Case C-520/04

Proceedings brought by

Pirkko Marjatta Turpeinen

(Reference for a preliminary ruling from the Korkein hallinto-oikeus)

(Freedom of movement for persons – Income tax – Retirement pension – Higher rate of tax for retired persons residing in another Member State)

Summary of the Judgment

1. *Freedom of movement for persons – Workers – Provisions of the Treaty – Scope ratione personae*

(Art. 39 EC)

2. *Citizens of the European Union – Right of free movement and freedom of residence in the territory of the Member States – Tax legislation*

(Art. 18 EC)

1. Persons who have carried out all their occupational activity in the Member State of which they are nationals and who have exercised the right to reside in another Member State only after their retirement, without any intention of working in that State, cannot rely on the freedom of movement guaranteed by Article 39 EC.

(see para. 16)

2. Article 18 EC must be interpreted as precluding national legislation according to which the income tax on a retirement pension paid by an institution of the Member State concerned to a person residing in another Member State exceeds in certain cases the tax which would be payable if that person resided in the first Member State, where that pension constitutes all or nearly all of that person’s income.

National legislation which places some of its nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State gives 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.

It is true that, in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable. However, in so far as the retirement pension paid in a Member State constitutes all or almost all of their income, non-resident retired persons are, objectively speaking, in the same situation as regards income tax as retired persons resident in that State who receive the same retirement pension.

(see paras 22, 26, 31, 39, operative part)

JUDGMENT OF THE COURT (First Chamber)

9 November 2006 (*)

(Freedom of movement for persons – Income tax – Retirement pension – Higher rate of tax for retired persons residing in another Member State)

In Case C-520/04,

REFERENCE for a preliminary ruling under Article 234 EC by the Korkein hallinto-oikeus (Finland), made by decision of 20 December 2004, received at the Court on 22 December 2004, in the proceedings brought by

Pirkko Marjatta Turpeinen,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues, M. Ileši? and E. Levits, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 9 March 2006,

after considering the observations submitted on behalf of:

– Ms Turpeinen, by K. Äimä, oikeustieteen lisensiaatti,

– the Finnish Government, by T. Pynnä and E. Bygglin, acting as Agents,

– the Spanish Government, by I. del Cuvillo Contreras and M. Muñoz Pérez, acting as Agents,

– the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Commission of the European Communities, by M. Condou, G. Rozet and P. Aalto, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 18 EC and 39 EC and of Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

2 The reference was made in the course of proceedings brought by Ms Turpeinen, a retired Finnish national, residing in Spain at the time relevant for the purposes of the main proceedings, concerning taxation in Finland of the retirement pension paid to her by a Finnish institution.

The main proceedings and the legal background

3 Until 1998 Ms Turpeinen was domiciled in Finland and worked as a youth psychiatrist in the Finnish public service. In 1998 she took early retirement and moved to Belgium. In 1999, when she took her final retirement, she settled permanently in Spain.

4 Ms Turpeinen's only income is a retirement pension paid to her by the Kuntien Eläkevakuutus (Local government pension insurance). By virtue of the double taxation agreement concluded between the Republic of Finland and the Kingdom of Spain, the retirement pension, paid on the basis of employment in the public sector, is taxable only in Finland.

5 Until 2001, Ms Turpeinen was subject to the tax regime for fully chargeable residents, a regime which covers all of the taxable person's worldwide income. It provides for progressive taxation, according to which a tax rate of 28.5% was applicable to the income constituted by Ms Turpeinen's retirement pension.

6 In 2002, the tax year relevant for the purposes of the main proceedings, the Uudenmaan verovirasto (Uusimaa Tax Office) informed Ms Turpeinen that thenceforth she was to be subject to the limited taxation regime, which covers only income from Finland and applies to Finnish nationals who have not been domiciled in Finland for three years consecutively, in accordance with Articles 9 and 11 of the Finnish Law on income tax (Tuloverolaki, Law No 1535/1992). Under that regime Ms Turpeinen's retirement pension was subject to a withholding tax of 35% by virtue of Paragraphs 1(1), 2(1), 3(1) and 7 of the Finnish Law on the taxation of income and property of limited taxpayers (Lähdeverolaki, Law No 627/1978).

7 Taking the view that she should be taxed as if she were generally taxable in Finland, that is to say progressively, Ms Turpeinen lodged a complaint against the decision of the Uusimaa Tax Office. She argued that within the European Union the treatment of an individual, where the author of the treatment is the same and all other factors except the place of residence remain unchanged, should remain the same. Since her complaint was unsuccessful, she brought an action to challenge that decision before the Helsingin hallinto-oikeus (Adminstrative Court, Helsinki).

8 When the latter dismissed her action, she appealed against that decision to the court which made the reference for a preliminary ruling.

The questions referred for a preliminary ruling

9 The Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 18 EC, on the right of a citizen of the Union to move and reside freely in the territory of the Member States, or Article 39 EC, on ensuring the freedom of movement for workers within the Community, to be interpreted as meaning that one or both of them preclude(s) national legislation under which, in the case of a person who resides abroad and is a limited taxpayer in the Member State, the withholding tax charged on the taxpayer's retirement pension based on a public-

law service relationship paid from that Member State exceeds in certain cases the tax which the taxpayer would be charged as a person resident and hence a general taxpayer in the Member State?

2. Is Council Directive [90/365] to be interpreted as precluding national legislation such as that described in Question 1 above?'

The questions referred for a preliminary ruling

10 By its questions the national court asks, essentially, whether Articles 18 and 39 EC and Directive 90/365 preclude national legislation, such as that at issue in the main proceedings, according to which the tax on a retirement pension paid in the Member State concerned to a person residing in another Member State exceeds, in certain cases, the tax which would be charged if that person resided in the first Member State.

11 It should be recalled from the outset that, while in the present state of Community law direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence in accordance with Community law, in particular the provisions of the EC Treaty concerning the right of every citizen of the European Union to move and reside freely within the territory of the Member States (Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 19 and the case-law cited).

12 In those circumstances it is appropriate to verify, first of all, whether Articles 18 EC and 39 EC preclude national legislation such as that at issue in the main proceedings.

Articles 18 EC and 39 EC

13 Article 18 EC, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC in relation to freedom of movement for workers (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26). It is therefore necessary to ascertain first whether the main case falls within the scope of Article 39 EC.

14 The Court has held on many occasions that the provisions of the EC Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 37; Case C-302/98 *Sehrer* [2000] ECR I-4585, paragraph 32; and Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 25).

15 National provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (*Terhoeve*, paragraph 39; *Sehrer*, paragraph 33; and *Kranemann*, paragraph 26).

16 However, as the Advocate General observed in point 60 of his Opinion, persons who have carried out all their occupational activity in the Member State of which they are nationals and who have exercised the right to reside in another Member State only after their retirement, without any intention of working in that State, cannot rely on the freedom of movement guaranteed by Article 39 EC. It appears that that is Ms Turpeinen's situation, having regard to the facts in the main proceedings as set out in the order for reference.

17 Since the main case is not covered by Article 39 EC, it is appropriate to rule on the applicability of Article 18 EC.

18 According to settled case-law, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16).

19 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, in particular, *Grzelczyk*, paragraph 33, and *Pusa*, paragraph 17).

20 Inasmuch as a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen to receive in the Member State of which he is a national 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 (see Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 30, and *Pusa*, paragraph 18).

21 Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of his stay in the host Member State by legislation in his State of origin penalising the fact that he has used them (*Pusa*, paragraph 19).

22 National legislation which places some of its nationals at a disadvantage 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 (*Pusa*, paragraph 20).

23 Since Ms Turpeinen has exercised her rights to freedom of movement and residence conferred by Article 18(1) EC, she may rely on that provision as against her State of origin.

24 It is common ground that the Finnish legislation at issue in the main proceedings introduces in certain cases, as between Finnish nationals who continue to reside in Finland and those who have established their residence in another Member State, a difference in treatment unfavourable to the latter, resulting simply from their having exercised their right to freedom of movement.

25 In so far as the rate of progressive taxation applicable to retired residents, based on the gross amount of the retirement pension paid by the public body in Finland, is less than the withholding tax of 35% applicable to retired non-residents, retired persons who reside for three years consecutively in another Member State and receive the same pension must bear a greater tax burden.

26 It is true that, in relation to direct taxes, the Court has accepted that the situations of residents and of non-residents are not, as a rule, comparable (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 31).

27 Thus with regard to income tax the Court has held that the situation of a resident differs from that of a non-resident in so far as the major part of the resident's income is normally concentrated in the State of residence. Moreover, that State generally has all the information needed to assess the taxpayer's overall ability to pay tax, taking account of his personal and family circumstances (*Schumacker*, paragraph 33, and Case C-376/03 *D* [2005] ECR I-5821, paragraph 27).

28 However, the Court has also accepted that a non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works is objectively in the same situation so far as concerns income tax as a resident of that State who does the same work there. Both are taxed in that State alone and their taxable income is the same (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 20).

29 That reasoning applies *mutatis mutandis* in a situation such as that in the main proceedings, where a retirement pension constitutes the taxable income.

30 As the Advocate General rightly pointed out in point 74 of his Opinion, Finnish tax legislation provides that retirement pensions such as that paid to Ms Turpeinen are, in the case of resident taxpayers, taxed in the same way as any income deriving directly from an economic activity, on a progressive scale and with allowances to take into account the taxpayer's ability to pay tax and his personal and family circumstances.

31 Consequently, it must be held that, in so far as the retirement pension paid in Finland constitutes all or almost all of their income, non-resident retired persons such as Ms Turpeinen are, objectively speaking, in the same situation as regards income tax as retired persons resident in Finland who receive the same retirement pension.

32 The difference of treatment resulting from rules such as those at issue in the main proceedings could be justified only if it were based on objective considerations proportionate to the legitimate aim of the national provisions (see, to that effect, *Pusa*, paragraph 20).

33 None of the arguments put forward by the Finnish Government before the Court in order to justify the difference of treatment at issue in the main proceedings can be accepted.

34 As the Advocate General observes in point 78 of his Opinion, the objectives of simplification and transparency of the Finnish tax system for non-resident taxpayers could be achieved by measures less restrictive of the freedom of movement of citizens of the Union than a tax which could, in certain cases, prove to be higher than that applicable to resident taxpayers who receive the same income.

35 As for the alleged difficulties as regards collection of the definitive tax from non-resident taxpayers, the tax regime at issue in the main proceedings goes beyond what is necessary in order to guarantee effective tax collection.

36 In that connection, it should be recalled that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) enables a Member State to obtain from the competent authorities of another Member State all the information enabling it to determine the correct amount of income tax or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer according to the legislation which it applies (Case C?422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42 and the case?law cited).

37 Moreover, according to Council Directive 76/308/EEC of 15 March 1976 on mutual

assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18), in the version resulting from Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17), a Member State may request assistance from another Member State in relation to the recovery of income tax payable by a taxpayer resident in the latter Member State.

38 In any event, the Finnish Government confirmed at the hearing that the tax regime at issue has been altered with effect from 1 January 2006, so that henceforth the retirement pension of a limited taxpayer is taxed in the same way as that of a person fully taxable in Finland, that is to say on the progressive scale, with the same tax allowances and according to the same tax declaration procedure. That approach is based, according to the Finnish Government, on practical considerations and on the political decision to reduce taxation for persons with a modest pension.

39 In the light of the foregoing considerations, the answer to the questions referred must be that Article 18 EC must be interpreted as meaning that it precludes national legislation according to which the income tax on a retirement pension paid by an institution of the Member State concerned to a person residing in another Member State exceeds in certain cases the tax which would be payable if that person resided in the first Member State, where that pension constitutes all or nearly all of that person's income.

40 In those circumstances there is no need to give a ruling on the interpretation of Directive 90/365.

Costs

41 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 18 EC must be interpreted as meaning that it precludes national legislation according to which the income tax on a retirement pension paid by an institution of the Member State concerned to a person residing in another Member State exceeds in certain cases the tax which would be payable if that person resided in the first Member State, where that pension constitutes all or nearly all of that person's income.

[Signatures]

* Language of the case: Finnish.