REPORT FOR THE HEARING
delivered in Case 186/87 *

I — Facts and written procedure

On 11 June 1982, Ian William Cowan, a British citizen who was on a visit in Paris, was the victim of an assault at the exit from a metro station. He was robbed of FF 150. His assailants, whom it has not been possible to identify, threw him to the ground before fleeing. Mr Cowan was seriously injured in his fall, suffering a fracture and crushing of the second lumbar vertebra.

Article 706-3 of the French code de procédure pénale (Code of Criminal Procedure) provides *inter alia* that any person who suffers harm as a result of acts, whether or not intentional, which constitute the *actus reus* of an offence may obtain compensation from the State where the relevant acts have caused physical injury with consequences of a certain severity, the harm consists in serious interference with the enjoyment of life as a result, *inter alia*, of physical injury and the injured person is unable to obtain effective and adequate compensation for the harm from any other source.

Article 706-13 extends the benefit of the guarantee of compensation to cases where the attack has been committed abroad but falls within the jurisdiction of the French courts, provided the victim is French.

Article 706-15 states that the provisions of Article 706-3 apply

'only to persons who are of French nationality or to foreign nationals who prove:

(i) that they are nationals of a State which has concluded a reciprocal agreement with France for the application of the said provisions and that they satisfy the conditions laid down in the agreement; or

(ii) that they are holders of a residence permit.'

The application for compensation must be made within one year from the date of the offence to a board consisting of three judges from the appropriate Cour d'appel, acting as a court of civil jurisdiction.

Mr Cowan applied to the Commission d'indemnisation des victimes d'infraction, Paris, for the grant of compensation in the amount of FF 36 154, made up as follows: FF 150 representing the amount of the theft, FF 11 004 for his temporary incapacity for work, FF 25 000 as compensation for pain and suffering, loss of enjoyment and partial permanent incapacity.

* Language of the case: French.

Mr Cowan relied on the prohibition of discrimination laid down, in particular, in Article 7 of the EEC Treaty. He argued that the conditions set out above were discriminatory and prevented tourists from going freely to another Member State to receive services there. The representative of the Treasury and the ministère public replied that the rules in question treated resident foreigners in the same way as French nationals and that to draw a distinction between their situation and that of tourists was in conformity with Community law, under which periods spent by nationals of a Member State in another Member State are subject to different conditions according to the length of the stay.

In those circumstances the board considered that its assessment of the compatibility with the Treaty of the provisions in question necessitated the interpretation of the Community rules in the light of the essential requirements and aims of Community law; it therefore stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Are the provisions of Article 706-15 of the code de procédure pénale, which governs cases where a foreign national who is the victim of an offence in France may obtain compensation from the French State, compatible with the prohibition of discrimination contained *inter alia* in Article 7 of the EEC Treaty?'

The order of the board was received at the Court Registry on 16 June 1987.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were submitted by the applicant in the main proceedings, Mr Cowan, represented by M. Renouf, Horsham, Great Britain, P. Jenkinson, Lille, France, and L. Misson, Liège, Belgium, the French Government, represented by Mr Guillaume, acting as Agent, assisted by M. Giacomini, acting as Deputy Agent, and the Commission of the European Communities, represented by J. Amphoux, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory enquiry.

II — Written observations

Mr Cowan makes the preliminary remark that it is undeniable that the French rules in dispute discriminate on the basis of nationality and that he is prevented from obtaining compensation solely by reason of his nationality.

Mr Cowan notes first, regarding the scope of application of the Treaty, that tourism constitutes a service for the purposes of Article 59 *et seq.* of the Treaty and that tourists are the recipients of that service (see judgments of the Court of 7 July 1976 in Case 118/75 *Watson and Belmann* [1976] ECR 1185, and of 31 January 1984 in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377).

Mr Cowan infers from the *Watson and Belmann* judgment that tourists may demand the prohibition of discrimination which constitutes a restriction on freedom of movement. He takes the view that the

fact that tourists are not compensated for physical harm inflicted by criminals in the same way as nationals constitutes an obstacle to freedom of movement for tourists.

Tourists will go more willingly to countries where their safety is guaranteed and, if they could enjoy the same assistance and the same compensation everywhere as nationals of the host country, the cost of travel insurance would fall.

Mr Cowan argues that the State in which the offence took place has the duty of ensuring the safety not only of its nationals but also of its visitors. He adds that in the present case foreign nationals in France were covered by the same system as French nationals until 1981. Thus, in spite of the 'standstill' rule in Article 62 of the Treaty, an established state of affairs has been called in question.

Secondly, Mr Cowan submits that compensation for his injury is itself a service for the purposes of Articles 59 *et seq.* of the Treaty. He adds that the distinguishing feature of the problem lies in the fact that the service thus defined is provided by the public administration and appears, superficially, to be free.

Relying on the judgment of 8 June 1982 in Case 258/78 *Nungesser* v *Commission* [1978] ECR 2015, he states that the mere fact that a service is provided by a public body does not prevent it from being a service for the purposes of the Treaty. Although Article 60 defines services as 'normally provided for remuneration' the problem raised corresponds to the problem of the right of access of Community nationals to public services in another Member State. The same problem is raised in the cases concerning the right of access to education, for example the judgment of the Court of 13 February 1985 in Case 293/83 *Gravier* [1985] ECR 593.

Furthermore, it is simplistic to speak of a free service since a tourist visting a foreign country spends large sums of money there.

He adds that the principle must be maintained that the benefit of all public services must be guaranteed without discrimination to any person paying for his own keep on the territory of another Member State.

It is self-evident that compensation for physical injury cannot be claimed when the victim's domestic law or a contract of insurance allows him to obtain satisfactory compensation.

Consequently Mr Cowan suggests that the Court should answer the question referred for a preliminary ruling as follows:

'Every Community national must be able to enjoy the public services provided by a Member State to its own nationals, even when those services are free, without discrimination in relation to those nationals, if the Community national is entitled to be on the territory of that Member State as a recipient of services. Consequently, a tourist who is the victim of an offence on the territory of a Member State may claim the

benefit of any legislation in force in that State for the compensation of victims under the same conditions as nationals, unless he can obtain compensation from another source, either by being covered by an insurance policy or because of automatic compensation for his injuries by the public authorities of the State of which he is a national.'

With respect to the prohibition of discrimination the French Government recalls that under Article 2 of the Treaty the task of the Community is in particular 'to promote throughout the Community a harmonious development of economic activities' and to eliminate any barriers to those activities created by the legislation and practices of Member States.

The prohibition, under Article 7 of the Treaty, of discrimination on grounds of nationality mainly concerns the free movement of workers. Rules concerning the compensation by the State of victims of offences are rules of criminal procedure which remain within the jurisdiction of the Member States (judgment of the Court of 11 November 1981 in Case 203/80 *Casati* [1981] ECR 2595). Those rules do not fall within the scope of application of the Treaty, and Article 7 cannot therefore be relied on.

Furthermore, the system of compensating victims of offences is in question is not discriminatory. It is a system of national solidarity financed by taxes and therefore intended principally for French nationals and resident foreigners. It is, however, open to non-resident foreigners within the framework of reciprocal agreements. That rule complies with the Council of Europe Convention of 24 October 1983 on the compensation of victims of violent crimes, which has been signed but not yet ratified by France and the United Kingdom and which superseded the preparatory work on a directive in this field.

As for the alleged obstacle to freedom of movement, the French Government recalls that Article 48 of the Treaty provides that 'freedom of movement for workers shall be secured within the Community.' Mr Cowan, however, was visiting as a tourist. Referring to the judgment of the Court of 27 October 1982 in Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] p. 3723, the French Government submits that as a tourist Mr Cowan cannot rely on Article 48 or on the direct application of Article 7 to the principle of freedom of movement since Article 48 constitutes the specific expression of the principle in this field and the benefit of its provisions is limited to workers.

The French Government recognizes that under the judgment of the Court in Joined Cases 286/82 and 26/83 *Luisi and Carbone*, *supra*, the movement of a recipient of services (such as a tourist) may not be obstructed to such an extent that the freedom to provide services within the Community is affected. However, in the present case national law does not create any barrier to the freedom of movement of Community nationals.

The French Government states that the compensation in question is not a financial transaction covered by the Treaty and suggests that the Court should answer the question referred to it as follows:

'The provisions of Article 706-15 of the code de procédure pénale which provide that compensation is payable only to foreign nationals who prove:

(i) that they are nationals of a State which has concluded a reciprocal agreement with France for the application of the said provisions and that they satisfy the conditions laid down in the agreement, or

(ii) that they are holders of a residence permit

are compatible with the prohibition of discrimination on grounds of nationality within the scope of application of the Treaty of Rome under Article 7 of the Treaty.'

The Commission observes as a preliminary matter that a national of a Member State may not rely on the provisions of Community law *vis-à-vis* another Member State unless that person is in a situation which is covered by those provisions. In that respect, it refers to the judgments of the Court of 18 June 1987 in Case 316/85 *Lebon* [1987] ECR 2811 and of 13 February 1985 *Gravier, supra.* A national of a Member State who has been attacked in another Member State cannot rely on Article 7 of the Treaty solely by virtue of being a Community national in order to claim the compensation provided by the law of the second Member State to victims of attacks, under the same conditions as the nationals of that State. That person must in addition be in the second Member State in circumstances in which Community law provides for the right to equal treatment.

The Commission also refers to the judgment of the Court of 23 March 1982 in Case 53/81 *Levin* [1982] ECR 1035, and states that the provisions of the Treaty relating to freedom of movement for persons and its corollary, the prohibition of discrimination on grounds of nationality, affect Community nationals by reason of the economic activity in which they participate or wish to participate.

The Commission makes particular reference to the situation referred to by Articles 59 *et seq.* of the Treaty, which concern the movement and the residence of nationals of Member States within the Community in respect of the provision of services.

In that regard the Court ruled in its judgment of 31 January 1984 *(Luisi and Carbone, supra)* that freedom of movement must be granted not merely to the persons providing services but also to the recipients of the services who go to the State where the person providing the services is established and that tourists, in particular, must be regarded as recipients of services who are entitled to the benefit of the provisions of the Treaty.

Thus, the capacity in which Mr Cowan was in France determines whether or not he may rely on the provisions of the Treaty in support of his claims. It is for the national court to decide whether Mr Cowan may be regarded as a tourist, but the Commission supposes that he may.

Examining the national provisions in question the Commission states that no discrimination on grounds of nationality is

apparent against nationals of other States as regards persons resident on French territory. On the other hand, whereas a French citizen residing in another Member State who is the victim of an attack while visiting France as a tourist may be awarded compensation, the same benefit is refused to nationals of other Member States in the same situation.

The Commission argues that the meaning and consequences of the rule against discrimination are closely dependent on the nature of the circumstances and on the objectives pursued by the relevant provisions of Community law. In that respect the Commission distinguishes between two main types of situation, that is to say that of nationals of Member States who establish themselves on the territory of another Member State in order to work there as an employed or self-employed person and that of the nationals of a Member State who go to another Member State to look for work, to pursue vocational training, or to provide or receive services pursuant to Articles 59 *et seq.* of the Treaty.

As regards the first category, the Commission observes that the situation of an employee covered by Article 48 or a self-employed person covered by Article 52 in the host country is characterized by stability and permanence. Those persons must be integrated into the society of the host country, with all the consequent rights and obligations.

With respect to the second category the Commission notes that those persons remain integrated in the society of their country of origin. They cannot therefore be regarded as having to be assimilated and integrated into the society of the host country. As regards persons providing services, the third paragraph of Article 60 merely provides that 'the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals'.

Thus the persons concerned may only rely on the rights needed in order to exercise the protected activities, that is to say both the right to reside for the period during which the activity lasts and the absence of any restrictions and discrimination in the application of the provisions which govern for economic purposes the exercise of the activities involved. As for the conditions of residence, the persons concerned may claim social benefits only in so far as they are necessary in order freely to accomplish the protected activities.

In reliance on the judgment of the Court of 18 June 1987 in the *Lebon* case, *supra*, the Commission states that a national of a Member State who stays as a tourist in another Member State may not rely on Articles 59 *et seq.* of the Treaty to obtain from that latter State benefits such as the minimum means of subsistence or entitlement to a holiday bonus.

As regards the rights in question in this case the Commission observes that Community law leaves Member States free to choose whether or not they wish to institute a system to compensate victims of attacks. The French system is a social benefit the purpose of which is to protect people

against the risk of attacks which may be committed on that State's territory. Such a risk is not necessarily linked to the residence there of the potential victim. French nationals are not required to be resident on French territory in order to benefit from the compensation. Persons who are not French, however, are required to be so resident, which creates inequality in the conditions under which Community nationals not resident in France may stay in that country as persons providing or receiving services, for example as tourists, according to whether or not they have French nationality.

The Commission submits that this differentiation, for which it does not appear possible to find objective justification, is capable of constituting an obstacle to the freedom to provide services set out in the Treaty. A non-resident who wishes to stay in France as a tourist and to cover himself against the risk of being attacked must take out an insurance policy for that purpose if he does not have French nationality, whereas a French tourist is not required to do so since he is covered against such risks by French law. The Commission therefore takes the view that that discrimination constitutes a measure contrary to the combined provisions of Articles 7 and 59 of the Treaty.

Finally, the Commission points out that the Court has consistently held (most recently the judgment of 28 January 1986 in Case 270/83 *Commission* v *France* [1986] ECR 273) that the rights conferred by the Treaty, in particular as regards freedom of movement and equal treatment, are unconditional and a Member State may not make its observance of them subject to the existence of a reciprocal agreement with the Member State of which the beneficiary is a national.

In consequence the Commission proposes that the Court should reply as follows to the question referred to it:

'The refusal by a Member State to apply a system of State compensation for victims of attacks such as that provided for by Article 706-3 *et seq.* of the French code de procédure pénale to nationals of Member States who are not resident on its territory but are present there as tourists, whereas it does grant that benefit to its own nationals in the same situation, constitutes discrimination on grounds of nationality contrary to the combined provisions of Articles 7 and 59 of the Treaty.'

O. Due
Judge-Rapporteur