).
- 20 National legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move (*D'Hoop*, paragraphs 34 and 35). Such legislation could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (*D'Hoop*, paragraph 36).

- 21 It is therefore necessary to establish whether, in a situation such as that in the main proceedings, the Law on enforcement introduces, as between Finnish nationals who continue to reside in Finland and those who have established their residence in Spain, a difference of treatment which places the latter at a disadvantage simply because they have exercised their right to move freely and whether, if proved, such a difference of treatment can, where appropriate, be justified in the light of the criteria noted in paragraph 20 of this judgment.
- 22 In order to reply to that question, it is first necessary to state that while, as the Finnish Government points out, enforcement for the recovery of debts falls as a rule within the competence of the Member States, it is none the less the case that that competence must be exercised in compliance with Community law and, in particular, the Treaty provisions on freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (see, by analogy, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33, and *Garcia Avello*, paragraph 25).
- 23 In the present case, the parties agree, as the referring court observed, that for the purposes of determining the attachable part of a pension paid at regular intervals in Finland, the Law on enforcement expressly provides for the deduction of the income tax prepayment levied in Finland but not of the tax that the holder of the pension will have to pay subsequently on that pension in the Member State where he resides.
- 24 In that regard, it must first be pointed out that the fact that the Law on enforcement does not provide that a tax to be collected subsequently on a pension paid at regular intervals must be deducted from that pension for the purposes of determining the attachable portion thereof cannot in itself give rise to a difference of treatment contrary to Community law.

- 25 As is clear from the order for reference and the written observations submitted to the Court by the Finnish Government, by providing that regular pension payments may be attached, but only up to a certain amount, the Law on enforcement seeks both to allow creditors to exercise their right to recover the sums due to them and to ensure that attachment does not deprive the debtor of a minimum income and, where appropriate, of the sum sufficient for subsistence which the protected part is deemed to represent.
- 26 Such objectives, which seek to allow the debtor to shield a limited part of his monthly income from his creditors' right of recovery, to an extent which guarantees him a minimum income, appear to justify, as the Finnish Government submits, the attachable part of a pension being determined solely in the light of the amount which would in fact be paid to the interested party in the absence of attachment, that is to say, by excluding from that amount in particular the income tax prepayment.
- 27 For the same reason, the Finnish legislature cannot be criticised in principle for failing to provide, in the Law on enforcement, for a fiscal debt to be taken into account in advance where that debt, since it is not yet due, does not currently threaten the enjoyment of the minimum income which that law seeks to guarantee to the debtor concerned.
- 28 As the Finnish Government rightly points out, if that were not the case the result would be an improper interference with the rights of creditors, whose protection the Law on enforcement also legitimately seeks to guarantee.

29 Secondly, however, the Law on enforcement cannot, without infringing Community law, preclude all consideration of the tax payable in the Member State of residence when such a tax has in fact become payable and thus to that extent affects the actual means available to the debtor and, in particular, his ability to meet his basic needs.

30 As the national court found, if that tax is not taken into account in the case of Mr Pusa, who lives in Spain and is there subject to tax on his pension pursuant to the double taxation Convention, he will have at his disposal for the fiscal year in question, following attachment and collection of tax on his pension, an amount less than that which he would have had had he continued to reside in Finland.

31 Accordingly, if the Law on enforcement must be interpreted to mean that it does not in any way allow the tax thus paid by Mr Pusa in Spain to be taken into account, that difference of treatment will certainly and inevitably result in Mr Pusa being placed at a disadvantage by virtue of exercising his right to move and reside freely in the Member States, as guaranteed under Article 18 EC.

32 By transferring his residence to Spain, the interested party would automatically, by the very application of the Law on Enforcement to which he remains subject in the event that his Finnish pension is attached and in the light of the double taxation Convention, lose the advantage which for him is represented by the tax which he pays on that pension being taken into account for the purposes of determining what part of his pension may be attached, since the criterion used by the Law for authorising tax to be taken into account is the withholding of tax at source, which for the interested party would require precisely that he not transfer his residence to Spain (see, by analogy, *Elsen*, cited above, paragraph 34).

- 33 Moreover, the difference of treatment resulting from such an exclusion cannot be justified.
- 34 To preclude all consideration of the tax payable in the Member State of residence when such tax has become payable and to that extent affects the actual means available to the debtor, in particular his ability to meet his basic needs, cannot be justified in the light of the legitimate objectives pursued by the Law on enforcement, as set out in paragraph 25 of this judgment, since such an exclusion would run counter even to the objective of guaranteeing the debtor a minimum income, and even the sum sufficient for subsistence corresponding to the protected part.
- 35 Accordingly, Community law in principle precludes legislation of a Member State under which the attachable part of a pension paid at regular intervals in that State to a debtor is calculated by deducting from that pension the income tax prepayment levied in that State, while the tax which the holder of such a pension must pay on it subsequently in the Member State where he resides is not taken into account at all for the purposes of calculating the attachable portion of that pension, the consequence of such a difference of treatment being that the annual income after taxation of the pension, which in fact remains freely at the disposal of the debtor, is less in the second case.
- 36 Thirdly, however, it must be pointed out that in its observations before the Court the Finnish Government claimed that the Law on enforcement, and in particular Paragraph 6a, first subparagraph, of Part 4 thereof, is in practice interpreted to mean that its provisions make it possible, when assessing on a case-by-case basis a debtor's ability to pay, to take into account a tax payable in another Member State, to the extent that the debtor presents a declaration substantiated by proof which establishes the actual amount of that tax and the other circumstances which affect his ability to pay. According to that Government, the Law similarly allows such a debtor subject to attachment to enjoy, after one year, periods during which

the attachment may be suspended wholly or in part in order to take into account the tax in fact paid in another Member State. Mr Pusa did not, however, make use of the opportunities thus available under the Law on enforcement.

- 37 It should be recalled in this regard that it is not for the Court to rule on the interpretation of provisions of national law and that it must generally take account, under the division of jurisdiction between the Community courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set (Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10).
- 38 It follows that it is for the national court alone to ascertain whether the interpretation of the Law on enforcement put forward by the Finnish Government before the Court is well founded.
- 39 Nevertheless, inasmuch as the order for reference in this case itself refers to the Law on enforcement, in particular to Paragraph 6a, first subparagraph, of Part 4 thereof, and since that order does not contain any information which could impugn the Finnish Government's interpretation, it is appropriate for the Court to consider whether Article 18 EC precludes national legislation which could be interpreted in that way.
- 40 First, as is apparent from paragraphs 24 to 28 of this judgment, the legitimate objectives pursued by the Law on enforcement are such as to justify, for the purposes of determining the attachable portion of a pension, the Law providing for taking into account the tax payable on that pension in the Member State where the debtor subject to attachment resides only if the exact amount of that tax is known and if it is proved that that amount was in fact paid or is to be paid within a given period.

- 41 On the other hand, where those requirements are satisfied Community law requires, as the Advocate General stated in paragraph 30 of his Opinion, that the detailed rules for taking that tax into account under national legislation be such as to allow a debtor resident in Spain to obtain an annual adjustment of the attachable portion of his pension to the same extent as if such a tax had been deducted at source in Finland.
- 42 It must also be held that a condition under which the debtor is required to prove that he has paid or must pay within a given period in his State of residence a specified amount as tax on his pension does not appear disproportionate in relation to the legitimate objective of seeking to ensure that tax is taken into account for the purposes of determining whether all or part of that pension must be excluded from attachment only once that tax is in fact payable or paid.
- 43 The fact remains, as the Finnish Government has rightly stated and as the Advocate General pointed out in paragraphs 30 and 31 of his Opinion, that it is the debtor who is generally best placed to provide such proof both quickly and effectively.
- 44 It must be made clear, however, that this is true only in so far as the national rules on the taking of evidence do not make it impossible in practice or excessively difficult to exercise the right to have proper account taken of the tax in question (see, by analogy, C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 80).
- 45 Finally, it must be added that inasmuch as the Law on enforcement expressly provides for the attachable part of the pension to be calculated on the basis of the net pension, that is to say, after prepayment of the tax owed by the pensioner in Finland, the opportunity for the debtor subject to attachment to obtain, in the form of an adjustment of the attachable part of his pension, the taking into

account of the tax which he is required to pay in Spain cannot, as rightly suggested by the Commission, depend on an assessment left to the discretion of the authority competent to authorise attachments. As the Advocate General points out in paragraph 32 of his Opinion, such an entitlement must, on the contrary, be clear from the national legislation in question.

46 In this regard, the Finnish Government stated at the hearing that the Law on enforcement is being reviewed and that the revised version is, precisely, to contain a specific provision requiring that taxes be taken into account where they are paid, by a person liable for payment, subsequent to attachment of a part of his income.

47 It is for the national court to determine whether the Law on enforcement includes provisions which satisfy the various conditions set out in paragraphs 40 to 45 of this judgment.

48 In the light of all the foregoing, the answer to the question referred must be that:

— Community law in principle precludes legislation of a Member State under which the attachable part of a pension paid at regular intervals in that State to a debtor is calculated by deducting from that pension the income tax prepayment levied in that State, while the tax which the holder of such a pension must pay on it subsequently in the Member State where he resides is not taken into account at all for the purposes of calculating the attachable portion of that pension;

— on the other hand, Community law does not preclude such national legislation if it provides for tax to be taken into account, where taking the tax into account is made subject to the condition that the debtor prove that he

has in fact paid or is required to pay within a given period a specified amount as income tax in the Member State where he resides. However, that is only the case to the extent that, first, the right of the debtor concerned to have tax taken into account is clear from that legislation; secondly, the detailed rules for taking tax into account are such as to guarantee to the interested party the right to obtain an annual adjustment of the attachable portion of his pension to the same extent as if such a tax had been deducted at source in the Member State which enacted that legislation; and, thirdly, those detailed rules do not have the effect of making it impossible or excessively difficult to exercise that right.

## Costs

- <sup>49</sup> The costs incurred by the Finnish and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Korkein oikeus by decision of 14 June 2002, hereby rules:

1. Community law in principle precludes legislation of a Member State under which the attachable part of a pension paid at regular intervals in that State to a debtor is calculated by deducting from that pension the income tax prepayment levied in that State, while the tax which the holder of such a pension must pay on it subsequently in the Member State where he resides is not taken into account at all for the purposes of calculating the attachable portion of that pension;
  
2. On the other hand, Community law does not preclude such national legislation if it provides for tax to be taken into account, where taking the tax into account is made subject to the condition that the debtor prove that he has in fact paid or is required to pay within a given period a specified amount as income tax in the Member State where he resides. However, that is only the case to the extent that, first, the right of the debtor concerned to have tax taken into account is clear from that legislation; secondly, the detailed rules for taking tax into account are such as to guarantee to the interested party the right to obtain an annual adjustment of the attachable portion of his pension to the same extent as if such a tax had been deducted at source in the Member State which enacted that legislation; and, thirdly, those detailed rules do not have the effect of making it impossible or excessively difficult to exercise that right.

Jann

Timmermans

Rosas

La Pergola

von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass

V. Skouris

Registrar

President