OPINION OF ADVOCATE GENERAL LENZ
delivered on 11 May 1995 *

A — Introduction

1. The present reference for a preliminary ruling, submitted by the Social Security & Child Support Commissioner, [1] concerns Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [2] and the applicability of that directive to a family benefit granted in the United Kingdom.

2. According to Article 1(1) of the directive, its purpose is to 'put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security.'

3. With regard to social security, Article 1(2) of the directive provides as follows:

'With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.'

4. The prohibition of sex discrimination in the conditions for access to jobs and posts is laid down in Article 3 of the directive. Article 3(2) requires Member States to take the measures necessary to prevent discrimination in this area.

5. Article 5 of the directive lays down corresponding rules with regard to working conditions, including the conditions governing dismissal.

* Original language: German.

1 — The Court has consistently recognized in its case-law that the Social Security Commissioner (previously the National Insurance Commissioner) is entitled to refer cases for a preliminary ruling.

2 — OJ 1976 L 39, p. 40.

6. The national proceedings in this case revolve around the question whether the appellant, Ms Jennifer Meyers, is entitled to payment of family credit, a family benefit which has existed in the United Kingdom since 1986.

7. Family credit is payable if the following three conditions are satisfied:

(1) the income of the claimant does not exceed a specified amount;

(2) the claimant or, if he is a member of a married or unmarried couple, he or the other member of the couple is normally engaged in remunerative work;

(3) the claimant or, if he is a member of a married or unmarried couple, he or the other member is responsible for a member of the same household who is a child or a person of a prescribed description.

8. Once family credit is awarded it is paid for a period of 26 weeks. The duration — and also the amount — of the benefit remains unchanged even if the claimant becomes unemployed in the interim, increases or decreases his wages, falls ill or has an accident which prevents him from continuing to work.

9. If family credit is awarded to a married or unmarried couple, it is in every case paid to the woman, even though she may not be the person engaged in remunerative work. It was originally provided that the benefit would be paid by the employer along with wages. However, after numerous protests by women's organizations and employers, the decision was taken to pay the family credit to the female partner.

10. The United Kingdom states that the objectives of family credit were set out in a document entitled 'Reform of Social Security'. In addition to the task of supplementing the system of social benefits, the second volume of that document refers to the further objective of ensuring that families do not find themselves worse off in work than they would be if they were not working.

11. The rules governing the calculation of a claimant's earnings are set out in the Family Credit (General) Regulations 1987. Those rules provide that certain payments are not to be included as earnings. The provisions are couched in general terms. They do not make it clear whether child-care costs may be taken into account in that calculation. The United Kingdom courts, however, have consistently held that child-care costs cannot be deducted when making that calculation.

12. On 26 April 1989 Ms Meyers applied for family credit for herself and her daughter, who was three years old at the time.

13. The Adjudication Officer responsible for deciding whether to grant family credit decided on 10 June 1989 that Ms Meyers was not entitled to that benefit.

14. As a single parent, Ms Meyers is obliged to incur certain costs for the care of her daughter in order to be able to engage in remunerative work. It is not disputed that she would be entitled to receive family credit if she were able to deduct child-care costs in calculating her earnings.

15. Ms Meyers takes the view that the method of calculation of earnings constitutes indirect discrimination against single parents. While it is possible for couples to take turns at looking after children, she, as a single parent, must pay someone else to do so. It is for that reason much more difficult for her to accept low-paid work. She is obliged to pay child-care costs, but without receiving any family credit. Since the vast majority of single parents are women, this also constitutes indirect discrimination against women.

16. The case is being dealt with on appeal by the Social Security & Child Support Commissioner, who takes the view that, in order for him to determine whether there is discrimination, it is necessary to obtain a preliminary ruling on the scope of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

17. The Social Security & Child Support Commissioner has accordingly referred the following question to the Court of Justice for a preliminary ruling:

'Does a benefit having the characteristics and purpose of family credit fall within the scope of Council Directive 76/207/EEC?'

B — Analysis

18. Article 1 of the directive gives an indication as to its scope. That article specifies the areas within which the principle of equal treatment for men and women is to be put into effect. In addition to working conditions and access to employment, vocational training and promotion, it also refers to social security. Social security, however, is covered by the directive only under certain conditions. Those conditions are set out in

Article 1(2), which provides for the Council, in matters of social security, to adopt provisions defining the substance, scope and arrangements for the application of the principle of equal treatment.

19. In the opinion of the United Kingdom, social-security systems are excluded completely from the scope of the directive by virtue of the provision in Article 1(2).

20. The Commission takes the opposite view and correctly refers in that regard to the judgment of the Court of Justice in Case 152/84 *Marshall*. [3]

21. The Court held in that judgment that the provision in Article 1(2) of Directive 76/207 constitutes a derogation from the scope of the directive which must be interpreted strictly in view of the fundamental importance of the principle of equality of treatment. [4]

22. The view espoused by the United Kingdom cannot therefore be accepted. Even though Article 1(2) and the final recital in the preamble to the directive envisage separate rules in matters of social security, this can only mean that the directive is not applicable without exception to the area of social security. If matters of social security were to be excluded entirely from the scope of the directive, the express reference to social security in Article 1(1) would make no sense.

23. If, however, social security is only exceptionally excluded from the scope of the directive, this means that a scheme which formally belongs to the area of social security may very well come within the scope of Directive 76/207. This is in line with the Court's judgment in Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell*, in which it held that the directive cannot be declared inapplicable solely because a scheme is part of a social-security system. [5]

24. On the other hand, such a scheme cannot in every case come within the scope of Directive 76/207. Certain conditions must first be satisfied.

25. In this connection, the Court held in its judgment in *Jackson and Cresswell* [6] that a scheme which is part of a social-security system will fall within the scope of Directive

3 — Judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

4 — *Marshall* judgment, paragraph 36.

5 — Judgment in Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* v *Chief Adjudication Officer* [1992] ECR I-4737, paragraph 27.

6 — At paragraph 28.

76/207 only 'if its subject-matter is access to employment, including vocational training and promotion, or working conditions.'

26. In the case of *Jackson and Cresswell*, the Court answered that question in the negative, in respect of income support in the United Kingdom, on the ground that the purpose of that benefit was merely to supplement low incomes. Since this was the sole function of income support, it did not come within the scope of Directive 76/207. The fact that the method by which the conditions for the granting of income support were calculated could affect the ability of single mothers to gain access to employment was not sufficient to bring that benefit within the scope of Directive 76/207. [7]

27. It is now necessary to consider whether family credit satisfies the criteria laid down by the Court in order for it to come within the scope of the directive.

28. The United Kingdom takes the view that family credit does not come within the scope of the directive any more than does income support.

29. The fact remains, however, that, unlike income support, with regard to which the recipient need not in every case be available for work, family credit is linked to remunerative work; a precondition of entitlement to family credit is that the claimant or his partner is engaged in such work.

30. The United Kingdom, however, argues that family credit does not satisfy the criteria precisely because there is no connection between entitlement to the benefit and a claimant's professional activity.

31. One argument for this, it claims, is that the money is paid in all cases to the female partner, even though she may not be engaged in any remunerative work.

32. Against this, it can be argued that one cannot with certainty infer from this the objective of family credit. As the United Kingdom itself argues, it was originally intended to have employers pay family credit along with wages. Only after protests by employers and numerous women's organizations was it decided to adopt the present scheme.

7 — Judgment in *Jackson and Cresswell*, paragraph 29 et seq.

33. Furthermore, this does not affect the condition that the claimant must be engaged in remunerative work. Where family credit is granted to a couple and payment is made to the woman, even though she does not work, it is the work of the man which determines that payment is to be made. Ms Meyers also pointed this out during the oral procedure. In her view, it cannot be excluded that family credit may also have remunerative work as its subject-matter, in this case precisely the work of the partner.

34. As an additional factor suggesting that family credit is unconnected with remunerative work, the United Kingdom points out that family credit continues to be paid even where the recipient becomes unemployed after the benefit has been granted. This argument is also unconvincing. If one were to accept the United Kingdom's argument and assume further that family credit, as the United Kingdom submits, is intended only as a supplement for low incomes, payment of the benefit ought not to continue where a recipient receives in the interim a wage increase. It is, however, a fact that payment continues even in such a case. This argument is thus insufficient to establish that the subject-matter of family credit is social security alone.

35. The same also applies with regard to the point made by the United Kingdom that the Social Security Appeal Tribunal has jurisdiction over appeals concerning decisions relating to family credit, as is always the case in matters of social security. It is not disputed that the subject-matter of family credit is social security. However, it is possible that another objective is also being pursued. Contrary to the view taken by the United Kingdom, it is possible that the condition that the claimant must be engaged in remunerative work is more than simply one of a number of conditions governing the award of family credit.

36. As already mentioned, the criterion laid down by the Court of Justice is that the benefit must also have access to employment or working conditions as its subject-matter.

37. Ms Meyers and the Commission share the view that this criterion has been satisfied in every regard.

38. The United Kingdom disputes this, arguing that the purpose of family credit is simply to provide financial assistance for families or single parents on low incomes.

39. So far as access to employment is concerned, Ms Meyers and the Commission submit that one of the purposes of family credit is to facilitate the decision whether one should accept or continue in low-paid work.

40. Ms Meyers refers in this connection to the United Kingdom's submissions in Case

C-78/91 *Hughes*. [8] That case concerned, *inter alia*, the question whether family credit was a social-security benefit within the meaning of Article 4(1) of Regulation (EEC) No 1408/71. [9] As is clear from the judgment, the United Kingdom argued at that time that 'family credit does not fall within any of the branches of social security listed in Article 4(1) of Regulation No 1408/71, since the main purpose of the benefit is to provide supplementary income for poorly paid workers with a family who would have a higher income if they were unemployed in order to encourage them to continue working'. [10]

41. As the United Kingdom has submitted in its written observations in the present case, this also corresponds to the fact that one of the purposes of family credit is to ensure that a family which is working is not placed in a worse position that a family which is unemployed.

42. The United Kingdom did not submit any different argument during the oral procedure.

43. The United Kingdom refers in this regard solely to the judgment in *Jackson and Cresswell*, in which the Court held that a social-security benefit does not come within the scope of Directive 76/207 by reason of its effect on access to employment. The Court, however, decided in the negative on this point only because there was no intention in that case to affect access to employment. The United Kingdom has itself stated that the position is different with regard to family credit. Family credit, unlike the benefit of income support at issue in *Jackson and Cresswell*, involves not only assistance to cover the needs of persons on low income but also encouragement to employees to remain in low-paid employment and to facilitate unemployed persons in deciding to accept such employment. The benefit in *Jackson and Cresswell* could not have had such a function since it did not involve the precondition of remunerative work.

44. The Court has thus also ruled that family credit performs a dual function. First, it 'encourages workers who are poorly paid to continue working; and secondly, it is intended to meet family expenses'. [11]

45. The United Kingdom concludes by arguing that access to employment cannot be the subject-matter of family credit in view of

8 — Judgment in Case C-78/91 *Hughes* v *Chief Adjudication Officer* [1992] ECR I-4839.

9 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), in the version codified by Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

10 — Judgment in *Hughes*, paragraph 18.

11 — Judgment in *Hughes*, paragraph 19.

the fact that it can be granted only if the claimant is already engaged in remunerative work. The Commission submits in this connection that Article 3 of the directive must be given a broad interpretation because of the fundamental importance of the principle of equal treatment.

46. The Commission also pointed out during the oral procedure that Article 3 concerns not only access to employment but also promotion. [12] It argues that the scope of Article 3 of the directive is for that reason not limited to access.

47. The issue of promotion, however, is not material to the present case. Account need be taken only of the question whether the directive is applicable with regard to access to employment. In order to examine this, it is not necessary to interpret Article 3 broadly or even extensively. A benefit such as family credit may indeed affect access to employment. It makes it easier for an unemployed person to accept low-paid work if he knows that, as a low-wage earner, he will receive an additional benefit in the form of family credit.

48. Ms Meyers provides an example on this point: if the case did not involve a benefit which is granted after low-paid work has been accepted, but rather a penalty, there could scarcely be any doubt that this penalty, the precondition of which is the exercise of low-paid work, would have a considerably adverse effect on access to such work.

49. In the light of all the foregoing, it is clear that family credit does come within the scope of Article 3 of Directive 76/207.

50. Ms Meyers argues further that Article 5 of Directive 76/207, which provides for equal treatment in working conditions, is also applicable to family credit. In this context also the criterion laid down by the Court of Justice in its judgment in *Jackson and Cresswell* is applicable — in other words, the crucial issue is what is the subject-matter of family credit. In order for family credit to come within the scope of Article 5 of the directive, it must also have working conditions as its subject-matter.

51. As already demonstrated, family credit represents, on the one hand, assistance for low-income families to meet their requirements. At the same time, the benefit paid is also intended to make it possible to accept or

12 — '... access ... to all levels of the occupational hierarchy' (Article 3(1) of the directive).

remain in low-paid work. Here too it is the second function of family credit which may satisfy the criterion laid down by the Court of Justice.

52. The effect of the payment of family credit is that recipient families are placed in a better financial position. Thus, such payment affects the general living conditions of a person or family engaged in remunerative work. However, this does not automatically mean that family credit constitutes a working condition within the meaning of Article 5 of the directive.

53. Ms Meyers takes a different view. She submits that family credit constitutes a working condition within the meaning of Article 5 since it determines how much money she will ultimately have at her disposal if she works.

54. In support of this submission, she argues that family credit would automatically have to be regarded as a working condition if — as originally planned — it were to be paid along with wages.

55. The United Kingdom counters this with the argument that family credit would, in such a case, form part of the wages and would fall within the scope of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. [13]

56. In that case, however, family credit could not be regarded as pay within the meaning of Directive 75/117. The second paragraph of Article 119 of the EC Treaty defines 'pay' as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.' Even if family credit were to be paid by the State to the employee via the latter's employer, this would not alter the fact that it is a State benefit and consequently not pay within the meaning of the second paragraph of Article 119 of the EC Treaty. As the United Kingdom itself argued in the course of the oral procedure, it is the substance which is conclusive, not the form in which payment takes place.

57. The United Kingdom's second argument against the views expressed by Ms Meyers also lacks conviction. The United Kingdom submits that even if it were the case that family credit was paid along with wages (which is not the case) and none the less came within the scope of Directive 76/207,

13 — OJ 1975 L 45, p. 19.

such a benefit would be payable only to someone who was engaged in remunerative work and subject to the condition that he would continue to be engaged in such work. No such scheme is envisaged for family credit. This argument raises new claims regarding possible conditions of payment which are purely hypothetical. It is not obvious why a benefit such as that cited in the example could be paid only under the conditions outlined by the United Kingdom.

58. Ms Meyers' argument, however, is equally unconvincing. The fact that payment of family credit helps to determine the financial situation of a person engaged in remunerative work does not support the conclusion that such a benefit constitutes a working condition within the meaning of Article 5 of the directive. Rather, the criteria laid down by the Court must be applied for the purpose of determining whether working conditions are the subject-matter of family credit. The manner in which payment is made cannot in any event have a bearing on the subject-matter of family credit.

59. Family credit is a benefit which is paid to a family member because that person works and in order that he should continue to work. There is therefore a close connection with work. Indeed, one objective of family credit is the maintenance of working relationships. In view of this close connection, there may be a working condition within the meaning of Article 5 of Directive 76/207.

60. According to the United Kingdom, a working condition must be either a condition in the contract of employment between the employee and the employer or a measure which may be applied by the employer to the employee in respect of the latter's employment. Family credit, so it is claimed, does not satisfy those conditions since it is a social-security benefit which is paid by the State and not always to the person engaged in remunerative work.

61. In the present case, however, family credit is being considered in its second function and not in its function as a social-security benefit. As the Court held in its judgment in *Jackson and Cresswell*, it is in principle possible that a social-security benefit paid by the State may also constitute a working condition within the meaning of Article 5 of Directive 76/207. To that extent, the definition of working conditions proposed by the United Kingdom is too narrow since it focuses solely on the relationship between employer and employee.

62. The United Kingdom is also mistaken if it is contending that the Court ruled in *Jackson and Cresswell* that a benefit such as family credit cannot be a working condition within the meaning of the directive. The social-security benefit there under examination was not a benefit analogous to family credit; rather, it was concerned solely and exclusively with payment of additional assistance to low-income families in order to

meet their requirements. The benefit at issue in *Jackson and Cresswell* could not have had the second function of facilitating access to low-paid work, as in the case of family credit, since it was not subject to the precondition that the claimant was engaged in remunerative work. For that reason the United Kingdom is also unconvincing in its contention that family credit cannot be a working condition within the meaning of the directive since this argument would otherwise have been put forward in *Jackson and Cresswell*. As already mentioned, the facts of the present case differ from those of *Jackson and Cresswell*.

63. Even if family credit is a social-security benefit, this does not in principle prevent it from also being a working condition within the meaning of Article 5 of the directive. So far as concerns the connection to the exercise of an activity, there is no obvious distinction between a measure which is implemented by an employer because it is prescribed by legislation in favour of an employee and which constitutes a working condition in the opinion of the United Kingdom, and a benefit, such as family credit, which the State itself grants by virtue of a working relationship and which the United Kingdom does not recognize as constituting a working condition. As is clear from the recitals in the preamble to Directive 76/207, working conditions with regard to pay are regulated by Directive 75/117, while other working conditions are intended to be regulated by Directive 76/207. Family allowances for officials also constitute working conditions for the purposes of Directive 75/117. So far as the conditions for the award and payment of such allowances are concerned, no major differences to family credit ought to arise. Both are paid or awarded only where a service or employment relationship exists and only if the recipient has family responsibilities. Consideration of this point makes it possible to regard family credit as a working condition within the meaning of Article 5 of the directive.

64. Although this involves a broad interpretation of the concept of 'working conditions', that term is also given a broad interpretation in the context of Article 48 of the EC Treaty and its specific application in Regulation (EEC) No 1612/68. [14] The Commission, too, has suggested that the concept of working conditions should be broadly interpreted in view of the importance attaching to the principle of equal treatment. In the Commission's view, the concept of working conditions includes everything which relates to the situation in which a worker finds himself after accepting work.

65. I wish to conclude by considering the United Kingdom's submission that the particular situation of single parents is already taken into account within the framework of family credit. That is not relevant to the present case, since it concerns the question whether there is in fact discrimination against single parents. That is a question which the national court must address.

66. The result of the foregoing must be that family credit has as its subject-matter both access to employment and working conditions.

14 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

C — Conclusion

67. I accordingly propose that the Court reply to the question submitted in the following terms:

A benefit having the characteristics and purpose of family credit falls within the scope of Council Directive 76/207/EEC.