

OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 11 December 2003¹

1. The dispute before the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) concerns a claim which, notwithstanding its exceptional nature, is capable of giving rise to a manifest injustice because, under national legislation, the award of compensation to Austrian ex-prisoners of war is refused where such persons have since adopted a different nationality.

Applicable law

2. As concerns national law, for the purposes of the question referred for a preliminary ruling it is necessary to refer only to Paragraph 1 of the Austrian Law on Compensation for Prisoners of War (Kriegsgefangenenentschädigungsgesetz; 'the Federal Law'),² which provides:

'Austrian nationals who

1. became prisoners of war in the course of the First or Second World War; or

The referring court asks whether that condition amounts to a restriction on freedom of movement for workers within the Community. In addition, it is necessary to consider whether a measure of that nature is compatible with the prohibition of discrimination on grounds of nationality, as defined in Article 12 EC.

2 were taken into custody and detained by a foreign power for political or military reasons in the course of the Second

¹ — Original language: Spanish.

² — *Bundesgesetzblatt* I, No 142/2000, in the version published in *Bundesgesetzblatt* I, No 40/2002.

World War or during the period when Austria was occupied by the allied forces; or

The facts of the main proceedings

- 3 were outside the territory of the Republic of Austria as a result of political persecution or the threat of political persecution within the meaning of the Law on Victim Welfare (*Opferfürsorgegesetz*; *Bundesgesetzblatt* I, No 183/1947), and for the reasons referred to in subparagraph 2 above were taken into custody by a foreign power and detained after the start of the Second World War, shall be entitled to a payment in accordance with the provisions of this federal Law.'

3. As regards the Community provisions, in addition to Article 39 EC which enshrines the principle of free movement for workers within the Community, it is also important to mention Article 12 EC, the first paragraph of which provides:

'Within the scope of application of [the EC Treaty], and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

4. The order for reference states that the applicant in the main proceedings, Josef Baldinger, was born on 19 April 1927 as an Austrian national. From January to May 1945, he fought in the Second World War as a soldier in the German armed forces. He was a prisoner of war in Russia from 8 May 1945 to 27 December 1947.

5. The applicant was subsequently employed in Austria until, in 1954, he travelled to Sweden to look for work and was employed there until 1964. Afterwards, he returned to work in his country of birth for a year, and then, in April 1965, he immigrated permanently to Sweden where he pursued an occupation and, in 1967, he adopted Swedish nationality, thereby losing his Austrian nationality.

Since 1 May 1986, the applicant has been drawing invalidity benefit and an old-age pension from the Austrian social security fund.

6. When, in 2000, the Federal Law introduced compensation for ex-prisoners of war, Mr Baldinger applied for an award but the

application was refused by a decision dated 1 March 2002 from the Pensionsversicherungsanstalt der Arbeiter, the body responsible for processing the payments.

7. Mr Baldinger challenged that decision before the referring court.

The question referred for a preliminary ruling

8. The Arbeits- und Sozialgericht Wien decided to stay those proceedings and refer the following question to the Court of Justice for a preliminary ruling:

2. were taken into custody and detained by a foreign power for political or military reasons in the course of the Second World War or during the period when Austria was occupied by the allied forces; or

3. were outside the territory of the Republic of Austria as a result of political persecution or the threat of political persecution and were taken into custody, for political or military reasons, by a foreign power and detained after the start of the Second World War,

is to be conditional on such persons holding Austrian nationality at the time of application?’

Procedure before the Court of Justice

‘Is Article 48(2) of the EC Treaty (now Article 39(2) EC), on the free movement of workers, to be interpreted as precluding a national rule which provides that entitlement to financial compensation, first legislated for in the year 2000, for persons who

9. The order for reference was lodged at the Court Registry on 28 October 2002.

1. became prisoners of war in the course of the First or Second World War; or

10. Written and oral observations were presented by the Austrian Government and the Commission. The hearing was held on 13 November 2003.

Analysis of the question referred for a preliminary ruling

11. The referring court states that the financial compensation at issue in the main proceedings is not linked to the pursuit of any paid activity.

12. In addition, it is not disputed that Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community³ does not apply to the proceedings, since, under Article 4(4) thereof, benefit schemes for victims of war or its consequences are excluded from the scope of the regulation.

Under such schemes, the relevant State's responsibility for paying the benefits does not stem from circumstances that arise as a result of the exercise of the right to free movement; instead, the benefits are paid in order to compensate the victim on the basis of the particular interests of the State which makes the award.

The essential purpose of the benefit granted is to give former prisoners of war who

underwent a long period of captivity a testimony of national gratitude for the hardships endured, thus granting them a financial quid pro quo for the services rendered to the State.⁴

13. Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community⁵ does not apply either, because, in its judgment in *Even*,⁶ the Court held that it follows from all the provisions of the regulation, and from the objective pursued, that the social and tax advantages referred to are generally granted to national workers primarily because of their objective status as workers or by virtue of the fact of their residence on the national territory. On the other hand, a benefit based on a scheme of national gratitude for suffering endured during armed conflict by, for example, prisoners of war, does not correspond to the essential characteristics of the advantages set out in Article 7(2) of Regulation No 1612/68, from which it follows that it does not fall within the material scope of that measure.

14. For the same reasons, it is difficult to link the disputed benefit to any of the three aspects referred to in Article 39(2) EC,

4 — Judgment in Case 9/78 *Gillard* [1978] ECR 1661, paragraph 13.

5 — OJ, English Special Edition, 1968 (II), p. 475.

6 — Case 207/78 [1979] ECR 2019.

3 — OJ, English Special Edition, 1971 (II), p. 416.

namely employment, remuneration and other conditions of work and employment. The principle of free movement for workers does not protect against disadvantages which may be the result of causes that are different in nature.

15. It therefore follows from a literal approach that, in reply to the question referred, the Court should declare that Article 39 EC does not preclude a national rule which makes the award of compensation to former prisoners of war conditional on such persons holding the nationality of the awarding Member State at the time of application.

16. However, it is difficult to countenance such a formal interpretation, which might give rise to a manifest injustice.

At the hearing, the Austrian Government did not put forward any reasons capable of justifying the difference in treatment concerned. Although the Austrian Government claimed that it had a legitimate interest in restricting the benefits in question to persons who have retained their links with Austria, it did broadly acknowledge that the anomaly was probably the result of an oversight on the part of the legislature.

17. It appears that it would be possible to avoid the discrimination at issue in these proceedings by interpreting the Federal law in the light of the objective it pursues. I have no wish to encroach upon the competence of the national court to interpret Austrian law, but it is clear that there is nothing in the wording of the provision to suggest that persons who were Austrian nationals at the relevant time, that is while they were held captive, should be excluded from receiving compensation.

Conversely, the formal interpretation of the provision preferred by the national court would lead to the Austrian Government compensating all persons who were prisoners of war during the First or Second World War, irrespective of their nationality, with the sole proviso that they must have been Austrian nationals at the time they completed the application.

18. At the hearing, the Austrian Government's representative stated that the aim pursued by the Federal Law is to compensate prisoners of war for hardships endured while they were in captivity. In justification of a restrictive interpretation of the provision, the Austrian Government's representative went on to state that such an approach was necessary because, during the period in question — in other words, during the German annexation — Austrian nationality did not exist as such, so that legislative texts tend to use an indirect term to describe Austrian nationals during that period, but

such an expression does not appear in the Federal Law.

19. It is therefore appropriate to consider whether, owing to the manifest injustice to which all those circumstances would give rise, the Court may approach the question in terms different to those used by the national court. It would be appropriate to heed the maxim of the 17th century Spanish writer Baltasar Gracián, who appealed to 'good heart in the face of fickle fortune, good nature in the face of harsh laws, good art in the face of imperfection, and good sense in all things'.⁷

20. As the Commission rightly points out, it is possible to counter such discrimination under Article 12 EC.

That provision, however, prohibits any discrimination on grounds of nationality, without prejudice to any applicable special provisions, *provided that it arises within the scope of application of the Treaty*.

21. The Commission cites the series of judgments concerning the incompatibility of the principle of *cautio judicatum solvi* (the requirement that a sum of money must be deposited as security for the costs of proceedings) with Community law.⁸ The Commission asserts that, in those judgments, the Court gave a broad interpretation of the material scope of the Treaty so as to include any action in the main proceedings which was concerned with the exercise of fundamental freedoms guaranteed by Community law.

22. I regret that I am unable to agree in full with the Commission's well-intentioned approach. The *Data Delecta* and *Hayes* cases concerned claims for sums of money in respect of payment for goods delivered in a typical cross-border transaction, from which it was simple to conclude that the dispute over the nature of the procedural measure in question was covered by the legal principle of the exercise of free movement of goods.

In *Saldanha*, the plaintiffs in the main proceedings sought an injunction from the national court to restrain a restructuring of the capital of the defendant company, in which they held shares. The Court recalled that, among the measures designed to give effect to the freedom of establishment, Article 54(3)(g) of the EC Treaty (now Article 44(2)(g)) empowers the Council and

7 — Gracián, B., *El Criticón*, Turner, Biblioteca Castro, Madrid, 1993, first part, chapter 8, p. 106.

8 — Judgments in Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661; Case C-323/95 *Hayes* [1997] ECR I-1711; and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325 ('*Data Delecta*', '*Hayes*' and '*Saldanha*').

the Commission to coordinate the safeguards which are required by Member States of companies or firms and which seek to protect the interests of shareholders and third parties. The disputed procedural requirement therefore came within one of the areas covered by the Treaty and was for that reason subject to the prohibition of discrimination based on nationality.

within the territory of the Member States, subject to the limitations and conditions arising from the Treaty and its implementing measures.

23. That case-law cannot be applied to the case before the Court, because, as has already been pointed out, compensation awarded to ex-prisoners of war is not one of the benefits included in the technical definition of freedom of movement for workers. Furthermore, the matters covered by that definition are more limited than those covered by the definition of free movement of goods, from which it follows that it cannot be said to preclude any measure which is capable, actually or potentially, of having a negative effect on the flow of movement within the Community.

24. It is therefore necessary to ascertain whether Mr Baldinger may claim any independent right by virtue of the fact that he is a citizen of the Union for the purposes of Articles 17 and 18 EC.

When citizenship of the Union, an initiative which has been described as highly symbolic,⁹ was established by the Treaty of Maastricht, the desire to endow the construction of the European Union with real political ambition became evident, and aroused a feeling of belonging to a community with shared values and ideals. Robert Kovar has recalled that, at the dawn of European integration, Jean Monnet admitted that it was not a question of creating a coalition between States but rather of promoting union among human beings.¹⁰

25. I have pointed out on a previous occasion that the creation of citizenship of the Union, with the corollary of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the

9 — Kovar, R. and Simon, D., 'La citoyenneté européenne', *Cahiers de droit européen*, 1993, p. 290.

10 — Kovar, R., 'L'émergence et l'affirmation du concept de citoyenneté européenne dans le processus d'intégration européenne', *La citoyenneté européenne*, edited by Philip, Ch. and Soldatos, P., Jean Monnet Chair of the University of Montreal, Montreal, 2000, p. 81.

Article 18(1) EC accords to every citizen of the Union the right to move and reside freely

internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.¹¹ Evidence of that qualitative development lies in the fact that freedom of movement and of residence, as an independent right, has been enshrined in Article 45(1) of the Charter of Fundamental Rights of the European Union.

26. So far, there is scant case-law on the question of Union citizenship, which is destined to be the fundamental status of nationals of the Member States.¹²

However, the judgments in *D'Hoop*¹³ and *Baumbast*¹⁴ confirm that the limitations and conditions which are referred to in Article 18 EC are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. However, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that

subject must be necessary and appropriate to attain the objective pursued.¹⁵

27. The *D'Hoop* case concerned tideover allowances granted in Belgium to young people who had completed their studies and were seeking their first employment. The Belgian national concerned had been refused the allowances on the ground that she had undertaken her secondary education in another Member State.

The Court held that such discrimination, which did not affect either freedom of movement for workers, as defined in Article 39 EC, or any of the traditional areas covered by the Treaty, was, notwithstanding, 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 right to reside within the territory of the Member States.¹⁶

The Court began its analysis of whether the measure itself was proportionate in nature by acknowledging that it was legitimate for the

11 — Opinion in Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1996] ECR I-3343, paragraph 34.

12 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

13 — Case C-224/98 [2002] ECR I-6191.

14 — Case C-413/99 [2002] ECR I-7091.

15 — *Baumbast*, paragraphs 90 and 91.

16 — *D'Hoop*, paragraph 35.

national legislature to wish to ensure that there is a real link between the applicant and the geographic employment market concerned, but concluded that a single condition concerning the place where the diploma of completion of secondary education was obtained was too general and exclusive in nature and went beyond what was necessary to attain the objective pursued.¹⁷

28. In *Baumbast*, the Court was required to assess the right of residence in the United Kingdom of a German national who was no longer entitled to rely on the provisions governing the free movement of workers.

The Court decided that it would amount to a disproportionate interference with the exercise of the right of residence conferred by Article 18(1) EC to refuse to allow a Community citizen to remain in the host Member State when that person had sufficient resources, had worked and resided lawfully in the Member State concerned for several years, accompanied by his family, had at no time been a burden on public finances, and had taken out comprehensive sickness insurance for himself and for his family in another Member State of the Union.¹⁸

29. It is apparent from those two cases that the Court is moving down the route of conferring on citizens of the Union an independent right of residence, examining in each case whether the restriction of that right is justified.

30. More recently, in *García Avello*,¹⁹ a similar test was applied in relation to a provision of Belgian civil law pursuant to which the children of a Spaniard, who both held dual Belgian and Spanish nationality, were precluded from being registered in accordance with Spanish practice, that is, by combining the first surname of the father with that of the mother.

In my opinion, the approach adopted by the Court in that ruling may be used as a guide in this case.

31. It seems clear that arrangements for passing on a person's patronymic surname are not governed by Community law and are instead within the competence of the Member States. However, when exercising that competence the Member States are required to comply with the Treaty provisions, in particular those concerning the freedom of

17 — *Ibid.*, paragraphs 38 and 39.

18 — *Baumbast*, paragraphs 92 and 93.

19 — Case C-148/02 [2003] ECR I-11613.

every citizen of the Union to reside in the territory of any of the Member States.²⁰

32. In *García Avello*, a link with Community law existed in the main proceedings, in that the children of the applicant were nationals of one Member State lawfully resident in the territory of another Member State. Accordingly, the children of the applicant could legitimately invoke Article 12 EC which prohibits any discrimination on grounds of nationality.²¹

33. The Court then turned to the traditional definition of inequality of treatment, going on to examine whether, in the case before it, discrimination was justified on the basis of objective considerations which were proportionate to the objective being legitimately pursued.²²

34. To my mind, that approach is applicable *mutatis mutandis* to the present dispute.

35. Irrespective of the fact that they are not linked to Community law, the rules governing the award of compensation laid down in the Federal Law must conform to the fundamental principles of Community law, in the same way as the rules governing people's surnames were required to do so in *García Avello*.

36. Mr Baldinger is a Swedish national, from which it irrefutably follows that he has the status of citizen of the Union. However, that status does not extend the scope *ratione materiae* of the Treaty to internal situations which have no link with Community law.²³

37. The applicant in the main proceedings exercised the right to settle abroad long before the accession of Austria and Sweden to the European Communities. Moreover, at that time, that is, on 1 January 1995, it would no longer have been possible to regard Mr Baldinger as a migrant, strictly-speaking, because he had adopted the nationality of the host Member State.

38. However, that circumstance is not decisive in the case before the Court, where the

20 — *Ibid.*, paragraph 25.

21 — *Ibid.*, paragraphs 27 and 29.

22 — *Ibid.*, paragraph 31.

23 — Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23.

cross-border element consists of the fact that a person who used to hold the nationality of one Member State now resides in another Member State. For that reason, his situation cannot be equated with that of nationals of his host Member State who have always retained the same nationality. In fact, as these proceedings demonstrate, despite the passage of time, his former bond of nationality may still determine his entitlement to certain rights. Clearly, it is not a purely internal matter.

similar position to any other person who exercises the right to freedom of movement and is, therefore, entitled to protection.

40. Accordingly, it is my view that a situation such as that of the applicant in the main proceedings falls within the scope of Community law.

39. Mr Baldinger's claim deserves the appropriate protection. It is not possible for Community law, insofar as it is an instrument in a project of integration, to treat Mr Baldinger less favourably merely because he chose to take the nationality of the country in which he had decided to reside permanently. The limited and conditional nature of the manner in which nationals and Community migrants are placed on an equal footing under the Treaty²⁴ justifies the decision to take the nationality of the host Member State in the event of a lengthy stay.

As a result, Mr Baldinger is entitled — under Article 18 EC, in conjunction with Article 12 EC — to move and reside freely within the territory of the Member States without fear of suffering unjustified discrimination on account of his nationality.

In view of the fact that the legal position of the applicant is not exactly equivalent to that of nationals of the host Member State, the applicant is — in material terms — in a

41. For its part, the principle of non-discrimination requires that similar situations should not be treated differently and that different situations should not be treated in the same way. Such inequality could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the aim legitimately pursued.²⁵

24 — See, for example, the wording and subject-matter of Article 39(3) EC and Article 55 EC.

25 — *D'Hoop*, paragraph 36.

42. It states in the order for reference that Mr Baldinger fulfils all the material requirements necessary for the award of the disputed compensation, *with the exception of the requirement that a person must hold Austrian nationality at the time of the application*. In order to ascertain whether there is discrimination, it is appropriate to consider the situations of two people who fulfil those requirements where one holds Austrian nationality but the other no longer does so because he lost Austrian citizenship when he acquired a new nationality. The former is awarded compensation whereas the latter is refused it.

43. The order for reference contains no indication as to why such inequality of treatment may be justified; nor does it clarify the aim pursued by the award of compensation.

44. As I mentioned earlier, at the hearing the representative of the Austrian Government observed that it was lawful to restrict compensation to persons who had retained links with their country of origin, although he did acknowledge that the discrimination involved was probably the result of an oversight on the part of the legislature.

45. It may be assumed that the award of financial compensation to persons who were prisoners of war is intended to provide testimony of gratitude for the hardships they endured. In any event, that must be the case, since, according to the case-law of the Court,²⁶ that category of benefits is not covered by the principles governing the free movement of workers within the Community.

It is in the light of that specific aim that the question whether the nationality condition is appropriate and proportionate must be assessed. It is beyond doubt that the restriction to former prisoners of war who still hold Austrian nationality of the grant of a benefit which is designed to express national homage is not an objective consideration *independent of nationality*, as required under Article 12 EC. The restrictive provision of the Federal Law produces the very outcome which the prohibition of discrimination on grounds of nationality seeks to avoid.

For the purposes of the gratitude they deserve, there is no distinction whatsoever between persons who were prisoners of war based on the fact that some of them retained their nationality while others, like the applicant in the main proceedings, settled in another country and chose to adopt

26 — See points 12 and 13 above.

another nationality. On the contrary, to exclude those who are no longer Austrian nationals, without any other reasonable justification, may be regarded as an affront to the dignity of people who are in the same position as Mr Baldinger.

not appropriate, there is no need to assess whether it is proportionate.

46. In view of the fact that the possible justification for the inequality of treatment is

47. Although citizenship of the Union is not of itself capable of conferring the full range of rights which are traditionally attached to membership of a political community, it must at least guarantee that it is possible to change nationality within the European Union without suffering any legal disadvantage.

Conclusion

48. In the light of the foregoing considerations, I propose that, in reply to the Arbeits- und Sozialgericht Wien, the Court of Justice should declare that Articles 12 and 17 EC preclude a provision of a Member State which provides that the award of compensation to former prisoners of war in recognition of the hardships they endured is conditional upon such persons holding the nationality of that Member State at the time the application is submitted.