OPINION OF ADVOCATE GENERAL JACOBS
delivered on 19 March 1998 *

1. Can a national of a Member State rely on the principle of non-discrimination on grounds of nationality in order to be granted the right to have criminal proceedings against him in another Member State conducted in a language other than the official language of that other State where that right is granted to certain nationals of that Member State? That is the issue raised in the Italian criminal proceedings against Mr Bickel and Mr Franz. Mr Bickel is an Austrian lorry driver who is being prosecuted for driving under the influence of alcohol; Mr Franz is a German national being prosecuted for carrying a prohibited knife while visiting Alto Adige as a tourist. The criminal proceedings against them are taking place in Bolzano, situated in the Trentino-Alto Adige Region, where because of the presence of a large German-speaking minority German has the same status as Italian. Thus residents of the Province of Bolzano have the right to opt for the use of German in criminal proceedings. The question raised in the main proceedings is whether Community law requires that right to be extended to Mr Bickel and Mr Franz.

Background

2. Article 6 of the Italian Constitution provides that the Republic shall protect linguistic minorities. To give effect to that provision, Article 99 of Presidential Decree No 670/1992 provides that in the Trentino-Alto Adige Region German is to have the same status as Italian, the official language of the State. Article 100 of the Decree provides *inter alia* that German-speaking citizens of the Province of Bolzano are to have the right to use their own language in relations with judicial bodies situated in that province. It appears that what is meant by 'citizens' is persons who are resident in Bolzano.

3. Presidential Decree No 574/1988 lays down further rules concerning the use of languages in relations between certain judicial bodies and the citizens of the Province of Bolzano. Under Article 15 of that Decree, a judicial body must, when drawing up a procedural document to be communicated to or served on a suspect or accused person, 'use his presumed language, to be determined on the basis of his known membership of a language group and other information already obtained in the course of the proceedings'. Under Article 16 an accused person can opt for the other language (German or Italian, depending on the case) when first questioned by the judge. Under Article 17 an accused person may decide, following the first examination, 'by declaration signed by him and submitted in

* Original language: English.

person or through his counsel to the prosecuting authority, that the proceedings be conducted in the other language'.

4. The Italian Government explains in its written observations that there are three substantial linguistic minorities in Italy, namely German, French and Slovene. There is however no uniform set of rules protecting those minorities; rather their protection is regulated in the framework of the rules on autonomy pertaining to the regions where they are living (respectively Trentino-Alto Adige, Valley of Aosta and Friulia Giulia).

5. It is common ground that the rules in issue concern only residents of Bolzano. Other Italian citizens do not have the right to opt for the use of German in court proceedings.

6. Mr Bickel is an Austrian lorry driver of German mother tongue, residing in Nüziders, Austria. On 15 February 1994 he was stopped in the vehicle he was driving by a police patrol in Castelbello (Bolzano) and charged with the offence of driving under the influence of alcohol, contrary to Article 186(2) of the Codice della Strada (Traffic Code). On 24 July 1995 the Bolzano Magistrate delivered a judgment in the Italian language imposing on the defendant a fine of LIT 876 000 (partly in place of five days' imprisonment) and suspending his driving licence for 25 days. Since it was not possible to serve the judgment on him, the Bolzano Magistrate revoked it on 5 October 1995 and issued a summons requiring him to appear before the ordinary courts — in this case the Pretura Circondariale di Bolzano (Bolzano District Magistrates' Court). The revocation was also drawn up in Italian only. On 21 October 1995 the defendant was requested in German and Italian to give an address for service in Italy for the purposes of the inquiry into the alleged offence. The defendant did not answer that request. On 8 March 1996 a summons to appear at a hearing fixed for 25 June 1996 was served on the defendant's counsel. The summons, in so far as it related to the charge, was drawn up in Italian. The hearing was later adjourned to 23 July 1996, the orders for adjournment being drawn up in Italian. On 5 July 1996 the defendant sent a document to the judicial authorities in which he declared that he did not know the Italian language and requested that the proceedings against him should take place in his mother tongue. At the hearing on 23 July 1996 counsel for the defendant reiterated that request, relying on Community law and asking for a reference to this Court.

7. Mr Franz is a German national of German mother tongue, residing at Peissenberg, Germany. In May 1995 he visited Alto Adige as a tourist. On 5 June 1995, upon inspection by customs officers at Tubre, he was charged with an offence contrary to Article 4 of Law 110/75, namely carrying a prohibited knife. On 8 March 1996 a bilingual summons to appear at a preliminary hearing fixed for 25 June 1996 was served on the defendant.

That hearing was adjourned to 23 July 1996, the orders for adjournment being drawn up in Italian. On 1 July 1996 the defendant sent a document to the judicial authorities in which he declared that he did not know the Italian language and requested that the proceedings against him should therefore take place in his mother tongue.

8. In both cases the Pretura Circondariale di Bolzano referred to the Court the following question:

'Do the principle of non-discrimination as laid down in the first paragraph of Article 6, the right of movement and residence for citizens of the Union as laid down in Article 8a and the freedom to provide services as laid down in Article 59 of the Treaty require that a citizen of the Union who is a national of a Member State and is present in another Member State be granted the right to call for criminal proceedings against him to be conducted in another language where nationals of that State in the same circumstances enjoy such a right?'

9. The referring court considers that the Italian rules in issue must be construed in such a way that all Community citizens may ask for criminal or civil proceedings to be conducted in German if they so wish. If Community citizens were not granted that right there would be a manifest breach of the principle of non-discrimination on grounds of nationality embodied in Article 6 of the Treaty. The procedural provisions in issue are said to fall within the scope of the Treaty in the light of the provisions of Article 8a, in particular the right to move freely conferred upon all citizens of the European Union, and of Article 59 on the freedom to provide services. The referring court considers that in the circumstances of the present case there is a sufficiently close link with those freedoms, and thus with the Treaty, in order to trigger the principle of non-discrimination.

10. The present case raises two issues: first, whether the choice of language in the criminal proceedings before the referring court comes within the scope of the Treaty; and secondly, whether the Italian rules, if construed so as to deny Mr Bickel and Mr Franz the right to use German, would entail discrimination on grounds of nationality.

11. The Court has already had occasion in its ruling in *Mutsch* [1] to consider whether a Luxembourg national had the right to use German in criminal proceedings in a German-speaking municipality of Belgium where Belgian law granted that right to Belgian nationals residing in that municipality. However, unlike Mr Bickel and Mr Franz, Mr Mutsch was a migrant worker residing in the Member State

1 — Case 137/84 *Ministère Public* v *Mutsch* [1985] ECR 2681.

concerned. The Court based its conclusion that he was entitled to use German on the ground that a migrant worker's right to use his own language in court proceedings on the same terms as national workers was important in ensuring his and his family's integration into the host country and hence that it fell within the meaning of the term 'social advantage' in Article 7(2) of Regulation No 1612/68. [2] The ruling does not therefore provide a direct answer to either of the issues raised by the present case.

The scope of application of the Treaty

12. Article 6 of the Treaty prohibits discrimination on grounds of nationality 'within the scope of application of this Treaty'. The first issue therefore is whether the putative discrimination in this case falls within the scope of the Treaty.

13. It may well be that in the case of Mr Franz a sufficient connection with the Treaty is provided by Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons. [3] That directive is aimed at approximating the weapons legislation of the Member States with a view to abolishing controls and formalities at intra-Community frontiers. [4] It mainly concerns firearms, but contains a number of provisions also on other weapons. In particular, Article 14 obliges Member States to adopt all relevant provisions prohibiting entry into their territory of a weapon other than a firearm provided that the national provisions of the Member State in question so permit. Moreover, Article 16 provides that Member States shall introduce penalties for failure to comply with the provisions adopted pursuant to the directive.

14. The order for reference states that Mr Franz was charged following an inspection by customs officers. If Mr Franz was entering, or had entered, Italy in possession of a prohibited weapon (or, possibly, if he was seeking to go to another Member State in possession of such a weapon), his situation would fall within the ambit of the Community legislation, with the result that the criminal proceedings against him would be subject to the prohibition of discrimination on grounds of nationality.

15. There may however be doubt whether Mr Franz's case can properly be decided on

2 — Council Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ, English Special Edition 1968 (II), p. 485.

3 — OJ 1991 L 256, p. 51.

4 — See the third recital of the preamble.

that ground; and in any event in the case of Mr Bickel there is no such link with Community law. There appear to be no provisions in the Treaty or in Community legislation which, as such, might bear on the substance of the charge brought against Mr Bickel, namely driving under the influence of alcohol. Mr Bickel's case therefore raises the general issue whether criminal proceedings against a Community citizen based on alleged facts which occurred while that citizen exercised his right to free movement come within the scope of application of the Treaty and are therefore subject to the prohibition of discrimination on grounds of nationality.

16. It seems to me that, in the light of *Cowan* v *Trésor public*, [5] that question must receive an affirmative reply. There a British citizen, while visiting France as a tourist, suffered injury from a violent assault and claimed compensation under a scheme provided for by the French code de procédure pénale (Code of Criminal Procedure). He was denied such compensation on grounds of his nationality. The French Government argued that the national rules did not impose any restriction on free movement; moreover, the right to compensation was a manifestation of the principle of national solidarity and presupposed a closer bond with the State than that of a recipient of services. [6] The Court did not accept that reasoning: [7]

'When Community law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law when that risk materialises. The fact that the compensation at issue is financed by the Public Treasury cannot alter the rules regarding the protection of the rights guaranteed by the Treaty.'

17. The Court likewise rejected the argument that the compensation in question fell within the law of criminal procedure, which was not included within the scope of the Treaty. Although in principle criminal legislation and the rules of criminal procedure were matters for which the Member States were responsible, Community law set certain limits to their power: [8]

'Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.'

5 — Case 186/87 [1989] ECR 195.

6 — See paragraph 16 of the judgment.

7 — At paragraph 17.

8 — Paragraph 19 of the judgment.

18. Although *Cowan* concerned a victim of criminal behaviour, the same principle must apply to the rights of an accused in criminal proceedings. Those rights are no less fundamental and must likewise be viewed as a corollary of the right to free movement.

19. In *Cowan* the only connection with Community law was that the facts occurred while Mr Cowan was in France as a recipient of services. By holding that that was sufficient to trigger the prohibition of discrimination the Court effectively brought any person exercising his right to enter another Member State within the protection offered by Article 6. [9]

20. The conclusion to be drawn from the *Cowan* case seems all the more compelling in the light of the subsequent amendments to the EC Treaty introduced by the Treaty on European Union. Part Two of the EC Treaty is now entitled 'Citizenship of the Union', and that citizenship is established by Article 8(1). Article 8a(1) provides:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

21. It may be concluded from that provision that, where a citizen exercises his right to move and reside within the territory of the Member States, his situation falls within the scope of the Treaty for the purposes of the prohibition of discrimination on grounds of nationality. It therefore re-affirms the conclusion that that prohibition applies to criminal proceedings arising in the course of the exercise of a citizen's freedom of movement.

22. It is unnecessary in this case for the Court to decide the broader question whether all criminal proceedings against a citizen of the Union fall within the scope of application of the Treaty for the purposes of Article 6, even where that citizen has not exercised his right to free movement. For example, would a national of Member State A charged with a criminal offence in Member State B on account of remarks published in a Member State B newspaper be entitled to rely on Article 6 of the Treaty?

9 — See also to that effect J. Mertens de Wilmars, 'L'arrêt Cowan', *Cahiers de droit européen*, 1990, pp. 388 to 402. See also Koen Lenaerts, 'L'égalité de traitement en droit communautaire', *Cahiers de droit européen*, 1991, pp. 3 to 41, at p. 28, who draws a conclusion from the *Cowan* judgment in relation to the *Mutsch* case that '... il paraît légitime d'affirmer que si Mutsch n'avait pas été un travailleur migrant, mais bien un touriste luxembourgeois de passage à Saint-Vith en Belgique qui s'était laissé impliquer dans une procédure pénale, il aurait pu lui aussi prétendre au bénéfice du traitement de son affaire en allemand sur la base des articles précités (7 et 59-60) du traité ...'.

23. It may be however that the time has come for even that question to be answered affirmatively. The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality. The introduction of that notion was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union. That concern is reflected in the removal of the word 'economic' from the Community's name (also effected by the Treaty on European Union) and by the progressive introduction into the EC Treaty of a wide range of activities and policies transcending the field of the economy.

24. Against that background it would be difficult to explain to a citizen of the Union how, despite the language of Articles 6, 8 and 8a, a Member State other than his own could be permitted to discriminate against him on grounds of his nationality in any criminal proceedings brought against him within its territory. Freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship. [10]

25. Such a conclusion does not of course entail a transfer of Member States' competence in criminal matters to the Community. It merely recognises the fact that, as the Court noted in *Cowan*, [11] Member States must exercise their powers in this area in conformity with the fundamental principle of equal treatment.

26. It is true that in some cases in which Article 6 was in issue, the Court has sought to establish a link with intra-Community trade: that appears to be so in *Phil Collins*, [12] which concerned copyright and related rights, and in *Data Delecta* and *Hayes*, [13] in the context of rules on security for costs in civil proceedings. But it cannot be inferred from that that the Court rejected a broader view of the scope of Article 6.

27. It should finally be emphasised that not every rule which works to the particular disadvantage of non-nationals entails discrimination contrary to Article 6. In particular it is open to Member States to show that advantages reserved to nationals or to residents are objectively justified on grounds unrelated to

10 — See also to that effect N. Bernard, 'What are the purposes of EC discrimination law?', in *Discrimination Law — Concepts, Limitations and Justifications*, edited by Dine and Watt, Longman, 1996, pp. 91 et seq.

11 — See paragraph 17 above.

12 — See Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145.

13 — See Cases C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661 and C-323/95 *Hayes* v *Kronenberger* [1997] ECR I-1711.

nationality. It is however increasingly difficult to see why Community law should accept any type of difference in treatment which is based purely on nationality, except in so far as the essential characteristics of nationality are at stake, such as access to a limited range of posts in the public service, or the exercise of certain political rights. [14]

The issue of discrimination

28. I therefore turn to the question whether the Italian rule in issue discriminates against Mr Franz and Mr Bickel.

29. The Italian Government denies that there is discrimination on grounds of nationality. It points out that the right to opt for the use of German is inextricably linked to citizenship of Bolzano. A national of another Member State who is temporarily present is in the same position as an Italian national so present, the latter also being denied the right in question.

30. The Italian Government adds that non-residents do not participate in the social contacts, living conditions and problems which are specific and exclusive to residents of Bolzano. The rule is merely aimed at protecting a specific linguistic minority in Italy, whilst recognising its ethnical and cultural identity. It would moreover be wholly disproportionate to let the accused opt for the use of their native language with a view to safeguarding the rights of defence; those rights are safeguarded by other means, such as the right to a free interpreter, in accordance with the relevant provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. [15]

31. On the latter point the Italian Government refers to a recent judgment of the Corte Costituzionale (Constitutional Court) in which it was held that the scope of the rules on the protection of linguistic minorities is different from the scope of the rules on rights of defence. The latter rules, in relation to languages, aim to ensure that a defendant is capable of understanding the proceedings, which is assumed not to be the case if he does not perfectly master the official language. The former rules, by contrast, amount to a special form of constitutional protection, corresponding to the cultural heritage of a specific

14 — See also F. Schockweiler, 'La portée du principe de non-discrimination de l'article 7 du traité CEE', *Rivista di Diritto Europeo*, 1991, at pp. 22 and 23.

15 — Both Article 6(3)(e) of the Convention and Article 14(3)(f) of the Covenant guarantee everyone charged with a criminal offence the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. (Under both instruments the protection extends only to the language used in court, not to other aspects of the proceedings.)

ethnic group, and thus take no account of whether a person belonging to such a group masters the official language. [16] The Italian Government draws the conclusion, with respect to the present case, that the right of residents of Bolzano to opt for the use of German does not depend on whether they are incapable of using Italian. In cases where a defendant is so incapable, Italian law thus deals with the problem by different means.

32. The Commission expresses doubts as to whether the Italian rule discriminates on grounds of nationality. The right to opt for the use of German is not conferred on all Italian citizens. It is conferred only on residents of Bolzano. Moreover, although a residence condition may constitute indirect discrimination on grounds of nationality, different treatment on grounds of residence may be justified by objective factors.

33. It is first necessary to clarify the precise scope of the Italian rule. It follows from the ruling in *Mutsch* that the choice of German in court proceedings cannot be restricted to Italian nationals but must be extended to nationals of other Member States who are resident in Bolzano. According to the Italian Government that is in fact the case. I shall therefore assume that the Italian rule does not entail direct discrimination on grounds of nationality.

34. Article 6 of the Treaty, however, also prohibits indirect discrimination. A rule discriminates indirectly against nationals of other Member States if it:

(a) works to the particular detriment of a group comprising mainly nationals of other Member States (for example non-residents);

and

(b) is not based on objective factors unrelated to nationality or is not proportionate. [17]

35. By treating differently persons who are for all material purposes in the same position, such a rule infringes the principle of equal treatment.

36. The first question, therefore, is whether the rule works to the particular disadvantage of nationals of other Member States. In my view it plainly does. The rule works to the particular disadvantage of German-speaking visitors to Bolzano from Germany and Austria (who will be predominantly German and

16 — Judgment No 15 of 29 January 1996, GURI, special series, 7 February 1996, No 6.

17 — See, in particular, Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617.

Austrian nationals) because the latter are all, without exception, prevented from choosing German for the conduct of criminal proceedings whereas most Italian residents being prosecuted in Bolzano who wish to use German are able to do so.

37. The argument advanced by the Commission and the Italian Government that Italian nationals not resident in Bolzano cannot choose German either is beside the point. Being Italian-speakers the overwhelming majority of Italian residents will have no practical interest in choosing German. In other words, German and Austrian visitors are without exception denied an advantage granted to most Italian residents who actually want the advantage. [18]

38. The present case is distinguishable from cases in which an advantage which might be of interest to residents in general is reserved to local residents. Let us suppose, for example, that under the relevant regulations the ruins of Pompeii were open free of charge out of season to residents of Naples and the surrounding area. It would be difficult to argue that such a rule worked to the particular disadvantage of nationals of other Member States since the vast majority of Italian residents would also be affected. In contrast the advantage in the present case, although regional in form, is in reality directed at a general category of residents, namely German-speakers.

39. The question therefore arises whether the different treatment is objectively justified. It would clearly be difficult to advance any administrative justification if, as appears to be the case here, local criminal courts are set up to conduct proceedings largely in German but are obliged to hear cases against German-speaking visitors in Italian. (At the hearing counsel for Mr Bickel and Mr Franz, a German-speaker, [19] stated that their case was being heard by German-speaking judges and that the Public Prosecutor was German-speaking.)

40. There can be no doubt that, even with the assistance of an interpreter, a defendant in criminal proceedings who is not fully conversant with the language of the proceedings is at a substantial disadvantage. It would nevertheless be unduly onerous to require a State to provide for the conduct of criminal proceedings in every Community language. It is however clear that no such justification can be advanced where, as here, the local courts

18 — For an analogous case see Case C-15/96 *Kalliope Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg* [1998] ECR I-47, judgment of 15 January 1998, in particular paragraph 23, and paragraphs 12 to 14 of my Opinion, to which the judgment refers.

19 — Authorised to use German for the purpose of the hearing under Article 29(2)(c) of the Rules of Procedure notwithstanding that the language of the case was Italian.

commonly function in the language of the visitor. According to counsel for Mr Bickel and Mr Franz, the requirement to use Italian would in their cases, if anything, lead to extra costs because the accused would then be entitled to a free interpreter. In the absence, therefore, of any administrative impediment some other justification must be sought.

41. Nor in my view is it possible, as the Italian Government suggests, to justify the rule on the ground that its purpose is to protect the German-speaking minority in Bolzano. I fully accept that the rule in question serves the wholly legitimate aim of protecting a Member State's linguistic minority, an aim unrelated to nationality. The difficulty, however, is that the exclusivity of the rule, that is to say, the denial of the advantage to visitors from other Member States, is neither a necessary nor an appropriate means of achieving that aim. In other words the rule is disproportionate. [20] Refusing the use of German to visitors does not in any way serve that aim. If anything, it has the reverse effect: it reinforces Italian as the principal language even in the predominantly German-speaking region of Bolzano. If a German-speaking Bolzano resident invites a relative or friend from Germany, Austria or Switzerland to visit him, any criminal proceedings brought against that relative or friend would be in Italian. It is hard to see how that serves to protect the German-speaking minority in Bolzano.

Conclusion

42. Accordingly the question referred by the Pretura Circondariale di Bolzano must in my opinion be answered as follows:

Where a Member State grants residents in part of its territory the right to use a language other than its official language in criminal proceedings against them, Article 6 of the EC Treaty must be interpreted as requiring it to afford the same right to nationals of other Member States visiting that territory if those nationals have that other language as their mother tongue.

20 — For a recent case in which the Court rejected the justification for a rule on the ground that the non-extension of the advantage which it conferred on non-residents was disproportionate, see Case C-57/96 *Meints* v *Minister van Landbouw, Natuurbeheer en Visserij*, judgment of 27 November 1997.