# OPINION OF ADVOCATE GENERAL JACOBS
delivered on 30 June 2005 [1]

1. Following its decision in *Garcia Avello*, [2] the Court is again asked to rule on the compatibility with the prohibition of discrimination and the rights of citizenship embodied in the EC Treaty of a national rule relating to the determination of the surname borne by a child.

2. The substantive issue raised is whether a national choice of law rule may assign that determination solely to the law of the child's (and/or parents') nationality — in this case, German — without regard to the law of the State of his or her place of birth — in this case, Denmark –with the result that the name is different under the two legal systems.

3. A preliminary issue however concerns the admissibility of the reference: whether the referring court is in fact 'called upon to give judgment in proceedings intended to lead to a decision of a judicial nature' [3] or whether it is merely acting in an administrative capacity.

## Legal background

### *Treaty provisions cited*

4. The first paragraph of Article 12 EC provides as follows:

'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.'

1 — Original language: English.

2 — Case C-148/02 [2003] ECR I-11613; see further point 47 et seq. below.

3 — See orders in Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, Case C-86/00 *HSB-Wohnbau* [2001] ECR I-5353, paragraph 11, and Case C-447/00 *Holto* [2002] ECR I-735, paragraph 17; judgments in Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9, Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14.

5. Article 17 EC provides:

'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.'

6. Under Article 18(1) EC:

'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.'

7. Article 234 EC provides:

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

...

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

*International rules on the attribution of surnames*

8. In order to ascertain the law applicable to the determination of a person's surname when there are connecting factors to more than one legal system, some legal systems

refer to the law of the person's domicile, although it appears commoner to refer to the law of his or her nationality, an approach enshrined, for several Member States, in international agreements.

9. For example, the ICCS (International Commission on Civil Status) Convention on the law applicable to surnames and forenames [4] provides that a person's names are to be determined by the law of the State of which he or she is a national.

10. There is also an ICCS Convention on changes of surnames and forenames. [5] Under Article 2 of that convention, each Contracting State undertakes 'not to authorise changes of surnames or forenames for nationals of another Contracting State, unless they are also nationals of the first-mentioned State'.

11. Finally, a draft ICCS convention on the recognition of surnames was adopted in Madrid on 25 September 2003. However, following the Court's judgment in *Garcia Avello* [6] it was decided to review the whole text in an attempt to take more account of the wishes of the individuals concerned .

12. The ICCS is an intergovernmental organisation whose members include 13 Member States of the European Union, with three further Member States having the status of observer. Of the Member States relevant to the present case, Germany has ratified the Istanbul Convention referred to in point 10 above, which is in force as between it and the other Contracting States; it has signed but not ratified the Munich Convention referred to in point 9. Denmark however is neither an ICCS member nor an observer.

*National law relevant to the present case* [7]

13. Under Danish rules of private international law, all questions of personal status,

4 — ICCS Convention No 19, signed at Munich on 5 September 1980; see in particular Articles 1 and 2.

5 — ICCS Convention No 4, signed at Istanbul on 4 September 1958.

6 — Cited in footnote 2, see further point 47 et seq. below.

7 — See further, for a more general comparative overview of the situation in the then Member States, point 5 et seq. of my Opinion in *Garcia Avello*, cited in footnote 2.

including those concerning the determination of a person's surname, are governed by the law of that person's domicile as defined in Danish law.

14. Where the surname of a person domiciled (in particular, at birth) in Denmark is to be determined, Danish law will thus apply. Essentially, if the parents use a single surname, that is the name assigned to the child; if they do not use the same surname, that of either parent may be chosen. However, Danish law also allows an administrative change of surname to one composed of the surnames of both parents joined by a hyphen.

15. In Germany, under Paragraph 1 of the Personenstandsgesetz (Law on civil status), matters relating to civil status are to be recorded by the civil registrar.

16. Under Paragraph 10(1) of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (Law introducing the Civil Code, hereinafter 'EGBGB'), a person's name falls to be decided by the law of the State of his or her nationality.

17. Reference to the law of another country is permitted under Paragraf 10(3) of the EGBGB only where one parent is a national of that country (and, if either parent has more than one nationality, the parents have a free choice as to which national law should apply). In addition, German law may be applied where neither parent has German nationality but at least one of them is resident in Germany, and the national law of the mother's husband may be applied if he wishes to give his name to the child.

18. Where German law applies, if a child's parents bear different surnames, the name to be attributed to the child is governed by Paragraph 1617 of the Bürgerliches Gesetzbuch (Civil Code, hereinafter 'BGB'), which provides:

'(1) If the parents do not share a married surname but have joint custody of the child, they shall, by declaration before a registrar, choose either the father's or the mother's surname at the time of the declaration to be the surname given to the child at birth. ...

(2) If the parents have not made that declaration within a period of one month following the child's birth, the Familien

gericht shall transfer the right to determine the child's surname to one of the parents. Subparagraph 1 shall apply *mutatis mutandis*. The court may lay down a time-limit for the exercise of that right. If the right to choose the child's surname has not been exercised on the expiry of that period, the child shall bear the surname of the parent to whom the right was transferred.

(3) Where a child is born outside German territory, the court shall not transfer the right to choose the child's surname in accordance with subparagraph 2 unless either a parent or the child so requests or unless it is necessary to record the child's surname on a German registration or identity document.'

19. The Familiengericht (Family Court) is the denomination given to a chamber of the Amtsgericht (Local Court) sitting in matters of family law.

20. Paragraph 46a of the Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on non-contentious proceedings, hereinafter 'FGG') provides:

'Before making a decision transferring to one parent the right to determine the surname pursuant to Paragraph 1617(2) of the Civil Code, the Familiengericht shall hear both parents and seek to bring them to an agreed choice. The Familiengericht's decision need not state the grounds on which it is based; no appeal shall lie from it.'

**Facts and proceedings in the present case**

21. The child Leonhard Matthias was born in Denmark in 1998 to parents Stefan Grunkin and Dorothee Paul, both of German nationality. There is no indication that the child himself or either parent has any nationality other than German. Since his birth, he has lived principally in Denmark, where his parents initially lived together. For some months in 2001 and 2002, he lived with them in Niebüll, in Germany; since February 2002 he has lived principally with his mother in Tønder, Denmark, where she has set up residence and established her medical practice, but regularly stays with his father in Niebüll, some 20 km distant.

22. Leonhard Matthias's birth was registered in Denmark. Some months after his birth, the surname 'Grunkin-Paul' was entered on

his Danish birth certificate by virtue of an administrative certificate attesting to that name, issued in accordance with Danish law. It may be presumed that the certificate was issued on the basis that the child was domiciled in Denmark for purposes of Danish private international law, so that Danish substantive law applied to the determination of his surname.

23. The parents, who have themselves never used a joint surname, wish to register him with the German authorities in Niebüll, again under the surname 'Grunkin-Paul' given to him in Denmark. Pursuant to the German legislation set out above,[8] those authorities have refused to recognise that name, insisting that the surname chosen must be either 'Grunkin' or 'Paul'.

24. The parents have challenged that refusal in the German courts, but their challenge was dismissed at last instance on 7 January 2003. On 27 February 2003, they were refused leave to bring a final appeal on constitutional grounds before the Bundesverfassungsgericht (Constitutional Court).

25. Pursuant to Paragraph 1617(2) of the BGB, the competent Standesamt (Registrar's Office) has now brought the matter before the Amtsgericht Niebüll, which as Familiengericht must designate the parent who will have the right to choose the child's surname or whose own surname will be given to the child if that choice is not exercised.

26. That court questions whether the choice of law rule in Article 10 of the EGBGB is valid in the light of Articles 12 EC and 18 EC, in so far as the determination of surnames is governed by nationality alone. It notes that the child uses a different surname in the country of his birth and residence from that required by the law of his nationality. It finds difficult to reconcile with the principle of freedom of movement the fact that a citizen of the Union should be forced by reason of his nationality to use different names in different Member States.

27. The Amtsgericht takes the view that, since there is no judicial remedy in national law against the decision which it must take, it is required by the third paragraph of Article 234 EC to refer a question on the interpretation of the EC Treaty to the Court of Justice.

8 — Points 16 to 18.

28. By order of 2 June 2003, issued on 23 February 2004, it has accordingly sought a ruling on 'the interpretation of the EC Treaty in relation to the compatibility of Article 10 of the EGBGB with the EC Treaty'.

29. Written observations have been submitted by the Belgian, French, German, Greek, Netherlands and Spanish Governments and by the Commission. Mr Grunkin, the German, Greek and Spanish Governments and the Commission presented oral argument at the hearing.

**Admissibility of the reference**

30. Under Article 234 EC, any court or tribunal of a Member State may refer a question on interpretation of Community law if it considers that a decision on the question is necessary to enable it to give judgment in proceedings before it.

31. According to settled case-law, whether a referring body is a 'court or tribunal' for that purpose is a question governed by Community law alone. The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. Moreover, a national court may refer a question to the Court of Justice only if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. A body may thus be a 'court or tribunal' within the meaning of Article 234 EC when it is performing judicial functions, but not when exercising other — for example, administrative — functions. Whether a body entrusted with different categories of function is to be regarded as such a 'court or tribunal' depends on the capacity in which it is acting when it seeks a ruling from the Court. In that regard, it is not relevant that the same body is to be classified as a 'court or tribunal' when otherwise configured — or even in the same configuration but exercising powers other than those in the context of which a preliminary ruling is sought. [9]

32. In that light, the German Government submits, the Amtsgericht is not competent

9 — See, for example, Case C-182/00 *Lutz* [2002] ECR I-547, paragraph 12, Case C-192/98 *ANAS* [1999] ECR I-8583, paragraphs 21 to 23, and the case-law cited in both.

to make a reference in this case. In the context of Paragraph 1617(2) of the BGB, that court carries out a purely administrative function which would otherwise fall to a registrar. It does so in the context of a non-contentious procedure, to which the only party is the registrar's office, even though the court must hear both parents before taking its decision; there is in any event no dispute between the parents in the present case. The Amtsgericht does not itself take a decision as to the child's surname, but merely as to the parent entitled to choose that name; if the parent fails to make that choice, it is by operation of law that his or her surname will be given to the child.

33. The situation in the present procedure, the German Government stresses, should be contrasted with that in the appeals to the ordinary courts already exhausted by the parents. Prior to the present procedure, Leonhard Matthias's parents had already asked the German authorities to recognise the surname given to him in Denmark. They had challenged the refusal to accord that recognition, leading to a final dismissal of their challenge by the Kammergericht (Court of Appeal) in Berlin, and had sought to challenge the latter decision before the Bundesverfassungsgericht. All those proceedings were properly of a judicial nature; a reference could have been made at any stage but was not. The conclusion that proceedings of the kind in issue before the Amtsgericht are not intended to lead to a decision of a judicial nature would thus not in other cases rule out any possibility of a reference to the Court of Justice.

34. At the hearing, the Greek and Spanish Governments supported that view, which was contested however by Mr Grunkin and the Commission.

35. Mr Grunkin stressed particularly that in proceedings of the kind in issue the parents not only have a right to be heard but are instrumental in determining whether the procedure is initiated at all.

36. The Commission submitted that the question of admissibility should be assessed on the basis not of the circumstances of the present case, which are unusual, but of the situation which normally gives rise to proceedings of the kind in issue. Usually, the parents are not agreed in choosing a name which is not permitted under German law but rather disagree over which of their different surnames should be given to the child. That normal situation is clearly and fundamentally distinct from cases such as those of land or company registration dealt with in the Court's case-law. There is a

dispute between two parties, to be settled by a court of law. That court has moreover absolute discretion in deciding the case, and is not required simply to apply formal criteria as in those other cases; it must assess the arguments and reach a decision, essentially in the interests of the child. The parents have a right to be heard, and may themselves initiate the procedure. Finally, it is not relevant that another procedural route to achieve the same result is available in German law and may give rise to a request for a preliminary ruling; whether such a request is made or not in one set of proceedings can have no influence on its admissibility in separate proceedings having the same subject-matter.

37. The reasons advanced by the German Government are certainly persuasive. The procedure governed by Paragraphs 1617(2) of the BGB and 46a of the FGG appears to have significant features of administrative rather than judicial proceedings. The availability of a separate, clearly judicial, route supports that view.

38. It may be noted moreover that, because no appeal lies from the Amtsgericht's decision in cases of this kind, the opposite view would render a reference for a preliminary ruling obligatory under the third paragraph of Article 234 EC, a consequence which does not seem consistent with the intended scheme of that article.

39. However, I also find the Commission's analysis persuasive, focussing as it does on the fundamentally contentious nature of the proceedings in their usual context, with a right for both parties to be heard, and the judicial nature of the decision taken by the Amtsgericht.

40. That analysis is of course rather less relevant to the specific features of the proceedings in the present case, and those features raise another doubt as to the admissibility of the reference for a preliminary ruling: to what extent is a decision on the question referred necessary to enable the Amtsgericht to give judgment?

41. As the procedure has been presented to the Court, the only decision which the Amtsgericht is called upon, or indeed competent, to take is the designation of the parent entitled to choose the surname to be

given to the child. It has no power to specify what that name will be. In the present case, it seems clear that, whichever parent is designated, the choice will be 'Grunkin-Paul' and it is not until that stage, when the matter is out of the Amtsgericht's hands, that the rules on choice of surname will come into play, possibly clashing with Community law.

42. If that is a correct statement of the situation under German law, then it is difficult to see how the Amtsgericht could apply the Court's ruling, whatever it may be, to the question referred.

43. However, it may be that the powers of the Amtsgericht in such matters are greater than they have been presented, or that it intends the registrar's office to be bound — as it must be — by the ruling sought. In those circumstances, it might be unwise for the Court to decline the question on the ground that an answer was not necessary for the national court to give judgment; ultimately, it is only the national court which can determine whether that is so.

44. Consequently, while conscious of the doubts as to whether the criteria for a reference under Article 234 EC are fully met, I consider it preferable to answer the question raised.

**The question referred**

45. Questions concerning the determination of surnames do not often arise in the context of Community law. There have however been two previous references to the Court in this field: *Konstantinidis* [10] and *Garcia Avello*. [11]

46. In *Konstantinidis* the Court found it contrary to the prohibition of discrimination on grounds of nationality for a Greek national to be obliged to use, in the pursuit of his occupation in another Member State, a transliteration of his name which modified its pronunciation if the resulting distortion entailed the risk that potential clients might confuse him with other persons.

10 — Case C-168/91 [1993] ECR I-1191.

11 — Cited in footnote 2.

47. In *Garcia Avello* it considered that Articles 12 and 17 EC precluded the Belgian authorities from refusing, as a matter of course, to grant an application, made on behalf of minor children resident in Belgium but having dual Belgian and Spanish nationality, for the surname of those children to be changed to that to which they were entitled according to Spanish law and tradition.

48. In both cases, the Court first considered whether the situations involved fell within the scope of Community law — and decided that they did — before examining the questions posed. In *Konstantinidis*, the link was based on the fact that the applicant was alleging an interference with the exercise of an economic freedom, namely freedom of establishment. In *Garcia Avello* — by which time citizenship of the Union had been introduced, with its attendant rights — the Court simply considered that a link with Community law existed in regard to the children in question, 'who are nationals of one Member State lawfully resident in the territory of another Member State'. [12]

49. It seems clear that the latter consideration must apply also in the case of Leonhard Matthias.

50. Although the Member States are competent to determine the rules governing a person's surname, they must none the less comply with Community law when exercising their competence. Citizens of the Union may rely in that regard on the rights conferred on them by the Treaty, in particular that set out in Article 12 EC not to suffer discrimination on grounds of nationality and that set out in Article 18(1) EC to move and reside freely in the territory of the Member States. [13]

51. In *Garcia Avello* [14] the Court noted in essence that Belgian practice treated in the same way those with Belgian nationality alone and those with dual Belgian and Spanish nationality, with the result that the latter would have different surnames under the two legal systems. That being likely to give rise to practical difficulties, there was discrimination on grounds of nationality. The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way.

12 — Paragraph 27; see also Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 19.

13 — See *Garcia Avello*, paragraphs 25 and 29.

14 — See paragraphs 31 to 37.

52. All the parties having submitted written observations consider that there is no such discrimination in the present case. At the hearing, even Mr Grunkin did not appear to argue that there was discrimination on grounds of nationality. I agree that there is none.

53. It is clear from the relevant German legislation [15] that all those who have German nationality alone are treated in the same way, and that all those who have (or whose parents have) more than one nationality are treated differently but quite without discrimination as regards their nationality.

54. Leonard Matthias is however from a practical point of view in a position closely comparable to that of the Garcia Avello children if in the Member State of his nationality a different surname must be registered from that which he bears in the Member State of his birth. While the practical difficulties which he is likely to encounter may not stem from discrimination on grounds of nationality, they constitute a clear obstacle to his right as a citizen to move and reside freely within the territory of the Member States. Although such difficulties may be of a similar kind to those encountered by Mr Konstantinidis, the combined effects of Articles 17 and 18(1) EC mean that it is now unnecessary to establish any economic link in order to demonstrate an infringement of the right to freedom of movement.

55. In addition to practical matters, which may range from the merely annoying to — in the climate of suspicion which has followed the events of 11 September 2001 — the extremely serious, a person's name is a fundamental part of his or her identity and private life, the protection of which is widely recognised in national constitutions and international instruments. [16]

56. It thus seems to me totally incompatible with the status and rights of a citizen of the European Union — which, in the Court's phrase, is 'destined to be the fundamental status of nationals of the Member States' [17] — to be required to bear different names under the laws of different Member States.

15 — See points 16 and 17 above.

16 — See my Opinions in *Konstantinidis*, at points 35 to 40, and in *Garcia Avello*, in particular at points 5, 27 and 36, together with the sources cited there.

17 — See, most recently, Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 31.

## Conclusion

57. I am therefore of the opinion that the Court should give the following answer to the question referred by the Amtsgericht Niebüll:

A rule of a Member State which does not allow a citizen of the European Union, whose name has been lawfully registered in another Member State, to have that name recognised under its own laws is not compatible with Articles 17 and 18(1) EC.