1. Article 3(1) of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, which defines the matters covered by the directive, is to be interpreted as not referring to a statutory scheme which, on certain conditions, provides persons with means below a legally defined limit with a special benefit designed to enable them to meet their needs. That interpretation is not affected by the circumstance that the claimant is suffering from one of the risks listed in Article 3 of the directive.

2. 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 is to be interpreted as meaning that the fact that, under a social security scheme which, on certain conditions, provides persons with means below a legally defined limit with a special benefit designed to enable them to meet their needs, the conditions of entitlement for receipt of the benefits may be such as to affect the ability of a single parent to take up access to vocational training or part-time employment is not sufficient to bring that scheme within its scope.

REPORT FOR THE HEARING
In Joined Cases C-63/91 and C-64/91 *

I — Facts and written procedure

1. In the United Kingdom, the Supplementary Benefits Act 1976 provided for the payment of a benefit to persons whose resources were insufficient to meet their requirements. Persons aged between 16 and pensionable age were entitled to claim a supplementary allowance the amount of which corresponded to the insufficiency of their means compared with their needs. Persons over pensionable age were entitled to a supplementary pension.

Pursuant to Regulation 6 of the Supplementary Benefits (Resources) Regulations 1981, a lone father or mother was not subject to the requirement of registration and availability for employment which anybody wishing to claim supplementary allowance normally has to fulfil.

* Language of the case: English.

For the calculation of resources, Regulation 10 provided for the deduction from earnings derived from employment of the expenses reasonably incurred without reimbursement in respect of the making of reasonable provision for another member of the 'assessment unit' because of his own necessary absence from home to carry out his duties in connection with that employment.

Under Regulation 11, an allowance paid pursuant to arrangements made by the Manpower Services Commission, a statutory body charged with arrangements for vocational training, for the maintenance of an applicant or his family was regarded as being earnings. Childminding expenses could be deducted from income derived from employment but not from income in the form of a training grant.

2. As from April 1988, the Supplementary Benefits Act 1976 has been replaced by the Social Security Act 1986. The new act provides for income support which is paid to everyone aged at least 18 whose income does not exceed a specified amount and who is not engaged in remunerative employment.

Like the 1981 Regulations, Regulation 8 of the Income Support (General) Regulations 1987 exempts a sole parent responsible for a child who is member of his household from the requirement of being available for work which recipients of income support normally have to fulfil. Pursuant to Regulation 5, persons working less than 24 hours a week are not regarded as being engaged in remunerative employment.

By contrast with the 1976 system, the 1986 regulations do not allow childminding expenses to be deducted from earnings derived from part-time employment.

3. At the time of the events giving rise to the reference in Case C-63/91, Sonia Jackson, an unmarried mother with a child aged four, was unemployed and for several years had been receiving income support. In September 1986 she commenced a training course organized by the Manpower Services Commission and accordingly received a weekly allowance.

On the ground that Ms Jackson's financial resources then exceeded her requirements, the competent authority — the Adjudication Officer — decided that she was not entitled to receive income support and at the same time refused to take account of the expenses incurred in having her child looked after while she attended the training course.

4. At the time of the events giving rise to the reference in Case C-64/91, Patricia Cresswell, a divorced mother with sole charge of two children aged five and two, was unemployed and received income support. Since she had taken a part-time job of less than 24 hours a week, the Adjudication Officer reduced the amount of her income support without taking account of the childminding expenses incurred by her.

5. Contending that the failure to take account of childminding expenses constituted discrimination on grounds of sex, contrary to the applicable Community legislation, Ms Jackson and Ms Cresswell brought the matter before the Social Security Appeal Tribunal and then the Social Security Commissioner, both of which dismissed their appeals, and then appealed to the Court of Appeal of England and Wales.

6. Considering that the disputes involved the interpretation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) and of 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 (OJ 1976 L 39, p. 40), the Court of Appeal of England and Wales, by two orders of 21 December 1990, stayed the proceedings before it and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1. Is supplementary allowance (Case C-63/91) or income support (Case C-64/91) — which is (or, in the case of supplementary allowance, was) a benefit available in a variety of personal circumstances to persons whose means are insufficient to meet their needs as defined by statute and who may or may not have suffered from one of the risks listed in Article 3 of Directive 79/7 — within the scope of Article 3 of Directive 79/7?

2. Is the answer to question 1 the same in all cases or does it depend on whether a person is suffering from one of the risks listed in Article 3 of Directive 79/7?

3. Are the conditions of entitlement for receipt of supplementary allowance (Case C-63/91) or income support (Case C-64/91) capable of falling within Directive 76/207 where those conditions relate solely to access to supplementary allowance or income support but the effect of application of those conditions may be such as to affect the ability of a single parent to take up access to part-time employment or vocational training?

7. In its orders for reference, the Court of Appeal invites the Court of Justice, if it finds in favour of the appellants in the main proceedings, to furnish guidance on the way in which any infringement of their rights should be corrected. The Court of Appeal observes in that respect that it must consider not whether the legislation at issue is unjust but whether the fact that more women than men suffer injustice is justified. In that context, it points out that the elimination of discrimination on grounds of sex against women will create discrimination against men.

8. The orders from the Court of Appeal of England and Wales were received at the Court Registry on 14 February 1991.

9. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 27 May 1991 by Sonia Jackson and Patricia Cresswell, the appellants in the main proceedings in Cases C-63/91 and C-64/91 respectively, represented by Penny Wood, solicitor, on 9 August 1991 by the United Kingdom, represented by J. E. Collins, Treasury Solicitor's Department, and on 23 May 1991 and 1 September 1991 by the Commission of the European Communities, represented by Karen Banks, a member of its Legal Department, acting as Agent.

10. On 27 November 1991, the President of the Court decided, pursuant to Article 43 of the Rules of Procedure, to join Cases C-63/91 and C-64/91 for the purposes of the oral procedure and judgment.

11. 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 inquiry.

II — Written observations submitted to the Court

1. *Sonia Jackson and Patricia Cresswell*, the appellants in the main proceedings, state with respect to the *first question*, that supplementary allowance and income supplement are intended to provide protection against the risks enumerated in Article 3(1) of Directive 79/7.

Ms Jackson states that the benefit created by the Supplementary Benefits Act is divided into two: the 'supplementary pension' for people over the age of 60 is manifestly within Article 3; the supplementary allowance for people aged between 16 and 60 is also a statutory scheme providing protection against the risks listed in Article 3(1), which materialize before pension age.

According to Ms Cresswell, the income supplement scheme contains a number of premiums addressed specifically to the risks listed in Article 3(1), namely the pensioner premium, the higher pensioner premium, the disability premium and the severe disability premium. Many people affected by one of the risks listed in Article 3(1) also receive income support, which proves that the latter scheme is inseparable from the specific benefit schemes referred to by that provision.

According to both the plaintiffs in the main proceedings, that aim of providing protection against the risks listed in Article 3(1) would be achieved not only if reference were made to the decisive criterion of the role played by those benefits in practice but also if regard were had to the role that those benefits were intended to play as a matter of design. In its judgment in Case 150/85 *Drake* v *Chief Adjudication Officer* [1986] ECR 1995, the Court advocated a broad interpretation of Directive 79/7. It is not possible therefore to limit the scope of that directive to the classic contributory schemes and leave aside the more general means-tested schemes. Furthermore, benefits of a type as general as those at issue before the national court do not come within the specific exclusions envisaged in Article 3(2).

The scope of Article 3 of Directive 79/7 cannot be determined by reference to that of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416); the fundamental problem raised by that regulation is whether a benefit is to be regarded as exportable, which accounts for the more restrictive interpretation adopted by the Court of the concept of social security benefits contained in Article 4 of that regulation. However, the Court has had an opportunity to condemn discrimination by a Member State within its territory by relying on the concept of social advantage within the meaning of Article 7(2) of 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). However, in the case of the directives prohibiting discrimination on grounds of sex, there is no fall-back position. Reference to Article 45 of Regulation No. 1408/71 is no longer relevant since it applies only to old-age and sickness benefits. Nor can it be contended that Directive 79/7 is only one step in the progressive programme for the implementation of the principle of equal treatment; an analysis of that programme, as it stands at present, shows that none of the directives included in the programme will cover discrimination of the kind at issue in the two cases before the national court.

In those circumstances, the plaintiffs in the main proceedings propose that the first question be answered in the affirmative.

With respect to the *second question*, they state that the answer to the first question is the same in all cases and does not depend on whether the applicant is affected by any of the risks listed in Article 3(1) of Directive 79/7.

As regards the *third question*, Ms Jackson and Ms Cresswell observe that the United Kingdom schemes at issue are also contrary to Directive 76/207, in so far as they create an obstacle to equal access for men and women to vocational training and employment. Directive 76/207 prohibits all discrimination within the financial arrangements made by a Member State for support during vocational training or with a view to obtaining employment. The fact that Article 1(1) of Directive 76/207 refers, with respect to the achievement of equal treatment in matters of social security, to paragraph 2, which speaks of progressive implementation, merely means that 'pure' social security lies outside the scope of the directive; discrimination within a social security system, which has the result of preventing equal access to vocational training or employment, nevertheless comes within the scope of the directive. It would in fact be absurd to exclude from the scope of Directive 76/207 financial provisions giving rise to such discrimination merely because they relate to social security and at the same time to leave within the scope of the directive similar financial provisions relating to other systems of allowances.

The judgment in Case 192/85 *Newstead* [1987] ECR 4753 related to a social security

system requiring higher contributions by men than by women, but did not relate to pay or other working conditions; the present cases, on the other hand, are concerned with equality of access either to vocational training or to employment and are specifically within the scope of Directive 76/207.

2. *The United Kingdom* states in the first place that there can be no question of indirect discrimination on grounds of sex unless the existence or the lack of a provision has a clear adverse impact on one sex or the other. No arguments on that matter were advanced before the Court of Appeal and the question whether it is appropriate to look at either the proportion or number of women disadvantaged was not raised. Since the national court has not asked for guidance on the matter of discrimination the United Kingdom states that it does not propose to address that issue.

With regard to the *first question*, the United Kingdom states that Directive 79/7 is only the first stage in the progressive implementation of the principle of equal treatment in social security matters. The scope of the directive is defined by Article 3 thereof: paragraph 1(a) lists certain risks covered, paragraph 1(b) refers to social assistance in so far as it is intended to supplement or replace the schemes referred to in paragraph 1(a) and paragraph 2 excludes certain benefits. In *Drake*, *supra*, the Court made it clear that, in order to fall within the scope of Directive 79/7, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the specified risks or a form of social assistance having the same objective.

The allowances in question are designed to protect persons against the risk of poverty and are not within the scope of Directive 79/7. Entitlement to the allowances depends essentially on a person's income and not upon the occurrence of one of the risks specified in Article 3(1); in particular, no link can be established between the allowances and the risk of unemployment; on the one hand, many unemployed people do not meet the prescribed conditions and, on the other, people in paid employment, in particular part-time employment, receive such allowances. As regards protection against poverty, it is natural for many who receive income support to have suffered risks listed in Article 3(1).

The United Kingdom states that the classification of the allowances in question as social security or as social assistance is irrelevant. In its judgments in Case 249/83 *Hoeckx* [1985] ECR 973 and Case 122/84 *Scrivener* [1985] ECR 1027, the Court concluded that the Belgian 'minimex' did not fall within Article 4(1) of Regulation No 1408/71 since it was a general benefit. The United Kingdom allowances at issue are similarly a general benefit.

The United Kingdom suggests that the first question be answered as follows:

'Income support and supplementary allowance are not within the scope of Directive 79/7'.

As regards the *second question*, the United Kingdom states that the application of Article 3 depends on the nature of the scheme in question, not on the characteristics of the applicant for benefit and that, accordingly, the answer to the first question is the same in all cases.

With respect to the *third question*, the United Kingdom submits that the conditions for entitlement to supplementary allowance and income support are not capable of falling within Directive 76/207. Article 1(2) of that directive expressly excludes the field of social security by referring to subsequent instruments. The Court confirmed, in *Newstead*, *supra*, that the directive does not apply to social security matters. In Case 152/84 *Marshall* [1986] ECR 523, the Court may indeed have recognized that, with respect to discriminatory retirement ages adopted by employers, Article 1(2) of Directive 76/207 must be interpreted strictly. However, the cases pending before the national court display certain analogies with *Newstead* in so far as they relate directly to the content of the social security system.

With regard to Case C-64/91, the United Kingdom states that income support is not intended to guarantee to a person who meets the prescribed conditions access to teaching or training.

It therefore proposes that the answer to the third question should be:

'The conditions of entitlement for receipt of supplementary allowance or income support are not capable of falling within Directive 76/207 where those conditions relate solely to access to supplementary allowance or income support but the effect of the application of those conditions may be such as to affect the ability of a single parent to take up access to vocational training or part-time employment.'

3. The *Commission* observes first that the two United Kingdom schemes raise a problem of equal treatment between men and women since, in all probability, single parents of young children will more frequently be women than men and it is essentially that category of persons who suffers a disadvantage under the schemes in question.

With respect to certain issues raised by the Court of Appeal, the Commission considers that it is not a question of proving that women are more affected by the provisions at issue than men but rather of deciding whether those provisions are necessary for

the pursuit of a legitimate objective. As regards the risk of new discrimination against men, the Commission observes that such a result would also be contrary to the requirement of equal treatment and that a discriminatory provision may not be applied to anyone.

However, the question of the discriminatory character of the rules concerned and the justifiability thereof is not a matter for the Court of Justice, which was why the Court of Appeal confined itself to questions on the scope of Directives 79/7 and 76/207.

As regards the *first and second questions*, concerning Directive 79/7, the Commission first considers whether any difference exists between the statutory schemes and social assistance. To the extent to which a social assistance scheme is found in a statute, it constitutes a statutory scheme.

Although Article 3(1)(a) does not specifically refer to social security schemes, it seems reasonable to regard it as covering such schemes and Article 3(1)(b) as covering schemes of social assistance which cannot be considered to come within the notion of 'social security'. It is probable that the use of the expression 'statutory schemes' was intended to cover social security schemes in the broadest sense of the word and that subparagraph (b) was added simply to make it clear that certain elements of social assistance were within the scope of the directive, although even a broad approach to the concept of social security would, in principle, have excluded them. It is therefore unnecessary to inquire whether a system belongs to the category of social security or that of social assistance: it should be enough that it covers one of the relevant risks referred to in Article 3.

The Commission notes a difference between the terms used in subparagraphs (a) and (b) of Article 3(1); whereas Article 3(1)(a) seems to cover statutory schemes which, as a matter of fact, provide protection against one of the enumerated risks, subparagraph (b) refers to social assistance which is *intended* to supplement or replace a relevant statutory scheme referred to in subparagraph (a). A literal approach to that text, at least in its English version, would lead to the inclusion of social assistance schemes only where they specifically aimed at the risks enumerated in the directive. In that regard, the Commission considers that supplementary allowance and income support provide protection against the risk of unemployment. If the benefits in question are to be regarded as social assistance, a formal approach would lead to their exclusion from the scope of the directive since, according to the English version, they are not 'intended' to supplement or replace a relevant social security scheme. The Commission considers, however, that if all the language versions of the directive are examined it becomes apparent that what matters is that, as a matter of fact, a social assistance scheme does supplement or replace a social security scheme, as it does in the present case. The Commission also observes that Article 3(1)(b) allows a Member State to cover a given risk either by a social security scheme or by social assistance.

To maintain that the United Kingdom schemes are not covered by the directive, on the ground that they are not specifically intended to provide protection against the risks listed in Article 3, leaves open the possibility of an uneven effect of the directive in the Community, depending on the extent to which a given Member State opts for schemes providing specific protection against individual risks or chooses to rely on a broad system which, as a matter of fact, covers the different risks enumerated in the directive, as

well as various others. In *Drake*, *supra*, the Court emphasised the need 'to ensure that the progressive implementation of the principle of equal treatment was carried out in a harmonious manner throughout the Community'.

In those circumstances, the Commission proposes that the first two questions be answered as follows:

'A State allowance which is available in a variety of personal circumstances to persons whose means are insufficient to meet their statutory requirements is within the scope of Article 3 of Commission Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, as regards a person who is suffering from one of the risks listed in that article.'

As regards the *third question*, the Commission recognizes that Directive 76/207 cannot be relied on as a basis for equal treatment in social security matters as such; that does not mean, however, that a provision affecting one of the matters covered by the directive, in particular access to vocational training or employment, is excluded from the directive solely because it is a provision of social security law. That approach would allow the Member States to practise discrimination by choosing to adopt its measures under the social security system. Furthermore, in his Opinion in Case 30/85 *Teuling* [1987] ECR 2497, Advocate General Mancini expressed the view that the relevant criterion was the effect produced by the rules in question, regardless of whether they formed part of a social security system.

In *Newstead*, *supra*, the Court may have accepted that an obligation to contribute to a widows' fund, as part of an occupational social security scheme, was a matter not within Directive 76/207; however, if the provisions concerning social security fell within the scope of Directive 76/207 whenever they caused discrimination in relation to one of the matters covered by the directive, one might consider that the rule at issue in *Newstead* would have to be examined and justified in the context of that directive.

However, account must be taken of the development of the case-law, particularly since the judgment in Case 262/88 *Barber* [1990] ECR I-1889, in which the Court recognized that pensions under a private occupational scheme are pay within the meaning of Article 119 of the EEC Treaty, which implies that all occupational social security matters are covered by that article and only State schemes must still be examined in the context of Directive 76/207. It is perhaps possible to argue that conditions concerning social security matters are not also working conditions, in the sense that they form part not of the relationship between employer and employee but of that between the worker and the State. It could, however, be argued against that approach that even State social security schemes affect workers in their capacity as workers and concern one of the conditions under which they work. The Commission concludes that at least some of the conditions governing State social security may be regarded as working conditions within the meaning of Directive 76/207. This

does not mean, however, that questions of social security as such fall within the scope of the directive.

Rather than distinguishing between the conditions governing social security schemes and working conditions, the Commission proposes that a social security provision should be included within the scope of Directive 76/207 if, beyond its own terms, it raises a problem of discrimination in the fields of access to employment, promotion, vocational training or working conditions. The United Kingdom rules at issue, apart from constituting discrimination in the sphere of social security, cause women to be placed at a disadvantage with regard to access to vocational training and employment. The Commission points out, in that connection, that in its judgment in *Marshall*, *supra*, the Court stated that the exclusion from the scope of Directive 76/207 must be interpreted strictly.

In those circumstances, the Commission proposes that the third question be answered as follows:

'The conditions of entitlement to such an allowance are capable of falling within the scope of Council Directive 76/207/EEC 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, where those conditions relate solely to access to the allowance in question but the effect of their application may be such as to affect the ability of a single parent to take up access to vocational training or part-time employment.'

F. A. Schockweiler
Judge-Rapporteur