OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 24 April 2008 [1]

1. This reference for a preliminary ruling from the Amtsgericht (Local Court) Flensburg (Germany) questions the compatibility of a German choice of law rule with the prohibition of discrimination and the rights of citizenship embodied in the EC Treaty. Under that rule the surname of a person having only German nationality is determined exclusively by German law. Consequently, even if such a person was born and habitually resides in another Member State (in this instance, Denmark) whose law applies to him by virtue of its own choice of law rules, his surname, formed and registered there in accordance with that law, cannot be registered in Germany unless it is also in accordance with German substantive law.

Legal background

Treaty provisions

2. 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.'

3. 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.'

4. 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

1 — Original language: English.

Treaty and by the measures adopted to give it effect.'

5. Under Article 65 EC (read also in conjunction with Articles 61(c) and 67 EC), the Community legislature may adopt 'measures in the field of judicial cooperation in civil matters having cross-border implications', including those with the aim of '(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction'. No such measures have yet been adopted in relation to the determination of names. [2]

Substantive rules governing the determination of surnames

6. In points 5 to 22 of his Opinion in *García Avello*, [3] Advocate General Jacobs provided an overview of the rules governing the determination of surnames in the Member States, as they applied at the time (2003). There have been developments since then, and in several Member States the substantive rules now allow more choice than was previously the case. Suffice it however to note at this stage that there is considerable variety not only in the way in which surnames are determined, but also in the degree of choice available as a matter of law. In particular, compound surnames (combining those of both parents) are prohibited in some Member States but permissible in other Member States and the norm in yet others.

Choice of law rules concerning the determination of surnames

7. In order to ascertain the law applicable to the determination of a person's surname when there are links to more than one legal system, some legal systems refer to the law of the person's habitual residence, [4] although it appears commoner to refer to the law of

2 — At the moment, measures under Article 65 EC are to be adopted 'in so far as necessary for the proper functioning of the internal market'. That limitation will no longer appear in Article 81 of the Treaty on the Functioning of the European Union, which is designed to replace Article 65 EC and which makes particular provision for measures concerning family law with cross-border implications.

3 — Case C-148/02 [2003] ECR I-11613.

4 — Among Member States, it appears that Denmark, Finland and Lithuania use the criterion of domicile (that is to say, habitual residence, rather than the concept of domicile as it is used in the common-law systems), while Greek law refers in some circumstances to the law of the last joint residence of the parents.

his or her nationality.[5] That approach is enshrined, for some Member States, in international agreements in the context of the ICCS (International Commission on Civil Status), an intergovernmental organisation whose members include 13 Member States, with three more having the status of observer. Germany is a member of the ICCS. Denmark is neither a member nor an observer.

8. A number of ICCS Conventions[6] relate to names, but none has been ratified by more than seven Member States. In summary, they provide that, in principle, a person's names are to be determined by the law of the State of which he or she is a national, and that Contracting States will not authorise surname changes for nationals of another Contracting State, unless they are also nationals of the first State, but will issue certificates of differing surname where appropriate. Under a more recent convention,[7] not yet in force, when a child is a national of more than one Contracting State, the surname attributed in the State of birth will be recognised in the other Contracting States, but so also will a surname attributed at the request of the parents in another Contracting State of which the child is a national.

Instruments concerning the rights of children

9. Article 3(1) of the United Nations Convention on the Rights of the Child[8] provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Substantially the same provision is to be found in Article 24(2) of the Charter of Fundamental Rights of the European Union.[9]

10. Article 7(1) of the Convention on the Rights of the Child provides, inter alia, that a child is to be 'registered immediately after birth and shall have the right from birth to a name'. Substantially the same provision is to be found in Article 24(2) of the International Covenant on Civil and Political Rights.[10]

5 — This seems to be the case for most of the remaining Member States. Ireland and the United Kingdom, however, do not have any specific choice of law rule — in practice, their domestic law is sufficiently flexible to accommodate names formed in accordance with any legal system.

6 — ICCS Conventions No 4, on changes of surnames and forenames, of 4 September 1958; No 19, on the law applicable to surnames and forenames, of 5 September 1980; and No 21, on the issue of a certificate of differing surnames, of 8 September 1982.

7 — ICCS Convention No 31, on the recognition of surnames, of 16 September 2005.

8 — Of 20 November 1989, ratified by all the Member States.

9 — OJ 2000 C 364, p. 1 (more recently, in OJ 2007 C 303, p. 1).

10 — Of 16 December 1966, also ratified by all the Member States.

National law relevant to the present case

11. Under Danish rules of private international law, questions concerning the determination of a person's surname are governed by the law of that person's domicile (that is to say, habitual residence) as defined in Danish law. Where the surname of a person habitually resident in Denmark is to be determined, Danish law will thus apply.

12. At the material time in the present case, the determination of surnames in Denmark was governed by Articles 1 to 9 of Law No 193 of 29 April 1981 (Lov om personnavne — Law on personal names). [11]

13. Under Article 1 of that law, if the parents used a single surname, that was the name assigned to the child. If they did not use the same surname, that of either parent could be chosen. However, Article 9 also allowed an administrative change of surname to one composed of the surnames of both parents joined by a hyphen.

14. Alternatively (and commonly), where the child bears the surname of one parent, the surname of the other parent may be used as a 'middle name' (*mellemnavn*). The two are thus in fact combined (without a hyphen). However, under the 1981 law only the second (surname) element of the combined name could in that case be passed on to the following generation.

15. In Germany, under Article 10(1) of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (Law introducing the Civil Code, 'EGBGB'), a person's name falls to be determined by the law of the State of his or her nationality. Under Article 10(3), a child's surname may be determined by reference to the law of another country only where a parent (or other person conferring the name) is a national of that country. However, German law may be applied where neither parent has German nationality but at least one of them is resident in Germany.

16. Under Paragraph 1616 of the Bürgerliches Gesetzbuch (Civil Code, 'BGB'), if the parents use a single surname, [12] that is the

11 — Since replaced, with effect from 1 April 2006, by Law No 524 of 24 June 2005 (Navnelov — Law on names), which allows a wider range of choices.

12 — Pursuant to Paragraph 1355, that can be only the surname previously held by one or other spouse, and not a combination of the two.

name assigned to the child, as in Denmark. Paragraph 1617 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. … The parents' choice also applies with respect to their subsequent children.

(2) If the parents have not made that declaration within a period of one month following the child's birth, the Familiengericht[13] 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.'

17. Paragraph 1617(1) thus excludes the possibility of combining the surnames of both parents to form a new compound name. It does not, however, preclude the perpetuation of an existing compound name already borne by either parent.[14]

Case-law of the Court of Justice

18. 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*[15] and *García Avello*[16] — and an earlier reference in the present case.[17]

13 — The designation of the Amtsgericht sitting as a family court.

14 — The Bundesverfassungsgericht (Constitutional Court) has held that Paragraphs 1616 and 1617 are not unconstitutional in so far as they preclude a child from bearing a compound surname combining those of both parents (judgment of 30 January 2002, 1 BvL 23/96, BVerfGE 104, p. 373).

15 — Case C-168/91 [1993] ECR I-1191.

16 — Cited in footnote 3.

17 — Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561 (see below, points 21 to 29).

19. 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.

20. In *García Avello* it considered that Articles 12 and 17 EC precluded the Belgian authorities from refusing 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.

Facts and proceedings

21. The child Leonhard Matthias was born in Denmark in 1998 to parents Stefan Grunkin and Dorothee Paul. He and his parents have only German nationality (mere birth in Denmark does not automatically confer Danish nationality). For most of his life, he has lived principally in Denmark, where his parents initially lived together. For some months in 2001-2002, he lived with them in Niebüll, in Germany. Since then he has lived principally with his mother in Tønder, Denmark, but regularly stays with his father in Niebüll, some 20 km distant.

22. Leonhard Matthias's birth was originally registered in Denmark under the surname 'Paul', with 'Grunkin' as a *mellemnavn*. Some months later, at his parents' request, the surname was changed to 'Grunkin-Paul' by virtue of an administrative certificate (*navnebevis*), and a birth certificate indicating that surname was issued. [18] That was possible because he 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 wish to register him with the German authorities in Niebüll, under the surname 'Grunkin-Paul' given to him in Denmark. Pursuant to the German legislation set out above, [19] those authorities refused to recognise that name, insisting that the surname chosen must be either 'Grunkin' or 'Paul'.

18 — According to Stefan Grunkin, the parents had originally declared Leonhard Matthias's surname as 'Grunkin-Paul' and the change was effected in order to bring his birth certificate into line with that intended declaration. Consequently, both parents' names would form part of the child's surname, and neither would be a mere *mellemnavn* (see point 14 above). Whatever the exact position may be, however, the starting point must be the fact that the choice of 'Grunkin-Paul' was one that was open to the parents under Danish law.

19 — Points 15and16.

24. The parents challenged that refusal in the German courts, but their challenge was dismissed at last instance in 2003.

25. Then, pursuant to Paragraph 1617(2) of the BGB, the competent Standesamt (Registrar's Office) brought the matter before the Amtsgericht Niebüll. As Familiengericht, that court's role was to designate the parent having the right to choose the child's surname or whose own surname is to be given to the child if that choice is not exercised.

26. However, it questioned whether the choice of law rule in Article 10 of the EGBGB was valid in the light of Articles 12 EC and 18 EC, in so far as the determination of surnames was governed by nationality alone. It accordingly sought a ruling from the Court of Justice on the interpretation of the EC Treaty in relation to the compatibility of Article 10 of the EGBGB with the EC Treaty. [20]

27. In the course of the procedure before the Court, doubts were raised as to the admissibility of the reference for a preliminary ruling, in that the referring court appeared to be acting in an administrative rather than a judicial capacity.

28. In his Opinion of 30 June 2005, Advocate General Jacobs acknowledged those doubts, but considered that the Court should none the less answer the question referred. [21] He took the view that the situation fell within the scope of Community law and that, although there was no discrimination on grounds of nationality, it was 'totally incompatible with the status and rights of a citizen of the European Union … to be required to bear different names under the laws of different Member States'. [22]

29. By judgment of 27 April 2006, the Court held that it had no jurisdiction to answer the question referred because the referring court could not be regarded as exercising a judicial function.

30. On 30 April 2006 the parents again applied to have their son registered by the Standesamt with the surname Grunkin-Paul, as the name under which he was registered in Denmark. The Standesamt again refused that registration because it was not possible under German law.

31. By virtue of German procedural rules, the parents' challenge to that new refusal is heard by a different Amtsgericht, namely Amtsgericht Flensburg. That court notes that

20 — Case C-96/04, cited in footnote 17.

21 — Points 30 to 44 of his Opinion.

22 — Points 45 to 56.

it is precluded by German law from ordering the registrar to record a compound surname, but has doubts similar to those entertained by the Amtsgericht Niebüll.

32. It therefore seeks a ruling on the following question:

'In light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the law relating to names is governed by nationality alone?'

33. Written observations have been submitted by Stefan Grunkin, by the Belgian, French, German, Greek, Lithuanian, Netherlands, Polish and Spanish Governments and by the Commission. The German, Greek, Lithuanian and Spanish Governments and the Commission were present at the hearing.

Admissibility

34. The admissibility of the present reference is not formally contested, although the Belgian Government queries (a) whether the referring court is competent to order the registration of a compound surname, particularly since an earlier set of proceedings had reached a definitive conclusion, and (b) whether the present proceedings are of a genuine nature.

35. Those doubts are, however, not shared by the German Government, which explains in some detail how, under German law, the present main proceedings are both admissible and truly contentious. Essentially, Leonhard Matthias's parents have brought proceedings (which are not precluded by the final disposal of their previous action in 2003) against the civil registrar, seeking an order that he register the child's surname as 'Grunkin-Paul'. In order to decide whether that order can be granted — in which context it is clearly acting in a judicial capacity — the referring court needs a ruling on the interpretation of Community law.

36. That being so, it seems to me unnecessary for the Court to examine the admissibility of the present reference in any greater depth.

Substance

Introductory considerations

37. Private international law, whatever its name may suggest, is not a body of international law. It is a branch of the domestic law of each legal system. It provides a mechanism or, more accurately, a series of interlocking mechanisms for determining, where legal situations or relationships have links to more than one legal system, what courts or other authorities should have jurisdiction, what substantive law should apply and what effects or recognition should be given to decisions taken, or legal acts accomplished, in accordance with other legal systems.

38. Because the situations or relationships concerned are by definition inter-jurisdictional, the machinery of each legal system necessarily interacts with the machinery of other systems. Sometimes the gears mesh, sometimes they clash. When they mesh (which is preferable), it may be because the legal systems concerned have compatible rules from the outset, it may be because they have worked together to achieve compatibility in the context of a body such as the ICCS or the Hague Conference on Private International Law,[23] or (within the European Union) it may be because they have had compatibility thrust upon them by Community legislation. There remain, however, many areas in which compatibility or harmonisation is incomplete.

39. The overall picture is thus of a complex arrangement of complex mechanisms, interacting in complexity but not always in harmony. Any adjustment to one mechanism may affect a broad range of interactions. A change to one legal system's rules of private international law concerning the determination of names could have repercussions not only on the way in which those rules interact with the equivalent rules of another system, but also on the operation of its own rules of private international law concerning related areas of personal status or family law (with consequent changes in the interactions between those rules and those of other systems) or on its relevant rules of substantive law.

40. It is small wonder, therefore, that most of the Member States submitting observations in the present case have urged the Court to avoid tampering with the German choice of law rule in question. Some academic commentators have, moreover, criticised

23 — Of which all the Member States and the European Community itself (see Council Decision 2006/719/EC of 5 October 2006, OJ 2006 L 297, p. 1) are members.

the Court's judgment in *García Avello*, and Advocate General Jacobs's Opinion in *Standesamt Stadt Niebüll*, for a perceived failure to appreciate the consequences of the approach taken. [24]

41. This is clearly an area in which it behoves the Court to tread softly, and with care. But just because it must tread softly, that does not mean that it must fear to tread at all.

42. As several Member States have pointed out, the area is one which the Community has power to regulate — just as, on the basis of Articles 61(c) and 67(1) EC, it has already regulated jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, [25] and envisages regulating applicable law in matrimonial matters. [26]

43. That being so, it is all the more true that, as the Court stated in *García Avello*, [27] '[a]lthough, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law …, in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States'.

44. Consequently, the Court cannot shirk its duty to interpret Community law in such a way as to assist national courts, such as the Amtsgericht Flensburg in the present case, whose task it is to decide whether specific national rules do indeed comply with that law.

24 — See, for example, the commentaries on *García Avello* by Mathias Audit, in Recueil Dalloz 2004, p. 1476, at point 20, and by Thomas Ackermann, in Common Market Law Review 2007, p. 141, especially at p. 153, and on the Opinion in *Standesamt Stadt Niebüll* by Dieter Henrich, in Praxis des internationalen Privat- und Verfahrensrechts 2005, p. 422.

25 — Currently in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

26 — Commission proposal (COM(2006) 399 final, of 17 July 2006) for a Council Regulation amending Regulation No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. The explanatory memorandum cites the 'growing mobility of citizens within the European Union [leading] to an increasing number of international couples, i.e. spouses of different nationalities, spouses who live in different Member States or who live in a Member State in which one or both of them are not nationals' — the very context in which the present case arises.

27 — At paragraph 25.

45. It is undoubtedly true that matters would be simpler if Community legislation had been adopted to deal with the situation (or if all of the Member States were members of the ICCS and had ratified all of its conventions). A legislative or conventional solution would moreover be appropriate in such a field. The discussions which precede the adoption of Community legislation or multilateral agreements are necessarily longer, more thorough and wider-ranging than can ever be achieved in the context of a preliminary reference procedure before the Court. And, given the increasing mobility of citizens throughout the territory of the European Union, which is not merely a single market but a single area of freedom, security and justice, it is clear that conflicts of interest involving the determination and use of personal names can (and probably will) arise with increasing frequency unless and until some adequate solution is found. Such a solution should be fully and systematically thought out, with due regard to all its implications for all the legal systems involved.

46. But no such solution is yet in place. As matters stand, the Court must interpret existing Community law on the right of a citizen to move and reside freely throughout the territory of the Member States, without discrimination on grounds of nationality. It must do so with regard to the specific situation which has arisen in the main proceedings. It should beware of encroaching to any unnecessary extent on Member States' competence in matters of private international law. At the same time, it must not dilute or weaken the concept of citizenship of the Union — the 'fundamental status of nationals of the Member States' [28] — or deprive the rights flowing from that status of real meaning.

47. Here, it seems to me that the issue which needs to be decided in order to allow the national court to reach a decision in the case before it is narrower than might appear at first sight.

48. First, the substantive rule of German law under which a child's surname must be that of one parent, with no possibility of combining the names of both, is not itself in question. No substantive rules of Community law are applicable in that area (nor would there appear to be any legal basis for adopting such rules), and no national rule prescribing or proscribing any particular form of name seems capable, on its own, of infringing a citizen's rights to freedom from discrimination and freedom of movement and residence. The issue can arise only when such a rule clashes, for a given individual, with a rule of another Member State.

28 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31. The formulation has been used repeatedly since then, most recently in Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 32.

49. Second, although the national court's question is framed in terms of the compatibility with Community law of the choice of law rule embodied in Article 10 of the EGBGB, in my view it does not need to consider the validity of that provision as a whole but only the validity of its effect, in combination with Paragraph 1617 of the BGB, in precluding the registration of a surname lawfully formed and already registered in Denmark.

50. Consequently, the submissions of certain Member States before this Court, pleading with some vehemence the superiority of nationality over habitual residence as a connecting factor in matters of personal status (being a more stable and clearly ascertainable criterion), are in my view not directly relevant, however valid they may or may not be. The Court need not and should not adjudicate between the two criteria — just as, in *García Avello*, it did not adjudicate between the Belgian and Spanish rules for determining the surname attributed to a child. [29] Its specific role in this case is rather to assess the non-recognition of a name against the standards of Community law.

51. Finally, it seems to me significant that the main proceedings concern a situation in which the surname was determined and registered at birth in accordance with the applicable Danish law, and modified and reregistered shortly after birth in accordance with the same applicable law, *before* any application was made to register it with the German authorities. This is not, therefore, a case of changing, in the Member State of habitual residence, a name determined in accordance with the law of the Member State of nationality. The fact that the surname originally registered was *compatible with* the German rules, and that the revised surname was not, does not mean that the first was formed *pursuant to* those rules. Both were formed pursuant to the Danish rules, and Leonhard Matthias's parents were entitled to exercise any choice available under Danish rules while habitually resident in Denmark. What they now seek is not the registration of a child to whom no surname has yet been attributed but the transcription in the German registers of a name already borne by the child in accordance with the law of his place of birth and stable residence. And while, in compliance with Article 7(1) of the Convention on the Rights of the Child, Leonhard Matthias's name had to be registered immediately after birth in Denmark, it seems clear from the wording of Paragraph 1617(3) of the BGB that there was no automatic requirement for his name to be recorded immediately on a German registration or identity document.

52. I shall therefore approach the case on that narrower basis, considering, first, whether the situation falls within the scope of Community law; second, whether it involves any discrimination on grounds of nationality

29 — It did, admittedly, at paragraph 42 of its judgment, comment on the raison d'être of the two systems and the ways in which each seemed adapted to that raison d'être, but it drew no conclusion as to their relative merits.

or interference with the right to freedom of movement and residence; and, third, whether any such discrimination or interference, if it exists, can be justified.

Applicability of Community law

53. In his Opinion in *Standesamt Stadt Niebüll*, [30] Advocate General Jacobs noted the Court's finding in *García Avello* that a link with Community law existed with regard to the children in question, 'who are nationals of one Member State lawfully resident in the territory of another Member State', [31] and considered the same to apply in the case of Leonhard Matthias.

54. He also referred to the statement in *Zhu and Chen* [32] to the effect that the situation of a national of a Member State who was born in another Member State but has not yet made use of the right to freedom of movement cannot be assimilated to a purely internal situation, thereby depriving him of the benefit of the provisions of Community law on freedom of movement and of residence. The Court went on in that case [33] to specify that a child can enjoy rights under those provisions before attaining the age of legal capacity to exercise those rights personally.

55. It seems to me that the situation in the main proceedings falls within the scope of Community law on analogous but even stronger grounds.

56. First, Leonhard Matthias was born, and habitually resides, in one Member State while possessing (only) the nationality of another Member State.

57. Second, as a citizen of the Union, Leonhard Matthias enjoys the right of freedom of movement and residence under Community law. Moreover, unlike the children in *García Avello* or *Zhu and Chen*, he has exercised and continues to exercise that right by residing successively in the two Member States in question and by moving repeatedly between them — as he is constrained to do by a family situation over which he has no control.

30 — At points 48 and 49.

31 — Paragraph 27 of the judgment.

32 — Case C-200/02 [2004] ECR I-9925, paragraph 19.

33 — At paragraph 20.

58. Third, in the course of doing so, he has encountered a conflict between a rule imposed on him by the law of one Member State and an option available to, and lawfully exercised by, his parents on his behalf under the law of the other Member State.

59. Such a situation clearly falls — both *ratione personae* and *ratione materiae* — within the scope of Community law, in the form of the rules governing a citizen's exercise of his right of freedom of movement and his right to be free from discrimination.

Is there discrimination?

60. In his Opinion in *Standesamt Stadt Niebüll*, [34] Advocate General Jacobs noted that, under the disputed rule, all those who have German nationality alone are treated in the same way, and all those who have (or whose parents have) more than one nationality are treated differently but quite without discrimination as regards their nationality.

61. None of the parties submitting observations in the present proceedings has disagreed with that assessment. Nor do I.

62. It is true that the rule in Paragraph 10 of the EGBGB *distinguishes* between individuals according to their nationality, but such distinctions are inevitable where nationality serves as a link with a particular legal system. It does not, by contrast, *discriminate* on grounds of nationality. The purpose of the prohibition of such discrimination is not to efface the distinctions which necessarily flow from possession of the nationality of one Member State rather than another (which are clearly maintained by the second sentence of Article 17(1) EC) but to preclude *further* differences of treatment which are based on nationality and which operate *to the detriment* of a citizen of the Union.

63. Under the German rule, any citizen of the Union who has a single nationality is treated in accordance with the law of his or her Member State of nationality, whereas all those who have more than one nationality are (in line with *García Avello* [35]) treated differently from those with a single nationality but still in accordance with the laws of their Member States of nationality. Moreover, German substantive law may be applied to any person, of any nationality, habitually resident in Germany, who wishes it, so that nationals of other Member States who are so

34 — At point 53.

35 — Paragraphs 32 to 35.

resident are not denied any benefit available to German nationals.

64. However, the prohibition of discrimination — the principle of equal treatment — in Community law is not confined to questions of nationality. It is commonly expressed as a general requirement that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified. [36]

65. Although the disputed rule clearly treats in the same way all situations in which the factor connecting an individual to a legal system is nationality, it does not extend that equality of treatment to situations in which the connecting factor is habitual residence. Legal systems within the Community variously refer to one criterion or the other. [37] It may therefore be asked whether the principle of equal treatment does not require equal weight to be accorded to the criterion of habitual residence applied in Danish law and the criterion of nationality applied in German law.

66. It seems to me that the answer must be that it does. To answer otherwise would be to take a position as to which criterion is 'better' and should be accorded more weight. That is a task, if it is to be undertaken, for the Community legislature, not the Court. Until such time as there is a uniform rule, it is for the Member States to decide which connecting factor they will use when determining the law applicable to a person's name, provided that they comply with Community law when exercising that competence.

67. Whilst the mere fact of choosing to use nationality rather than habitual residence (or vice versa) as a connecting factor does not itself offend against the requirement of equal treatment in Community law, a refusal to recognise the effects of measures which are valid under another legal system using another connecting factor does seem to offend.

68. An example of that might be the fact that, if Leonhard Matthias had been born not in Denmark but in a Member State which

36 — See *García Avello*, paragraph 31, and the case-law referred to there. The Court has been criticised (see Ackermann, cited in footnote 24 above, at p. 149) for having conflated in *García Avello* the general, 'Aristotelian', notion of equal treatment with the specific Article 12 EC prohibition of discrimination on grounds of nationality. Whatever the justification of that criticism, I here refer to the general principle as a separate matter.

37 — Indeed, Regulation No 2201/2003 (cited above in footnote 25, Article 3) allows a choice between the two criteria when determining jurisdiction in relation to termination of marriage, and the Commission's proposal for its amendment (cited above in footnote 26, proposed new Article 20a) would allow a choice when determining applicable law.

applied (a strong form of) the *jus soli*,[38] he could have acquired the nationality of that Member State and German law would have recognised a name determined in accordance with its law. German citizens born in another Member State and registered under a name formed in accordance with the law of that State as the State of their habitual residence are thus treated differently depending on whether the State also allows them to acquire its nationality, a matter not necessarily linked to the criterion it uses when determining the applicable law relating to names.

69. If, therefore, a choice of law rule of a Member State leads systematically to a refusal to recognise a surname given to a national of that Member State in accordance with the law of his Member State of birth and habitual residence, which is applicable by virtue of its own choice of law rules, then that refusal does not constitute discrimination on grounds of nationality prohibited by Article 12 EC. It is, however, in my view contrary to the general principle of equal treatment. That principle requires that, when a situation is not purely internal to a Member State but involves the exercise of a right guaranteed by the EC Treaty, a link to the law of another Member State should not be treated differently according to whether it is (according to the law of that other Member State) based on nationality or habitual residence.

38 — For example, Ireland — see *Zhu and Chen*, paragraph 9.

70. Another breach of the general principle might be discerned in the fact that the German rule treats in the *same* way the different situations of, on the one hand, German nationals whose name *has not* been previously registered in another Member State and, on the other hand, those whose name *has* been so registered.

71. However, as with the prohibition of discrimination on grounds of nationality, the principle of equal treatment does not simply preclude all distinctions, whatever the circumstances. It therefore seems necessary to enquire whether Leonhard Matthias's rights of freedom of movement or residence are interfered with.

Is there interference with freedom of movement and/or residence?

72. In *García Avello*, the Court noted that 'a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname

recognised in another Member State of which they are also nationals'. [39]

73. Such inconvenience is in no way lessened by the fact that a person has the nationality of only one of the Member States concerned. It stems, in practical terms, not from the possession of more than one nationality but from the fact of moving, as a citizen of the Union, between Member States and successively living, studying, working, seeking benefits, completing administrative formalities, opening bank accounts and carrying out the many other transactions of everyday life in each of them.

74. Those practical difficulties, in Advocate General Jacobs's view in his Opinion in *Standesamt Stadt Niebüll*, 'constitute a clear obstacle to [Leonhard Matthias's] right as a citizen to move and reside freely within the territory of the Member States'. [40] I agree.

75. Several Member States have argued however that there is nothing in the choice of law rule in issue or its application in this case which is inherently liable to hamper or to render less attractive the exercise of the right to freedom of movement or residence. [41] It was open to Leonhard Matthias's parents to choose in Denmark a surname fully compatible with German law, and such a surname would indeed have been bestowed on the child if they had not deliberately chosen otherwise. Parents cannot be discouraged from moving to another Member State by the knowledge that they will be treated in the same way as if they had not exercised the right to do so.

76. That reasoning cannot itself be faulted — and it is probably true that there is no Member State in which Leonhard Matthias's surname, had he been born there, would have had to be registered in a form incompatible with the German substantive rules.

77. It seems to me, however, that that argument misses the point. The question is not whether *parents* may be dissuaded from exercising their rights of movement and residence, or hindered in the exercise of those rights, by any rules which may apply in determining the surname of their children, born or unborn. It is whether a *child* whose birth

39 — Paragraph 36 of the judgment.

40 — Point 54 of the Opinion.

41 — See, by analogy, for example, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, or Case C-285/01 *Burbaud* [2003] ECR I-8219, paragraph 95.

has been lawfully registered under a particular name in accordance with the law of the Member State of the place of that birth — and who has not himself exercised any choice with regard to that registration — suffers inconvenience or hardship when exercising *his own rights* as a citizen of the Union [42] if the Member State of his nationality refuses to recognise the name thus registered.

78. The answer must be that he does. At the very least, there will be a discrepancy between his birth certificate and his travel documents. For someone who, like Leonhard Matthias, continues to live principally in his Member State of birth whilst maintaining a strong link with his Member State of nationality, the problems will necessarily increase. As life progresses, he will acquire various documents in the name given on his birth certificate, but he may well also acquire other documents in the name recognised by his Member State of nationality. He may study and acquire qualifications in both States. He may be registered for social security purposes in both States. He may well move to a third Member State and encounter administrative difficulties because he bears a different name in different documents. And the fact cannot be ignored that both public authorities and private bodies have in recent years become increasingly suspicious of any situation which appears out of the ordinary, often with extremely uncomfortable results for those who fall under their suspicion.

42 — Compare *García Avello* and *Zhu and Chen*, in both of which the Court stressed the children's rights.

79. It seems to me clear, therefore, that a refusal on the part of the Member State of a person's nationality to recognise a name lawfully given to him necessarily renders it appreciably more difficult for him to exercise his rights as a citizen of the Union to move and reside freely throughout the territory of the Member States. The fact that, as the French Government points out in the present case, Leonhard Matthias has not in fact yet been prevented or dissuaded from moving between Denmark and Germany does not mean that his right to do so has not been restricted.

Can there be justification?

80. If, in principle, the way in which German law is applied in a case such as Leonhard Matthias's — and I stress again that what is at issue is the refusal to register the surname lawfully given to him in Denmark — is both incompatible with the requirement of equal treatment and such as to interfere with his Treaty rights as a citizen of the Union, can there be any justification for the refusal in question?

81. Possible justifications may be divided into those of a systematic nature, which might justify an automatic refusal of recognition or transcription whenever certain

criteria are met, and those more closely related to the individual situation, which might justify refusal on a case-by-case basis.

82. In the former category, Germany has pointed out the benefits of not allowing compound surnames combining those of both parents (in that, if the practice were allowed, future generations might find themselves with surnames of unmanageable length, [43] compounded of already compound names) and of using only nationality as a connecting factor when determining the law applicable to an individual's name (in that it is a more stable and easily ascertainable criterion than habitual residence).

83. As I have already stated, I do not consider it necessary or appropriate to take a view on the relative merits of differing substantive or choice of law rules in this field. However, it seems to me that Germany cannot in any event rely on such arguments, since German law does not totally exclude either compound surnames for its own nationals (if, for example, under Article 10(3) of the EGBGB, the name is determined in accordance with the national law of a parent who bears another nationality) or the use of habitual residence as a connecting factor (again under Article 10(3) of the EGBGB, even in the absence of German nationality, German law may apply if either parent is resident in Germany [44]). To recognise Leonhard Matthias's compound surname, lawfully given to him in his Member State of birth and habitual residence, would not therefore appear to offend against any absolute rule of German law. [45]

84. Still in the category of justifications of a systematic nature, the Lithuanian Government (which in other regards considers that the effect of the German rules is not contrary to Community law) argues that no Member State should be required to recognise names given to its nationals in accordance with foreign law if those names are incompatible with the structure of its national language, a fundamental part of its national heritage. Lithuanian surnames take

43 — It appears that the longest compound surname recorded in the United Kingdom is Temple-Nugent-Brydges-Chandos-Grenville, borne by the Dukes of Buckingham and Chandos from 1822 to 1889, when the title became extinct — perhaps due to a surfeit of surnames. Most families, however, manage to avoid such excesses.

44 — It is interesting to note a case referred to by the Secretary General of the ICCS at its General Assembly in Edinburgh on 15 September 2004. On 16 February 2004, the Tribunal Administratif (Administrative Court) in Luxembourg annulled a decision of the Luxembourg authorities refusing to allow the child of a Luxembourgish couple resident in Germany to be registered in Luxembourg under the mother's surname. The couple had chosen that name as their single surname (see point 16 and footnote 12 above) and the child, born in Germany, was registered there under that name, all in accordance with German law, which could be applied, under its own choice of law rules, as the law of the place of residence. The Luxembourg court ruled that such a situation could not be considered contrary to public policy in Luxembourg.

45 — Compare paragraph 44 of the judgment in *García Avello*, where the Court stressed that the systematic refusal of the Belgian authorities to accord a change of surname was clearly disproportionate since derogations were available in other comparable situations.

different forms according to whether they are borne by a man or a woman and, if by a woman, according to whether she is married or single. Those differences are inherent in the structure of the language and distorted forms are unacceptable as a matter of national policy.

85. It does not seem to me necessary to decide on that argument in the context of the present case. There is no suggestion that a compound surname such as 'Grunkin-Paul' offends against fundamental values of the German language. I note, however, that the European Court of Human Rights has stressed the importance of national language considerations in the field of personal names and has accepted that the imposition of linguistic rules may be justified. [46]

86. As regards circumstances which might justify a refusal of recognition or transcription in a particular case, the possibilities are varied. Clearly, it would seem justifiable to refuse to register a surname which was in some way ridiculous or offensive. If national law totally precluded the possibility of siblings bearing different surnames, it could perhaps be justifiable to refuse to register a name that would give rise to such a situation. It might also be justifiable to refuse to recognise a name given in accordance with the law of another Member State to which a child is connected by birth but not nationality, if the place of birth is shown to have been chosen simply in order to circumvent the rules of the Member State of nationality, without there being any other real connection with that place. [47]

87. However, in the present case there is no suggestion that either circumstance applies. In particular, it appears that Leonhard Matthias's connection with Denmark, where he has lived for most of his life and where it is to be expected that he has made friends and put down roots, is genuine and stable. In that regard — and with regard to any refusal in comparable circumstances to register a name on the basis of factors specific to the individual case — I recall that the German authorities and courts, like those of all the Member States, are required to have regard to the child's best interests as a primary consideration. [48] It certainly seems to me likely to be in Leonhard Matthias's interests, as he now approaches his 10th birthday, for the surname he has borne for almost all of

46 — See *Bulgakov* v *Ukraine* (No 59894/00, 11 September 2007), paragraph 43, and the case-law cited there.

47 — To allow such a justification would, admittedly, involve some tension with the Court's judgment in *Zhu and Chen*, cited in footnote 32, at paragraph 34 et seq. of which it rejected an argument that it was not possible to rely on nationality of a Member State acquired by virtue of a place of birth deliberately chosen for that sole purpose. However, the Court's reasoning there was based on the right of each Member State to lay down the conditions for *acquisition* of nationality, and did not concern the *use* of nationality or any other criterion *as a connecting factor* for purposes of private international law. See also Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 24, and the case-law cited there.

48 — See point 9 above.

his life in the Member State of his habitual and stable residence to be recognised by the authorities of the Member State of his nationality.

Concluding remarks

88. I have thus reached the view that the Court should interpret Community law, in relation to a citizen's right to move and reside freely throughout the European Union and to be treated without discrimination in doing so, in such a way that, in the main proceedings, Leonhard Matthias's surname of Grunkin-Paul, lawfully registered in Denmark more than nine years ago, must be registered in Germany.

89. It is of course true that, in a preliminary ruling procedure, the Court's role is to give an interpretation of Community law, not to apply that law to the factual situation underlying the main proceedings, and that the purpose of the procedure is to ensure uniform interpretation and application of Community law throughout the Member States. In other words, this Court cannot itself decide the specific case before the referring court but its ruling will determine the outcome both of that case and of other comparable proceedings which may be brought before other national courts.

90. It is with regard to the latter aspect that I have stressed a need for a degree of caution in the present case. Whilst I fully agree with Advocate General Jacobs that it is '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" — to be required to bear different names under the laws of different Member States', [49] I recognise also the widely expressed concern that the delicate edifice of private international law rules concerning personal status within the European Union should not be thrown into utter confusion.

91. I would stress therefore that my approach would not require any major change to Germany's substantive or choice of law rules in the field of names, but would simply require them to allow greater scope for recognising a prior choice of name validly made in accordance with the laws of another Member State. To that extent, it involves no more than an application of the principle

49 — Opinion in *Standesamt Stadt Niebüll*, point 56, citing Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 31.

of mutual recognition which underpins so much of Community law, not only in the economic sphere but also in civil matters.

92. Moreover, I would recommend a ruling in the present case which is not only tailored to the specific type of situation in which Leonhard Matthias finds himself but also allows scope for justifiable public policy exceptions (even though I do not find that any valid exception has been raised in the present proceedings with regard to the way in which the relevant German rules are currently applied).

93. Finally, I would point out that, whilst the determination of a person's name falls within the scope of laws on personal status, it is a rather specific matter within that field. It involves identification, which is a separate matter from legal status or capacity. Consequently, I do not consider that it would necessarily follow that a ruling with regard to names should be extrapolated to such other matters.

Conclusion

94. In the light of all the above considerations, I am of the opinion that the Court should answer the question raised by the Amtsgericht Flensburg as follows:

— a choice of law rule under which a person's name is to be determined in accordance with the law of his nationality is not in itself incompatible with Articles 12, 17 or 18 EC;

— however, any such rule must be applied in such a way as to respect the right of each citizen of the Union to move and reside freely in the territory of the Member States;

— that right is not respected if such a citizen has been registered under one name in accordance with the applicable law of his place of birth, before it becomes necessary to register his name elsewhere, and is subsequently required to register a different name in another Member State;

— consequently, the authorities of a Member State may not, when registering the name of a citizen of the Union, automatically refuse to recognise a name under which he has already been lawfully registered in accordance with the rules of another Member State, unless recognition would conflict with overriding reasons of public interest which admit of no exception.